JUDICIAL COLLEGE

The Crown Court Compendium

Part I: Legal Summaries, Directions and Examples

May 2016

Maddison – Ormerod – Tonking – Wait

Contents

Amendment

Please note that footnote 131 was amended on 11th May 2016.

1. INTRODUCTION

1-1 Style and abbreviations

Unless the context indicates otherwise: any reference to a person in the masculine is to be read as including the feminine; and 'Judge' includes 'Recorder'.

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

The following abbreviations are sometimes used:

AJA	Administration of Justice Act 1970
CDA	Crime and Disorder Act 1998
CAJA	Coroners and Justice Act 2009
CCA	Crime and Courts Act 2013
CJA	Criminal Justice Act 2003
CJPOA	Criminal Justice and Public Order Act 1994
CJIA	Criminal Justice and Immigration Act 2008
CJPA	Criminal Justice and Police Act 2001
CrimPD	Consolidated Criminal Practice Directions*
CrimPR	Criminal Procedure Rules 2016*
D	The defendant
E	The/an expert witness
LASPO	Legal Aid and Sentencing and Punishment of Offenders Act 2012
MDA	Misuse of Drugs Act 1971
P	The/a principal offender
PACE	Police and Criminal Evidence Act 1984
PC	Police Constable
PCC(S)A	Powers of Criminal Courts (Sentencing) Act 2000
PoCA	Proceeds of Crime Act 2002
SOA	Sexual Offences Act 2003
V	The victim/complainant
W	The/a witness
YJCEA	Youth Justice and Criminal Evidence Act 1999

***NOTE:**

CrimPR are available at http://www.legislation.gov.uk/uksi/2015/1490/contents/made

CrimPD are available at https://www.judiciary.gov.uk/wp-content/uploads/2015/09/crim-pd-2015.pdf

1-2 Foreword

Since 1987 the Judicial Studies Board and its successor, the Judicial College, have provided guidance for Judges and Recorders when summing up cases in the Crown Court. The first was in the form of the *Specimen Directions to the Jur*y; they were 43 pages long and accompanied by a 5 page guide for structuring a summing-up. They replaced the informal notes provided by senior judges, such as one written by Cusack J. The primary purpose of the *Specimen Directions* was to alleviate what Lord Lane CJ described in his foreword as "mistakes on straightforward points which one would not expect to cause any difficulty". Lord Lane CJ added a further pithy observation: "The directions will often require adaptation to the circumstances of a particular case. They should not be regarded as a magic formula to be used as an incantation."

Although the *Specimen Directions* succeeded in their primary purpose, Lord Lane's observation was not always followed. Lord Woolf CJ in his Foreword to the 2003 re-issue, had to emphasise that the Specimen Directions "have to be selected and tailored to meet the facts of a particular case and not used indiscriminately". Regrettably this guidance was again not always followed. The Directions were on occasions used as short-cuts and incorporated into summings-up, often verbatim, without the necessary thought and work to adapt them to the issues in the case concerned.

To address this situation, in 2010 the J.S.B. published the *Crown Court Bench Book - Directing the Jury*, a new work by Pitchford LJ intended to replace the *Specimen Directions.* It provided helpful and comprehensive guidance and included many example directions deliberately based on hypothetical facts and therefore less amenable to being used as templates. This work was seen by users as being particularly useful when summing up in long and complex cases, but for shorter cases some judges continued to use the *Specimen Directions*.

This led to the Judicial College's publication in December 2011 of a *Companion to the Bench Book* written by Judge Simon Tonking and Judge John Wait, two of the authors of this *Compendium*, who were then and until 2014 the joint directors of the College's criminal induction seminars for newly appointed Recorders. This *Companion* took the form of check- lists of matters which would and (depending on the issues in the case) might need to be dealt with when directing the jury on particular legal and evidential subjects. This work was well received and a second part, dealing with sentencing in the Crown Court, followed in January 2013.

The unintended end result, evident from discussions at Judicial College Seminars and from a survey of Crown Court Judges, was that different Judges and Recorders were now using the *Specimen Directions*, the *Bench Book* and the *Companion* either singly or in various different combinations. The Judicial College rightly decided that what was needed was a new work, but one which did not replace but sought to combine the strengths of the previous work.

The result is this *Compendium*. It differs from its predecessors in various respects. First, it combines guidance on jury and trial management, summing up and sentencing. Secondly, it was preceded and informed by 600 replies to the survey asking for the views of Crown Court Judges on the strengths and weaknesses of the previous publications, and which legal and evidential topics they found the most difficult to sum up. Thirdly, it has been subject to rigorous review - the Directions and

Examples in Part II of the *Compendium* by a number of experienced Crown Court judges and most of the Examples by the Plain English Campaign. Fourthly, Professor Cheryl Thomas, Professor of Judicial Studies, Judicial Institute, University College London, whose excellent research into juries' understanding of criminal proceedings is unsurpassed, has given valuable advice to the authors with a view to making the Examples more accessible and easier to understand. Fifthly, hyper-links are provided to all the authorities and statutory provisions referred to in the text.

I am very grateful to the authors who have undertaken this massive task. I am sure that they have addressed through the *Compendium* the issues that I have outlined. They have done so with clarity and erudition. All judges who try criminal cases will therefore find it invaluable. The task that remains is to steer both substantive and procedural law back to a state where the *Compendium* can be shorter, though we will never reach a state where it can all be summarised in a length that was possible in 1987.

The Right Honourable The Lord Thomas of Cwmgiedd,

Lord Chief Justice of England and Wales

April 2016

1-3 The purpose and structure of the Compendium

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

The Compendium is intended to replace all of the guidance previously provided by the Judicial College and its predecessor the Judicial Studies Board namely: the 'Specimen Directions to the Jury' in the Crown Court Bench Book published in March 2010; the Companion to the Bench Book published in October 2011; and part II of the Companion, dealing with sentencing, published in January 2013. This Compendium seeks to combine the perceived strengths of all these previous publications, so that further reference to them is not necessary. Its format and contents have been guided by the wide-reaching survey referred to in the Foreword in Chapter 1-3.

We appreciate that the users of this Compendium will have widely differing degrees of experience in trying and sentencing in Crown Court cases. We have sought be inclusive, and therefore to meet the needs of the most inexperienced Recorder. We appreciate that some the Compendium's contents will cover areas of law, practice and procedure already well known to more experienced hands, and will therefore be more helpful to some than to others. We also appreciate that some Judges and Recorders will have developed their own practices, procedures and formulae for summing up with which they feel comfortable and which they prefer to those suggested in this Compendium. We have sought to provide useful guidance, but not to be at all prescriptive.

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

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

There is then a section headed 'Directions' which is intended to serve as a check list of the points that will or, depending on the facts and issues in the particular case, may need to be covered when summing up in the subject area concerned. Occasionally this section is headed ‘Procedure’ when particular steps need to be taken in managing the trial. Finally, in hatched areas, there are one or more Example Directions and/or 'Routes to Verdict', sometimes generic in nature and sometimes based on specific hypothetical facts. We hope that these will provide a useful starting point for framing legal and evidential directions, but they must be tailored to each particular case and should not be 'parachuted' indiscriminately and inappropriately into summings-up. If the provision of Examples do not add to a 'Directions' section or *vice versa* then one or the other is omitted.

The format adopted in Part II follows a broadly similar pattern. Chapters S4 to S9, which deal separately with every sentence and other order available in the Crown Court, are to be read in conjunction with Chapters S2 and S3 and Appendix SII, which are of general application.

We have done our best to frame the Examples in language which is not unduly legalistic and will be more readily understood by juries. In this regard we have been greatly assisted by guidance given by Professor Cheryl Thomas in structuring many Examples. We have also been given invaluable insight by the Plain English Campaign team, who considered most of our draft Examples in great detail, in the use of clear and simple language. We have adopted many of the suggestions made by each, but the responsibility for the final wording of the Examples is ours alone.

Up-dates of all three Parts of this Compendium will be in the form of electronic copies of any particular pages that need to be replaced.

1-4 Timing of directions of law

Traditionally, directions of law were given to the jury for the first time in the summing-up. This is not necessarily the best way to help the jury. This traditional approach meant that the jury would be directed that their task was to evaluate the evidence at a stage when the evidence had concluded; and they would be directed to exercise caution in relation to various parts of the evidence such as identification evidence long after the evidence had been given. Recognising this, some members of the judiciary have adopted the practice of giving some directions at earlier stages of the trial.

Such an approach has now been encouraged by Sir Brian Leveson P in his recent 'Review of Efficiency in Criminal Proceedings'. He encourages (a) identification for the jury of the issues in the case, by both prosecution and defence, **before** the evidence is called; and (b) the giving of directions of law at a point or points in the trial when they are of most use to the jury. In his words: "I know of no reason why it should not be open to the judge to provide appropriate directions at whatever stage of the trial he or she considers it appropriate to do so."[1] This approach has been formally adopted in a new Crim PR Rule 25.14 Trial and sentence in the Crown Court; Directions to the jury and taking the verdict. This requires the judge at a jury trial (i) to give the jury directions about the law at any time at which that will help the jurors to evaluate the evidence that they hear, and (ii) when summing up the evidence for them, to do so only to such extent as is directly relevant and necessary.

We would therefore encourage judges and Recorders to give careful thought to the timing of their legal directions. Some of these might usefully be given before the prosecution's opening speech. Examples would be directions about the different roles of the judge and jury; the burden and standard of proof; and the definition of the offence(s) charged. Directions about the use of special measures must be given just before the evidence of the witness(es) for whom such measures are to be used. Directions relating to hearsay, character or identification evidence, for example, might be given just before or just after the evidence concerned is adduced.

We are not suggesting that it will always be appropriate to give some of the legal directions before the summing-up, but simply that thought be given to the time at which directions can most helpfully be provided. It will be wise to forewarn the advocates in the absence of the jury if it is intended to give some directions before the summing up, to indicate what the proposed directions are, and to ask for any submissions the advocates may have. It will be important to keep any such directions under review after they have been given, in case they are affected by any subsequent developments in the trial; and, if they are, to expand on those directions as necessary during the summing-up.

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

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[1] Paragraph 238 of the Review.

1-5 Written directions and Routes to Verdict

The research[2] of Professor Cheryl Thomas (cited in the Foreword above) has demonstrated the value to jurors of having written directions of law. She has conducted systematic assessments of jurors' comprehension of oral and written judicial directions, and explored jurors' perceptions of the comprehensibility of judges' oral directions and the value of written directions.

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

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

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

Unsurprisingly in a number of decisions, notably *ABCD,*[3] the Court of Appeal (Criminal Division) has encouraged the provision of written directions. This approach has also received the backing of Sir Brian Leveson, President of the Queen's Bench Division, in his *Review of Efficiency in Criminal Proceedings*[4] and is reflected in CrimPD VI 39K.

The argument in favour of providing juries with written directions is now overwhelming. Recent surveys with judges at Judicial College courses have revealed that over 90% judges now use written directions some of the time, although there are differing views about how often, when and what form written directions should take. There may still be a few judges and recorders who have yet to embrace the use of written directions, but it is clear that they are now very much in the minority in England and Wales. The authors of this work very much hope that the

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

[3] [2010] EWCA Crim 1622.

[4] *Review of Efficiency in Criminal Proceedings* paras 284 and 288. www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf

Compendium will provide encouragement and some of the tools to assist judges in using written directions.

Forms of written directions

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

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

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

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

Routes to Verdict

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

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

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

> 'The Judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law as the Judge understands it to be and to the issues and evidence in the case. These questions – the 'route to verdict' – should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached.'[5]

[5] *Review of Efficiency in Criminal Proceedings* paras 307 and 308.

Discussion with advocates

All written directions for the jury must be discussed, and preferably agreed, with the advocates well before they are provided to the jury. Written directions provided to the jury during the judge's oral directions should be discussed with advocates no later than the point at which the giving of evidence ends and before the advocates' speeches begin.

Keeping a record

A copy of any written directions, Routes to Verdict or other materials which the judge has provided to the jury and with which they retire must be initialled by the judge and put in the court file to ensure that in the event of an appeal it is that version which comes to be considered by the CACD.

1-6 Acknowledgements

We wish to acknowledge with real gratitude the advice, help and support which we have received from so many people.

We thank, for their support and suggestions, Sir Brian Leveson PQBD, Lady Justice Hallett VPCACD, Lords Justices Bean, Fulford, Pitchford and Treacy, Mr. Justice William Davis, Mrs. Justice McGowan, Mr. Justice Openshaw and their Honours Judges Ambrose, Aubrey QC, Bayliss QC, Edmunds QC, Everett, Farrer QC, John Phillips CBE, Picton, Rook QC, Deborah Taylor and Zeidman QC.

We thank, for their care, industry and good humour in reviewing this work:

Part I – Jury and Trial Management and Summing Up: the course directors and tutor judges of the Judicial College Criminal Continuation Course: respectively their Honours Judges Sally Cahill QC and Pegden QC and their Honours Judges Catterson, Davey QC, Denyer QC, Hilliard QC, Kinch QC, Leonard QC, Lynch QC, Juliet May QC (now Mrs. Justice May), Mr. Recorder Richard Atkins QC and Mr. Recorder Bruce Houlder QC; and

Part II - Sentencing: Lyndon Harris, Ll.B. (Hons), Barrister, editor of Thomas' Sentencing Referencer.

In respect of the Examples in Part I we thank Professor Cheryl Thomas, Professor of Judicial Studies at the Judicial Institute, University College London, for her most valuable advice about tailoring our draft directions to make them more accessible to jurors; and members of the Plain English Campaign for their work in helping us to simplify the wording used in the directions.

In respect of Part II we are very grateful to Joanna Shaw, B.A. (Hons.), LLM, Barrister of 1, Essex Court, Temple, and researcher of the Judicial Institute, UCL, who painstakingly researched and corrected the footnotes and formatted and hyperlinked the text.

Finally and above all we acknowledge the forbearance and support of our respective wives during the time-consuming preparation of this work, whose patience has at times been sorely tried.

The authors

Sir David Maddison is a recently-retired High Court judge, has been involved in judicial training for many years and was a contributor to the original Specimen Directions published by the then Judicial Studies Board.

Professor David Ormerod QC is on secondment from UCL and is currently the Criminal Law Commissioner and has been involved in judicial training for over a decade. He assisted Lord Justice Pitchford in preparation of the Crown Court Bench Book.

His Honour Simon Tonking is a recently retired Circuit Judge. He was formerly Resident Judge of Stafford and, with His Honour Judge John Wait, Co-director of the Judicial College Criminal Induction Course and co-author of the Bench Book Companion.

His Honour Judge John Wait, was formerly Resident Judge of Derby and, with His Honour Judge Simon Tonking, Co-director of the Judicial College Criminal Induction Course and co-author of the Bench Book Companion.

2. JURY MANAGEMENT

2-1 Empanelling the jury

ARCHBOLD 4-292; BLACKSTONE'S D 13.17; CrimPR 25.6; CrimPD 26

Legal Summary

1. See CrimPD Part 26D: Juries: Precautionary Measures before Swearing;

   26D.1 There should be a consultation with the advocates as to the questions, if any, it may be appropriate to ask potential jurors. Topics to be considered include:

   a. the availability of jurors for the duration of a trial that is likely to run beyond the usual period for which jurors are summoned;

   b. whether any juror knows the defendant or parties to the case;

   c. whether potential jurors are so familiar with any locations that feature in the case that they may have, or come to have, access to information not in evidence;

   d. in cases where there has been any significant local or national publicity, whether any questions should be asked of potential jurors.

   26D.2 Judges should however exercise caution. At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community or otherwise to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from the advocates, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness.

   Length of trial

   26D.3 Where the length of the trial is estimated to be significantly longer than the normal period of jury service, it is good practice for the trial judge to enquire whether the potential jurors on the jury panel foresee any difficulties with the length and if the judge is satisfied that the jurors' concerns are justified, he may say that they are not required for that particular jury. This does not mean that the judge must excuse the juror from sitting at that court altogether, as it may well be possible for the juror to sit on a shorter trial at the same court.

   26D.4 Where a juror appears on a jury panel, it will be appropriate for a judge to excuse the juror from that particular case where the potential juror is personally concerned with the facts of the particular case, or is closely connected with a prospective witness. Judges need to exercise due caution as noted above.

2. The jury to try an issue (including a trial of the facts[6] for a defendant found unfit) is selected from the panel by ballot in open court. It is normal practice to read out the jurors' names, selected at random, in open court.[7] Where, exceptionally, there is a risk of juror interference, jurors may be called by number.[8]
3. Following the ballot and any challenges the jury members are then each sworn, following the guidance in CrimPD 26.E1.

Procedure

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

4. Before the jury panel enters the court the judge should consult the advocates as to any questions to be asked of the panel, in accordance with CrimPD 39, about any personal connection or knowledge they may have in relation to any aspect of the case such as:
   (1) Personal connection with or knowledge of anyone involved in the case whether as a witness (either prosecution or defence) or as someone who will be named (e.g. a deceased person, a co-defendant not before the jury or a person who was arrested but not charged). The defence advocate/s should be asked to identify any other significant names that might be referred to during the case or confirm that there are none;
   (2) Personal connection with or knowledge of any place or organisation connected with the case (e.g. the location of the incident, D's home address, a public house or a business);
   (3) Awareness of any publicity that the case has received in the local or national media.
5. It is important not to exceed judicial discretion and whilst it is permissible to exclude a juror who comes from, or has personal knowledge of, a particular area in order to avoid the risk of a juror having, or acquiring, personal knowledge of D or a witness, it is not permissible to exclude a jury panel drawn from a particular section of the community or otherwise to influence the overall composition of the jury.
6. It is not normally necessary to ask any questions of the panel before the panel comes into the court room.
7. When the jury panel has entered it is advisable to:
   (1) Apologise for any delay, giving an explanation if it is possible to do so without prejudice to the case which is to be tried.
   (2) Give the panel, in neutral terms, brief details about the case that they are going to try e.g. the date, location and general nature of the incident.

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[6] Criminal Procedure (Insanity) Act 1964, s.4A.

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

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

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

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

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

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

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

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

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

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

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

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

Example

NOTE: This example is not intended to cover every matter that may need to be raised with the jury panel in any particular case, as to which see Procedure above.

This case involves {specify e.g. "an incident"} which happened at {location} on {date}. Because a jury must decide the case only on the evidence given in court, it is essential that no one on the jury has any personal connection with, or personal knowledge of, the case or anyone associated with it. I am now going to give you some information about these things. If you know any of the people personally, or you know anything about the case, please write a note explaining this and hand it to the usher.

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

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

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

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

Of course sometimes we only know someone by their first name or a nickname. If at any stage during the case you realise that you know someone involved it is important you let me know straightaway. Please do this by immediately writing a note and handing it to the usher.

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

Such a case will have been identified in advance and an enlarged jury panel will have been summoned.

10. In some courts, 2 weeks before the trial date, the jury summoning officer sends a standard questionnaire to the panel informing them of the potential length of the trial, reminding them of their public duty to serve on a jury but asking if they have any pre-booked and paid-for holidays, if they or any member of their immediate family have any anticipated hospital admissions or on-going long-term medical treatment or if they have any other reason which would make it impossible for them to sit on a long trial.

11. If the procedure in paragraph 10 above is followed:

    (1) potential jurors are told to bring the completed questionnaire to court on the day of the trial, together with any written evidence if they are seeking to be excused. In light of such information the jury summoning officer, exercising the discretion provided by s.9(2) Juries Act 1974, may withdraw any name/s from the panel list; and

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) If there is any ambiguity or doubt about a particular answer given by a member of the panel, or if the judge, having read the reason put forward on

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

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

Example

NOTE: This example is not intended to cover every matter that may need to be raised with the jury panel in any particular case, as to which see Procedure above.

STAGE 1:

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

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

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

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

You have been provided with a questionnaire as you came into court which you will have time to complete when you leave court and go back to the jury area. I accept that it is likely that some of you may not be able to sit on the jury in this case and the completed questionnaires will help me decide who is able – and who is unable – to sit on the jury in this case.

Anyone who has a very good reason for not sitting on a jury for this length of time will be released from serving in this case but will be required to make themselves available on other cases which are due to start on or after today.

You must understand that it is my duty to find a jury to try this case: so the reasons that I may accept for not sitting on the jury in this case are very limited.

Please look at the questionnaire that you have been given. [At this point take the jury through the questionnaire, adding any further comments by way of explanation which you think may be helpful, for instance giving examples of what sort of employment issue may lead to the member being excused and what is unlikely to do so.]

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

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

Just before you leave the court room, let me explain that this case involves {specify e.g. “an incident”} which happened at {specify location} on {specify date}. Because a jury must decide the case only on the evidence given in court, it is essential that no one on the jury has any personal connection with, or personal knowledge of, the case or anyone associated with it.

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

Finally, you are now have some information about the case which you may be asked to try. If you are selected to sit on the jury in this case I shall give you some directions about not trying to get any information about it, either on the internet or in any other way. You will be told that to do so would amount to an offence which is punishable by imprisonment. The same applies to all of you at this stage; you must not use the information you have been given to do any research into what this case is about. If you are chosen to try this case you will be given all the information you will need in this courtroom.

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

STAGE 2

Thank you all for completing the questionnaires. I have had an opportunity to read them {if appropriate: and some people have been excused}.

The clerk of the court will now read out a list of names. This is not the list of those people who will be on the jury to try this case but of a larger number who are eligible to try it. If your name is called and you want me to consider any reason why you should be excused to serve on this jury, please {either write me a note or come forward to speak to me}*.

After we have identified those able to sit you will asked to return to the jury area where there will be a ballot to select a panel of {number} from whom the final 12/14 jurors will be selected.

We will then adjourn until {e.g. after lunch/tomorrow} to provide a final opportunity for those who have been chosen to make sure that there is nothing which might affect their ability to sit on this jury. After this adjournment, you will be sworn in as the jurors to try this case.

*__NOTE__: It is recognised that methods of communication with potential jurors vary in different courts.

STAGE 3 (after an adjournment)

We are now ready to swear the jury. If your name is called and you want to raise anything further which might give me cause to excuse you from sitting on this jury, please {either write me a note or come forward to speak to me}*. If you are able to sit on this jury, then please go to the place in the jury box which you will be shown by the usher and take the oath or affirmation.

*__NOTE__: It is recognised that methods of communication with potential jurors vary in different courts.

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

2-2 Challenge and stand down of a juror

ARCHBOLD 4-296, 304 and 305; BLACKSTONE'S D13.21; CrimPR 25.7 and 8; CrimPD 26

Legal Summary

1. Challenges *for cause* to the array[9] or the polls may be made by either party.[10] The challenge should be made before the juror is sworn.[11] In practice, the discretion to stand down a juror by agreement obviates the need for further inquiry into the challenge in most cases.
2. The Attorney-General has issued guidelines revised in 2012 on the use by the prosecution of the right of stand down.[12] The Crown should assert its right to stand down only on the basis of clearly defined and restricted criteria: (1) where a jury check reveals information justifying the exercise of that right and its exercise is personally authorised by the Attorney General; or (2) where someone is manifestly unsuitable and the defence agrees that the exercise by the Crown of the right to stand down is appropriate.
3. The judge has the discretion to stand down jurors who are not competent to serve by reason of a personal disability: CrimPD 26C.3.[13] Judges must not use that discretionary power to stand jurors by in an attempt to reject jurors from particular sections of the community or otherwise influence the overall compositi on of the jury: CrimPD 26D.2.[14]
4. A judge should always be made aware at the stage of jury selection if any juror in waiting is a serving police officer, prison officer or prosecution service employee. Guidance on how judges should approach jury selection of such individuals is provided in CrimPD 26C.6 et seq.[15] The test to apply is well established: "Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[16]

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

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

[11] Juries Act 1974, s.12(3).

[12] 2012 update - https://www.gov.uk/guidance/jury-vetting-right-of-stand-by-guidelines--2

[13] *Mason* [1981] QB 881; *Jalil* [2008] EWCA Crim 2910.

[14] *Ford* [1989] QB 868.

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

[16] *Abdroikov* para. 15.

Example 1: matter disclosed by a juror

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

Please now go with the usher. It may be that you can serve on the jury in another case.

Also consider, as appropriate:

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

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

Example 2: matter not disclosed by a juror

{Name of juror}: I am afraid that you cannot serve on the jury for this trial. Please now go with the usher. It may be that you can serve on the jury in another case.

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

2-3 Alternate jurors

ARCHBOLD 4-265d; BLACKSTONE'S D13.18; CrimPR 25

Legal Summary and Directions

1. The power to select extra jurors has been acknowledged by the Court of Appeal in *M*.[17] CrimPR 25 now governs this procedure;

25.6(6) The jury the court selects—

(a) must comprise no fewer than 12 jurors;

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

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

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

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

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

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

(a) must take an oath or affirm and

(b) becomes a full jury member until discharged.

Discharging jurors

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

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

(b) before the court discharges the jury.

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

[17] *M* [2012] EWCA Crim 2056.

Example 1: At the point of empanelling the jury

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

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

If anything of that kind were to happen then one of the two additional jurors would take their place. If nothing happens by the end of the prosecution's [if appropriate: and defence] explanation, then the additional jurors will be released from service on this jury/further jury service.

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

Example 2: if a substitute is required

We have discovered that it has become impossible for one of the first 12 jurors to continue to serve on the jury in this trial. So {specifically addressing juror 13} could I ask you to go into the jury box and take his/her place.

Example 3: when a substitute is not required

We have now reached the point in the trial where we can no longer substitute one juror for another. If, as sometimes happens, a {second} member of the jury had had to stand down, the fact that you {jurors 13 and 14} were here would have saved a lot of time.

Thank you very much for the time that you have spent listening to this case. Now that you are no longer serving on the jury, you must not speak about the case to any of the remaining jurors until it is over.

2-4 Discharging a juror or jury

ARCHBOLD 4-307; BLACKSTONE'S D13.49; Crim PR 25.7; Crim PD 26

Legal Summary

Discharging individual jurors[18]

1. The judge has a power to discharge a juror or jurors but the jury must never fall below 9 in number. A juror should only be discharged where there is a high degree of need.[19]
2. Section 16[20] of the Juries Act 1974 sets out the consequences of discharge, but the extent of the jurisdiction to discharge a juror is a matter of common law; s. 16 merely sets out the consequences of exercising it.[21] Discharge of jurors is not dependent on the consent of the parties. In a case where the jury has to consider more than one verdict, the judge retains the power to discharge a juror even after one or more of the verdicts have been given: Wood.[22]
3. Examples of situations in which it may be necessary to discharge a juror include: illness, misconduct or a juror having an unavoidable personal commitment.
4. CPD Trial 26 H2 provides further guidance.[23] It is emphasised that

   > "the judge must decide for him or herself whether the juror has presented a sufficient reason to interfere with the course of the trial. If the juror has presented a sufficient reason, in longer trials it may well be possible to adjourn for a short period in order to allow the juror to overcome the difficulty. In shorter cases, it may be more appropriate to discharge the juror and to continue the trial with a reduced number of jurors:" CPD 26.

   Moreover,

   > "The good administration of justice depends on the co-operation of jurors, who perform an essential public service. All such applications should be dealt with sensitively and sympathetically and the trial judge should always seek to meet the interests of justice without unduly inconveniencing any juror." CPD 26.
5. In the event of a juror or jurors being discharged, the remaining jurors will deserve an explanation as to why that person is absent. In cases in which the

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[18] See link

[19] Erle CJ's judgment in *Winsor* (1866) LR 1 QB 390.

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

[21] *Hambery* [1977] QB 924.

[22] [1997] Crim LR 229.

[23] https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu

juror is suspected of engaging in misconduct, care will be needed. In cases where the juror has been discharged for other reasons, few difficulties will arise.

6. The remaining jurors may also need an explanation as to what if any regard they are to have to the comments and views expressed by the discharged juror(s). In Carter,[24] Lord Judge CJ explained:

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

Discharging the entire jury

7. A judge has the discretion to discharge the jury.[25] Once a jury has been discharged it is functus officio and cannot be reconvened. In exceptional circumstances it may be possible to set aside an order to discharge.[26]

8. The reasons for discharging a jury will depend on the circumstances of the case. The judge's overriding duty in this context is to ensure that proceedings are fair and to do justice in the particular case. Examples of situations in which it may be necessary to discharge the jury include: where inadmissible material has become known to the jury or there is a risk that improper information known to one juror has been shared with others.

Investigating alleged wrongdoing

9. The Criminal Practice Direction contains comprehensive guidance on the approach to take where there is alleged wrongdoing by one or more jurors: CrimPD VI Trial 26M: Juries: Jury Irregularities.

10. If the judge considers that the trial should continue, then under CPD 26M.26 the judge should consider what, if anything, to say to the jury. For example, the judge may reassure the jury nothing untoward has happened or remind them their verdict is a decision of the whole jury and that they should try to work together. Anything said should be tailored to the circumstances of the case.

11. The discharged juror(s) must be warned not to discuss the circumstances with anyone and it may be necessary to discharge the juror(s) from current jury service.

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[24] [2010] EWCA Crim 201.

[25] *Weaver* [1968] 1 QB 353.

[26] *S* [2005] EWCA Crim 1987; *F* [2009] EWCA Crim 805.

12. In the event that a jury is discharged and the trial relisted, the jury should be warned not to discuss the circumstances with anyone.
13. If information about a jury irregularity comes to light during an adjournment after verdict but before sentence, then the trial judge should be considered functus officio in relation to the jury matter, not least because the jury will have been discharged. See CrimPD 26M.41 for the procedure to follow.

Procedure

Discharge of a juror for personal reasons

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

Discharge of whole jury for irregularity within the trial process

21. If the discharge is as a result of something that has happened within the trial e.g. a witness or advocate referring to matters that are not admissible in evidence and are seriously prejudicial, the matter will be subject to submissions from the advocates.
22. The decision whether or not to discharge will take into account the nature and seriousness of the irregularity and also that juries are expected to abide by their oath/affirmation to try the case according to the evidence.
23. If the decision is not to discharge, consideration must be given to what, if anything, the jury are to be told. In many cases a rehearsal of the inadmissible material draws unnecessary attention to a matter which may have appeared insignificant to the jury.

24. If the jury have to be discharged, consideration must be given to what they should be told. If the matter is to be retried before another jury it is generally prudent to tell them no more than that something has arisen which makes it impossible for the case to proceed. They should be thanked for their work to date and if a retrial is to commence immediately consideration must be given to releasing the jurors from further service until the trial is complete.

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

Example 1: Juror released for personal reasons

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

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

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

Example 2: Jury discharged

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

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

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

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

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

2-5 Conducting a view

ARCHBOLD 4-323; BLACKSTONE'S F8.50; CrimPD 26J

Legal Summary

1. The court may take a "view" out of court by inspecting a particular location or inspecting any object which it is inconvenient or impossible to bring to court. This may be useful where maps, photographs, videos or diagrams will not suffice.
2. The view may take place in any case in which the judge thinks that it would be of service to the jury. It may be at the request of any party. A view may only take place before the jury has retired.[27]
3. Before any court embarks upon a view, the judge must make clear precisely what is to happen, including where various individuals will be permitted to stand, what actions can be performed at the scene of the view etc.[28] If witnesses are to be present it must be agreed what demonstrations, if any, they will be permitted to perform.
4. CrimPD VI Trial 26J: Juries: Views

   26J.1 In each case in which it is necessary for the jury to view a location, the judge should produce ground rules for the view, after discussion with the advocates. The rules should contain details of what the jury will be shown and in what order and who, if anyone, will be permitted to speak and what will be said. The rules should also make provision for the jury to ask questions and receive a response from the judge, following submissions from the advocates, while the view is taking place.

   All parties should attend: the judge[29], all members of the jury[30], the parties, the advocates, a shorthand writer/logger, any witnesses and/or dock officers directed to attend, and the ushers. The jury should remain in the company of the ushers. D is not bound to attend but his presence may be important to allow an opportunity to identify for his legal representatives ways in which the locus has changed since the alleged crime.

   The view itself should be conducted without discussion unless necessary. The judge should take precautions to prevent any witnesses present from communicating, except by way of demonstration, with the jury.[31] A shorthand writer/logger should record all communications between the judge and the advocates and or the jury.

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

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

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

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

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

Procedure

5. Planning:
   (1) If the judge decides that a view is to be held, careful arrangements must be made and all those attending the view must know precisely what procedure is to be adopted: the judge must produce clear ground rules.[32]
   (2) When on a view the court is still sitting and proper procedures must be followed throughout.
   (3) If any particular place or other specific feature of the scene is to be identified and viewed, the procedure for doing so must be agreed in advance. It may be helpful to discuss and agree with the advocates a list describing what the jury should look at. This can then be given to the jury and explained to them before leaving court. In an appropriate case this can be supplemented with an annotated plan setting out, for example, a route and/or features that they should look at. Such preparation should reduce the need for anyone to have to communicate with the jury during the view.
   (4) The jury should be told to take any relevant plans and photographs with them.
   (5) When it is suggested that a defendant, particularly one who is in custody, is to attend the view great care must be taken. It may be that one or more dock officers will be needed to escort the defendant/s but care needs to be taken with regard to the use of handcuffs. Account must be taken of any risk of escape.
6. Travel:
   (1) Travel to and from the location must be very carefully regulated. It should start and finish at the court for everyone involved. It is important to ensure that there is no risk of contamination at any stage of the travelling process.
   (2) Usually travel is by a single coach. It is important that different parties, in particular the jury, the defendant and any witness/es are kept apart and go to and remain in appropriate seats.
   (3) Talking en route is permitted but on no account may anyone at all talk about the case.
   (4) If a defendant is to travel to the location, a dock officer/officers will escort him as appropriate.
7. At the view:
   (1) Any communications between the judge and the advocates, any witness/es and/or the jury must be recorded (usually on a portable recorder held by the court clerk).
   (2) Apart from communicating with his advocate, any D must remain silent.
   (3) If any evidence is taken this must be done in the same way as in court: it must be recorded and audible to the judge, advocates, defendant/s if present and all members of the jury.

[32] CrimPD 26J.1

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

Example

NOTES:

1. These instructions should be given in court before the view takes place.
2. This example does not contain all possible instructions that may have to be given: other instructions will be case-specific, depending on the location and the purpose of the view.

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

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

At 10 o'clock tomorrow morning, we will all meet in this courtroom [add if appropriate: and I will give you directions about what you should look at when you get to the scene and tell you what documents you should take with you]. The ushers will then take you to {specify location e.g. the car park}. From there a coach will take us to the scene. We will all get onto the coach in a particular order. The defendant will get on first and sit at the back {in the company of the dock officer}. Then the lawyers, [if applicable: the witness, W, with an usher], followed by me and the court clerk. Finally, you and your ushers (who will stay with you throughout the journey and at the scene) will get on. You will sit at the front of the coach but you do not need to sit in any specific order.

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

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

When we get to the scene you must stay together as a jury in one group and in a place where you can all hear everything that is said, except if I need to discuss a particular point privately with the advocates. You must not talk at the scene. You must simply observe {and listen if any evidence is given}. If you want to ask a question, write it down and hand it to the usher.

When the visit is over we will return to court on the coach. We will get on the coach in the same order, so you will get on last and sit in exactly the same places as before. When we get back to court you will be taken to the jury area first before we all come back into the courtroom.

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

3. TRIAL MANAGEMENT

3-1 Opening remarks to the jury

ARCHBOLD 4-325; BLACKSTONE'S D13.20; CrimPD 26G.3

Legal Summary

1. Guidance on the appropriate directions to jurors at the start of the trial is provided in CrimPD 26G.3.
2. It is vitally important that such guidance is followed. The instructions given to the jury at the outset will reduce the risk of jurors engaging in behaviour which may jeopardise the fairness of the trial and lead to them being discharged. The instructions will repeat some of the information that has been provided on the jury DVD and in the address given by the jury manager. Nevertheless, it is important that the jury is directed on these issues by the judge:
   (1) to make sure that jurors understand what is permitted;
   (2) so that the defendant and members of the public gain confidence from hearing the instruction in open court that the jury is to try the case on the evidence;
   (3) so that the jurors have received a court order that in the event that they do ignore the directions and engage in improper conduct that breach will be a contempt of court: *AG v Dallas*[33] and a criminal offence under the Criminal Justice and Courts Act 2015;
   (4) in the event challenges on appeal it is clear what instruction the jurors have received.
3. The Guidance provides

   At the start of the trial

   26G.3 Trial judges should instruct the jury on general matters which will include the time estimate for the trial and normal sitting hours. The jury will always need clear guidance on the following:

   i. The need to try the case only on the evidence and remain faithful to their oath or affirmation;

   ii. The prohibition on internet searches for matters related to the trial, issues arising or the parties;

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

   iv. The importance of taking no account of any media reports about the case;

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

v. The collective responsibility of the jury. As the Lord Chief Justice made clear in R v Thompson and Others:[34]

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

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

Subsequent reminder of the jury instructions

26G.4 Judges should consider reminding jurors of these instructions as appropriate at the end of each day and in particular when they separate after retirement.

Directions

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

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

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

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

The jury's responsibilities

8. The jury's tasks are to weigh up the evidence, decide what has been proved and what has not and return a verdict / verdicts based of their view of the facts and what the judge will tell them about the law.

9. Any juror should indicate immediately if he is not able to hear any of the evidence.

[34] [2010] EWCA Crim 1623, [2011] 1 W.L.R. 200, [2010] 2 Cr. App. R. 27.

10. If a juror realises at any stage that he recognises someone connected with the case, notwithstanding that he did not do so when the names were read over before the jury were sworn, he should write a note immediately and pass it to the usher who will give it to the judge.

11. The jury must try the case only on the evidence and arguments they hear in court. From this it follows that throughout the trial each juror:

    (1) must disregard any media reports on the case;

    (2) must not discuss the case at all with anyone who is not on the jury, for example with friends or relatives, whether by face to face conversation, telephone, text messages, chat-lines or social networking sites such as Facebook or Twitter;

    (3) must not carry out any private research of their own with a view to finding information which is or might be relevant to the case, for example by referring to books, the internet or search engines such as Google, or by going to look at places referred to in the evidence;

    (4) must not share any information which is or might be relevant to the case and which has not been provided by the court; and

    (5) must not give anyone the impression that he or she does not intend to try the case on the basis of the evidence presented.

12. These instructions are given for good reasons:

    (1) They aim to prevent the jury being influenced by opinions expressed by people who have not heard to the evidence.

    (2) The prosecution and the defence are entitled to know on what evidence the jury have reached their verdict(s); otherwise the trial cannot be fair.

    (3) Information obtained from outside sources may not be accurate and may mislead the jury.

13. It is vital in the interests of justice and in the jury's own interests that they should follow these instructions strictly. If they do not it may well be necessary to halt the trial and start again with a new jury, causing a great deal of delay, anxiety and expense. In fairness to the jury they should be aware from the beginning that if they do not follow the instructions they may well be guilty of a criminal offence and at risk of a sentence of imprisonment.

14. Although the jury must not discuss the case with anyone outside their own number they are allowed to talk amongst themselves about the case, as it progresses. However, they should only do so when they are all together in the privacy of their jury room: they should not discuss the case in “twos and threes”. The jury should wait until they have heard all of the evidence before forming any final views.

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

16. The jury must be told that if they have any difficulties or problems while serving as jurors, including any problem they may have amongst themselves, they should write a note to the judge immediately and give this to the usher. If any

such matter is not reported until after the trial is over it may be too late to do anything about it.[35]

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

18. When the trial is over jurors may discuss with others their experience of being on a jury and speak about what took place in open court. However, they must never discuss or reveal what took place in the privacy of their jury room, whether by talking or writing about it, for example in a letter, text message or other electronic message such as on Twitter or Facebook. This is absolutely forbidden by Act of Parliament and, if done, would amount to a contempt of court.[36]

Other information

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

NOTE: The opening remarks must reflect, as appropriate, the information set out above but are personal to the style of the judge who makes them. Accordingly no example is given.

[35] *Mirza* [2004] UKHL 2.

[36] *R. v. Turford, R. v. Saffery, R. v. McGuigan* CACD

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

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

Legal Summary

1. If the question arises at the instance of the defence, the prosecution or the court that a defendant is unfit to plead and stand his trial, it is for the judge alone to decide whether the defendant is fit.[37] The determination of that question may be postponed by the judge until any time until the end of the Crown's case. If the judge[38] concludes the defendant is fit to plead or stand trial[39] the trial proceeds in the usual way (albeit perhaps with special measures e.g. an intermediary).
2. If the judge finds the defendant unfit, the court has a responsibility to ensure that D is appropriately represented.
3. A jury[40] must then be empanelled to try the issue

   > "whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence".[41]

4. If the act is not proved the jury return a verdict of not guilty. The burden of proof is on the Crown to the criminal standard. [42] Any confession or incriminating statement made by D should not ordinarily be introduced, unless D's unfitness arose after the making of the statement.[43]

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

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

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

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

[41] Criminal Procedure (Insanity) Act 1964, s.4A(2).

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

[43] *Swinbourne* [2013] EWCA Crim 2329. See also *Wells* [2015] EWCA Crim 2 where Sir Brian Leveson P said: where a defendant's disability impacts on his/her ability to take part in a trial but he/she is not otherwise affected by a psychiatric condition such as renders what is said in interview unreliable (whether or not the delusional traits are apparent on the face of the interview), there is no reason why the jury should not hear them albeit with an appropriate warning. When considering the extent to which evidence of the interview should be admitted, it remains relevant to consider all the circumstances.

5. Juries should not be told what the disposal powers are if they find the defendant did the act.[44]

6. The case law on what "act or omission" means is confused.[45] The defences of Loss of Control and Diminished Responsibility cannot be pleaded at a hearing of the trial of the issue under section 4A Criminal Procedure (Insanity) Act 1964.

Directions

If the judge rules that D is unfit

7. Jury selection proceeds in the usual way save that D has no right of challenge.

8. The jurors take an oath or affirm in a form requiring them to determine whether D did the act or made the omission charged as the offence, or is not guilty.

9. As part of his introductory remarks, the judge should explain to the jury the nature of the proceedings, and that although D is not fit to be tried for the offence there is an important public interest in ascertaining whether or not he did the act or made the omission: see the *Example* below.

10. If, as is likely, D does not give evidence the judge should discuss with the advocates in the absence of the jury before closing speeches whether the jury should be directed that they may or must not draw an adverse inference: see Chapter 17-5.

11. The summing up will be in the conventional form save that the jury is concerned only with whether D did the act or made the omission, and not with his state of mind. Care will be needed to identify those elements of the offence of which they jury must be sure: see paragraph 6 above.

12. If D is being tried jointly with other defendants who are being tried conventionally, the differences between the issues arising and the verdicts available should be explained clearly to the jury.

13. The verdict will be:

    (1) 'D did the act charged'; or

    (2) 'D made the omission charged'; or

    (3) 'Not Guilty'.

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[44] *Moore* [2009] EWCA Crim 1672.

[45] *Antoine* [2000] UKHL 20 which holds that the inquiry should not include any assessment of mens rea but that the jury can take account of "objective" elements of defences. *Cf B* [2012] EWCA Crim 770: permitting the jury to inquire into the accused's purpose. See also *Wells* [2015][EWCA Crim 2, where Sir Brian Leveson P said: "What would not fall within the category of objective evidence are the assertions of a defendant who, at the time of speaking, is proved to be suffering from a mental disorder of a type that undermines his or her reliability and which itself has precipitated the finding of unfitness to plead. These assertions need not themselves be obviously delusional: to repeat the example provided by Judge LJ, it is not necessary that the defendant assert that he or she is a deity being attacked by the devil. The exclusion of evidence outside this category may put the defendant at a disadvantage; however this is balanced by the fact that these are not criminal proceedings and the disposals are accordingly limited."

Example

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

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

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

3-3 Trial in the absence of the defendant

ARCHBOLD 3-222; BLACKSTONE'S D15-84; CrimPD 14E

Legal Summary

1. In general a defendant has a right to be present throughout his trial. Exceptionally a trial may start or proceed in the absence of the defendant. This may be as a result of him voluntarily absenting himself or being excluded from the court for misbehaving.[46] Where the defendant is too ill to attend it is possible to continue in his absence if the defendant consents or there will be no prejudice arising from his absence.
2. The court's discretion to commence or continue a trial in the defendant's absence must be exercised with the utmost care and caution and with close regard to the overall fairness of the proceedings. The relevant principles to be applied by a judge in deciding whether to continue in the defendant's absence are set out by the House of Lords in *Jones*.[47] See also CrimPD III 14E1.
3. In exercising the Court's discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including in particular:
   (1) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
   (2) whether an adjournment might resolve the problem;
   (3) the likely length of such an adjournment;
   (4) whether the defendant, though absent, is or wishes to be legally represented at the trial or has by his conduct waived his right to representation;
   (5) whether an absent defendant's legal representatives already have and/or are able to receive instructions from him during the trial and the extent to which they are able to present his defence;
   (6) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;
   (7) the risk of the jury reaching an improper conclusion about the absence of the defendant;
   (8) the general public interest and the particular interest of complainants and witnesses that a trial should take place within a reasonable time of the events to which it relates;

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

[47] [2002] UKHL 5.

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

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

4. The decision to try a defendant in his absence must be based on a proper foundation, that D has waived his entitlement to attend. Good practice dictates that defendants should be reminded at the plea and case management hearing of their obligation to maintain contact with their lawyers and to be aware of the date of their trial or the period of any relevant warned list[48]

5. As soon as the defendant is absent the judge must warn the jury against speculating against the reasons for the absence and that absence is not an admission of guilt and adds nothing to the prosecution case. These warnings should be repeated in summing up. In some cases it will be inadvisable to tell the jury that D 'has absented himself', even if that appears to be true see *Barnbrook* [49]

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

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

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

8. If it is not appropriate (e.g. misbehaviour or voluntary absence), tell the jury that they must not (a) speculate about the reason for the defendant's absence or (b) treat it as providing any support for the prosecution's case.

Directions - when summing up

9. Repeat the earlier directions.

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

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

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

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

[49] [2015] All ER (D) 107 (Apr).

Example

If a reason can be given for D's absence: D is unable to come to his trial because {specify}.

If no reason can be given (e.g. because D has absconded):D is not here.

In any event:

But he has previously pleaded 'Not Guilty' [add if appropriate: and he has told his lawyers what his case is and they will be representing him during the trial.]

The fact that D is not here does not affect your task, which is to decide whether or not he is guilty of the charge(s) against him. You must not speculate about the reason he is not here. His absence is not evidence against him and must not affect your judgment.

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

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

ARCHBOLD 1-247 and 9-82; BLACKSTONE'S D11.76 and F11.76

Legal Summary

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

   (1) by agreement of the parties;

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

   In neither situation is s.101 of the CJA 2003 engaged; the absent accused's conduct is relevant because it has to do with the facts of the alleged offence. S.100 CJA 2003 might be engaged.
4. Where evidence is adduced of the conviction or plea of a defendant who is not present the jury need to be directed on its evidential significance. If it is not evidence against the defendant on trial the jury need to be directed to that effect. The evidence is being adduced for information only. If the evidence of the absent defendant's guilt is admissible as evidence against the present defendant the jury will need to be directed carefully as to the limited use it has.

   > "If the evidence is admitted the trial judge should be careful to direct the jury as to the purpose for which it has been admitted, and—we would add—to ensure that counsel do not seek to use it for any other purpose. Of course it may happen that the judge will either limit or extend that purpose at a later stage of the trial, after hearing submissions from counsel."[50]

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

Directions

5. Where a co-defendant is named on the indictment but is not taking part in the trial, if it is possible to do so without prejudice to the defendant being tried, it will be helpful to make the situation the subject of an agreed fact and put before the jury in this way.
6. Where it is not appropriate for the jury to be given any information about the co-defendant they must be directed that they are not trying that defendant, they

[50] Per Staughton LJ in *Kempster* [1989] 1 WLR 1125.

must not speculate about his position and that it has no bearing on the position of the defendant whom they are trying.

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

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

You have heard that X has been convicted of/pleaded 'guilty' to/been accused of the offence(s) for which D is now being tried. You must decide whether D is guilty or not guilty on the evidence given in this trial and X's position must not influence your decision in any way.

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

You have heard that X has pleaded 'guilty' to/been convicted of {specify}, the offence for which D is now being tried. The fact that X has pleaded 'guilty' is evidence that the offence was committed. But it is not evidence that D took part in the offence and you must decide whether or not D is guilty only on the other evidence given in this trial.

3-5 Defendant in person

ARCHBOLD 4-383, 4-441 and 8-225; BLACKSTONE'S D17.17; CrimPR 23; CrimPD 26P.4 and 5

Legal Summary

1. A defendant may choose to conduct his case in person.
2. Where a defendant is unrepresented from the outset, the judge should direct the jury, at the start of the trial, that a defendant has a right to choose to represent himself. The jury should be told to bear in mind the difficulty that presents for the defendant. *De Oliveira* [51]
3. If the defendant is representing himself, there is a statutory restriction on cross examining certain witnesses in person: s 35 YJCEA 1999. The restrictions relate to child witnesses and sexual complainants, but the court also has the power, on application by the Crown, to prohibit cross examination by an unrepresented defendant in other cases where the interests of justice demand it. See also CrimPR 23.
4. The judge should ask the defendant whether he wishes to call any witnesses in his defence: *Carter.*[52] The judge may need to assist an unrepresented defendant in the conduct of his defence. The judge will need to warn the unrepresented defendant about the inferences that may be drawn under the CJPOA 1994 if he does not give evidence.
5. If the statutory restriction does not apply, the court is not obliged to allow an unrepresented defendant to ask whatever questions, at whatever length, the defendant wishes: *Brown*. [53]
6. In some cases a short explanation of the reason the defendant has chosen to represent himself may be appropriate. This may be particularly desirable if the defendant's representation ceases after the trial has started. For example, in *Hammond*[54] the trial judge directed the jury as follows:

> "Members of the jury, just to let you know what the situation is, the defendant [a co-defendant of Hammond] himself has decided to dispense with the services of his counsel. He was given time to consider and I have refused his application to have alternative counsel and, therefore, from now on he is going to represent himself.
>
> It has been explained to him that he will be subject to the same rules of evidence and procedure as counsel would have been had they continued to represent him and which apply to all the other defendants and the prosecution in this case.

[51] [1997] Crim LR 600, CA.

[52] (1960) 44 Cr.App.R. 225.

[53] [1998] 2 Cr App Rep 364.

[54] [2013] EWCA Crim 2636.

It has also been explained to him that my role in this case is to ensure that the trial is fair, and that there may be some occasions when he needs some guidance so that he complies with those rules, so as to ensure a fair trial not only for himself but also the other defendants and the prosecution.

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

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

On appeal Laws LJ stated:

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

7. CrimPD 26 provides:

26P.4 If the defendant is not represented, the judge shall, at the conclusion of the evidence for the prosecution, in the absence of the jury, indicate what he will say to him in the presence of the jury and ask if he understands and whether he would like a brief adjournment to consider his position.

26P.5 When appropriate, and in the presence of the jury, the judge should say to the defendant:

'You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question, the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court or lead any agreed evidence. Afterwards you may also, if you wish, address the jury. But you cannot at that stage give evidence. Do you now intend to give evidence?'

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

Directions

8. Directions may have to be given in respect either of a defendant who has decided to represent himself from the outset of the trial or of a defendant who has become unrepresented in the course of a trial as a result of his advocate withdrawing or being dismissed.

If the defendant is unrepresented from the outset of the trial

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

If a defendant becomes unrepresented in the course of the trial

18. Ensure through the defendant and the prosecution that the defendant has all of the papers and a pad of paper and pens with which to take notes.

19. If D has served a defence statement, confirm the issues that are to be subject to question and evidence in the trial.
20. If D has not served a defence statement remind him that it is mandatory and that he is required to notify the court of the nature of his defence and the issues so that you are able to ensure a fair trial. Discuss and take a note for his agreement of the issues in the case.
21. Explain to the jury that the defendant has dispensed with the services of his lawyers or that the defendant is no longer being represented by lawyers.
22. Emphasise that the fact that he is no longer represented is not evidence in the case.

In all cases

23. Explain to D (in the presence of the jury) the procedure for the [remaining parts of the] trial, including if appropriate that there are restrictions on his right to cross examine and that an advocate will be appointed to carry out such cross examination.[55]
24. Invite D (in the absence of the jury) to provide materials to be used and questions to be asked in cross-examination, so that he may be advised as to admissibility and warned as to consequences.
25. The prosecution have no general right to a closing speech unless D has called at least one witness or the court permits [CrimPR 38.9(2)(i)].

Example 1: defendant unrepresented from the start of the trial

The defendant, Mr. X, has chosen to represent himself in this trial. In our legal system, everyone has a right to represent themselves instead of having a lawyer. But because we do not expect someone who is not a lawyer to be familiar with the procedure in court, I am now going to explain this to him. [Then go through the matters described above with D.]

Example 2: defendant becomes unrepresented during the trial

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

NOTE: See also the direction and commentary in the case of Hammond at paragraph 6 above.

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

3-6 Special measures

ARCHBOLD 8-71; BLACKSTONE'S D14.1; CrimPR 18; CrimPD 18

Legal Summary

1. Special measures may be available for a witness (other than a defendant) in criminal proceedings. Those eligible are in the following categories:
   (1) all witnesses under 18 at the time of the hearing or video recording; [56]
   (2) vulnerable witnesses affected by a mental or physical impairment;
   (3) witnesses in fear or distress about testifying;
   (4) adult complainants of sexual offences, or trafficking/exploitation offences; and
   (5) a witness to a 'relevant offence', currently defined to include homicide offences and other offences involving a firearm or knife.
2. The special measures available are:
   (1) screening the witness from the accused (YJCEA 1999, s. 23);
   (2) giving evidence by live link, accompanied by a supporter (s. 24)
   (3) giving evidence in private, available for sex offence or human trafficking cases or where there is a fear that the witness may be intimidated (s. 25);
   (4) ordering the removal of wigs and gowns while the witness gives evidence (s. 26);
   (5) video recording of evidence-in-chief (s. 27);
   (6) video recording of cross-examination and re-examination where the evidence in chief of the witness has already been video recorded (s. 28) (brought into force on a limited basis for pilot schemes);
   (7) examination through an intermediary in the case of a young or incapacitated witness (s. 29)
   (8) provision of aids to communication for a young or incapacitated witness (s. 30);
   (9) anonymity (dealt with further in Chapter 3-8 below).[57]
3. S.32 YJCEA 1999[58] provides:

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

[56] All child witnesses are automatically eligible for special measures, including defence witnesses other than the child defendant.

[57] CAJA 2009, Pt 3, Ch 2.

[58] As amended by Criminal Justice Act 2003, s.331 sch.36, paras. 74 and 75.

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

4. In *Brown and Grant*[59] the Court of Appeal held that the warning should be given immediately before the witness gives evidence, when it is more likely to impress itself on the jury; it is not important whether the warning is repeated in the summing up.
5. The 2015 CPD makes clear that assisting a vulnerable witness to give his or her best evidence is not merely a matter of ordering the appropriate special measure.
6. Guidance on further directions, ground rules hearings and intermediaries is given at CPD I General matters 3E.
7. Transcripts:[60]
   (1) The Court in *Popescu*[61] set out the principles governing the provision to the jury of transcripts of ABE interviews.
   (2) The judge is required to give the jury such directions as would be likely effectively to safeguard against the risk of disproportionate weight being given to the transcripts.
   (3) In *Sardar* [62]the court emphasised that the dangers in allowing a jury to have the transcript

   > "Nonetheless, the danger which precludes a jury having copies of the transcript is not merely that the jury might view the evidence-in-chief in the transcript in isolation from the other evidence. There is also a danger that the jury will concentrate upon the written word rather their impression of the witness and their assessment of that witness as she gives her evidence, both in the form of the video recording and during cross-examination. The jury, under our system of oral evidence, is required to assess the truth of a witness's evidence by reference to their assessment of her whilst she is giving that evidence. That is fundamental to the methods by which we expect juries to reach a conclusion as to guilt or innocence." [63]
8. Jury requests for transcripts: In the event that, after retirement to consider their verdict, the jury requests a transcript of the interview this should only be acceded to if they have had the transcript earlier in the case and then only with the agreement of both parties and subject to a clear reminder to the jury of the other evidence and as to the status of the transcript.
9. Jury requests for replay of recorded evidence:

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[59] [2004] EWCA Crim 1620.

[60] Archbold 8-92; Blackstone's D14.35.

[61] [2010] EWCA Crim 1230. The court considered *Welstead* [1996] Cr App R 59, CA and *Morris* [1998] Crim LR 416.

[62] [2012] EWCA Crim 134.

[63] Per Moses LJ at para.25.

(1) If, after retirement to consider their verdict, the jury requests that a recording of a witness's evidence in chief be replayed the judge should follow the guidance in *Rawlings; Broadbent*.[64]

(2) If the recording is replayed the judge should warn the jury that because they are hearing the complainant's evidence in chief a second time they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case. The judge should also remind the jury after the replay, of the relevant parts of cross-examination and re-examination of the witness.

(3) If the recording is not replayed but the jury are reminded of the evidence, by reference to the transcript, the judge must warn the jury not to give disproportionate weight to the evidence because it is repeated after all the other evidence and to direct them that they should consider it in the context of all the evidence. The judge must also remind them of the relevant parts of cross-examination, re-examination and the defendant's evidence. [65]

Directions

10. In respect of any special measures for witnesses the purpose of a direction is to explain what is to happen or has happened and to ensure that there is no prejudice to the defendant. This should be done before the evidence is presented and a short reminder of this should be given in the summing up.

11. In all special measures cases an explanation should be given about the purpose of presenting evidence with special measures: to permit a witness who may be nervous about giving evidence in open court to give evidence without having to see/be seen by anyone other than those who need to see the witness give evidence (jury, advocates, judge) and to put the witness, so far as is possible, at ease.

12. A transcript of an ABE interview should only be provided to the jury to enable them better to follow the evidence of the witness. If the interview is inaudible, the transcript must not be used as a substitute and the witness may have to give oral evidence at the trial.

13. If the jury are provided with a transcript of an ABE interview, they should be told:

    (1) This is only so that they can more easily follow the interview. However, it is what they see and hear on the recording which is the evidence not what they read on the transcript. For this reason they must take care to watch the video as it is shown, so that they can assess the manner/demeanour of the witness when giving evidence.

    (2) [If appropriate:] The transcript will be/has been withdrawn after the playing of the recording because there is no transcript of the cross examination of the witness or any of the evidence of other witnesses and to avoid the danger of concentrating on the transcript, rather than on the evidence as a whole.

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[64] [1995] 1 WLR 178.

[65] *McQuiston* [1998] 1 Cr App R 139.

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

14. The transcript should never normally be retained by the jury after the witness has completed their evidence in chief. If, in an exceptional case it is suggested by one or more of the advocates or by the jury themselves that the jury should retain a transcript after the evidence in chief and/or that the recording should be re-played, the judge must hear submissions of the advocates and decide on the appropriate course. Should he permit either course, the judge must always ensure that the cross-examination and re-examination of the witness concerned are fully summed up, and direct the jury that they must base their verdict(s) on the evidence as a whole and must not be over-reliant on the transcript/recording.

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

Example 1: where evidence has been given behind screens, through video link and/or with a pre-recorded interview

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

Example 2: where transcripts have been given to the jury

As I have already explained, the only reason you had a transcript while you watched and listened to the video of the interview with {witness} was to help you to follow it. Because it is what you saw and heard on the video which is the evidence, and not the transcript, and you do not have a transcript of what other witnesses said, you cannot keep it. I will however remind you of the main points of what this witness said when I review the evidence.

3-7 Intermediaries

ARCHBOLD 8-94 and Supp. B-22, B-23; BLACKSTONE'S D14.3, 43 and 48; CrimPD 3F

Legal Summary

1. One of the special measures that may be available to a witness is the use of an intermediary. As the CPD I 3F.1 explains:

   "Intermediaries are communication specialists (not supporters or expert witnesses) whose role is to facilitate communication between the witness and the court, including the advocates. Intermediaries are independent of the parties and owe their duty to the court."[66]

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

3. The judge should explain to the jury at the outset that the role of the intermediary is a neutral one to assist the court by allowing the witness to communicate effectively and explain that this has nothing to do with the defendant and should not prejudice them against them. YJCEA 1999 s.32 [67] provides:

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

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

   (1) is not an expert;

   (2) is independent;

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

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

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

6. Defendant's intermediary:

   (1) There is currently no statutory provision in force for intermediaries for Ds.[68] A court may use its inherent powers to appoint an intermediary to assist D's

[66] See Registered Intermediaries Procedural Guidance Manual, Ministry of Justice 2012: https://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual_2012.pdf

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

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

communication at trial (either solely when giving evidence or throughout the trial) and, where necessary, in preparation for trial. See CPD 3.F3.[69]

(2) For further guidance on the approach to use of intermediaries for Ds see CPD 3F4- 3F6, and generally in relation to vulnerable defendants see CPD 3G

(3) An appropriate direction to the jury explaining why D had the services of an intermediary may be needed.

Procedure and Directions

7. At a preliminary hearing / PCMH / PTPH, orders should have been given concerning the involvement of an intermediary. These should include

   (1) the order appointing the intermediary;

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

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

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

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

   (6) the date and time of the GRH;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Intermediaries are used when a witness needs help to understand what is being said and to make sure that the witness is understood by everyone in court. An intermediary does not discuss the evidence with a witness or give evidence for him.

Before today, the intermediary met and got to know W and now the intermediary will help W to follow the proceedings. There has been an earlier hearing at which with the assistance of the intermediary, it was decided for how long, about what and in what way W would be asked questions. The intermediary will intervene if s/he feels that W is having difficulty understanding something or needs a break.

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

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

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

Intermediaries are used when a defendant needs help to understand what is being said and to make sure, if a defendant gives evidence, that he is understood by everyone in court. The intermediary does not discuss the evidence with the defendant or give evidence for him

Before today, the intermediary met and got to know D and now the intermediary will help D to follow the proceedings. There has been an earlier hearing at which with the assistance of the intermediary, it was decided for how long, about what and in what way D would be asked questions. The intermediary will intervene if s/he feels that D is having difficulty understanding something or needs a break.

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

3-8 Anonymous witnesses

ARCHBOLD 8-147; BLACKSTONE'S D14.49, D14.58

Legal Summary

1. The decision of the House of Lords in *Davis*[70] that there was no common law discretion permitting witnesses to give evidence anonymously led to Parliament enacting the Criminal Evidence (Witness Anonymity) Act 2008. This was replaced shortly after, in almost identical terms, by sections 86-90 Coroners and Justice Act 2009. The aim was to create a comprehensive statutory scheme to balance the countervailing interests of the accused, the witness, the victim and the public, and to ensure compliance with article 6, ECHR.[71]
2. An application for a witness anonymity order may be made by either the prosecution or defence.[72] Three conditions as set out in the Act must be shown to be satisfied.[73]
3. A witness anonymity order prevents the identity of the witness from being disclosed in the proceedings,[74] although the witness cannot be screened from the judge or jury.[75] It is to be regarded as a "special measure of last practicable resort"; save in the exceptional circumstances set out in the Act, "the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained."[76]
4. There is no common law or statutory power permitting the statement of an anonymous witness to be read.[77]

Directions

5. The jury will need careful direction to ensure that:
   (1) no unfair prejudice to the defendant is drawn from the use of such measures; and
   (2) the disadvantages faced by the defendant because of the inability to know the identity of the witness are highlighted. In Ellis v UK[78] the European

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[70] [2008] UKHL 36.

[71] *Mayers* [2008] EWCA Crim 2989 by Lord Judge CJ at para. 7.

[72] CAJA 2009, s.87. For procedure see Crim PR 2015 r18 **].** The AG has issued guidelines: https://www.gov.uk/applications-for-witness-anonymity-orders-the-prosecutors-role as well as the DPP: http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html

[73] CAJA 2009, s.88. S.89(2) provides a non-exhaustive list of considerations to which the court should have regard in assessing whether the conditions are met; s.88(6) provides guidance specifically in relation to Condition A.

[74] CAJA 2009, s.86. S.86(2) sets out a non-exhaustive list of protective measures.

[75] CAJA 2009, s.86(4).

[76] *Mayers* [2008] EWCA Crim 2989 by Lord Judge CJ at paras. 8 and 5.

[77] E.g. under CJA 2003, ss.116 or 114.

Court relied on the judge's careful directions to the jury as a counterbalancing factor to safeguard against an unfair trial when a witness gave evidence anonymously.[79]

Example

NOTE: In *Mayers*[80] and in *Nazir*[81] the trial judges' directions were approved by the Court of Appeal.[82] So rather than provide a hypothetical example, what follows is the trial judge's direction in *Nazir*:

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

[78] [2012] ECHR 813.

[79] See paras. 85 to 86 of that judgment.

[80] [2008] EWCA Crim 2989.

[81] [2009] EWCA Crim 213.

[82] [2009] EWCA Crim 213 at para.58 for an extract of such a direction, *De St Aubin* [2013] EWCA Crim 1021.

3-9 Interpreters

ARCHBOLD 4-58, 61 and 62; BLACKSTONE'S D16.32

Legal Summary

1. Interpreter for a witness: The court has a discretion whether to allow a witness to have the assistance of an interpreter.[83]
2. Interpreter for a defendant: Where interpreters are used in the course of police interviews, PACE Code C.13 applies. The jury may require some explanation as to why an interpreter was used in interview, particularly if an interpreter is not then used at trial.
3. At trial D has a right to an interpreter guaranteed by Art.6(3)(e) of the ECHR.[84] This right includes a right to have documents translated. As was made clear in *Begum*[85]

   > "unless a person fully comprehends the charge which that person faces, the full implications of it and the ways in which a defence may be raised to it, and further is able to give full instructions to solicitor and counsel so that the court can be sure that that person has pleaded with a free and understanding mind, a proper plea has not been tendered to the court. The effect of what has happened in such a situation as that is that no proper trial has taken place. The trial is a nullity" [86]

4. If D's command of English is such that he needs an interpreter, he cannot waive that right simply because he has legal representation.[87] Where D is represented evidence should still be translated to him unless he or his advocate requests otherwise and the judge also thinks that is appropriate having regard to whether D substantially understands the nature of the evidence that is going to be given against him.[88]
5. For extradition proceedings see CrimPD 17B.21.
6. For proceedings in Welsh see the guidance in CrimPD 3K.
7. In legal proceedings in Wales, the Welsh language may be used by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation must be made accordingly: Welsh Language Act 1993 s 22(1). As to the principle of the Welsh Language Act 1993 that, in the administration of justice in Wales, the English and Welsh languages should be treated on a basis of equality see *Consolidated*

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[83] *Sharma* [2006] EWCA Crim 16.

[84] See also European Parliament and Council Directive (EU) 2010/64 (OJ L280, 26.10.2010).

[85] (1993) Cr App R 96.

[86] Per Watkins LJ p.100.

[87] *Lee Kun [1916]* 1 KB 337.

[88] See link

Criminal PD paras III.23.1–III.23.13. If a defendant in a court in England asks to give or call evidence in the Welsh language, the case should not be transferred to Wales and, in ordinary circumstances, interpreters can be provided on request: *Consolidated Criminal* PD para III.22.1. Any reference in this title to '*Consolidated Criminal PD*' is a reference to *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, as it has been amended: see para 110 note 4.

8. As to the meanings of 'England' and 'Wales' see para 11 note 5.[89]
9. As to pleading to an indictment see para 379 et seq.[90]
10. As to the conduct of such interviews see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 13.1–13.4; and police and investigatory powers vol 84A (2013) para 530. The use of double translation, at interview and at trial, is permissible: *R v West London Youth Court*, ex p N [2000] 1 All ER 823, [2000] 1 WLR 2368, DC.
11. The cost of employing an interpreter is payable out of central funds and may not be treated as costs of any party to the proceedings: see the Prosecution of Offences Act 1985 ss 19(3)(b), 21(5). As to costs that may be paid out of central funds see para 858 et seq. See also *Wei Hai Restaurant Ltd v Kingston upon Hull City Council* [2001] EWHC Admin 490, 166 JP 185, DC (refusal of magistrates' court to appoint an interpreter during defence case did not render trial unfair where no prior indication of need for interpreter, and no evidence that defence case had in fact been prejudiced).[91]
12. Where there is an issue as to whether the defendant has sufficient understanding of the English language to follow the trial proceedings and to appreciate the consequences of his plea, the judge has a duty to verify the need for interpretation facilities with the defendant, and to satisfy himself as to the adequacy of the arrangements made; failure to do so is a violation of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) (right to a fair trial), taken together with art 6(3)(e) (right to interpreter) (see rights and freedoms vol 88A (2013) para 288): *Cuscani v United Kingdom* (2003) 36 EHRR 11, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights ('ECHR') and is incorporated into English law by means of the Human Rights Act 1998 Sch 1: see rights and freedoms vol 88A (2013) para 116 et seq.

- General matters **3J** Wales and the Welsh Language: Applications for evidence to be given in Welsh
- General matters **3K** Wales and the Welsh Language: Use of the Welsh Language in Courts in Wales

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[89] *R v Begum* (1985) 93 Cr App Rep 96, CA.

[90] *R v Lee Kun* [1916] 1 KB 337, 11 Cr App Rep 293, CCA. As to evidence of a police interview through an interpreter see *R v Attard* (1958) 43 Cr App Rep 90

[91] *R v Lee Kun* [1916] 1 KB 337, 11 Cr App Rep 293, CCA; approved in *Kunnath v The State* [1993] 4 All ER 30, 98 Cr App Rep 455, PC.

Directions

Where an interpreter has been appointed to assist a witness

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

Where an interpreter has been appointed to assist a defendant

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

Example: interpreter for a witness

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

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

Example: interpreter for a defendant

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

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

4. FUNCTIONS OF JUDGE AND JURY

ARCHBOLD 4-438; BLACKSTONE'S D18-26

Legal Summary

1. The jury need to be directed that they are responsible for decisions of fact; the judge for decisions of law.[92] Such a direction is not a mere formality. Without it, juries might get the impression that any comments made by the judge were matters to which they were bound to pay heed. It is the duty of the judge to ensure that the jury understand that responsibility for the verdict is theirs and not his.[93] In *Wang,*[94] the House of Lords confirmed that there are no circumstances where a judge is entitled to direct a jury to return a verdict of guilty.
2. The jury does not have to resolve every issue of fact that has been raised but only those which are necessary to reach their verdict/s.
3. The jury must not speculate; they must decide the case on the evidence alone.
4. In some instances it will be necessary to direct the jury that if they find certain facts to be proved (to the relevant standard) then as a matter of law a particular issue is established. For example, in gross negligence manslaughter, it will be for the jury to establish whether certain facts were proved which, as a matter of law meant that a particular duty of care was owed by the defendant. [95]

Directions

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

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[92] *Wootton and Peake* [1990] Crim LR 201.

[93] *Broadhurst* [1964] AC 441 at 457, 459.

[94] [2005] UKHL 9.

[95] *Evans* [2009] EWCA Crim 650.

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

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

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

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

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

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

(9) If appropriate: the jury must not allow themselves to be influenced by any emotional reaction to the case and/or any sympathy for anyone involved in the case and/or by any fixed ideas/preconceptions/prejudices they may have had.

6. In many cases the jury will be provided with a written summary of all / some of the judge's legal directions and/or a route to verdict.

Example

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

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

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

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

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

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

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

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

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

[If appropriate

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

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

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

5. BURDEN AND STANDARD OF PROOF

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

Legal Summary

1. Otherwise than in cases of insanity and exceptions created expressly or impliedly by statute, the prosecution bears the burden of proving that the defendant is guilty: *Woolmington v DPP*[96]; *Hunt*.[97] The standard of proof is to the criminal standard: the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty. It is unwise to elaborate on the standard of proof: *Yap Chuan Ching*.[98]
2. If an advocate has referred to "beyond reasonable doubt", the jury should be told that this means the same thing as being sure.
3. If the jury ask for clarification of this, their question should be answered as shortly as possible. The jury might be told that "beyond reasonable doubt" means being sure so that they have no realistic doubts.
4. Where the defence bears an evidential burden to raise a defence (e.g. alibi, duress or self-defence) the burden of disproving it to the criminal standard is on the Crown: *Williams*.[99] In cases in which the defence bears the legal burden of proof, it is to the civil standard: D has to show that it is more likely than not: *Carr Briant*.[100]
5. The summing up must contain an adequate direction as to the burden and standard of proof whether or not it has been mentioned by any advocate: Blackburn.[101] No particular form of words is essential. The direction is usually given early in the summing up: *Yap Chuan Ching*.
6. Particular care is needed where D raises different defences, some of which impose burdens on the Crown and some on the defence (e.g. insanity and automatism).
7. Any question from the jury about the burden and standard of proof must be shown to the advocates and discussed with them in the absence of the jury.

Directions

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

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

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[96] *[1935] AC 462*

[97] *[1987] AC 352.*

[98] *Ching* (1976) 63 Cr App Rep 7 at para.11.

[99] (1984) 78 Cr App Rep 276.

[100] [1943] KB 607.

[101] (1955) 39 Cr App Rep 84.

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

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

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

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

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

Example 1: where the burden is on the prosecution

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

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

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

Example 2: where the burden is on the defendant

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

6. THE INDICTMENT

6-1 Separate consideration of counts and/or defendants

ARCHBOLD 4-441; BLACKSTONE'S D18.28

Legal Summary

1. If the indictment contains more than one count, the jury should be directed to give separate consideration to each one: Lovesey.[102] The jury must reach a verdict on each count separately.
2. If there is more than one count and the evidence on one count is relevant to one or more other counts (i.e. is cross-admissible) see Chapter 13. If there is more than one count and no question of cross-admissibility arises, consideration should be given to whether the jury needs to be directed that they must consider the evidence on each count separately[103].
3. Where the trial involves more than one D the jury should be directed to consider the case against and for each separately: *Smith.*[104] The jury's verdicts may be the same or different in respect of different Ds on different counts.
4. However if the evidence against each D or in relation to each count is the same or very similar the judge should so advise the jury and indicate that as a matter of common sense their verdicts are likely to be the same in relation to each D or count.

Directions

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

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[102] [1970] 1 QB 352.

[103] There is no strict legal requirement to do so: *H* [2011] EWCA Crim 2344.

[104] (1935) 25 Cr App R 119.

Example (where there are no alternative counts)

Each defendant faces a number of counts and you must return a separate verdict on each count in respect of each defendant who is charged on that count. To do this you must consider the evidence on each count and against each defendant separately.

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

See also Chapter 6-4: Alternative Verdicts.

6-2 Multiple incident and specimen counts

ARCHBOLD 1-188, 207 and 221; BLACKSTONE'S D11.35; CrimPR 10; CrimPD 10A

Legal Summary

1. In most cases each count in the indictment will relate to a specific incident of offending (referred to below as a 'specific incident count'). However, if the allegations relate to a course of conduct, the prosecution may choose to use one or more (a) multiple incident counts (CrimPR 10.2(2)) and/or (b) specimen counts whether or not the indictment also includes any specific incident counts. See also CrimPD 10A.10.

Multiple incident counts

2. Under CrimPR 10.2(2) “more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission”. Additional guidance is provided in CrimPD 10A.10**.** The circumstances in which such a count may be appropriate include: the same victim on each occasion, the offences involving marked repetition in the method of commission or location, a clearly defined offending period, the same defence is being advanced. Care needs to be taken in such cases to ensure that the sentencing powers for the offence remained the same throughout the period of alleged offending.

3. As the CrimPD recognises at 10A.13

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

4. In A[105] Fulford LJ acknowledged:

> “The problem that this case has highlighted is how does the court deal with a course of conduct count under the Criminal Procedure Rules 14.2(2) when the extent, seriousness and timespan of the defendant's offending is unclear from the jury's verdict. There were no means by which the judge was able to interpret the jury's decision in this regard.
>
> [47] In our judgment, the central answer to this problem is to be identified in the purpose underpinning multiple counts: it is to enable the prosecution to reflect the defendant's alleged criminality when the offences are so similar and numerous that it is inappropriate to indict each occasion, or a large number of different occasions, in separate charges. This provision allows the prosecution to reflect the offending in these circumstances in a single count rather than a number of specimen counts. However, when the prosecution fails to specify a sufficient minimum number of occasions within the multiple

[105] [2015] EWCA Crim 177

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

Specimen counts:

5. In some instances the Crown will be relying on a specimen count charging a distinct identifiable offence as an example of one of the multiplicity of offences which could be charged; but to keep the trial manageable these are not separately included. An example would be a single incident of false accounting alleged against a bookkeeper who had perpetrated the same conduct repeatedly over many years.
6. Alternatively, in some instances the Crown may rely on a specimen count alleging a single offence committed on a single occasion within a defined period during which D is alleged to have engaged in a course of similar conduct. This approach will be adopted when the Crown is unable to give particulars of every offence during the period. An example would be a case involving multiple sexual offences against V over a defined period (e.g. between birthdays).
7. It is not always necessary to give a "*Brown"* direction. Only in cases in which the Crown is advancing truly alternative bases for a finding of guilt and there is a risk that the jury might feel that it is sufficient for some to be sure of one basis and some on another is a *Brown* direction needed.[106]

> "In most cases where a specimen count is relied on, it is enough for the judge to tell the jury, as the judge did in this case, that they may convict if they are sure that the offence has been committed at least once. Where the

[106] *Williams* [2012] EWCA Crim 2516.

complainant cannot particularise any specific incident and merely alleges a pattern of similar conduct, the question for the jury will be whether they are sure that the account of the complainant is reliable. There will be no room for the jury to focus on one incident rather than another because no single occasion is sufficiently distinct, and it would be meaningless and unhelpful to tell the jury that they had to be sure in relation to the same incident." [107]

The form of the indictment

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

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

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

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

   (4) The indictment should not include so many counts as to be overloaded. Judges have a duty to ensure that this rule is complied with: CPD II 10A.3.

   (5) The indictment should be framed in such a way as to give the judge sufficient sentencing powers in the event of conviction. Unless the defence agree otherwise, a defendant convicted of a multiple incident count, having denied any wrong-doing, must be sentenced on the basis that he committed the minimum number of offences sufficient to justify his conviction: for example, two offences if the count alleges 'more than one occasion', or five offences if the count alleges 'at least five occasions'. Similarly, unless the defence otherwise agree, a defendant convicted of a specimen count, having denied any wrong-doing, must be sentenced on the basis that he committed only one offence.[108]

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

   (7) Though it does not commonly occur in practice, it is permissible for an indictment to contain a multiple incident count and an alternative specimen count to provide for the possibility that the jury may not be sure that the offending occurred on more than one occasion.

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[107] Per Elias LJ in *Hobson* [2013] EWCA Crim 819.

[108] *Canavan; Kidd; Shaw* [1998] 1 W.L.R. 604, *Hartley* [2011] EWCA Crim 1299; *A [2015] EWCA Crim 177.*

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

Directions

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

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

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

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

11. In relation to any specimen count charging an identifiable offence, the direction to the jury should explain that:

    (1) the count is an example of what the prosecution say were many similar offences committed by D;

    (2) the prosecution have chosen an example because the indictment would be too long if every alleged offence were included; and

    (3) before convicting, the jury must be sure that D committed the particular offence charged, whether or not they are sure that he committed any of the other similar alleged offences (see Example 2 below).

12. In relation to any specimen count which is an example of a number of offences not specifically identified but occurring during a course of conduct, the direction to the jury should explain that:

    (1) the count is an example of what the prosecution say were many similar offences committed by D;

    (2) the prosecution have chosen an example because [as appropriate] the indictment would be too long if every alleged offence were charged and/or because V is not able to say exactly when or how often the offences occurred; and

    (3) before convicting, the jury must be sure that D committed at least one offence of the kind charged during the stated period whether or not they are sure that he also did so on further occasions (see Example 3 below).

13. It may be appropriate to include a multiple incident count with a specimen count as an alternative, to cover different factual conclusions which the jury might reach (see Example 3 below).
14. The jury will be much assisted by the use of written directions and/or a route to verdict (see Route to Verdict below).

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

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

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

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

The prosecution say that on ten separate days D made false entries in his employers' accounts to hide the fact that he was taking their money. To avoid having lots of charges, the prosecution have brought just one charge, relating to one of these entries, as an example or specimen. Although you must take into account all of the evidence, you should return a verdict of 'Guilty' only if you are that D committed the particular offence charged, whether or not you are sure that he committed any of the other similar offences which the prosecution allege.

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

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

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

But, in case you are sure that D did sexually assault V but you are not sure that he did so as many as four times, the prosecution have added Count 2, in which they allege, by way of an example or specimen charge, that D did so on at least one occasion.

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

If you are not sure that D sexually assaulted V at all, you will find him not guilty on Counts 1 and 2.

Example Route to verdict: based on Example 3 above

Question 1

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

- If **yes**, return a verdict of 'Guilty' on Count 1. In this event you will not consider count 2 so you will disregard question 2 below.
- If **no**, return a verdict of 'Not Guilty' on Count 1 and go to question 2.

Question 2

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

- If **yes**, return a verdict of 'Guilty' on Count 2.
- If **no**, return a verdict of 'Not Guilty' on Count 2.

6-3 Alternative Verdicts

ARCHBOLD 4-524; BLACKSTONE'S D19.41

Legal Summary

1. It is highly desirable to include any available alternative as a separate count in the indictment, if it is legally possible to do so, for the following reasons:
   (1) It makes the case easier for the jury to understand and easier to sum up.
   (2) It avoids any potential difficulty arising out of section 6(3) of the Criminal Law Act 1967 whereby the jury can only convict of an alternative offence not charged in the indictment if they have first found D not guilty of the offence which is charged.
2. If the lesser alternative cannot legally be charged in the indictment (e.g. careless driving as an alternative to dangerous driving) it is good practice to provide the jury with written directions that include a definition of the alternative offence. Whether or not there is a separate count a written 'route to verdict' will assist the jury.

Directions

Where the alternative offence is charged in the indictment

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

Where the alternative offence is not charged in the indictment

7. The direction to the jury should deal with the following matters:
   (1) The count on which the alternative verdict is available should be identified.
   (2) The constituent elements of the two offences concerned should be explained.
   (3) The jury should be told why the offence charged (referred to here as 'A') is more serious than the alternative (referred to here as 'B').
   (4) The direction should explain that the prosecution say that D is guilty of 'A', but if the jury are not sure of that, they should consider 'B'.
   (5) The jury should be directed to consider 'A' first. If they find D "Guilty" of that, they should not consider 'B', on which they will not be asked to return a

verdict. If they find D “Not Guilty” of 'A' they should consider 'B' on which they may return a verdict of “Guilty” or “Not guilty”. Thus they could find D “Guilty” of 'A' or 'B' but not of both; or they could find D “Not Guilty” of both.

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

Example 1: where alternative counts are on the indictment

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

You must consider Count 1, which alleges {specify} first. If your verdict on Count 1 is “Guilty” that is the end of your deliberations and you will not consider Count 2 or return any verdict on it.

However, if you are not sure that D is guilty of Count 1, you will find him “Not Guilty” and then go on to consider Count 2.

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

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

Question 1.

Are we sure that when he wounded V, D was acting unlawfully, that is to say that he was **not** acting in lawful self-defence?

- If **yes**, go to question 2.
- If **no**, return verdicts of 'Not Guilty' on Counts 1 and 2 and do not consider questions 2 and 3 below.

Question 2.

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

- If **yes**, return a verdict of 'Guilty' on Count 1 and do not consider Count 2 or question 3 below.
- If **no**, return a verdict of 'Not Guilty' on Count 1 and go to question 3.

Question 3.

Are we sure that when he unlawfully wounded V, D realised that he might cause him some injury?

- If **yes**, return a verdict of 'Guilty' on Count 2.
- If **no**, return a verdict of 'Not Guilty' on Count 2.

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

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

[Having directed the jury about dangerous driving] "If you find D "Not Guilty" of dangerous driving - but only in this event - you must go on to decide whether he is guilty or not guilty of careless driving. This is a less serious offence than dangerous driving.

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

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

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

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

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

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

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

6-4 Agreement on the factual basis of the verdict

ARCHBOLD 4-452; BLACKSTONE'S D18.44

Legal Summary

1. The jury must be agreed that every ingredient necessary to constitute the offence has been established.[109]
2. In a small proportion of cases, it will be appropriate to direct the jury that they can only convict if they are agreed about the factual basis of their verdict. Examples are:
   (1) When more than one statement or act is alleged against D in the same count.
   (2) A case of harassment in which several acts are alleged and the jury must be sure that at least two of them occurred.
   (3) A case in which the jury is asked to consider the offence of manslaughter on different bases (e.g. 'unlawful act' or loss of control or diminished responsibility) and the judge informs the jury that if they convict of manslaughter they will be asked to indicate the basis on which they did so.

Directions

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

[109] *R. v. Brown (K.) 79 Cr.App.R. 115, CA.*

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

The prosecution must prove, among other things, that D pursued a course of conduct, which means "behaved in a way", which amounted to harassment of V. A course of conduct is only established if it is proved that D behaved in such a way on at least two occasions. As you know, the prosecution say that he did so on three occasions. They say that on one D followed V in the street; on another he assaulted her; and on a third, he made an offensive phone call to her.

Before you can convict D you must be sure that the prosecution's case is correct about at least two of these occasions, and you must also be agreed about which particular two they were.

If you are sure about that, it will not matter if some or all of you are also sure about the other occasion. But it would not be enough if you were all sure that the prosecution were right about two of the occasions, but could not agree about which two they were. In that case you would have to return a verdict of 'Not Guilty'.

Route to Verdict based on the above charge

It is agreed that if any 2 of the 3 alleged events occurred they would amount to a course of conduct and D would be guilty: so the questions you have to answer are these.

Question 1.

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

- If **yes**, return a verdict of 'Guilty' and disregard questions 2 and 3.
- If **no**, go on to answer question 2.

Question 2.

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

- If **yes**, return a verdict of 'Guilty' and disregard question 3.
- If **no**, go to question 3.

Question 3.

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

- If **yes**, return a verdict of 'Guilty'.
- If **no**, return a verdict of 'Not Guilty'.

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

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

Question 1.

Are we sure that D made representation (1)?

- If **yes**, go to question 2.
- If **no**, go to question 3.

Question 2.

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

(a) was acting dishonestly and

(b) intended to make a gain for himself?

- If **yes**, return a verdict of 'Guilty' and disregard questions 3 and 4.
- If **no**, go to question 3.

Question 3.

Are we sure that D made representation (2)?

- If **yes**, go to question 4.
- If **no**, return a verdict of 'Not Guilty' and disregard question 4.

Question 4.

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

(a) was acting dishonestly and

(b) intended to make a gain for himself?

- If **yes**, return a verdict of 'Guilty'.
- If **no**, return a verdict of 'Not Guilty'.

7. CRIMINAL LIABILITY

7-1 Child defendants

ARCHBOLD 1-159, 4-86 and 4-161; BLACKSTONE'S A3.72 and D14.21

Legal Summary

1. The presumption that a child between the ages of 10 and 14 years is incapable of forming criminal intention (i.e. *doli incapax*) was abolished by Crime and Disorder Act 1998, s.34.[110] Where the act alleged occurred on or after 30th September 1998, all children aged 10 or over are treated as having the same capacity as adults to commit criminal offences.
2. The irrebuttable presumption that a boy under the age of 14 is incapable of sexual intercourse was abolished by the Sexual Offences Act 1993.
3. The age of a child (whether over or under 14 years) is likely to be a relevant factor where:
   (1) the offence in question requires a specific intent or subjective recklessness (e.g. foresight of consequences);
   (2) a possible defence has a subjective element;
   (3) a possible defence requires an assessment of reasonableness (e.g. loss of control, duress, self-defence);
   (4) it is shown that a child is not of normal development for his age (e.g. in a defence of diminished responsibility).
4. Discussion with counsel will be required to identify relevance in the particular case.

Directions

5. The need for and form of any directions to the jury relating to D's age should be discussed with the advocates in the absence of the jury before closing speeches.
6. Should a direction be thought appropriate, its exact terms will have to be tailored to the circumstances of the individual case. It will have to include an identification of the issue to which D's age is relevant and a direction that the jury should consider that issue in the light of what they know of D's age, development and maturity at the time of the alleged offence.

[110] *JTB* [2009] UKHL 20.

Example: D is charged with wounding with intent

NOTE: The following example relates only to the age of the defendant. It does not incorporate a direction on Intention [Chapter 8-1] or Self-defence [Chapter 18-1].

D admits that he stabbed V with a pen-knife but says that he was acting in lawful self-defence because he believed that V was about to attack him with a metal bar. D also says that the knife was only a small one, that he did not realise that it might cause really serious injury and that he did not intend to do so.

How relevant is it that D was 11 years old when this incident happened? His class teacher told you that D is a slow learner who can find some things difficult to understand, although he has not been formally diagnosed with a learning difficulty. You may take this into account when you are deciding whether D believed, or may have believed, that V was about to attack him with the bar; and, if the question arises, when you are deciding whether D intended to cause V really serious injury.

7-2 Joint participation in an offence

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

Legal Summary

General introduction

1. Legal liability for a criminal offence may arise in the following circumstances in which D is involved with another or others:

   (1) by his own conduct and with the necessary fault, D committed the offence with another (P) [joint principal: see Chapter 7-3 below];

   (2) by his own conduct and with intent, D assisted another (P) to commit the offence [assisting: see Chapter 7-4 below];

   (3) by his conduct and with intent, D encouraged another (P) to commit the offence [encouraging: see Chapter 7-4 below];

   (4) D "commanded or commissioned" (i.e. ordered or suggested) the offence committed by another (P) and P committed it with the necessary fault [procuring: see Chapter 7-4 below].

2. Any person who aids, abets, counsels or procures the commission of any indictable offence, is liable to be tried and punished as a principal offender.[111] Secondary participation is a specific intent offence for the purposes of intoxication: see Chapter 9.

3. It has always been sufficient to prove that D was either the principal or accessory[112]: it is not necessary to specify what role D is alleged to have played.[113] The Crown should draw the particulars of the offence 'in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer'[114].

4. If all that can be proved is that the principal offence was committed either by D or by P, both must be acquitted.[115] Only if it can be proved that the one who did not commit the crime as principal must have aided, abetted, counselled or procured the other to commit it can both be convicted.[116]

5. In the context of death or injury caused to children or vulnerable adults, see however the statutory solution offered in Domestic Violence, Crime and Victims Acts 2004 and 2012.

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[111] Accessories and Abettors Act 1861, s.8; *R. v. Jogee* [2016] UKSC 8.

[112] *R v Fitzgerald* [1992] Crim LR 660.

[113] *R. v. Gianetto* [1997] I Cr.App.R.1. CA.

[114] *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350 at p. 1357D Lord Hailsham of St Marylebone

[115] *R v Abbott* [1955] 2 QB 497; *R v Banfield* [2013] EWCA Crim 1394, [2014] Crim LR 147.

[116] *R v Lane and Lane* (1985) 82 Cr App R 5.

7-3 Joint principals

ARCHBOLD 18-6; BLACKSTONE'S A 4.1

Legal Summary

1. Where there are several participants in a crime, D will be a principal offender if his conduct fulfils the *actus reus* element of the crime and at the time of performing the *actus reus* he had the relevant *mens rea*.[117] The crucial question in deciding whether D is a joint principal or an accessory is whether D by his own act (as distinct from anything done by P with D's advice or assistance) performed the *actus reus*. There is no need for D and P to act with a common purpose to commit the crime together although in cases of joint principals they usually will: they may for example both independently engage in attacking V, each intentionally causing him GBH by their blows. If each has by his own acts caused GBH then he is liable as a principal.

Directions

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

[117] *Macklin and Murphy* (1838) 2 Lew CC 225.

Example: in a case of robbery where 2 Ds are alleged to have acted as joint principals

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

Charge: robbery. It is alleged that D1 and D2, having planned to commit a street robbery, followed V into a subway and then both Ds took hold of him and both demanded his mobile 'phone. When he refused, both Ds searched his pockets. During the search D1 found and removed V's mobile 'phone. Both Ds then ran away.

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

Before you could convict either D of this offence the prosecution must have proved in relation to each separate D, so that you are sure of it, that he took part in the robbery of V by using force on V in order to steal from him and then by stealing V's mobile 'phone.

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

7-4 Accessory/secondary liability

ARCHBOLD 18-9; BLACKSTONE'S A4.5

Legal Summary

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

1. Following the decision in *R v Jogee* [2016] UKSC 8; R v Ruddock [2016] UKPC 7 the Supreme Court and Privy Council unanimously re-stated the principles concerning the liability of secondary parties in a single judgment. The court held that the so called "parasitic accessory" approach to liability[118] is no longer to be applied in English law. Numbers in square brackets are paragraph numbers of the judgement.
2. D's liability for criminal offences committed by P is to be based on ordinary principles of secondary liability [76].
3. D is liable as an accessory (and not as a principal) if he assists or encourages or causes another person, P to commit the offence and D does not, by his own conduct, perform the *actus reus*.[119] The offence occurs where and when the principal offence occurs.[120] It is not necessary that D's act of assistance or encouragement was contemporaneous with the commission of the offence by P.[121] D's acts must have been performed before P's crime is completed. There is no requirement that D and P shared a common purpose or intent.[122] It is immaterial that D joined in the offence without any prior agreement.[123] D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim.
4. D's liability for **assisting** an offence will depend on proof that the offence was committed even if the principal offender cannot be identified and that:
   (1) D's conduct[124] assisted the offender, P, in the commission of the offence.[125]
   (2) D intended that his conduct would assist P.[126] There need not be a meeting of minds between D and P.

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[118] The approach laid down by the Privy Council in *Chan Wing Siu v R.* [1985] A.C. 168, as subsequently adopted in English law could not be supported.

[119] *Kennedy (No 2)* [2007] UKHL 38.

[120] *JF Alford Transport Ltd* [1997] EWCA Crim 654.

[121] *Stringer [2011] EWCA Crim 1396.*

[122] *A-G's Reference (No 1 of 1975)* [1975] QB 773.

123 *Rannath Mohan* [1967] 2 AC 187.

[124] Which can, subject to D's mens rea, include an omission when D was under a duty to act *Webster* [2006] EWCA Crim 415.

[125] Following *Jogee* paragraph 12, read literally, the prosecution may not even have to establish this.

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

(4) D had not withdrawn at the time of P's offence: see Chapter 7-6.

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

(1) D's conduct amounting to encouragement came to the attention of P (it does not matter that P would have committed the offence anyway)[127] but there is no requirement that D's conduct has caused P's conduct.[128] Non accidental presence may suffice if D's presence did encourage and D intended it to.[129]

(2) D intended,[130] by his conduct to encourage P. The prosecution do not need to establish that D desired that the offence be committed.[131] P must have been aware that he had D's encouragement or approval.

(3) D knew,[132] or if the act is preparatory to P's offence, intended the essential elements of P's crime, albeit not of the precise crime or the details of its commission.[133]

(4) Where it is alleged that D counselled P to commit the offence, that offence must have been within the scope of P's authority i.e. was one which P knew he had been encouraged to commit.[134]

(5) D had not withdrawn at the time of the offence: see Chapter 7-6.

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

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

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

(1) D intended to assist or encourage P

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

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[126] *Bryce* [2004] EWCA Crim 1321; *NCB v Gamble* [1959] 1 QB 11; *Jogee*.

[127] A-*G v Able* [1984] QB 795 at p.812; see also *Jogee* para. 12.

[128] *Calhaem* [1985] QB 808, followed in *Luffman* [2008] EWCA Crim 1739.

[129] *Clarkson* [1971] 1 WLR 1402 emphasising that care is needed where D is drunk and might not realise that he was giving encouragement.

[130]This is not restricted to purposive intent: *Bryce* [2004] EWCA Crim 1321.

[131] *Jogee* para. 90.

[132] See recently *ABC* [2015] EWCA Crim 539.

[133] *Jogee* para. 14.

[134] *Calhaem* [1985] QB 808.

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

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

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

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

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

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

D's liability for manslaughter if D did not intend that P should commit murder

11. If P murdered V in the course of a criminal venture with D but D did not intend that P might *intentionally* kill or cause really serious harm, D can be found guilty of manslaughter if the jury are sure that D intentionally participated in an offence in the course of which V's death was caused and a reasonable person would have realized that, in the course of that offence, some physical harm might be caused to some person.[135]

[135] *Church* [1965] EWCA Crim 1.

D's liability for manslaughter if P is convicted of manslaughter

12. Where D and P participate in a crime and in the course or furtherance of that crime P kills V without intentionally doing so or intending to cause GBH, P will be liable to be convicted of manslaughter if:

    (1) P intentionally performed the unlawful act;

    (2) that act caused V's death;

    (3) a reasonable person sharing P's knowledge of the circumstances would have realized that P's unlawful act might cause a risk of some physical harm, albeit not necessarily serious harm, to V.

13. If there was a manslaughter by P, D will be guilty of it if:

    (1) D participated in the unlawful act (as a joint principal or accessory);

    (2) D was aware of the circumstances in which the unlawful act would be committed;

    (3) a reasonable person sharing D's knowledge of the circumstances would have realized that P's unlawful act might cause a risk of some physical harm to V.

14. D can also be guilty of manslaughter, irrespective of P's liability if D intentionally committed an offence and it caused V's death and a reasonable person would realize that that act might cause a risk of some physical harm to some person albeit not necessarily serious harm.[136]

15. D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim.

Directions

NOTE:

(a) In some cases the prosecution may allege that D is guilty because he was either a principal offender or an accessory/secondary party, though they cannot say which (see *Examples 2 and 4*).

(b) The following numbered paragraphs are based on the law as stated in *R. v. Jogee; Ruddock v. The Queen.*[137] [138]. As in the Legal Summary above, numbers in square brackets are paragraph numbers of the judgement.

(c) A direction based on paragraph 16 below will need to be given in every case in which D is said to be liable as an accessory/secondary party. Directions based on the subsequent paragraphs should be added only if and as appropriate to the facts and issues in the particular case. The need for and form of any such directions should be discussed with the advocates in the absence of the jury before closing speeches.

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[136] *Church* [1965] EWCA Crim 1; *Bristow* [2013] EWCA Crim 1540.

[137] [2016] UKSC 8; [2016] UKPC 7.

The jury must be directed as follows:

16. D is guilty of a crime committed by another person (P) if D intentionally assists/encourages/causes P to commit the crime [8, 9 and 99].

17. If P's crime requires a particular intention on P's part, e.g. murder or a section 18 offence: This means that D must intentionally assist/encourage/cause P to (commit the *actus reus*) with (the required intent). In *Jogee* paras.90 and 98 it is said that in a case of concerted physical attack resulting in GBH to V, it may be simpler and will generally be perfectly safe to direct the jury that D must intentionally assist/encourage/cause P to cause such harm to V, D himself intending that such harm be caused.

18. Though the prosecution must prove that D intended to assist/encourage/cause P to commit the crime concerned, they do not need to prove that D had any particular wish/desire/motive for the offence to be committed [91]. Such a direction is most likely to be appropriate in conjunction with those referred to in Directions 20 and 28 below.

19. The prosecution must prove that D knew about the facts that made P's conduct criminal [9].

20. Where D does not know which particular crime P will commit, e.g. where D supplies P with a weapon to be used for a criminal purpose: D need not know the particular crime which P is going to commit. D will be guilty if he intentionally assists/encourages/causes P to commit one of a range of offences which D has in mind as possibilities, and P commits an offence within that range [10, 14 and 90]. See also Direction 18 above.

21. It does not matter whether P commits the crime alone or with others.

22. D need not assist/encourage/cause P to commit the crime in any particular way e.g. by using a weapon of a particular kind [98].

23. It is not necessary that D should have met or communicated with P before P commits the crime.

24. D's conduct in assisting, encouraging, causing P to commit the crime may take different forms. It will usually be in the form of words and/or conduct. Merely associating with P/ being present at the scene of P's crime will not be enough; but if D intended by associating with P/being present at the scene to assist/encourage/cause P to commit the crime e.g. by contributing to the force of numbers in a hostile confrontation, or letting P know that D was there to provide back-up if needed, then D would be guilty [11, 78 and 89].

25. The prosecution do not have to prove that what D did actually influenced P's conduct or the outcome [12].

26. The prosecution do not have to prove that there was any agreement between D and P that P should commit the offence concerned [17, 78 and 95].

27. Where the prosecution do allege an agreement between D and P: The agreement that P should commit the crime need not be formal or made in advance. It may be spoken or made by a look or a gesture. The way in which people behave, e.g. by acting as part of a team, may indicate that they had made an agreement to commit a crime. Any such agreement would be a form of encouragement to P to commit the crime [78].

28. Where the prosecution allege that there was an agreement between D and P to commit crime A, in the course of doing which P went on to commit crime B, with which D is also charged, a direction based on the following will be appropriate: If D agrees with P to commit crime A, in the course of doing which P also commits crime B, D will also be guilty of crime B if D shared with P an intention that crime B, or a crime of that type, should be committed if this became necessary. It is for the jury to decide whether D shared that intention with P. If the jury were satisfied that D must have foreseen that, when committing crime A , P might well commit crime B, or a crime of that type, it would be open to the jury to conclude that D did intend that crime B should be committed if the occasion arose. Whether or not the jury think it right to draw that conclusion is a matter entirely for them [91 – 94]. *See also Direction 18 above.*

Example 1: dwelling house burglary; one accessory/secondary party providing assistance beforehand, the other doing so at the scene:

D1 and D2 are charged with the burglary of a dwelling house with intent to steal. Neither entered the house. This was done by P who has pleaded guilty. The prosecution say that D1 provided P with tools (jemmy, wire cutter, glass cutter and a torch), which P used when breaking into the house; and that D2 went to the house with P but stood outside as a look-out. D1 denies that he provided the tools used by P. D2 says that he arrived on the scene by coincidence, and knew nothing of the burglary.

The law states that a D may be guilty of a crime even if the crime is actually carried out by another person. If D intends that a crime should be committed and assists / encourages / causes it to be committed, he is guilty of the crime, even if somebody else actually carries it out.

D1 will therefore be guilty of this burglary, even though he did not carry it out himself, if:

1. he provided the tools to P; **and**
2. he intended to assist P (or anyone else) to carry out a burglary of some kind; **and**
3. P used the tools when breaking into the house.

The prosecution do not have to prove that D1 knew where, when or by whom the burglary was to be committed, or that he had any wish/desire that any burglary should be committed.

For the same reasons, D2 will be guilty of this burglary, even though he did not carry it out, if he intentionally helped P to carry out the burglary by keeping a look-out while P was in the house.

The prosecution say that D1, D2 and P all played their different parts in committing this burglary; and that D1 and D2 are therefore guilty even though P actually carried it out.

Route to verdicts for Example 1

D1

Question 1

Are we sure that D1 provided the tools to P?

- If yes, go to question 2.
- If no, return a verdict of ‘Not guilty’ and do not consider questions 2 and 3.

Question 2

Are we sure that when D1 provided P with the tools, D1 intended that they would be used to commit a burglary of some kind?

- If yes, go to question 3.
- If no, return a verdict of 'Not Guilty' and do not consider question 3.

Question 3

Are we sure that P used one or more of the tools provided by D1 to gain entry to {address}?

- If yes, return a verdict of 'Guilty'.
- If no, return a verdict of 'Not Guilty'.

D2

Question 4

Are we sure that D2 knew that P had entered the house as a trespasser to steal property?

- If yes, go to question 5.
- If no, return a verdict of 'Not Guilty' and do not consider question 5.

Question 5

Are we sure that D2 was deliberately helping P to commit the burglary by keeping a look-out?

- If yes, return a verdict of ‘Guilty'.
- If no, return a verdict of 'Not Guilty'.

Example 2: assault occasioning actual bodily harm - attack by three defendants - prosecution allege that each D was either a principal offender or an accessory/secondary party.

The prosecution allege that the three Ds pushed V to the ground and surrounded him. V was then kicked by one or more of the Ds, but the prosecution cannot say by which one(s). V suffered bruising to his body. Each D accepts that D was assaulted and injured, but says that, though present at the scene, he took no part in the assault.

Although the prosecution are not able to prove which of the Ds kicked and injured D there are two ways in which a D could be guilty of this charge. First, he would be guilty if he himself deliberately kicked and injured V. Secondly, he would be guilty if he deliberately helped or encouraged either or both of the other Ds to assault V.

The prosecution say that each D is guilty either because he joined in the attack on V, and must therefore either have intentionally kicked and injured V himself, or because he deliberately helped or encouraged either or both of the others to do so.

Each D however says that although he was present at the scene of the attack on V he played no part in it, and that V was assaulted by the other two. Merely being present at the scene of a crime is not enough to make a D guilty of the crime. But if a D intends by his presence to help or encourage another D to commit the crime by giving moral support to another D or by contributing to the force of numbers, then D is guilty.

Route to verdicts for Example 2

To reach your verdicts you should answer this question separately in respect of each defendant.

Are we sure that the defendant whose case we are considering did one or both of the following two things (even if we cannot be sure which it was):

1. deliberately assaulted V by kicking him; or
2. deliberately helped or encouraged one or both of the other Ds to assault D?

- If the answer is “Yes, we are sure that he did do one of these things”, return a verdict of 'Guilty'.
- If the answer is “No, we are not sure that he did either of these things”, return a verdict of 'Not Guilty'.

Example 3: House-holder assaulted during a burglary, D being an accessory/secondary party

D is charged in Count 1 with a dwelling-house burglary with intent to steal, and in Count 2 with assaulting V, the house-holder, causing V actual bodily harm. D did not enter the house or assault V himself. This was done by P, who punched and injured V when V discovered and challenged him inside the house. It is agreed that D was outside keeping watch when P assaulted V.P has pleaded guilty to both counts. D has pleaded guilty to count 1 (burglary) and not guilty to count 2 (ABH).

The prosecution do not suggest that D entered the house or assaulted V, but it is possible for a person to be guilty of a crime even if it is actually carried out by somebody else.

D would be guilty of the assault in count 2 if D and P both intended that if P was challenged by someone in the house as P was burgling it, P should if necessary assault that person. If you were satisfied that D must have foreseen that while committing the burglary P might well commit such an assault if the occasion arose, it would be open to you to decide that D intended that the assault would be committed if necessary/if the occasion arose and that D is therefore guilty of the assault. Whether or not you do come to that conclusion is entirely for you to decide, having considered all the evidence.

Route to Verdict for Example 3

You are only considering count 2 (ABH). You should answer the following question

Are we sure that D intended that if P was challenged in the house as P was burgling it, P should if necessary assault the person who challenged him?

- If yes, return a verdict of 'Guilty'.
- If no, return a verdict of 'Not Guilty'.

Example 4

Following an attack by both Ds, V suffered a fractured skull (agreed to have been caused by a kick to the head and to amount to GBH) and minor bruising to his body. D1 and D2 are charged in count 1 with causing GBH to V with intent, to which they have pleaded Not Guilty; and in count 2 with assaulting V occasioning him ABH to which they have pleaded Guilty. The jury are aware of these pleas.

The prosecution say that the Ds put V to the ground and then both kicked him. The prosecution cannot say who caused the fractured skull but say that each D is guilty of count 1 either as a principal, because he was the D who personally caused it, or as an accessory, because he helped or encouraged the other D to do so. Each D accepts punching V to the body while V was on his feet, but denies intending any serious injury. Each D alleges that when V started to fight back the other D went further than planned or foreseen by putting V to the ground and then kicking him in the head.

There are three ways in which either D may be guilty of Count 1:

First, he would be guilty if he himself kicked V intending to cause him really serious injury and fractured his skull.

Secondly, he would be guilty if he did not personally cause the fractured skull but intended that V should suffer some really serious injury and helped or encouraged the other D to cause such an injury by joining in the kicking of V while he was on the ground.

Thirdly, even if a D did not kick V while he was on the ground he would still be guilty of Count 1 he joined in an attack on V, and the Ds both intended that if V fought back one of the Ds should cause V some really serious injury. If you were satisfied that the D whose case you were considering must have foreseen that during the assault on V the other D might well intentionally cause V some really serious injury if that happened, it would be open to you to decide that D intended that, if the occasion arose, V would be caused really serious injury and that D is therefore guilty of Count 1 even though he did not himself kick V on the ground. Whether or not you do come to that conclusion is entirely for you to decide, having considered all the evidence.

If you are sure that one of these three things applied to the D whose case you are considering, your verdict on Count 1 will be guilty, even if you are not sure which of the three things it was. If on the other hand you decide that the D's account is or may be true your verdict will be 'Not Guilty'.

Route to verdict for Example 4

Are we sure that the defendant whose case we are considering did at least one of the following three things (even if we cannot be sure which of the three it was)?

1. kicked V on the head, causing the fractured skull, intending to cause V really serious injury; or
2. intended that V should suffer some really serious injury and helped or encouraged the other defendant to do so by joining in the kicking of V on the ground; or
3. though not himself kicking V on the ground, joined with the other defendant in an attack on V with both defendants intending that if the occasion arose one of them should cause V some really serious injury?

- If the answer is "Yes, we are sure that he did do one of these things" return a verdict of 'Guilty'.
- If the answer is "No, we are not sure that he did any of these things", return a verdict of 'Not Guilty'.

Example 5: Murder/manslaughter

D accepts that he and P took part in a joint attack on V, punching and kicking him. V fought back, whereupon P produced a knife, stabbed V once in the chest, and killed him. P has pleaded guilty to murder (Count 1). D has pleaded not guilty to murder (Count 1) and manslaughter (Count 2) but guilty to assault occasioning actual bodily harm (Count 3). D contends that he did not know that P had a knife.

In law it is possible for a person to be guilty of a crime even if it is actually carried out by somebody else.

D accepts that he took part in an attack on V which caused V some injury. That being so D would be guilty of murder if he knew that P had a knife and intended that if V fought back P should use it during the joint attack on V, intending to kill V or to cause him really serious injury.

D would be guilty of manslaughter if he knew that P had a knife and intended that if V fought back P should use it during the joint attack on V but did not realise that P might intend to kill V or cause him really serious injury.

Route to Verdict for Example 5

Question 1

Are we sure that D knew that P was carrying a knife?

- If yes, go on to answer question 2.
- If no, return verdicts of 'Not Guilty' on Counts 1 and 2 and disregard questions 2 and 3 below.

Question 2

Are we sure that D intended that if V fought back P should use the knife on V during the attack on V?

- If yes, go on to answer question 3.
- If no, return verdicts of 'Not Guilty' on Counts 1 and 2 and disregard question 3 below.

Question 3

Are we sure that D intended that P should use the knife on V intending to kill V or to cause V really serious injury?

- If yes, return a verdict of 'Guilty' on Count 1 and disregard Count 2 (on which you will not be asked to return a verdict).
- If no, return verdicts of 'Not Guilty' on Count 1 and 'Guilty' on Count 2.

7-5 The abolition of parasitic accessory/joint enterprise

NOTE: following the Supreme Court decision in R. v. Jogee[139], the principles governing every form of secondary liability are as described in Chapter 7-4. There is no longer any separate category of parasitic accessory/joint enterprise liability.

[139] [2016] UKSC 8

7-6 Withdrawal from joint criminal activity

ARCHBOLD 18-26; BLACKSTONE'S A4.30

Legal Summary

1. A secondary party may, exceptionally,[140] rely on the fact that he has withdrawn from the criminal venture prior to P's acts.
2. What constitutes effective withdrawal depends on the circumstances of the case, particularly the extent of D's involvement and proximity to the commission of the offence by P. Compare *Grundy*,[141] (effective withdrawal weeks before burglary) and *Beccara* (nothing less than physical intervention to stop P committing the violent crime they were engaged in).[142]
3. It is certainly not sufficient that D merely changed his mind about the venture: D's conduct must demonstrate unequivocally[143] his voluntary disengagement from the criminal enterprise: *Bryce*.[144] In addition, D must communicate to P (or by communication with the law enforcement agency) his withdrawal and do so in unequivocal terms unless physically impossible in the circumstances: *Robinson*.[145] This requirement for timely effective unequivocal communication applies equally to cases of spontaneous violence, unless it is not practicable or reasonable to communicate the withdrawal: *Robinson*;[146] *Mitchell and King*.[147] In a case in which the participants have engaged in spontaneous violence, in practice the issue is not whether there had been communication of withdrawal but whether a particular defendant clearly disengaged before the relevant injury or injuries forming the allegation were caused.[148] In some instances D throwing down his weapon and walking away *may* be enough. Whether D is still a party to the crime is a question of fact and degree for the jury to determine. Where D is one of the instigators of the attack, more may be needed to demonstrate withdrawal: *Gallant*.[149]
4. A judge need not direct on withdrawal in every case (e.g. it is unnecessary where D denies that he played any part in the criminal venture: *Gallant*.[150]

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[140] *Mitchell* [1990] Crim LR 496.

[141] [1977] Crim LR 543.

[142] *Becerra Cooper* (1975) 62 Cr App Rep 212; *Baker* [1994] Crim LR 444.

[143] *O'Flaherty* [2004] EWCA Crim 526 at para.58.

[144] [2004] EWCA Crim 1231.

[145] *Robinson* [2000] EWCA Crim 8.

[146] *Robinson* [2000] EWCA Crim 8, explaining *Mitchell, King* [1999] Crim LR 496. *O'Flaherty* [2004] EWCA Crim 526 at para.61 per Mantell LJ.

[147] *Mitchell, King* [1999] Crim LR 496

[148] See *O'Flaherty* [2004] EWCA Crim 526; *Mitchell* [2008] EWCA Crim 2552 [2009] 1 Cr. App. R. 31 [2009] Crim. L.R. 287 ; *Campbell* [2009] EWCA Crim 50.

[149] [2008] EWCA Crim 1111.

[150] [2008] EWCA Crim 1111.

5. It is not necessary for D to have taken all reasonable steps to prevent the crime although clearly it should be a *sufficient* basis for the defence.

Directions

6. Any direction on withdrawal from assisting or encouraging is likely to be highly fact-specific. The need for and form of any such direction should therefore be discussed with the advocates in the absence of the jury before closing speeches.
7. Subject to this, it will usually be appropriate to direct the jury as follows:

   (1) The law provides that a person can withdraw from involvement in a crime only if strict conditions are met.

   (2) He must before the crime has been committed:

      (a) conduct himself in such a way as to make it completely clear that he has withdrawn; and

      (b) if there is a reasonable opportunity to do so, inform one or more of the others involved in the enterprise / a law enforcement agency (as appropriate) in clear terms that he has withdrawn.

   (3) Against that background, it is for the jury to decide whether, in the circumstances of the case, D did (and said) enough and in sufficient time to make an effective withdrawal from the enterprise. If he did or may have done so, the verdict would be “Not Guilty”. If he did not, the verdict would be “Guilty” if all the elements of the offence were proved against him.

   (4) The circumstances to be taken into account would include (as appropriate):

      (a) the nature of the proposed joint crime;

      (b) D's anticipated role in the proposed crime;

      (c) what, if anything, D had already done to further the proposed crime;

      (d) the time at which D sought to withdraw;

      (e) what D did to indicate his withdrawal;

      (f) whether D had any reasonable opportunity to inform anyone else that he was withdrawing/; and, if so

      (g) how and when he took that opportunity.

   (5) Briefly summarise the parties' cases on these issues.

Example: withdrawal from a joint attack

NOTE: In this Example the only substantial issue is whether or not D3 had withdrawn from the attack on V.

D1, D2 and D3 are all charged with causing grievous bodily harm, which means really serious injury, to V, with intent to do so. Witnesses called by the prosecution have said that all three defendants punched and kicked V and then ran away together, leaving V seriously injured on the ground.

You know that D1 and D2 have pleaded guilty. D3 has pleaded not guilty. He admits that he had been part of a plan, with D1 and D2, to cause really serious injury to V, but he says that he withdrew/backed out before the crime was committed. He says that just as the attack was about to begin, he shouted 'Leave it lads' to the others and then stood back while they attacked V.

If you are sure that the prosecution witnesses are telling the truth, you would be bound to conclude that D3 was as guilty as D1 and D2. But what if you thought that D3's account was or might be true?

The law provides that a person who joins a plan to commit a crime can withdraw/back out of it, but only if, before the crime has been committed, he does or says something to make it clear that he has backed out.

So if you decide that D3 did do or say something to suggest that he had withdrawn/backed out, or may have done so, you will have to consider when this happened.

If he did not do or say anything until V had already suffered really serious injury that would be too late. The crime would already have been committed, and he would be guilty of it.

But if you decide that he did do or say something, or may have done so, before V had suffered really serious injury, you would have to decide whether what he did or said was enough to make it clear that he had backed out. If you think it was, or may have been, your verdict would be "Not Guilty". Otherwise, it would be "Guilty" (assuming of course that you were sure that he had, with the others, intentionally caused V really serious injury).

On the question of withdrawing or backing out:

the prosecution say {specify};

the defence say {specify}

Example Route to Verdict

Because D3 admits that he had planned with D1 and D2 to cause really serious injury to V and that V suffered really serious injury when he was attacked, the questions that arise are as follows:

Question 1

Are we sure that:

(a) D3 took part in the attack on V; **and**

(b) D3 intended that V should suffer really serious injury?

- If **yes**, return a verdict of 'Guilty' and disregard questions 2 to 4.
- If **no**, go on to answer question 2.

Question 2

At any time did D3 do or say, or may he have done or said, anything to suggest that he had withdrawn from the plan to cause really serious injury to V?

- If **yes**, go on to answer question 3.
- If **no**, return a verdict of 'Guilty' and do not consider questions 3 and 4.

Question 3

Did D3 do or say this, or may he have done or said this, before V had suffered really serious injury?

- If **yes**, go on to answer question 4.
- If **no**, return a verdict of 'Guilty' and do not consider question 4.

Question 4

Did D3 do or say enough, or may he have done or said enough, to make it clear that he had withdrawn from the plan to cause really serious injury to V?

- If **yes**, return a verdict of 'Not Guilty'.
- If **no**, return a verdict of 'Guilty'.

7-7 Conspiracy

ARCHBOLD 33-1; BLACKSTONE'S A5.43

Legal Summary

Statutory Conspiracy

1. The offence of conspiracy under Criminal Law Act 1977, s.1 requires proof that the defendant[151] agreed[152] with another or others (whether identified or not) that a course of conduct would be pursued which *if carried out in accordance with their intentions* would necessarily involve the commission of any offence[153] by one or more of the parties to the agreement, or would do so but for the fact that it was an impossible attempt. The *mens rea* for conspiracy requires proof of that intention to be a party to an agreement to do an unlawful act[154]and that D and one other party knew or intended that the circumstance element(s) of the intended offence would exist at the time of the offence (even if the substantive offence can be committed without proof of knowledge).[155]
2. The offence is complete upon agreement; nothing need be done in pursuit of the agreement. The conspiracy continues for as long as there are two or more parties to it intending to carry it out. [156]
3. The Court of Appeal has repeatedly noted that:

   > "the prosecution should always think carefully, before making use of the law of conspiracy, how to formulate the conspiracy charge or charges and whether a substantive offence or offences would be more appropriate." [157]

4. Where the agreement relates to multiple offences, particular care is needed to ensure that the Ds were all parties to the relevant agreement at the relevant time. The prosecution's decision as to whether to charge multiple counts or a single conspiracy requires careful thought. In *Ali*[158] the Court of Appeal held that:

   > "It is not permissible to put into an indictment an alternative factual basis which makes no difference to the offence committed whether it is for the purpose of enabling a jury to decide an issue of fact or for any other purpose. The judge must resolve the factual issues which are material to sentencing if

[151] There can be no conspiracy with an intended victim, spouse /civil partner or child under 10.

[152] Mere negotiation is insufficient

[153] But not merely aiding and abetting an offence: *Kenning* [2008] EWCA Crim 1534.

[154] *Anderson [1986] AC 27.,*

[155] E.g. in conspiracy to rape it is necessary to prove knowledge that V would not be consenting even though no such proof would be required for the substantive offence of rape: *Saik* [2006] UKHL 18, applied in *Thomas* [2014] EWCA Crim 1958

[156] *DPP v. Doot [1973] AC 80.*

[157] *Shillam* [2013] EWCA Crim 160 at para. 25.

[158] [2011] EWCA Crim 1260 at para. 37.

the offences are the same; in limited circumstances, the judge may ask the jury a specific question."

5. Similarly, care is needed when the allegation is that the agreement was to commit either one or another crime in the alternative.[159]

6. It is not necessary for each member of the conspiracy to know the other members. If it is alleged that the parties to the conspiracy is a 'wheel' or 'chain' conspiracy, each alleged conspirator must each be shown to be party to a common design, and he must be aware that there is a larger scheme to which he is attaching himself.[160]

7. The Court of Appeal has again returned to this recently. In *Serious Fraud Office v Papachristos* [2014] EWCA Crim 1863, the Court of Appeal considered the legitimacy of a second count added late in the trial. Fulford LJ cited *Shillam* as establishing (at [19]) that:

> "The evidence may prove the existence of a conspiracy of narrower scope and involving fewer people than the prosecution originally alleged, in which case it is not intrinsically wrong for the jury to return guilty verdicts accordingly, but it is always necessary that for two or more persons to be convicted of a single conspiracy each of them must be proved to have shared a common purpose or design."

Common law conspiracy

8. At common law offences of conspiracy to defraud and conspiracies to do acts tending to corrupt public morals or outrage public decency are available. In practice, conspiracy to defraud is the only common law offence commonly prosecuted. Conspiracy to defraud is committed if there is

> ...an agreement by two or more [persons] by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled [or] an agreement by two or more by dishonesty to injure some proprietary right of his suffices to constitute the offence...[161]

or

> an agreement to deceive a person into acting contrary to the duty he owes to his clients or employers. [162]

9. The Attorney-General has issued guidance (January 9, 2007) to prosecuting authorities as to when it is appropriate to charge a common law conspiracy to defraud instead of a substantive offence. Care needs to be given to the number of counts: two or more similar but separate agreements cannot be charged as a single conspiracy to defraud.[163]

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[159] *Hussain* [2002] EWCA Crim 6; [2002] 2 Cr. App. R. 26; [2002] Crim. L.R. 407

[160] *Shillam* [2013] EWCA Crim 160.

[161] *Scott v Metropolitan Police Commissioner* [1975] AC 819. See recently the detailed analysis in *Evans and others* [2014] 1 WLR 2817.

[162] *Wai Yu-tsang v The Queen* [1991] UKPC 32.

[163] *Mehta* [2012] EWCA Crim 2824.

Evidence

10. On the common law evidential rule admitting hearsay evidence of statements made in furtherance of a common enterprise: see Chapter 14-14.

11. Evidence admissible against one D to a conspiracy may be inadmissible against another. Particular care will be needed in directing the jury in such cases.[164] An acquittal of one conspirator will not necessarily mean that the conviction of the other(s) is impermissible. Directions on circumstantial evidence and inferences may also be necessary.

Directions

12. The jury should be directed as follows:

    (1) A conspiracy is an agreement between two or more people to commit an intended crime/one or more intended crimes.

    (2) A conspiracy or agreement of that kind is itself a crime, separate from the intended crime(s).

    (3) In this case the prosecution say that the intended crime(s) was/were {specify} and that D was part of a conspiracy or agreement to commit it/them.

    (4) To prove its case, the prosecution must make the jury sure that:

        (a) there was a conspiracy or agreement to commit *{specify}*;

        (b) D joined in that conspiracy; and

        (c) when he joined in D intended that *{specify}* should be committed by (as appropriate) himself and/or one or more of the other conspirators.

13. Only if and to the extent that it is relevant to the particular case the jury should also be directed that conspirators may:

    (1) join and leave a conspiracy at different times;

    (2) play different parts in the conspiracy, be they major or minor;

    (3) not necessarily know/meet/communicate with all of the other conspirators;

    (4) not necessarily know all the details of the conspiracy.

14. Since the evidence will usually be circumstantial it will usually be necessary to add a direction based on Chapter 10-1 (Circumstantial evidence) below. It may also be necessary to add a direction based on Chapter 14-14 (Hearsay – Statements in furtherance of a common enterprise) below.

[164] *Testouri* [2003] EWCA Crim 3735.

Example

Just as it is a criminal offence to steal something, so it is also a criminal offence for two or more people to agree to steal something. An agreement to commit a crime is called a conspiracy. The agreement (or conspiracy) is itself a crime.

In this case, D is charged with entering into a conspiracy with X, Y and Z (who are named in the indictment) to steal a car.

Before you could convict D you must be sure that:

1. there was an agreement to steal a car;
2. that D joined in the agreement with one or more of X, Y and Z; and
3. that, when D did so, he intended that a car should be stolen by one or more of X, Y and Z.

The prosecution do not have to prove that:

1. D was in the conspiracy from the beginning, because people may join and leave a conspiracy at different times;
2. D had been in contact with all of the other people in the conspiracy; or
3. D played an active part in putting the conspiracy into effect.

There is no direct evidence of this conspiracy. This is not unusual: you would not expect people who are planning a crime to put their agreement into writing or to tell other people about it. So you should consider the evidence of what happened and of what D and the other people accused of the conspiracy did and said and ask yourselves whether that makes you sure that there was a conspiracy and that D was part of it and intended that it would be put into effect.

7-8 Criminal attempts

ARCHBOLD 17.42 and 33-127; BLACKSTONE'S A5.72

Legal Summary

1. By section 1(1) Criminal Attempts Act 1981, the *actus reus* of an attempt to commit an offence is any act "more than merely preparatory to the commission of the offence". Intent is the essence of attempt: the more than merely preparatory act must be accompanied by an intention to commit the full offence, even if the full offence is one of strict liability or one in which the full offence requires only a lesser degree of *mens rea* than intent (e.g. although for murder intent to cause GBH is enough, attempted murder requires intent to kill).[165]
2. In *Pace and Rogers*,[166] the Court of Appeal held that section 1(1) requires intent to commit all the elements of the full offence.
3. It does not matter that the offence which the defendant intends to commit is impossible by reason of facts unknown to him: section 1(2); *Shivpuri*.[167] However, where mistake of law is a defence to a charge of committing a specific offence (e.g. section 2(1)(a) Theft Act 1968), it will also be a defence to a charge of attempting to commit that offence.
4. It is for the judge to decide whether there is sufficient evidence of an attempt for the issue to be left to the jury; if so, it is for the jury to decide whether the acts proved amount to an attempt.[168]

Directions

5. The offence which D is charged with attempting should be defined.
6. The jury should be told that the prosecution must prove that:

   (1) D intended to commit that offence; and

   (2) with that intention, D did an act/acts which in the jury's view went beyond mere preparation to commit the offence.
7. If there is an issue as to whether D's acts did go beyond mere preparation, the parties' arguments in that regard should be briefly summarised.
8. If it is appropriate in the circumstances of the case, the jury should be told that the fact that the full offence could not have been committed (e.g. because the pocket which D was trying to pick was empty) provides no defence.

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[165] *Whybrow* (1951) 35 Cr App R 141. The Court of Appeal had previously held, however, that whilst intent is required as to any specified consequences of D's conduct, something less may suffice in respect of any relevant circumstances: *Khan* [1990] 1 WLR 813 (attempted rape committed where D intended to have intercourse with V and was reckless as to her lack of consent); *Pace and Rogers* [2014] EWCA Crim 186.

[166] [2014] EWCA Crim 186.

[167] [1986] UKHL 2.

[168] Criminal Attempts Act 1981, s.4(3), (4); *Griffin* [1993] Crim LR 515.

Example 1: Attempted theft from the person

The prosecution case is that D saw V get a large number of bank notes from a cash machine and put them into his inside jacket pocket. They say that D then followed V along a crowded street and deliberately bumped into him a number of times. Unfortunately for D, he was being watched by PC X, who thought that D was trying to distract V in order to steal the cash. So PC X then arrested D.

D says that he had not seen V get any money and was not aware of bumping into him; and if he did it was accidental.

Before you can convict D you must be sure that:

1. D bumped into V at least once; and
2. When D bumped into V, he did so deliberately; and
3. When D did so, he was trying to steal the money.

If you are sure about all of these things, your verdict will be 'Guilty'. If you are not sure about one or more of them, your verdict will be 'Not guilty'.

There is a distinction between attempting to commit a crime and doing something which is no more than preparation in order to commit it; and if you think that what D did was, or may have been, no more than preparation in order to steal the money you must find him 'Not guilty'. But if you are sure that D was actually trying to steal from V when he was arrested, you will find him 'Guilty'.

7-9 Causation

ARCHBOLD 17-66, 19-6, 19-10 and 19-12; BLACKSTONE'S A1.25, B1.58

Legal Summary

General rule

1. Offences which require proof of a result require proof of causation. The question of whether D's act caused the prohibited result is one for the jury; but in answering this question, they must apply legal principles which should be explained to them by the judge.[169]
2. D's act need not be the sole or the main cause of the result. It is wrong to direct a jury that D is not liable if he is, for example, less than one-fifth to blame.[170]
3. D's contribution to the result must have been more than negligible or minimal.[171] He may be held to have caused a result even if his conduct was not the only cause and even if his conduct could not by itself have brought about the result.[172] Where there are multiple causes (including where the victim has contributed to the result), D will remain liable if his act is a continuing and operative cause.
4. Contributory causes from third parties, or victims, will not necessarily absolve the accused of causal liability unless the contribution from the other party is such as to break the chain of causation – see below. In *R* v *Warburton and Hubbersty* [173] Hooper LJ, delivering the judgment of the court, emphasised that

> "the test for the jury is a simple one: did the acts for which the defendant is responsible significantly contribute to the victim's death."

Novus actus interveniens and remoteness

5. Most problems of causation concern the application of the principle *"novus actus interveniens"* or "new and intervening act". If there is an intervening event,[174] either as a naturally occurring phenomenon or by some human conduct, it may operate to "break the chain of causation", relieving D of liability for the ultimate result (although he may remain liable for an attempt in many cases). Although D's original act may remain a factual "but for" cause of the result, the intervening act may operate so as to supplant it as the legal cause.[175]

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[169] *Pagett* [1983] EWCA Crim 1.

170 *Henningan* [1971] 3 All ER 133.

[171] Affirmed by the Supreme Court in *Hughes* [2013] UKSC 56 at para. 33 and by the Court of Appeal in *L* [2010] EWCA Crim 1249 at para. 9 (concerning Road Traffic Act 1988, s.2B). *Hennigan* [1971] 3 All ER 133; *Cato* [1976] 1 WLR 110; *Notman* [1994] Crim LR 518.

[172] *Warburton* [2006] EWCA Crim 627.

[173] [2006] EWCA Crim 627, CA.

[174] Which can be an act or omission.

[175] E.g., *Pagett* (1983) 76 Cr App R 279 at p.288 by Robert Goff LJ: "… the Latin term [*novus actus interveniens*] has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused."

6. The Court of Appeal has, on more than one occasion, advised against entering into an exposition of the *novus actus interveniens* principle when it is plain that there is more than one cause and the issue is whether D made a more than minimal contribution to the result.[176]

   (1) An intervening act by D will not break the chain of causation so as to excuse him where the intervening act is part of the same transaction perpetrated by D: e.g. D stabs V and then shoots him.

   (2) If, despite the intervening events, D's conduct remains a 'substantial and operative cause' of the result, D will remain responsible, and if the intervention is by a person, that actor may also become liable in such circumstances.

   (3) D will not be liable if a natural event which is extraordinary or not *reasonably foreseeable* supervenes and renders D's contribution merely part of the background.

   (4) D will not be liable if a third party's intervening act is one of a *free deliberate and informed nature* (whether reasonably foreseeable or not)[177] rendering D's contribution merely part of the background. Human intervention in the form of a foreseeable act instinctively done for the purposes of self-preservation or in the execution of a duty to prevent crime or arrest an offender will not break the chain of causation: *Pagett.*[178]

   (5) D will not be liable if a third party's act which is not a free deliberate informed act, was not reasonably foreseeable rendering D's contribution merely part of the background.

   (6) D will not be liable if a medical professional intervenes to treat injuries inflicted by D and the treatment is so *independent* of D's conduct [179]and *so potent* as to render D's contribution part of the history and not a substantial and operating cause of death. The jury must remain focused on whether D remains liable, not whether the medical professional's conduct ought to render him criminally liable for his part. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury) with which D is charged. *Malcharek*[180] confirms that "switching off" a life support system will not break the chain of causation: such medical intervention will not meet the test of being (1) unforeseeably bad and (2) the sole significant cause of death.

   (7) D will not be liable if the victim's subsequent conduct in response to D's act is not within a range of responses that could be regarded as reasonable in the

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[176] E.g. *Pagett* (1983) 76 Cr App R 279.

[177] This includes acts instinctively done for self-preservation and acts of an involuntary nature by the third party: *Empress Car* [1998] UKHL 5 in the case of a strict liability environmental offence only if the intervening act was extraordinary would it break causation.

[178] (1983) 76 Cr App R 279.

[179] Although usually an act, it can be an omission to act: *McKechnie* (1992) Cr App R 51.

[180] [1981] 1 WLR 690.

circumstances. Was V's act daft or wholly disproportionate to D's act? If so it will break the chain.

(8) D will be liable if the victim has a pre-existing condition rendering him unusually vulnerable to physical injury as a result of an existing medical condition or old age. D must accept liability for any unusually serious consequences which result: *Hayward*[181]; *Blaue.*[182] Caution needs to be exercised with cases of unlawful act manslaughter.

7. Many of the modern authorities on causation relate to cases of causing death by dangerous driving. In such cases the bad driving of the defendant and that of others may be concurrent causes of death. In *Hennigan*,[183] Lord Parker CJ made clear that the jury is not in such cases concerned with apportionment. It was enough if the dangerous driving of the defendant was a real cause of death which was more than minimal. In *Skelton*,[184] Sedley J (as he then was), held that the defendant's dangerous driving must have played a part, "not simply in creating the occasion of the fatal accident but in bringing it about." In *Barnes*,[185] it was held that it was open to the jury to find that the defendant's dangerous driving "played more than a minimal role in bringing about the accident and death." Hallett LJ noted that in some circumstances judges might have to give the jury further assistance in relation to the difference between bringing about the conditions in which death occurred and "causing" the death.

8. In *L*,[186] Toulson LJ, as he then was, held that *Hennigan*, *Skelton* and *Barnes* established the following principles:

> "first, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, i.e. causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury."[187]

He concluded that:

> "it is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury."[188]

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[181] (1908) 21 Cox CC 692.

[182] [1975] 1 WLR 1411

[183] [1971] 3 All ER 133.

[184] [1995] Crim LR 635.

[185] [2008] EWCA Crim 2726.

[186] [2010] EWCA Crim 1249 (concerning death by careless driving).

[187] [2010] EWCA Crim 1249 at para.9.

[188] [2010] EWCA Crim 1249 at para. 16.

9. The Court of Appeal in *Girdler*[189] considered how the trial judge might best explain to the jury the concept of foreseeability where the defence case was that a new act had intervened. The defendant in that case had driven into another vehicle which, when it came to rest, created an obstruction. Some vehicles avoided the obstruction; one did not and a fatal accident occurred. Hooper LJ held that:

> "We are of the view that the words "reasonably foreseeable" whilst apt to describe for a lawyer the appropriate test, may need to be reworded to ease the task of a jury. We suggest that a jury could be told, in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and were sure that his dangerous driving was more than a slight or trifling link to the death(s) then:
>
> 'the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur.'
>
> The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary it should be made clear that the jury are not concerned with what the defendant foresaw."[190]

Directions

10. No specific direction will be required unless, unusually, a particular issue of causation arises. If it does, it will usually be one of two kinds.

    (1) Where D's conduct was not the only cause of the relevant outcome (e.g. where negligent medical treatment contributed to the outcome, or vehicles were driven by D and another person in such a way as to cause a fatal collision), the jury should be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that his conduct contributed to the outcome in a way that was significant, that is more than trivial.

    (2) Where D's conduct set in train a sequence of events leading towards the outcome concerned, but a new act intervened and became the immediate cause of the outcome (e.g. where D's unlawful act caused V to react in a way which caused his injuries or death), the jury should be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that:

        (a) A reasonable, ordinary, sensible person, in the circumstances which D knew about at the time of his conduct, could sensibly have foreseen that the new event might follow from his conduct; and

        (b) D's conduct contributed to the outcome in a way that was significant, that is more than trivial.

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[189] [2009] EWCA Crim 2666.

[190] At para.43.

Example

You have heard that after D stabbed V, V was taken to hospital where he was treated negligently. If he had been treated properly, he would have had a 75 per cent chance of survival.

You have to decide whether by stabbing V, D caused V's death. This does not need to have been the only cause, but it must have made more than a minimal contribution to V's death. If you decide that it made more than a minimal contribution, and so was a cause of death, you must go on to decide whether the other elements of the offence of murder have been proved. But if you decide that the stabbing made only a minimal contribution to V's death, your verdict must be "Not Guilty".

The prosecution say that the contribution made by the stabbing was clearly more than minimal. If D had not stabbed V, V would not have had to go to hospital, would not have suffered negligent treatment and would not have died. The defence, on the other hand, say that as V would have had a good chance of survival if he had been not been treated negligently, the contribution made by the stabbing should be seen as minimal.

8. STATES OF MIND

8-1 Intention

ARCHBOLD 17-34; BLACKSTONE'S A2.4

Legal Summary

1. Numerous offences are defined so as to require proof of 'intention' to cause specified results. The definition of intention has generated considerable case law. The "golden rule"[191] when directing a jury upon intent it is best to avoid any elaboration or paraphrase of what is meant by intent. It is an ordinary English word. It is quite distinct from "motive".
2. Where some extended explanation is needed, the most basic proposition is that a person "intends" to cause a result if he acts in order to bring it about. In such circumstances it is immaterial that D's chances of success are small.
3. In some cases[192] it may be necessary to give a further detailed explanation, sometimes described as 'oblique' as distinct from 'direct' intention.[193] Under this definition, a court or jury *may find* that a result is intended, though it is not D's purpose to cause it, when:
   (1) the result is a virtually certain consequence of that act, and
   (2) D knows that it is a virtually certain consequence.
4. It is advisable not to deviate from that formula by use of words such as "high probability" or "very high probability" instead of "virtual certainty[194] In *Allen*[195] the Court of Appeal emphasized that it 'is only in an exceptional case that this extended direction by reference to foresight becomes necessary. It is needed where D denies his purpose, not where e.g. D denies any part in the crime: *Phillips.*[196]
5. The probability of the result is an important matter for the jury to consider when determining whether D foresaw the result as virtually certain and whether they infer that he intended it. In a case where reference to foresight of the consequences is required, if the judge is convinced that, on the facts, and having regard to the way the case has been presented, some further explanation is necessary to avoid misunderstanding. The trial judge is best placed to make the decision on the appropriate direction.

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[191] per Lord Bridge in *Moloney* [1984] UKHL 4.

[192] Usually where D claims his aim was to achieve a different purpose and he hoped that the harm for which he is being prosecuted would not arise.

[193] The House of Lords in *Woollin* [1998] UKHL 28 limited its definition to murder, but the test appears to be applied across the criminal law.

[194] R v Royle [2013] EWCA Crim 1461.

[195] [2005] EWCA Crim 1344.

[196] [2004] EWCA Crim 112.

6. Where (in such a rare case) it is necessary to direct the jury on the matter, they should be directed that they are not entitled to find the necessary intention unless they are sure that the consequence was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case". [197]
7. The mere fact that the result is virtually certain in fact is not proof of intention – the inquiry into intention is one involving an assessment of D's state of mind: Stringer.[198]
8. Section 8 of the Criminal Justice Act 1967 provides:

   A court or jury, in determining whether a person has committed an offence,

   (1) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable result of those actions; but

   (2) shall decide whether he did intend or foresee that result
9. For the purposes of voluntary intoxication, if the offence charged has intention as the predominant *mens rea* it can for practical purposes be treated as one of specific intent: see Chapter 9.

Directions

10. A direction about intention will only be needed if the offence charged requires the prosecution to prove that D intended a particular action and/or result and D disputes this.
11. Any doubts about the need for, and form of, any direction about intention should be discussed with the advocates in the absence of the jury before closing speeches.
12. If a direction is necessary, it will usually be sufficient to direct the jury that:

    (1) the prosecution have to prove that D had the required intention at the time of the alleged offence (but see paragraph 16 below); and

    (2) when considering whether the prosecution have done so, the jury should draw such conclusions as they think right from [as appropriate] D's conduct and/or words before and/or at the time of and/or after the alleged offence (see *Example 1* below).
13. It will <u>not</u> usually be necessary or desirable to attempt a definition of 'intention', this being a word in ordinary English usage. If, unusually, some further explanation is thought necessary, it will usually be sufficient to add only that D intends a certain result if he acts to bring it about and (if the issue arises) that if D does so, his chances of actually bringing it about are not relevant.
14. However, where D contends that he did not act to bring about the result contended for by the prosecution, and/or acted to bring about a different result, it <u>may</u> be necessary to add a direction (sometimes referred to as a *Nedrick* or

[197] *Woollin* [1998] UKHL 28.

[198] [2008] EWCA Crim 1222.

Woollin direction) that before the jury could find that D intended the result contended for by the prosecution, they would have to be sure that it was virtually certain that D's actions would have that result unless something unexpected happened, and that D himself realised that that was so. If the jury were sure of that, it would be open to them to find that D intended that result, if they thought it right to do so in the light of all the evidence (see Example 2 below). The jury would be assisted by a written 'Route to Verdict' (see Route to verdict below).

15. The following directions may also be necessary, depending on the evidence and issues.

    (1) The prosecution do not have to prove that the offence was planned, or that D's intention was formed in advance.

    (2) Although the prosecution must prove that D intended the result concerned, they do not have to prove that D had any particular motive or desire to bring about that result.

    (3) The fact that D may have regretted afterwards what he had done does not negative any intention that he held at the time to do it.

    (4) When deciding whether D had the required intention, the jury are entitled to take into account [as appropriate] D's age/maturity/any relevant learning difficulty or mental or personality disorder referred to in the evidence.

16. The directions suggested in paragraphs 12 to 14 above will need to be adapted if D took alcohol/drugs to give himself 'Dutch courage' to commit an offence, because in such a case the prosecution must prove that D had the required intention when he started drinking/taking drugs rather than at the time of the alleged offence.

17. For directions about the effect of alcohol/drugs on a defendant's intention see the relevant sections of Chapter 9.

Example 1: Causing grievous bodily harm with intent.

D is charged with unlawfully and maliciously causing V grievous bodily harm with intent to do so. On this charge, the word 'maliciously' adds nothing so I suggest that you cross out the words "and maliciously" in the Particulars of Offence.

Grievous bodily harm means really serious injury. It is accepted that V's facial fractures amount to really serious injury, but the prosecution have to prove that D intended to cause really serious injury at the time that he struck V in the face. They do not have to prove that D had formed that intention in advance.

To decide what D's intention was you need to consider what D did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things.

So first consider what D did. D's fist only made contact once, but how much force was used? W said that D gave V “a really hard crack” and sent him straight to the floor. Dr. E told you that severe force would have been needed to cause V's injuries. However, D says that he only struck a tame and accidental blow as he was flailing his arms about.

You should also consider what D said. W told you that, before hitting V, D said {specify} and that, after V had hit the floor, D said {specify}. D denies saying any of this.

When you have considered all of this, you must then decide, in the light of your findings, what D's intention was when he caused V's injuries.

Example 2: Murder - D claims he acted only to frighten V - Nedrick / Woollin direction. Manslaughter is not being left as an available alternative verdict.

D admits killing V by pouring paraffin through V's letter box and setting it alight. The only question for you to answer is whether or not you are sure that when he did this, D intended either to kill V or to cause V really serious injury. The prosecution say that D clearly intended to do so, but D says that he wanted only to frighten V.

To decide what D's intention was you need to consider what D did and said before, at the time of and after the incident, and then draw conclusions from your findings about these things. [Refer briefly to the evidence and arguments relied on by the prosecution and the defence in this regard.]

If you are sure that D's intention was to kill or seriously injure V, the prosecution will have proved the intention necessary for murder and your verdict will therefore be 'Guilty'.

If however you accept that D may only have wanted to frighten V, you should then consider whether it was virtually certain that, unless something unexpected happened, what D did would cause V's death or really serious injury; and, if so, whether D realised that this was virtually certain. If, in the light of all the evidence, you are sure about these things, it would be open to you to conclude that D did intend to kill or seriously injure V, and your verdict would be 'Guilty'. Otherwise, the prosecution would not have proved the intention necessary for murder, and so your verdict would be 'Not Guilty'.

Route to verdict based on Example 2

Question 1

Are we sure that when D poured paraffin through V's letter box and set it alight, D's intention was to kill V or to cause V really serious injury?

- If **yes**, return a verdict of 'Guilty' and do not consider questions 2 to 4.
- If **no**, go to question 2.

Question 2

Was it virtually certain that D's pouring paraffin through V's letter box and setting it alight would, unless something unexpected happened, cause death or really serious injury to someone inside the house?

- If **yes**, go to question 3.
- If **no**, return a verdict of 'Not Guilty' and do not consider questions 3 and 4.

Question 3

Are we sure that D realised that this was virtually certain?

- If **yes**, go to question 4.
- If **no**, return a verdict of 'Not Guilty' and do not consider question 4.

Question 4

In the light of our answers to questions 2 and 3, and all of the evidence, are we sure that D did intend to kill or cause really serious injury to someone inside the house?

- If **yes**, return a verdict of 'Guilty'.
- If **no**, return a verdict of 'Not Guilty'.

8-2 Recklessness

ARCHBOLD 17-50; BLACKSTONE'S A2.6

Legal Summary

1. Recklessness features as a *mens rea* element in a wide range of offences. In some, it relates to the circumstances (e.g. whether the property belongs to another) in others, to the consequences (whether damage or injury will result).
2. The leading authority is *G,*[199] where, in the context of criminal damage Lord Bingham based his definition of recklessness on the Draft Criminal Code, cl 18(c):

   > A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to—
   >
   > (i) a circumstance when he is aware of a risk that it exists or will exist;
   >
   > (ii) a result when he is aware of a risk that it will occur;
   >
   > and it is, in the circumstances known to him, unreasonable to take the risk.

3. It is likely that this subjective definition of recklessness applies for all statutory offences of recklessness unless Parliament has explicitly provided otherwise.
4. It is a subjective form of *mens rea*, focused on the defendant's own perceptions of the existence of the risk. Whether it is reasonable for D to run the risk is a question for the jury dependent on all the facts. In directing a jury, there is no need to qualify the word "risk".
5. It is well established that where D closes his mind to the risk he can be found reckless within the subjective definition, as where he claims that his extreme anger blocked out of his mind the risk involved in his action. As Lord Lane CJ put it: 'Knowledge or appreciation of a risk of the [proscribed harm] must have entered the defendant's mind even though he may have suppressed it or driven it out.'[200]
6. For the purposes of voluntary intoxication, it is submitted that where the predominant *mens rea* for an offence is recklessness, that offence can be treated as one of basic intent: see Chapter 9.

Directions

7. A direction to the jury about the meaning of recklessness should be based on the following definition of Lord Bingham in *R v. G*[201] which is thought to be of general application albeit provided in the context of an arson case:

   > "A person acts recklessly....with respect to -
   >
   > (i) a circumstance when he is aware of a risk that it exists or will exist;

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[199] [2003] UKHL 50.

[200] *Stephenson* [1979] EWCA Crim 1. See also the comments of Lord Bingham in *G* [2003] UKHL 50 para. 39 and Lord Steyn para. 58.

[201] [2004] 1 AC 1034

(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk".

8. It may be appropriate to add that:

   (1) the prosecution have to prove that D was reckless at the time of the alleged offence (but see paragraph 3 below); and

   (2) when considering whether the prosecution have done so, the jury should draw such conclusions as they think right from [as appropriate] D's conduct and/or words before and/or at the time of and/or after the alleged offence.

9. In the definition of some offences for which recklessness will suffice to establish liability, such as criminal damage, recklessness is a lesser alternative to intention. If the prosecution base their case only on intention a direction about recklessness will be unnecessary and confusing. It will rarely be appropriate to direct a jury on recklessness in relation to assault.

10. Any doubt about the way in which the prosecution puts its case should be resolved before the case is opened. If any doubt about the need for and form of a recklessness direction remains at the end of the evidence it should be discussed with the advocates in the absence of the jury before closing speeches.

11. In relation to the effect of voluntary intoxication by alcohol/drugs, offences based on recklessness are treated as offences of basic intent: see Chapter 9.

Example 1: Criminal damage

The prosecution must prove that D:

(a) destroyed/damaged {specify} by fire; **and** when he did so

(b) he **either** intended to do so **or** was aware of the risk that {specify} would be destroyed/damaged and took that risk when it was unreasonable to do so in the circumstances that were known to him.

Example 2: Arson (deliberately setting fire but being reckless as to whether life would be endangered)

The prosecution must prove that D:

(a) destroyed/damaged {specify} by fire; **and** when he did so

(b) intended to do so; **and**

(c) took the risk of putting the life of another person in danger, by that fire, when it was unreasonable to do so in the circumstances that were known to him.

Example 3: Assault Occasioning Actual Bodily Harm

Throwing a glass in the course of a melée in a public house:

The prosecution must prove that D:

(a) threw a glass; **and**

(b) when he did so, he intended that the glass should hit someone; **or**

(c) when he did so, he was aware of the risk that the glass would hit someone and took that risk {Only if in issue: when it was unreasonable to do so in the circumstances that were known to him}; **and**

(d) the glass hit V, causing V to suffer some personal injury (however slight).

8-3 Malice

ARCHBOLD 17-45; BLACKSTONE'S A2.12

Legal Summary

1. Malice features as a form of *mens rea* in a number of old offences that are commonly prosecuted (including OAPA 1861 s.20[202]). The classic definition is that provided in *Cunningham*,[203] where the Court of Criminal Appeal observed:

   > "in any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

2. In cases requiring 'malice' D must actually foresee the risk that harm might occur and deliberately take it. It is wrong to suggest that it is enough that D "ought to have" foreseen the risk.

3. The test of recklessness requires that D not only foresaw a risk, but unjustifiably went on to take it. It seems from *Cunningham* that that element is not a requirement for the *mens rea* of malice. The House of Lords in *Parmenter and Savage* have approved the *Cunningham* formulation when interpreting the word malice.

4. For the purposes of voluntary intoxication, where the predominant *mens rea* is one of malice, the offence is one of basic intent: see Chapter 9.

Directions

5. Except in relation to an offence contrary to s. 20 of the Offences against the Person Act 1861 a direction to the jury about the meaning of 'malice' or 'maliciously' should be based on R. v. Cunningham:[204] see paragraph (d) in Example 1 below.

6. In relation to an offence contrary to s. 20 of the 1861 Act, the 'Cunningham' direction should be adapted in the light of R. v. Savage;[205] the difference being that in such a case the intention or recklessness need not relate to the particular kind of harm that was in fact done. It is sufficient if it relates to any injury however slight: see paragraph (b) in Example 2 below.

7. If the charge combines 'maliciously' with words requiring a specific intent which encompasses the legal meaning of 'maliciously', the jury should simply be

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[202] In *that offence* it requires proof only that D foresaw a risk of injury of some type and not that he foresaw a risk of injury of the level actually caused: *Savage* [1992] UKHL 1.

[203] [1957] 2 QB 396.

[204] [1957] 2 QB 396

[205] [1992] 1 AC 699

directed that the word 'maliciously' adds nothing and can be disregarded. The example most commonly occurring in practice is unlawfully and maliciously wounding or causing grievous bodily harm with intent to do grievous bodily harm, contrary to section 18 of the 1861 Act: see the Example in Chapter 8-1 above.

8. In relation to the effect of voluntary intoxication by alcohol/drugs, offences of 'malice' are treated as offences of basic intent: see Chapter 9 below.

Example 1: Causing grievous bodily harm with intent to resist arrest (s.18)

The prosecution must prove the following:

(a) that D deliberately struck PC V;

(b) that D did so unlawfully;

(c) that by striking PC V, D caused him to suffer grievous bodily harm (which means "really serious injury");

(d) that when D struck PC V, he was acting "maliciously". The word "maliciously" has a particular legal meaning, which is that he either

(e) intended to cause PC V some injury, however slight; or

(f) was aware of a risk that he might cause PC V some injury, however slight, but took that risk; and

(g) that when D struck PC V, he intended to prevent PC V from lawfully arresting him.

Example 2: Causing grievous bodily harm/wounding (s.20)

The prosecution must prove the following:

(a) that D used some unlawful force on V;

(b) that when he did so D was acting "maliciously". The word "maliciously" has a particular legal meaning which is that he either

(i) intended to cause V some injury, however slight; or

(ii) was aware of a risk that he might cause V some injury, however slight; but took that risk; and

(c) that in the event D caused V to suffer a wound/grievous bodily harm (which means "really serious injury").

8-4 Wilfulness

ARCHBOLD 17-47; BLACKSTONE'S A2.13

Legal Summary

1. This *mens rea* term appears in many statutory offences including some which are commonly prosecuted. To prove that D's conduct was wilful[206] the Crown must prove either intention or recklessness. In *Sheppard,*[207] Lord Keith held that "wilfully" is a word which ordinarily carries a pejorative sense:

   > "It is used here to describe the mental element, which, in addition to the fact of neglect, must be proved. … The primary meaning of 'wilful' is 'deliberate'. So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection. As a matter of general principle, recklessness is to be equipirated [sic] with deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty."[208]

2. In *JD*[209] the Court of Appeal confirmed that, when it is alleged that the D's conduct was 'wilful' on the basis that his conduct was 'deliberate' or 'intentional', few if any problems arise in satisfying the test. When the allegation is that the alleged 'wilfulness' is demonstrated by D being reckless, the question is whether D was reckless in the subjective (*G*[210]) sense rather than the objective (*Caldwell*) sense of the word. The question is whether D had seen the risk of the proscribed circumstances or consequences and nevertheless gone on unreasonably to take that risk; if so his conduct can be described as wilful.

3. In *Turbill*[211], the Court of Appeal disapproved of the judge using terms like "carelessness" or "negligence" when directing on wilful neglect. As Hallett LJ made clear: "They are not the same. ….The neglect must be "wilful" and that means something more is required than a duty and what a reasonable person would regard as a reckless breach of that duty."

4. When considering the effect of voluntary intoxication on criminal liability, it must be borne in mind that where the predominant *mens rea* is one of wilfulness the offence is to be treated for practical purposes as one of basic intent: see also Chapter 9.

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[206] The same test applies whether the element is one requiring proof of an act or omission: *Emma W* [2006] EWCA Crim 2723.

[207] [1981] AC 394 at p.408 in the context of the offence under the Children and Young Persons Act 1933, s.1 as amended by the 2015 Act.

[208] At p. 418. Quoted with approval in *Emma W* [2006] EWCA Crim 2723.

[209] [2008] EWCA Crim 2360.

[210] [2003] UKHL 50. *Att.-Gen.'s Reference (No. 3 of 2003)* [2004] 2 Cr.App.R. 23.

[211] [2013] EWCA Crim 1422.

Directions

5. When directing the jury about the meaning of 'wilful' or 'wilfully', reference should be made to section 8-1 ('Intention') and/or section 8-2 ('Recklessness') above, depending on the offence charged and whether the prosecution put their case on the basis of intention and/or recklessness.

6. In relation to the effect of voluntary intoxication by alcohol/drugs, offences of 'wilfulness' are treated as offences of basic intent: see Chapter 9 below.

Example: Child Cruelty

D is charged with wilfully neglecting his son V, who is four, in a manner likely to cause injury to health. The prosecution say that D did this by failing to get adequate medical help after V had developed a serious rash all over his body. D says that he was away from home for long periods and that, if V was neglected at all, it was by his mother.

The prosecution must first prove that D neglected V in a way likely to damage his health, and the law is that D is to be taken to have done this if he failed to provide adequate medical help for V. The prosecution must also prove that D acted “wilfully”.

To do this the prosecution must prove **either**

(a) that D knew that V needed medical help but deliberately failed to get it; **or**

(b) that D realised that V might need medical help but ignored this and failed to get the help he needed when it was unreasonable in the circumstances known to him

8-5 Knowledge, belief and suspicion

ARCHBOLD 17-49 and 49a; BLACKSTONE'S A2.14 and 15

Legal Summary

Knowledge

1. Knowledge is a *mens rea* term that arises in a vast number of offences. Whereas intention is usually descriptive of a state of mind as to consequences (e.g. D intends to make a gain), knowledge is usually used in relation to circumstances (e.g. possessing an article knowing it is prohibited). Knowledge is a stricter form of *mens rea* than belief or suspicion.
2. In *Montila*,[212] the House accepted that:

   > "A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is the question whether the person knows that the property is A."[213]

3. Subsequently in *Saik* the House of Lords concluded in the context of a requirement of knowledge in conspiracy that: "the word 'know' should be interpreted strictly and not watered down. In this context knowledge means true belief".[214]
4. Proof of negligence is not sufficient to satisfy a requirement of knowledge in an offence: *Flintshire County Council v Reynolds*[215] (a person who has 'constructive notice' may be negligent as to the relevant facts, but is not to be taken to have knowledge of them).
5. *Wilful blindness:* Knowledge is interpreted as including "shutting one's eyes to an obvious means of knowledge" or "deliberately refraining from making inquiries the results of which the person does not care to have".[216] The House of Lords adopted this proposition:

   > "It is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or

[212] [2004] UKHL 50.

[213] [2004] UKHL 50 at para. 27.

[214] [2006] UKHL 18 at para. 26. See also Hooper LJ in *Liaquat Ali and Others* [2005] 2 Cr App R 864 at para. 98.

[215] [2006] EWHC 195 (Admin) obtaining benefit contrary to Social Security Administration Act 1992, s.112. *Amayo* [2008] EWCA Crim 912.

[216] *Roper v Taylor's Garage* [1951] 2 TLR 284 per Devlin J. *Warner v Metropolitan Police Comm* [1969] 2 AC 256, p.279, per Lord Reid.

refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed."[217]

6. Similarly, in *Sherif* [218]the court stated that the jury are entitled to conclude, if satisfied that the defendant deliberately closed his eyes to the obvious because he did not wish to be told the truth, that this was capable of being evidence in support of a conclusion that the defendant did indeed either know or believe the matter in question.

7. Devlin J in *Roper v Taylor Garages (Exeter)*[219] distinguished actual knowledge, wilful blindness (knowledge in the second degree), and constructive knowledge (knowledge in the third degree). Actual knowledge was considered above.

8. As for wilful blindness, Devlin J emphasized:

> "…a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have [wilful blindness], and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make [constructive knowledge]."[220]

9. See also recently Davis LJ in *Wheeler* 'wilfully shutting eyes to the obvious may constitute evidence connoting knowledge or belief; and it need not necessarily be assumed in all cases that suspicion is all that can safely be inferred from the relevant facts.' [221]

Belief

10. Belief differs from knowledge because knowledge is limited to true beliefs but not those which are mistaken.

11. According to the Court of Appeal in *Hall*:[222]

> "Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: 'I cannot say I know for certain that the circumstance exists] but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen'."

12. In *Forsyth*[223] the court said that the judgment in *Hall* is 'potentially confusing'. In *Moys*[224] the court suggested simply that the question whether D knew or

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[217] *Westminster City Council v Croyalgrange Ltd* (1986) 83 Cr App R 155 at p.164, per Lord Bridge.

[218] [2008] EWCA Crim 2653.

[219] [1951] 2 TLR 284.

[220] *Roper v Taylor's Garage* [1951] 2 TLR 284 at p.288. The Draft Criminal Code suggests that knowledge includes wilful blindness Cl.18(1)(a) a person acts knowingly 'with respect to a circumstance not only when he is aware that it exists or will exist but also when he avoids taking steps that might confirm his belief that it exists or will exist'.

[221] [2014] EWCA Crim 2706, [10].

[222] (1985) 81 Cr App R 260 at p.264.

believed that the proscribed circumstance existed is a subjective one and that suspicion, even coupled with the fact that D shut his eyes to the circumstances, is not enough.

13. For the purposes of voluntary intoxication, it is submitted that offences in which the predominant *mens rea* is knowledge or belief can for practical purposes be treated as offences of specific intent: see Chapter 9.

Suspicion

14. This form of *mens rea* features in a number of cases including those under the Proceeds of Crime Act and terrorism Acts.

15. In *Da Silva*,[225] 'suspicion' was held to impose a subjective test: D's suspicion need not be based on 'reasonable grounds'. Suspicion is an ordinary English word. This dictionary definition is consistent with the previous judicial interpretations of the concept of suspicion in the related field of criminal procedure. One of the most famous statements is that of Lord Devlin in *Hussien v Chong Fook Kam*:[226]

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."

16. The court in *Da Silva* added held that:

> "the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds".[227]

17. The court stated that using words such as 'inkling' or 'fleeting thought' is liable to mislead. This implies that juries ought to be encouraged to look for some foundation for the defendant's alleged suspicion.

18. For the purposes of voluntary intoxication, offences where the predominant *mens rea* is one of suspicion can for practical purposes be treated as offences of basic intent: see Chapter 9.

Directions

19. It should be made clear to the jury that the prosecution must prove that D had the required knowledge/belief/suspicion at the time of the alleged offence.

20. It will usually be unnecessary to give the jury any direction about the meaning of 'knowledge', 'belief' or 'suspicion', these being ordinary words in common usage.

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[223] [1997] 2 Cr App R 299. A *Hall* direction is not necessary in every case: *Toor* (1987) 85 Cr App R 116.

[224] (1984) 79 Cr App R 72.

[225] [2006] EWCA Crim 1654. See also *Shah v HSBC* [2010] EWCA Civ 31.

[226] [1969] UKPC 26 at p.3.

[227] [2006] EWCA Crim 1654 at para. 16. Applied in *Afolabi* [2009] EWCA Crim 2879.

21. If, however, any elaboration is thought necessary, the jury should be directed to the following effect, as appropriate to the particular case.

    (1) To show that D knew 'X', the prosecution must prove that 'X' was in fact the case, and that D was sure that 'X' was the case.

    (2) To show that D believed 'X', the prosecution must prove that because of the circumstances and/or what he had seen and/or heard, D realised that the only reasonable explanation was that 'X' was the case.

    (3) To show that D suspected 'X', the prosecution must prove that D thought that there was a real possibility that 'X' was the case, even though he could not prove / be sure about it.

22. In a case in which the prosecution contend that D believed or suspected 'X', the prosecution may contend (usually because of the definition of the offence concerned):

    (1) that 'X' was in fact the case; and/or

    (2) that the belief or suspicion was unreasonable.

23. If so, the jury should be directed that the prosecution must prove as much. If not, the jury should be directed, as appropriate, that the prosecution do not have to prove that 'X' was in fact the case and/or that the belief or suspicion was unreasonable.

24. Though the direction to the jury should be kept as simple as possible, it may be necessary in some cases based on knowledge to explain that belief or suspicion are not enough, and in some cases based on belief that suspicion is not enough, by reference to paragraph 21 above.

25. It may also be appropriate to add that if the jury concluded that D closed his eyes to 'X' being the case, and asked no questions to avoid being told that 'X' was the case, they could treat that as evidence that D knew / believed / suspected 'X', if they thought it right to do so.

26. In relation to the effect of voluntary intoxication by alcohol/drugs, offences based on 'knowledge' and 'belief' are treated as offences of specific intent, and offences based on 'suspicion' are treated as offences of basic intent: see Chapter 9.

Example: Handling stolen goods

The prosecution must prove that when D received the stolen {specify}, which he admits he did, he knew or believed that it was stolen, and was acting dishonestly.

These two issues go together. If you are sure that D knew or believed that the {specify} was stolen when he received it and that he intended to keep it, you would be bound to conclude that he was acting dishonestly.

The defence have told you that suspicion is not enough and that is true. So it is important to understand the difference between knowledge or belief on the one hand and suspicion on the other. To prove that D knew that {specify} was stolen the prosecution must show that D was sure that it had been stolen. To show that D believed that {specify} was stolen they must show that, because of the circumstances in which D received it, he realised that the only reasonable explanation was that it had been stolen. However, if D merely thought that {specify} might have been stolen that would amount only to suspicion and would not be enough to prove that D knew or believed that {specify} was stolen.

[Here there should be a summary of the circumstances in which D received the stolen goods.]

The prosecution say that it is obvious in these circumstances that D knew or at the very least believed that {specify} was stolen. One of the things that the prosecution rely on is that D said nothing at the time he received it. If you come to the conclusion that D turned a blind eye and asked no questions because he did not need or want to be told the truth, you could treat that as evidence that D did indeed know or believe that {specify} was stolen.

8-6 Dishonesty

ARCHBOLD 21-5; BLACKSTONE'S B4.51

Legal Summary

1. The test of dishonesty established in *Ghosh*[228] applies to any offence requiring proof of dishonesty: those in the Theft Act 1968 (handling, false accounting) and Fraud Act 2006, but also other statutory offences and common law offences such as conspiracy to defraud.

The Ghosh Test

2. A specific direction on dishonesty is not needed in every case. In most cases it is sufficient to direct the jury that the word dishonesty bears its ordinary meaning. The *Ghosh* direction is only needed where D might have believed that what is alleged was in accordance with the ordinary person's idea of honesty.[229]
3. Where a specific direction is required because it is the honesty of D which is in issue, it must be in the form prescribed in *Ghosh:*
   (1) Have the prosecution proved D was acting dishonestly by the ordinary standards of reasonable and honest people?
   (2) If the prosecution have proved D's act was dishonest by those standards, did D realise he was acting dishonestly by the ordinary standards of reasonable and honest people?
   (3) If the prosecution prove the defendant realised he was acting dishonestly by the ordinary standards of reasonable and honest people it is no defence for a defendant to say he was acting honestly by his own standards.
4. Where a specific direction is required, the order of questions posed in *Ghosh* should not be reversed[230] and the words used should be closely followed.[231] Care may also be need to avoid conflating denials of dishonesty and denials of awareness of the civil law. [232]

Theft

5. In cases of theft, s. 2 Theft Act 1968 specifies three situations which are not dishonest. If the defendant's state of mind may have been within one of the situations provided for in s. 2 he is not dishonest. In a case of theft the jury must be reminded of the s. 2 provisions whenever they are raised by the evidence.[233]

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[228] [1982] EWCA Crim 2. Approved by a five member Court of Appeal in *Cornelius* [2012] EWCA Crim 500.

[229] *Roberts* (1985) Cr App R 117; *Price* (1989) 90 Cr App R 409.

[230] *Green* [1992] Crim LR 292.

[231] *Hyam* [1997] Crim LR 439.

[232] *Lightfoot* [1993] 97 Cr App R 24.

[233] *Falconer Atlee* [1973] 58 Cr App R 348; *Wootton and Peake* [1990] Crim LR 201.

Directions

6. It will not usually be necessary to give a direction about or to attempt a definition of “dishonest” or “dishonestly”, beyond referring to it as a requirement of the offence concerned.

7. However it may, depending on the circumstances of the case, be necessary to add that:

   (1) “dishonesty” is a word in common use, and has no special legal meaning; and/or

   (2) the prosecution must prove that D was dishonest at the time of the alleged offence; and/or

   (3) when considering whether the prosecution have proved that D was dishonest, the jury should draw such conclusions as they think right from D's conduct and/or words before and/or at the time of and/or after the alleged offence.

8. In addition if (unusually) D's case is that he did not regard the conduct on which the prosecution rely as being dishonest, the jury should be given a *Ghosh* direction based on the second paragraph of the Example Direction below, and it will usually be helpful to provide the jury with a 'Route to Verdict' based on that direction.

Example

The only issue in this case is whether D was acting dishonestly. He admits that he walked out of the shop with the radio intending not to pay for it and that he intended to keep it. But he says that it was only a cheap radio, he was penniless, and that he was living a miserable life on the streets and needed some source of entertainment. In these circumstances he says that he did not think that it was dishonest to take the radio, and neither, he says, would anyone else. The prosecution say that it was obviously dishonest, that D knew it, and that he is now putting forward a devious argument to avoid being convicted.

You must first decide whether you are sure that D's behaviour was dishonest by the ordinary standards of reasonable and honest people. If you are sure it was, you must then ask whether D must have realised that it was dishonest by those standards. If you are sure about that as well, the prosecution will have proved that D acted dishonestly and your verdict will therefore be ‘Guilty’, whether or not D personally thought his behaviour was dishonest.

But if you are not sure that D's behaviour was dishonest by those standards, or not sure that D realised that it was, the prosecution will not have proved that D acted dishonestly, and your verdict will therefore be ‘Not Guilty’.

Route to Verdict

Question 1

Are we sure that D's conduct in taking the radio from the shop without intending to pay for it was dishonest by the ordinary standards of reasonable and honest people?

- If **yes**, go to question 2.
- If **no**, return a verdict of 'Not Guilty'.

Question 2

Are we sure that D realised that his conduct was dishonest by those standards?

- If **yes**, return a verdict of 'Guilty'.
- If no, return a verdict of 'Not Guilty'.

8-7 Mistake

ARCHBOLD 17-10 and 17-22; BLACKSTONE'S A2.35, A3.2 and A3.60

Legal Summary

Mistake of criminal law

1. Ignorance or mistake of law is no defence to a criminal charge;[234] *mens rea* does not involve knowledge on the part of D that his behaviour was against the criminal law.[235]

Mistake of civil law

2. Where the *mens rea* of an offence turns on proof of an element of civil law, D's mistake of civil law will excuse him whether or not his mistake was a reasonable one. For example, where D is charged with criminal damage it must be proved that the damaged property "belonged to another". If D has made, or may have made, a mistake in thinking the property is his own, he is not guilty of that offence because he has not intended or been reckless as to damaging property belonging to another. [236]

Mistake of fact

3. Where D has made a mistake of fact this provides an excuse in all crimes of *mens re*a where it prevents D from possessing the relevant fault element which the law requires for the crime with which he is charged. [237]It is not a question of defence, but of denial of *mens re*a.

4. In crimes where the *mens re*a element is subjective (intention, recklessness, malice, wilfulness, knowledge and belief) the mistake need not be a reasonable one, but reasonableness of D's conduct will be important in evidential terms. The jury may infer from D's conduct and the unreasonable nature of the mistake in the particular circumstances that D had the relevant *mens re*a; but the onus of proof remains throughout on the Crown and, technically, D does not bear even an evidential burden.

5. The same approach applies where D makes a mistake about an element of a defence that calls for him to have a genuine (though not necessarily reasonable) belief in certain facts. For example, in self defence, D must believe that there is a need for the use of force. D will not be denied the defence of self defence if he made, or may have made, a sober mistake as to the need for the use of force,

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[234] *R v Esop* (1836) 7 C & P 456.

[235] Statutory Instruments Act 1946, s.3(2) provides a defence for D charged with an offence created by Statutory Instrument to prove that, at the time of the offence, the instrument had not been published nor reasonable steps taken to bring its contents to the notice of the public or D.

[236] *Smith* [1974] QB 354.

[237] *B v DPP* [2000] UKHL 9; *K* [2001] UKHL 41; *G* [2003] UKHL 50.

even if his mistake was unreasonable.[238] In such a case D would not intend to use unlawful force; see Self defence Chapter 18-1.

6. In crimes of negligence D's mistake of fact will only excuse if the mistake is a reasonable one. Similarly, where a defence requires D to hold a reasonable belief in a fact,[239] only if the mistake was a reasonable one to make in the circumstances will the defence still be available to D.

7. Mistake of fact, however reasonable, does not afford a defence to crimes of strict liability.

Directions

8. Where D claims to have been ignorant of or mistaken about the criminal law, the jury should be directed that this provides D with no defence.

9. Where D claims to have made a mistake about the civil law which would affect his criminal liability, the jury should be directed as follows:

   (1) If the jury find that D really did make the mistake concerned, or may really have done so, their verdict should be 'Not Guilty'.

   (2) This is so whether the jury regard the mistake as a reasonable or unreasonable one to have made in the circumstances of the case.

   (3) Nevertheless, when deciding whether D really did make or may have made the mistake he claims, the jury may, if they find it helpful, consider D's conduct, and whether or not the mistake was reasonable. They could take the view, if they thought it right, that the less reasonable the mistake D claims to have made, the less likely it is that D really made it.

   (4) If the jury were sure that D did not make the mistake at all, it could not provide him with a defence.

10. Where D claims to have made a mistake of fact which would affect his criminal liability whether it was reasonable or not, the jury should be directed as indicated in paragraph 9 above.

11. Where D claims to have made a mistake which would affect his criminal liability only if it was reasonable, the jury should be directed as follows:

   (1) If the jury find that D really did make the mistake concerned, or may really have done so, and consider that it was a reasonable one to have made in the circumstances of the case, their verdict should be 'Not Guilty'.

   (2) If the jury find that D really did make the mistake concerned, or may really have done so, but consider that it was not a reasonable one to have made in the circumstances of the case, it would not provide D with a defence.

   (3) [If the point arises:] A mistake resulting entirely from D's voluntary intoxication by alcohol and/or drugs cannot be regarded as reasonable.

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[238] *Williams* [1987] 3 All ER 441; *Beckford* [1987] UKPC 1.

[239] E.g. duress where D must genuinely and reasonably believe there is a threat of death or serious injury: *Hasan* [2005] UKHL 22.

(4) If the jury are sure that D did not really make the mistake at all, it could not provide D with a defence.

Example: Mistake of fact - burglary

It is alleged that D entered {address} as a trespasser, intending to steal something from inside the house. D says that he was drunk and that he was not trespassing because he mistakenly thought that the house was his mother's, with whom he was going to stay the night.

The prosecution must first prove that D was a trespasser. To do this they must make you sure either that D did not make the mistake he claims or that, although he may have made the mistake, he would not have done so if had he been sober. In other words the prosecution must prove that D knew the house was not his mother's or that he would have known this if he had been sober.

If you decide that D made or may have made the mistake he claims and that he would or may have made the same mistake if sober, the prosecution will not have proved that he was a trespasser and your verdict will therefore be 'Not Guilty'. If however you are sure that he did not make this mistake, or although he may have made it he would not have done so if sober, the prosecution will have proved that he was a trespasser, and you must then consider a second question.

This question is whether you are sure that D intended to steal something from inside the house. Here it is D's actual intention that counts, whether he was drunk or not. However, you should bear in mind that a person affected by alcohol may still able to form an intention, and it is no defence for him to say that he would not have formed that intention had he been sober.

If you are sure that D did intend to steal something from inside the house, your verdict will be 'Guilty'. If you are not sure, your verdict will be 'Guilty'.

See also Example 3 in Chapter 18-1 (relating to mistaken belief in self-defence cases when voluntarily intoxicated).

9. INTOXICATION

ARCHBOLD 17-102, 104 and 105; BLACKSTONE'S A3.15 and 60

Legal Summary

1. The effect of a defendant's intoxicated state on his criminal liability turns upon whether it was self-induced, the type of offence charged and the level of intoxication. The same principles apply whether the alleged intoxication is induced through alcohol or through drugs.[240]

Voluntary Intoxication

2. Cases of voluntary intoxication include those where the defendant has taken drink or drugs or any other intoxicating substance although he was unaware of its strength.[241]

3. Voluntary intoxication may be relevant to particular defences: for example see Chapter 18-1 Self-defence; Chapter 18-3 Duress. Particular statutory defences may make special provision. See e.g. Criminal Damage Act 1971, s. 5(2).[242] Note in particular that an honest belief in the need to act in self-defence which results from an intoxicated mistake may not be relied upon. [243]

4. If the level of voluntary intoxication is such that D did not know the nature of his act or that he was doing wrong that is not a plea of insanity.[244] If the voluntary intoxication has resulted in a disease of the mind and the defendant claims that the disease caused him to lack awareness of the nature and quality or wrongfulness of the act, the plea is one of insanity[245]: see Chapter 18-5 M'Naghten insanity including insane automatism.

5. Specific intent offence:

   (1) An offence is one of specific intent if the predominant *mens rea* is one of intention (e.g. murder).[246] If the offence charged is one of specific intent the Crown must prove that the defendant had the relevant *mens rea* for the offence despite his being intoxicated.[247] His intoxication can provide evidence that he did not form the *mens rea.* The quantity of intoxicant taken is just one of the circumstances to be considered.

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[240] *Lipman* [1970] 1 QB 152.

[241] *Allen* [1988] Crim LR 698.

[242] *Jaggard v Dickinson* [1981] QB 527. Cf *Magee v. Crown Prosecution Service*, 179 J.P. 261, D.C.

[243] see the Criminal Justice and Immigration Act 2008 s 76(4), (5).

[244] *Coley* [2013] EWCA Crim 223.

[245] *Coley* [2013] EWCA Crim 223.

[246] *Heard* [2007] EWCA Crim 125 suggesting that the test is whether the mens rea goes to some ulterior matter beyond the actus reus (eg on this view reckless criminal damage being reckless whether life is endangered is specific intent).

[247] *Majewski* [1976] UKHL 2.

(2) If the defendant did form the *mens rea*, his intoxication provides no excuse: an intention formed in drink or under the influence of drugs remains an intention. If the *mens rea* was formed, it is no excuse for the defendant to say that he would not have formed it but for the intoxication. In *Sheehan and Moore*, Lane LJ stated:

> "in cases where drunkenness and its possible effect on the defendant's *mens rea* is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent."
>
> Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

(3) If the defendant has voluntarily intoxicated himself in order to commit/or in anticipation of committing a crime ("Dutch Courage" intoxication) that intoxication does not provide an excuse even though, because of the voluntary intoxication, at the time of committing the offence the defendant did not form the *mens rea.*[248]

6. Basic intent offence:

(1) A basic intent offence encompasses, *inter alia*, crimes of recklessness, malice, wilfulness, suspicion, negligence and strict liability.

(2) Intoxication by dangerous drug: Where the offence charged is a basic intent offence, the defendant's claim of lack of *mens rea* on the basis of his voluntary intoxication will not afford a defence.[249] The jury should be told to ignore the evidence of the voluntary intoxication and ask whether the defendant would have had the relevant *mens rea* if sober.[250]

(3) Intoxication by non-dangerous drug: When the voluntary intoxication arises as a result of the defendant taking an intoxicating substance that is not commonly known to create states of unpredictability or aggression (e.g. valium), the jury need to be sure that the defendant was, in taking that drug, subjectively reckless as to becoming aggressive or unpredictable in his behaviour.[251] If they are sure of that recklessness having regard to all the circumstances including the drug and its quantity and the defendant's knowledge and experience of it, then the state of the defendant's intoxication at the time of the offence can provide no defence.

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[248] *Attorney General for Northern Ireland v Gallagher* [1961] UKHL 2.

[249] *Majewski* [1976] UKHL 2.

[250] *Richardson* [1999] 1 Cr App R 392.

[251] *Hardie* [1984] EWCA Crim 2.

Involuntary intoxication

7. Where the intoxication is involuntary (e.g. spiked drinks, unforeseen adverse reactions to bona fide medical prescription drugs) the defendant is entitled to be acquitted unless the Crown prove that he had the relevant *mens rea* for the offence despite being intoxicated. If it is proved that the necessary *mens rea* was present when the necessary conduct was performed by him, a defendant does not have open to him a "defence" of involuntary intoxication: *Kingston.*[252] A defendant is not involuntarily intoxicated where he has taken a substance commonly known to create states of unpredictability but he was unaware of its strength.[253]

8. The jury should be directed to consider whether they are sure the defendant did not form the *mens rea* for the offence. Intention or recklessness formed in drink or under the influence of drugs, even if imbibed involuntarily, remains intention or recklessness. The question for the jury is whether the defendant did form the *mens rea*, not whether he was capable of doing so.[254] In a case under the Public Order Act 1986, section 6 requires D to "show" that his intoxication was not voluntary.

Directions

9. A direction about the effect of intoxication by alcohol and/or drugs on D's state of mind will be necessary only if:

   (1) D claims not to have formed the required state of mind (*mens rea*) because he was intoxicated by such substances; and

   (2) there is evidence that he may have consumed such substances in such a quantity that he may not have formed that state of mind.

10. The need for and form of any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

11. In relation to an offence of specific intent where D was voluntarily intoxicated by alcohol and/or drugs, the jury should normally be directed as follows:

   (1) It is possible for a person to be so intoxicated by alcohol/drugs that he is not able to form an intention.

   (2) However, a person intoxicated by alcohol/drugs may nevertheless still be perfectly capable of forming an intention; and if he does so, it is no defence for him to say that he would not have formed a particular intention or acted in a particular way had he not been affected by alcohol/drugs.

   (3) The jury should therefore consider whether, despite being intoxicated, D had formed the required intention at the time of the alleged offence.

   (4) If they were sure that he had, his intoxication would not provide him with any defence.

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[252] *Kingston* [1994] UKHL 9.

[253] *Allen* [1988] Crim LR 698.

[254] *Sheehan, Moore* [1975] 1 WLR 739.

(5) If they were not sure, D would be not guilty.

(6) See also paragraphs 15 and 17 below.

12. In relation to an offence of basic intent where recklessness is sufficient and D was voluntarily intoxicated by alcohol and/or a dangerous drug, the jury should normally be directed as follows:

(1) They should consider whether they are sure that D would have had the required state of mind had he not been intoxicated i.e. he would have recognised the risk had he been sober.

(2) If they are sure of this, his intoxication would not provide him with any defence.

(3) If they are not sure, he will be not guilty.

(4) See also paragraphs 15 and 17 below.

13. In relation to an offence of basic intent where D was voluntarily intoxicated by a non-dangerous drug, (i.e. one which does not usually lead to unpredictable or aggressive behaviour, such as Valium or insulin, but is said to have done so in D's case), the jury should normally be directed as follows:

(1) They should consider whether, when he took the drug, D was aware of the risk that it might lead to such behaviour in his case, but went on to take the risk when it was unreasonable to do so in the circumstances known to him.

(2) If they were sure of this, his intoxication would not provide him with any defence.

(3) If they were not sure, D would be not guilty.

(4) See also paragraphs 15 and 17 below.

14. In relation to any offence (other than one of strict liability) where D claims to have been intoxicated involuntarily (e.g. because his drink had been spiked) the jury should normally be directed as follows:

(1) They must first decide whether or not D's claim is true.

(2) If they were sure it was untrue, they should obviously disregard it.

(3) If they thought that it was or might be true, they should consider whether, despite being involuntarily intoxicated, D had formed the required state of mind at the time of the alleged offence.

(4) If they were sure of this, his intoxication would not provide him with any defence, even though it was involuntary.

(5) If they were not sure, D would be not guilty.

(6) See also paragraphs 15 and 17 below.

15. If D claims not to remember what happened because of the alcohol/drugs he had taken, the jury should be directed as follows:

(1) They must first decide whether or not D's claim is true.

(2) If they were sure that it was untrue, they should obviously disregard it.

(3) If they thought that it was or might be true, they should take it into account when deciding whether the prosecution have proved that D had the required

state of mind. They should bear in mind, however, that D might have had the required state of mind at the time of the alleged offence even if he did lose or may have lost his memory at some later stage.

16. The jury should also be directed that when they are considering all these matters they should take into account (as relevant in the particular case) any evidence about the quantity of alcohol and/or the nature and quantity of the drugs that D had taken; when D had done so; the circumstances in which D had done so; D's knowledge and/or experience of alcohol and/or the drug concerned; any expert evidence; and any relevant evidence of D's condition, and/or of what D did and/or said, before and/or at the time of and/or /after the alleged offence.

17. The directions suggested above will need to be adapted if D took alcohol/drugs to give himself 'Dutch courage' to commit an offence, because in such a case the prosecution must prove that D had the required state of mind when he started drinking/taking the drugs rather than when the offence was committed.

Example: Wounding with intent and unlawful wounding

In relation to Count 1 (section 18) D's defence is that he did not intend to cause V grievous bodily harm, which means really serious injury, and that because D had drunk about ten pints of strong lager in the two hours or so before the incident he was so drunk that he was not capable of forming that intention.

It is possible for a person to be so drunk that he is not able to form a particular intention. However, a person who is drunk may still be able to form an intention; and, if he does so, it is no defence to say that he would not have formed that intention if he had been sober.

If you think that D was or may have been so drunk that he did not form an intention to cause V really serious injury, you must find him not guilty of Count 1 and go on to consider the alternative Count 2 (section 20). But if you are sure that, despite being affected by alcohol, D did intend to cause V really serious injury you will find him guilty of Count 1 and in that event you will not consider, or return a verdict on, Count 2.

When you are considering how drunk D was and whether he intended to cause really serious injury, you should look at all of the evidence on this point.

[Here summarise the relevant evidence.]

If you need to consider Count 2, the amount that D had had to drink is irrelevant. The question on Count 2 is whether you are sure that D either acted “maliciously” in the sense that I have already explained to you [see Chapter 8-3 Example 2] or would have done so if he had been sober. If you are sure that one of these things has been proved, your verdict on Count 2 will be ‘Guilty’. Otherwise it will be ‘Not Guilty’.

10. EVIDENCE – GENERAL

10-1 Circumstantial evidence

ARCHBOLD 10-3; BLACKSTONE'S F1.18

Legal summary

1. Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely or almost entirely on circumstantial evidence and it is in this category that most controversy is generated and specific directions will be required.
2. A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence: circumstantial evidence "works by cumulatively, in geometrical progression, eliminating other possibilities" (*DPP v Kilbourne*[255] per Lord Simon). The prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence and motive. The subsequent conduct of the defendant may also furnish evidence of guilt, for example evidence of flight, fabrication or suppression of evidence, telling lies or unexplained possession of recently stolen property.
3. At the conclusion of the prosecution case the question for the judge is whether, looked at critically and in the round, the jury could safely convict.[256] The question for the jury is whether the facts as they find them to be drive them to the conclusion, so that they are sure, that the defendant is guilty.[257]
4. Pitchford LJ in Masih[258] says that the correct question is "Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?"
5. It has been held that circumstantial evidence must always be

   > "narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. …It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference": Teper.[259]

   There is no requirement, however, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion.[260]
6. *Teper* and *McGreevy* were considered in *Kelly*[261] in which Pitchford LJ said:

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[255] [1973] AC 729 at p.758.

[256] *P(M)* [2007] EWCA Crim 3216.

[257] *McGreevy v DPP* [1973] 1 WLR 276.

[258] [2015] EWCA Crim 477

[259] [1952] UKPC 15 at p.3per Lord Normand.

[260] *McGreevy v DPP* [1973] 1 WLR 276.

> "39. The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt (seeTeper v R). However, as the House of Lords explained in McGreevy, circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty? It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence."

Directions

7. In a case in which there is both direct and circumstantial evidence, the jury should be directed as follows:

   (1) Some of the evidence on which the prosecution rely is direct evidence. Briefly summarise the direct evidence.

   (2) The prosecution also rely on what is sometimes described as circumstantial evidence. That means different strands of evidence no one of which proves that D is guilty but which, the prosecution say, when taken together and with other evidence prove the case against D. Briefly summarise the circumstantial evidence, and the conclusions which the prosecution say are to be drawn from it.

   (3) See also paragraph 9 below.

8. In a case in which the only evidence is circumstantial, the jury should be directed as follows:

   (1) In some cases there is direct evidence that a defendant is guilty, for example evidence from an eye-witness who saw the defendant committing the crime, or a confession from the defendant that he committed it.

   (2) In other cases however, including this one, there is no direct evidence and the prosecution rely on (what is sometimes referred to as) circumstantial evidence. That means different strands of evidence which do not directly prove that D is guilty but which do, say the prosecution, leave no doubt that D is guilty when they are drawn together.

   (3) Briefly summarise the circumstantial evidence and the conclusions which the prosecution say are to be drawn from it.

   (4) See also paragraph 9 below.

9. In a case involving any circumstantial evidence, the jury should also be directed as follows:

   (1) Briefly summarise any evidence and/or arguments relied on the defence to rebut the circumstantial evidence and/or the conclusions which the prosecution contend are to be drawn from it.

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[261] [2015] EWCA Crim 817.

(2) The jury should therefore examine each of the strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.

(3) However, the jury must not speculate or guess or make theories about matters which in their view are not proved by any evidence.

(4) It is for the jury to decide, having weighed up all the evidence put before them, whether the prosecution have made them sure that D is guilty.

Example

NOTE: although an example is provided judges should bear in mind the words of Pitchford LJ in Kelly[262]:

> "It is not unusual for the trial judge to point out to the jury the difference between proof by direct evidence and proof by circumstances leading to a compelling inference of guilt. However, there is no rule of law that requires the trial judge to give such an explanation or any requirement to use any particular form of words. It depends upon the nature of the case and the evidence."

Where all the prosecution evidence is circumstantial

There is no direct evidence that D committed the crime with which he is charged, such as evidence from an eye-witness who saw him committing it, or evidence that he confessed to committing it.

The prosecution therefore rely on what is sometimes referred to as circumstantial evidence: that is pieces of evidence relating to different circumstances, none of which on their own directly proves that D is guilty but which, say the prosecution, when taken together leave no doubt that D is guilty.

[Summarise the pieces of evidence on which the prosecution rely and the conclusions they say should be drawn from them.]

The defence say that you should not accept [some of] these pieces of evidence.

[Identify the pieces of evidence concerned, and summarise the defence arguments about them.]

The defence also say that the evidence on which the prosecution rely does not in fact prove D's guilt at all. They say that there are too many gaps and too many unanswered questions.

[Summarise the defence arguments about this.]

You must decide which, if any, of these pieces of evidence you think are reliable and which, if any, you do not. You must then decide what conclusions you can fairly and reasonably draw from any pieces of evidence that you do accept, taking these pieces of evidence together. You must not however engage in guess-work or speculation about matters which have not been proved by any evidence. Finally you must weigh up all the evidence and decide whether the prosecution have made you sure that D is guilty.

[262] *Kelly* [2015] EWCA Crim 817

10-2 Corroboration and the special need for caution

ARCHBOLD 4-468; BLACKSTONE'S F5.1

Legal Summary

1. Corroborative evidence is relevant, admissible,[263] and credible[264] evidence independent of the source requiring corroboration,[265] and which has the effect of implicating the accused.
2. Historically there were specific categories of case where, because of the nature of the allegation or the type of witness, a direction was required that the jury should look for corroboration of the evidence in question: evidence of an accomplice, a complainant in the trial of a sexual offence and evidence of a child, but corroboration is now required by statute only in cases of treason,[266] perjury,[267] speeding[268] and attempts to commit such offences.[269]
3. Although corroboration in the strict sense is now no longer required in support of the categories outlined above, circumstances may nevertheless require the judge, as a matter of discretion in summing up, to give a warning to the jury about the need for caution in the absence of supporting evidence.
4. In *Makanjuola*,[270] Lord Taylor CJ gave the following guidance:

> "To summarise:
>
> (1) Section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
>
> (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
>
> (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. **This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for**

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[263] *Scarrott* [1978] QB 1016 at p.1021.

[264] *DPP v Kilbourne* [1973] AC 729 at p.746; *DPP v Hester* [1973] AC 296 at p.315.

[265] *Whitehead* [1929] 1 KB 99.

[266] Treason Act 1795, s.1.

[267] Perjury Act 1911, s.13.

[268] Road Traffic Regulation Act 1984, s.89(2).

[269] Criminal Attempts Act 1981, s.2(2)(g).

[270] [1995] 1 WLR 1348 at p.1351D.

suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

(5) **Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.**

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7) .....

(8) Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense." [emphasis added]

5. The need to consider giving a discretionary warning of the type described in *Makanjuola* arises whenever the need for special caution before acting on the evidence of certain types of witness, if unsupported, is apparent. The following types of witnesses/categories of case are worth consideration:

   (1) Co-defendants: An accused may have a purpose of his own to serve by giving evidence which implicates a co-defendant.[271] In Jones,[272] in which each of the defendants in part placed blame on the other, Auld LJ commended counsel's suggestion that in such cases the jury should be directed:

   (a) to consider the cases of each defendant separately;

   (b) the evidence of each defendant was relevant to the case of the other;

   (c) when considering the co-defendant's evidence, the jury should bear in mind that the interest may have an interest to serve; and

   (d) the evidence of a co-defendant should otherwise be assessed in the same way as the evidence of any other witness.

   (2) Witnesses tainted by improper motive.[273]

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[271] *Cheema* [1994] 1 WLR 147; *Muncaster* [1998] EWCA Crim 296; *Jones* [2003] EWCA Crim 1966.

[272] *Jones* [2003] EWCA Crim 1966 at para.47.

[273] *Beck* [1982] 1 WLR 461 at p.467E (defence making allegations of impropriety against witnesses for the prosecution); *Chan Wai-Keung* [1995] 1 WLR 251 (prisoner awaiting sentence giving evidence in unrelated case); *Ashgar* [1995] 1 Cr App R 223 (defence allegation that prosecution witnesses were protecting one of their number); *Pringle* [2003] UKPC 9 and *Benedetto* [2003] UKPC 27 (cell confession); *Spencer* [1987] UKHL 2 (patients in a secure hospital).

(3) Witnesses of bad character.[274]

(4) Evidence from a witness received after section 73 SOCPA 2005 agreement[275]

(5) Children: Whether to give a direction will depend on the circumstances of the case, including the intelligence of the child and, in the case of unsworn evidence, the extent to which the child understands the duty of speaking the truth. In R v MH,[276] a case involving a three year old complainant, the Court of Appeal rejected the suggestion that the judge should have directed the jury that children may imagine, fantasise or misunderstand a situation, may easily be coached, may say what they think their mother wants to hear, or may merely repeat by rote that which has been said on a previous occasion; and that the judge should have warned the jury not to be beguiled by the attractiveness of the child and to bear in mind his extreme youth. It would have been wrong for the judge to engage in such generalisations remote from the facts of the case.

(6) Unexplained infant deaths: Such cases may give rise to serious and respectable disagreement between experts as to the conclusions which can be drawn from post mortem findings. Supporting evidence independent of expert opinion may be required.[277]

(7) Inherently unreliable witnesses: for example if it has become clear that a witness has made a false complaint, otherwise lied or given substantially different accounts in the past.

6. Whether a warning is given and the terms of any warning given are matters of judicial discretion.[278] In *Stone*[279] the Court of Appeal reiterated the need to examine the particular circumstances of the case before reaching a judgment as to the terms in which the requirement for caution should be expressed.[280] A possible starting point, drawing on *Turnbull*[281] [see Chapter 15-1] is to warn the jury of the special need for caution before acting on the disputed evidence, and to explain the reason why such caution is required. Where the jury is advised to look for supporting evidence, the judge should identify the evidence which is

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[274] *Spencer* [1987] UKHL 2; *Cairns, Zaidi and Chaudhary* [2002] EWCA Crim 2838.

[275] *Daniels and Others* [2010] EWCA Crim 2740.

[276] [2012] EWCA Crim 2725 at para.50 to 51 per Pitchford LJ.

[277] *Cannings* [2004] EWCA Crim 1; *Kai-Whitewind* [2005] EWCA Crim 1092 (evidence supporting the experts' opinion as to cause of death was found in post mortem results) and *Hookway* [2011] EWCA Crim 1989 (dispute between experts not whether there was DNA evidence incriminating the appellants but as to the strength of that evidence).

[278] *Laing v The Queen* [2013] UKPC 14 at para.8 citing Lord Taylor CJ in *Makanjuola* [1995] 1 WLR 1348 at p.1351.

[279] [2005] EWCA Crim 105.

[280] The content of the warning is a matter for the judge's discretion in the light of the evidence, the issues and the nature of the particular taint on the evidence of the impugned witness: *Muncaster* [1998] EWCA Crim 296; *L* [1999] Crim LR 489.

[281] [1977] QB 224.

capable of supporting that of the witness;[282] if there is none, the jury should be directed to that effect.

Directions

7. In some cases, for example those listed in paragraph 5 above, it may be appropriate for the judge to direct the jury to approach the evidence of a particular witness with caution. The need for and terms of any such direction should be discussed with the advocates in the absence of the jury before closing speeches.

8. It is usually a matter for the judge's discretion whether to give any direction, and if so in what terms. However, if one defendant or suspect in relation to an offence gives evidence against another a cautionary direction will almost always be necessary, as to which see also the final bullet point below.

9. Any such direction is best given as part of the review of the evidence rather than as a set-piece legal direction during the first part of the summing up.

10. The strength and terms of any such direction will depend on the circumstances of the individual case. No set formula is available. The following is offered only by way of general guidance, and is not intended to cover every situation that might arise:

    (1) The witness concerned ('W') should be identified and the reason(s) for the need for caution should be explained.

    (2) Sometimes it will be sufficient simply to direct the jury to approach the evidence of W with caution. If so, the jury should also be directed that they may nevertheless rely on that evidence if, having taken into account the need for caution, they are sure that W is telling the truth.

    (3) Where there is no independent supportive evidence, it may be appropriate to remind the jury of that fact, and possibly to suggest that the jury may have wished for such evidence. In that event the jury should also be directed that they may nevertheless rely on the evidence of W if, having taken into account the need for caution and the absence of any independent supportive evidence, they are sure that W is telling the truth.

    (4) In cases where there *is* potentially independent supportive evidence, that evidence must be identified, adding that it is for the jury to decide whether they accept that evidence and if so whether they regard it as supportive. If they conclude that there is independent supportive evidence they may take this into account when assessing W's evidence, but it does not mean that W is bound to be telling the truth. On the other hand, even if the jury conclude that there is no independent supportive evidence, they may still rely on the evidence of W if, having taken into account the need for caution and the absence of any independent supportive evidence they are sure that W is telling the truth.

    (5) Where co-defendants give evidence against each other, the need for caution needs to be conveyed without unnecessarily diminishing the

[282] *B (MT)* [2000] Crim LR 181.

evidence of either defendant. This can usually be achieved by incorporating directions that the jury should consider the case of each defendant separately; should examine that part of each defendant's evidence which implicates the other with caution, since each may have his / her own purpose to serve; but otherwise should assess each defendant's evidence in the same way as that of any other witness. This approach can be adapted to cover a case in which one co-defendant gives evidence against another, but not *vice versa*.

Example 1: co-defendant[283]

When considering the evidence of D1 and D2 you should bear these points in mind:

1. First, as I have already explained to you, you must consider the case against and for each D separately.
2. Secondly, you should decide the case in relation to each D on **all** of the evidence, which includes the evidence given by each of the Ds.
3. Thirdly, you should assess the evidence given by each of the Ds in the same way as you assess the evidence of any other witness in the case.
4. Finally, when the evidence of one D bears upon the case of the other, you should have in mind that the D whose evidence you are considering may have an interest of his own to serve and may have tailored his evidence accordingly. Whether either D has in fact done this is entirely for you to decide.

Example 2: co-defendant who has pleaded guilty and has, by written agreement, assisted the prosecutor by giving evidence[284]

When considering the evidence of W you should bear in mind that he has already pleaded guilty to the offence with which D is charged and gave evidence which implicated D after formally agreeing to help the prosecution by doing so. He did this hoping to get a lesser sentence.

Because this is the situation you should approach W's evidence with caution, knowing that he has an obvious incentive to give evidence which implicates D. You should ask yourselves whether W has, or may have, tailored his evidence to implicate D falsely or whether you can be sure, despite the potential benefit to W of giving evidence against D, that he has told you the truth. If you are sure that he has told the truth, you may rely on his evidence.

[283] This example is based on *Jones and Jenkins* [2003] EWCA Crim 1966.

[284] Serious Organised Crime and Police Act 2005, s.73.

10-3 Expert evidence

ARCHBOLD 10.35; BLACKSTONE'S F10.1; CrimPR 19; CrimPD 19

Legal Summary

1. In considering the admissibility of expert opinion evidence a judge should have regard to the factors listed in CPD 19.
2. Expert evidence is admitted only on matters that lie beyond the common experience and understanding of the jury: *Turner*[285]. The purpose of the expert's opinion evidence is to provide the jury with evidence of findings and the conclusions that may be drawn from those findings. Particular care is needed to avoid expert opinion as to the credibility, reliability or truthfulness of a witness or confession: *Pora* v *The Queen.*[286] Lord Kerr explained

   > "It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case."

   See also *H* [287]
3. The expert must be duly qualified and should only provide evidence on matters within his or her expertise: *Atkins*[288] at [27]; *Clarke.*[289]
4. Unlike lay witnesses, experts may give evidence of opinion. Where the expert has given evidence of opinion, the jury remains the ultimate arbiter of the matters about which the expert has testified. The jury are not bound to accept the expert's opinion if there is a proper basis for rejecting it. But "where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence, juries may not do so": see *Brennan.*[290] The jury must be warned not to substitute their own opinions for those of the experts e.g. by undertaking their own examination of handwriting or a fingerprint. A jury is entitled to rely on an expert opinion which falls short of scientific certainty: *Gian.*[291]
5. If an expert expresses his conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain that these terms are no more than labels which the

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[285] [1981] QB 834.

[286] [2015] UKPC 9.

[287] [2014] EWCA Crim 1555.

[288] [2010] 1 Cr App R 117.

[289] [1995] 2 Cr App R 425.

[290] [2014] EWCA Crim 2387.

[291] [2009] EWCA Crim 2553.

witness has applied to his opinion of the significance of his findings and that because such opinion is entirely subjective different experts may not attach the same label to the same degree of comparability: *Atkins*.[292]

6. The fact that a prosecution expert cannot rule out, as a matter of science, a proposition consistent with D being not guilty does not mean that the case should be withdrawn: *R. v. Vaid.*[293]

7. In deciding what weight, if any, to attach to the expert's evidence the jury may take into account his or her qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

8. Sciences and techniques in their infancy need to be approached with caution but that does not necessarily mean the expert opinion based on such techniques should not be adduced: *R. v. Ferdinand and others.*[294]

9. If the expert testifies as to primary facts (e.g. that there was no blood on D's boots) the jury cannot reject that and form their own opinion on the matter. *Anderson.*[295]

10. If the expert is someone involved in the investigation of the offence, the jury will need to be aware of that when considering the weight to give to his or her evidence: *Gokal.*[296]

11. In an extreme case where the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between reputable experts it may be unwise to leave the case to the jury: *Cannings*;[297] cf. *Hookway.*[298] The content of a summing-up in such cases will require considerable care: see *Henderson* for guidance.[299]

Directions

12. There is no invariable rule as to <u>when</u> a direction on expert evidence should be given. It is often best included in the legal directions at the beginning of the summing up; but if, for example, there has been evidence from only one expert, or the expert evidence taken together is brief, it may be preferable to give the direction immediately before the expert evidence is summarised.

13. The direction should be as follows:

    (1) Begin by identifying the expert witness/es and, shortly, the issue/s on which they have given evidence.

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[292] [2010] 1 Cr App R 117.

[293] [2015] Crim.L.R. 532

[294] [2014] 2 Cr.App.R. 331(23), C.A.

[295] [1971] UKPC 25.

[296] *[1999] 6 Archbold News 2.*

[297] [2004] [2004] EWCA Crim 1.

[298] [2011] EWCA Crim 1989.

[299] [2010] 2 Cr App R 185.

(2) In every case, the jury should then be directed as follows:

(a) Expert witnesses regularly give evidence and opinions in criminal trials to assist juries on matters of a specialist kind which are not of common knowledge.

(b) However, as with any other witness, it is the jury's task to weigh up the evidence of the expert(s), which includes any evidence of opinion, and to decide which they accept and which they do not. The jury should take into account [as appropriate] the qualifications/practical experience/methodology/source material/quality of analysis/objectivity of the experts, and the impression they made when giving evidence.

(c) The jury's verdicts must be based on the evidence as a whole, of which the expert evidence and opinion forms only a part.

(3) In addition, it may be necessary to incorporate one or more of the following directions:

(a) The jury are not themselves experts on the matters about which the expert(s) have given evidence, and should not therefore carry out any tests, comparisons or experiments of their own, or try to reach conclusions of their own which disregard the expert evidence: see **Notes 1** and **2** below.

(b) The jury do not have to accept the expert evidence even though it is uncontested: see **Note 3** below.

(c) In a case where an expert expresses an opinion in relative terms, a direction in accordance with *Atkins,* referred to in the Legal Summary in Part I.

Notes

1. Such a direction will be necessary if, without it, there is a realistic danger that the jury will go their own way - e.g. in cases involving hand-writing or finger-print comparison.
2. If a non-expert witness gives an opinion on a subject (e.g. hand-writing comparison) which is properly the subject of expert opinion, but no such expert evidence has been called, the jury should be directed to disregard the non-expert evidence. This happens infrequently. In any event a distinction is to be drawn between this situation and one in which a non-expert witness who is able to recognise a person’s handwriting purports to identify it. This is not expert, but factual, evidence.
3. Such a direction will not always be appropriate. It will not be if, for example, expert evidence is read to the jury because it is agreed by all parties; or if there is un-contradicted expert evidence on which the defence rely. It will be appropriate if, for example, a prosecution expert witness has been challenged in cross-examination, but no defence expert has been called. Before giving any direction about expert evidence discuss it with the advocates in the absence of the jury before closing speeches.

Example: handwriting expert

There is no doubt that the signature on the cheque has been forged, but D says that he did not write it. On that issue you heard evidence from two hand-writing experts, Mr. Smith for the prosecution and Mr. Jones for the defence. I will summarise their evidence for you later, but in a nutshell Mr. Smith says that D definitely wrote the signature and Mr. Jones says that there are strong indications that D did not write it.

There is nothing unusual about expert witnesses giving evidence in a criminal trial: experts are often called to give evidence and opinions on matters of a specialist kind which are not common knowledge, such as the techniques of comparing hand-writing and what this can reveal.

As you are unlikely to be experts in this field you must not carry out experiments, tests or comparisons of your own, or try to reach any conclusions of your own which do not take account of the evidence of the experts.

Your task is to weigh up the evidence and opinions which the two expert witnesses gave you and decide which parts you accept and which you do not, just as you do with every other witness. When doing this, take account of what you have heard about the experts' qualifications and experience and the impression they made on you as they gave their evidence.

Finally, bear in mind that the expert evidence forms only part of the evidence and you must reach your verdict(s) by considering all of the evidence in the case.

10-4 Delay

ARCHBOLD 4-465; BLACKSTONE'S D3.73

Legal Summary

1. A defendant has the right to a fair trial within a reasonable time. In exceptional cases delay will lead to a stay of proceedings as an abuse of process.[300] That involves a separate question from whether (applying the principles in *Galbraith*[301] there is a case to answer.
2. A prolonged delay between the commission of the alleged offence and the complaint leading to trial is capable of leading to forensic disadvantages.
3. In cases in which there has been a significant delay, the jury need to be directed on the relevance of that delay[302] including the impact on the preparation and conduct of the defence and the relationship with the burden of proof. Such a direction is only required where the potential difficulty arising from delay is significant and becomes apparent in the course of the trial or where it is necessary to be even handed between the accused and complainant. Whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case.[303]
4. Particular care will be needed in sexual cases where the issue of delay may be perceived as having an effect on the credibility of a complainant[304]: see Chapter 20-1 and 20-2.
5. Note in particular *PS*:[305]

> "37 Although viewed globally the judge's direction contained all of the essential elements he needed to include when directing the jury on this issue (set out at paragraph 35 above), we do not consider it was necessarily structured in the most appropriate way, given the circumstances of this case. As with the direction on the burden and standard of proof, the direction regarding delay – **as it affects the defendant** – is designed to ensure his criminal trial is fair. The courts have decided that even very considerable delays in bringing prosecutions can, save exceptionally, be managed in the trial process. But this is often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the defendant rather than amalgamating it with other aspects of the relevance of delay, for

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[300] *A-G's Reference (No 1 of 1990)* [1992] QB 630 at pp.643–4; *A-G's Ref (No. 2 of 2001)* [2003] UKHL 68; *Burns v HM Advocate (A-G for Scotland intervening)* [2008] UKPC 63. *F(S) [2011] EWCA Crim 1844.*

[301] [1981] 1 WLR 1039.

[302] The principles were reviewed in *H (Henry* [1998] 2 Cr App R 161, at pp.164-168, per Potter LJ. Reviewed in *PS* [2013] EWCA Crim 992. Also *E* [2009] EWCA Crim 1370; *E(T)* [2004] EWCA Crim 1441.

[303] *M (Brian)* [2000] 1 Cr App R 49; *PS* [2013] EWCA Crim 992 at para.25.

[304] *Doody* [2008] EWCA Crim 2557.

[305] [2013] EWCA Crim 992.

instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principle means of protecting the defendant, is diluted and its force is diminished."

Directions

Delay in Making a Complaint

6. Note that the complaint(s) which led to the criminal proceedings and any earlier complaint(s) are now admissible in evidence. (See CJA 2003, section 120(4), (7) and (8) and Chapter 14-12 below.)

7. Where there has been a substantial delay between the alleged offence(s) and the making of the complaint that led to the current criminal proceedings, the jury should be directed as follows:

   (1) The jury should consider the length of and the reasons for the delay in making the complaint and ask whether or not the delay makes the evidence in court of V more difficult to believe.

   (2) In a sexual case: the courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed, confused or even guilty and may not speak out until some time has passed. There is no typical reaction. Every case is different. [See also Chapters 20-1 and 20-2 in relation to sexual cases.]

   (3) The jury should not assume that a late complaint is bound to be false, any more than an immediate complaint would definitely be truthful. The jury should consider the circumstances of the particular case.

   (4) The matters to be considered are (depending on the evidence and issues in the case):

   (a) Any reason(s) given by V for not having complained earlier.

   (b) Any reasons why V may have been put off from speaking out earlier (about which V did not give evidence) such as:

      (i) V felt afraid of D;

      (ii) V was shocked and/or ashamed and/or confused;

      (iii) V blamed himself;

      (iv) V had mixed feelings for D;

      (v) V was worried that no-one would believe him;

      (vi) V was worried about what would happen to him/D/the family if he spoke out.

   (c) Whether or not D is said to have put pressure on V to keep quiet and if so, how

   (d) What triggered the eventual making of the complaint.

(e) The age and degree of maturity and understanding of V at the time/s it is said that the offence/s was/were committed.

(f) The difference in age and the relationship (if any) between V and D.

(g) The physical and/or emotional situation in which V was living at the time.

(h) Whether V had made earlier complaints that did not lead to criminal proceedings and if so when and, briefly, if relevant why they were not proceeded with.

(i) Any reasons for the delay suggested by or on behalf of D.

(5) It is for the jury alone to weigh up all these matters when deciding whether they are sure that V has given truthful and reliable evidence.

Delay: the effect on the trial

8. Where there has been a substantial delay between the alleged offence(s) and the current criminal proceedings, it will probably be necessary to direct the jury as suggested below. However, the length of the delay, the cogency of the evidence and the circumstances of the case may all affect the need for or the content of such a direction, which may well need to be discussed with the advocates in the absence of the jury before closing speeches. Thus what follows should not be regarded as a blue-print.

(1) The passage of time is bound to have affected the memories of the witnesses.

(2) A person describing events long ago will be less able to remember exactly when they happened, the order in which they happened or the details of what happened than they would if the events had occurred more recently.

(3) A person's memory may play tricks, leading him genuinely to believe that something happened (to him) long ago when it did not. This will only arise in the rare case where it is suggested V suffers from Recovered Memory Syndrome, and expert evidence must always be called on this point.

(4) The jury must therefore consider carefully whether the passage of time has made the evidence about the important events given by any of the witnesses concerned less reliable than it might otherwise have been because (depending on the evidence in the particular case) they cannot now remember particular details / they claim to remember events in unlikely detail/their memories appear to have improved with time.

(5) The passage of time may also have put D at a serious disadvantage. For example (again depending on the evidence in the particular case):

(a) D may not now be able to remember details which could have helped his defence.

(b) Because, after all this time, V has not been able to state exactly when and / or where D committed the crimes of which D is accused, D has not been able to put forward defences, such as showing that he could not have been present at particular places at particular times, which he may have been able to put forward but for the delay.

(c) D has not been able to call witnesses who could have helped his defence because they have died / cannot now be traced / cannot now remember what happened.

(d) D has not been able to produce documents which could have helped his defence because they have been lost / destroyed / cannot be traced.

(6) [If appropriate]: The fact/s that

(a) D is of good character and/or

(b) No other similar allegations have been made in the time that has passed since the events alleged

is/are to be taken into account in D's favour.

(7) The jury should take all these matters into account when considering whether the prosecution have been able to prove, so that the jury are sure about it, that D is guilty.

Example

NOTE: Any direction dealing with delay is bound to be fact-specific, as is the example below. In a case involving sexual allegations see also Chapter 20-1 below.

You know that V first complained that D had repeatedly beaten and injured him at the care home about 20 years after V had left the home. You should take this into account in three ways.

First, the defence say that if V had really been beaten, he would have complained much earlier. However, when V was asked about the delay, he said that he was terrified of D while at the home and that, even after he left, it took him a long time to pluck up the courage to go to the police. He did so only when he was appalled to read a newspaper article describing D as a wonderful caring man. Take all this into account when considering whether V's complaints are true. Someone who delays making a complaint is not necessarily lying. Equally, someone who makes a prompt complaint is not necessarily telling the truth.

Secondly, bear in mind that the passage of time is likely to have affected the memory of each of the witnesses about exactly what happened all those years ago. It may even have played tricks on their memories, leading them genuinely to believe that things happened when they did not.

Thirdly, be aware that the passage of time may have put D at a serious disadvantage. He may not able to remember details now that could have helped him, and he has told you that two workers at the care home, who he says would have supported his case, have since died.

[Where D is of good character]: Fourthly, the fact that no similar allegations have been made in the 20 years since the date of the alleged events which you are considering means that D is entitled to ask you to give significant weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

You should take the long delay into account in D's favour each of these ways when you are deciding whether or not the prosecution have proved that D is guilty, so that you are sure of it.

10-5 Evidence of children and vulnerable witnesses

ARCHBOLD 4-117, 118, 161, 19-416 and Supp B-25 and 26; BLACKSTONE'S D.14.1, 14.18 and F4.21

Legal Summary

1. Special Measures and Intermediaries are dealt with in Chapter 3-6 and Chapter 3-7.
2. The approach to receiving the evidence of children has altered dramatically over recent years.
3. The competence of a child to testify is dealt with in s. 53 YJCEA. The Court of Appeal in *Barker* [306] noted that the witness need not understand every single question or give a readily understood answer to every question. Dealing with the matter broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. [307]
4. The approach to cross examination of children and vulnerable witnesses[308] is markedly different from that in relation to adults. Ensuring that advocates adapt the style of cross examination requires effective case management from the outset. The Court of Appeal has repeatedly emphasised that the judge has a clear obligation to control cross-examination of children and vulnerable witnesses.[309] In *Barker*[310] the Lord Chief Justice considered the circumstances in which very small children might give evidence in criminal trials. The Court acknowledged that whilst the right of the defendant to a fair trial must not be undiminished, the trial process must cater for the needs of child witnesses and that the forensic techniques had to be adapted to enable the child to give the best evidence of which he or she is capable.

Case Management

5. The CrimPR[311] and CrimPDs[312] describe the way in which judges should deal with children and vulnerable witnesses: see in particular CrimPR Part 3, CrimPD 1 General matters 3D: *Vulnerable People in the Courts* and CrimPD 1 General matters 3E: *Ground Rules Hearings to Plan the Questioning of a Vulnerable*

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[306] [2010] EWCA Crim 4.

[307] *IA* [2013] EWCA Crim 1308. Noting that advocates need not turn 'every stone' in cross examining a child or vulnerable witness para.73.

[308] *Dixon* [2013] EWCA Crim 465.

[309] *Barker* [2010] EWCA Crim 4. *W and M* [2010] EWCA Crim 1926; *Wills* [2011] EWCA Crim 1938; *E* [2012] EWCA Crim 563.

[310] [2010] EWCA Crim 4.

[311] CrimPR 2015 Parts 1, 3, 18, 23.

[312] CrimPD IA, I 3D, I 3E, I I 3G.

Witness or Defendant. See also the Judicial College's *Young Witness Bench Checklist 2012.*

6. Central to the effective management of a case involving child witnesses will be the 'ground rules hearing' which should, amongst other things, establish the style limits and duration of questioning child witnesses, and seek to guard against protected repetitive cross-examination. In *Lubemba,*[313] at paragraphs 42 – 45, Hallett LJ (VP) summarised some of the key issues that should be addressed.

Witness distress

7. In cases where the witness becomes distressed by questioning from the advocate, it may be necessary for the judge to ask the questions as drafted by the advocate: *R v S*.[314] Where a witness becomes so distressed that it is not possible to complete cross examination that does not necessarily mean that the trial must be stopped.[315] The question will be whether the examination of the witness had been sufficient to allow the jury properly to assess the issues in dispute. Appropriate explanations to the jury will be necessary.

Explanation to the jury

8. In *Wills*[316], the Court of Appeal emphasised, as it has done in other cases, that when restrictions are placed on cross examination, the judge where appropriate and in fairness to the defendant:

> "should explain the limitations to the jury and the reasons for them. It is also important that defendants do not perceive, whatever the true position, that the cross-examination by their advocate was less effective than that of another advocate in eliciting evidence to defend them on allegations such as those raised in the present case.
>
> 38. Secondly, we observe that if there is some lapse by counsel in failing to comply with the limitations on cross-examination, it is important that the judge gives a relevant direction to the jury when that occurs, both for the benefit of the jury and any other defendant. To leave that direction until the summing up will in many cases mean that it is much less effective than a direction given at the time.
>
> 39. Thirdly, this case highlights that, for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished

[313] [2014] EWCA Crim 2064. See also *Jonas* [2015] EWCA Crim 562.

[314] [2014] EWCA Crim 1730.

[315] *Pipe* [2014] EWCA Crim 2570; *Stretton and McCallion* (1988) 86 Cr App R 7; *PM* [2008] EWCA Crim 2787.

[316] *Wills* [2011] EWCA Crim 3028

giving evidence, either by the advocate or by the judge, after the necessary discussion with the advocates. This was, we think, envisaged by what the Lord Chief Justice said in R v B[arker] at [42]."

9. See also *Edwards*[317] where the judge made clear to the jury the difficulty D faced by the limits on cross examination:

> "The jury knew that the defendant disputed the evidence of [V]. The judge clearly explained his decision as to cross-examination technique and why he had taken it. In addition, the jury was specifically directed "to make proper fair allowances for the difficulties faced by the defence in asking questions about this."

The Advocates' Gateway

10. In numerous cases the Court of Appeal has endorsed the report of the Advocacy Training Council of the Bar of England and Wales "Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court". The report contains recommendations in relation to cross-examination and refers to the use of a trial practice note/trial protocol on this aspect at paragraph 15 of part 5 of the report. The Court of Appeal has endorsed and the CrimPD make specific reference to the valuable toolkits published by the Advocates' Training Council on The Advocates' Gateway.[318] http://www.advocacytrainingcouncil.org/vulnerable-witnesses/advocates-gateway

Other materials

11. Other initiatives, with which judges need to be familiar, particularly in cases of sexual offences, include the *DPP Guidelines on Prosecuting Cases of Child Sexual Abuse*,[319] the publication of the 2013 Protocol and Good Practice Model: Disclosure of Information in Cases of Alleged Child Abuse and Linked Criminal and Directions Hearings.[320] Judges should also bear in mind the guidance in the *Equal Treatment Benchbook* 2013 when dealing with vulnerable witnesses.

Procedure:

Ground Rules Hearings

NOTE: This section is included because the Ground Rules Hearing and the orders made at it are so important to, and will inform, the directions to be given to the jury at the outset of the trial, before the child or vulnerable witness gives evidence and in summing up.

12. A Ground Rules Hearing (GRH) should be held in every case where there is a young or vulnerable witness.

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[317] [2011] EWCA Crim 3028.

[318] See CPD 3D.5 - 3D.7; *Wills* [2011] EWCA Crim 3028; *Lubemba* [2014] EWCA Crim 2064 para.40.

[319] CPS *Guidelines on Prosecuting Cases of Child Sexual Abuse* (Crown Prosecution Service October 2013).

[320] CPS Protocol and Good Practice Model.

13. Before the GRH the defence advocate must serve on the court and on the Prosecution a copy of the list of proposed questions to be put to the young or vulnerable witness, together with a copy of the Defence Statement.
14. The GRH must, save in very exceptional circumstances, be held before the day of trial, with the trial advocates and any intermediary in open court (other than in exceptional circumstances). An intermediary is not a witness and should not be sworn.
15. The GRH should address the following topics:
    (1) How the advocates and judge, and any intermediary are going to interact with W/D, and with each other, including how each will be addressed.
    (2) The length of time after which a break/breaks must be taken.
    (3) The "ground rules" for asking questions of W/D.
    (4) Any additional questions to be asked by the prosecution in examination in chief (if appropriate).
    (5) The overall length of cross examination.
    (6) In a multi-handed case, who will conduct the cross examination.
    (7) The language to be used in any questions put to W/D, including the type and length of questions.
    (8) The aids to communication, if any, to be used.
    (9) The questions/topics submitted by the advocates which may be put to W/D.
    (10) What the jury are to be told about the limitations imposed.
    (11) Whether, where W is to give evidence in chief by way of a pre-recorded interview, he should see the recording at the same time as the jury on the day of the trial or (almost always preferably) on the day before he is cross examined, so that W need not come to court until shortly before he is due to be cross examined.

Directions at trial

16. Any special measures, including the use of an intermediary, should be explained: see Chapter 3-6 Special Measures and Chapter 3-7 Intermediaries.
17. Depending on the age of the child or the vulnerability of W, it may help the jury to explain how his level of understanding, regardless of intelligence, may be limited. This may be done before W gives evidence.
18. It may also help the jury and fair to all parties to explain to the jury, before such a witness is cross examined, that the cross examination will not be conducted in the same way as it would have been if the witness had been an adult/non-vulnerable adult: see Example 4 below.
19. Any particular difficulties which have arisen in the course of the case should be addressed in a manner which is fair to both/all parties.
20. Where offences are said to have occurred within the home, the jury should be alerted to the potential difficulties which a child may have perceived in reporting matters: see Example 2 below.

21. Where grooming is alleged to have occurred, the concept of grooming and the potential difficulties of a witness' realisation and/or recollection of innocent attention becoming sexual should be explained: see Chapter 20-3 Grooming of children.

Example 1 - Evidence of a child witness

V is a very young child aged {specify}. It is for you to decide whether he or she is reliable and has told the truth. The fact that a witness is young does not mean that his/her word is any more or less reliable than that of an adult and you should assess V's evidence in the same fair way as you assess any other evidence in the case.

Because this witness is so young you should bear a number of things in mind:

- A child does not have the same experience of life or the same degree of maturity, logic, perception or understanding as an adult. So, when a child is asked questions s/he may find the questions difficult to understand, may not fully understand what it is s/he is being asked to describe and may not have the words accurately or precisely to describe things.
- A child may be tempted to agree with questions asked by an adult, whom the child may well see as being in authority, particularly in a setting such as this. Also, if a child feels that what s/he is asked to describe is bad or naughty in some way, this may itself lead to the child being embarrassed and reluctant to say anything about it or to be afraid that s/he may get into trouble.
- A child may not fully understand the significance of some things that have happened (which may be sexual) at the time they happened and this may be reflected in the way s/he remembers or describes them [If applicable in later life].
- A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time, when trying to describe events, even after a fairly short period, and a child's memory of when and in what order events occurred may not be accurate.
- A child may not be able to explain the context in which events occurred and may have particular difficulty when answering questions about how s/he felt at the time or why s/he did not take a particular course of action

All these things go to a child's level of understanding rather than to his/her credibility and so you should be cautious about judging a child by the same standards as an adult. None of these things mean that this witness is or is not reliable: that is a matter for your judgment.

Example 2: Cases involving a family setting/familiar environment.

V gave evidence about things which s/he said happened at {e.g. his/her home / his/her uncle's home}. You should be cautious about assessing what his/her family life was like by reference to your own experiences. A child relies upon and loves the people with whom s/he lives and will usually accept, without questioning, whatever happens within that home as the norm. As a result, events that others might think out of the ordinary may become routine and so are not particularly memorable. This may affect the way in which the child remembers events when some time later s/he is asked about what happened.

Also, a child may not always appreciate that what is happening to him/her in his/her home is not normal and may only come to realise this as s/he grows older.

So when you are assessing V's evidence you should look at it in the context of his/her home life as it has been described to you.

Example 3: A child's reason for silence

Experience has shown that children may not speak out about something that has happened to them for a number of reasons. A child may

- be confused about what has happened or about whether or not to speak out;
- blame him/herself for what has happened or be afraid that he/she will be blamed for it and punished;
- be afraid of the consequences of speaking about it, either for him/herself and/or for another member of the family (such as {specify});
- may feel that s/he may not be believed;
- may have been told to say nothing and threatened with the consequences of doing so;
- may be embarrassed because s/he did not appreciate at the time that what was happening was wrong, or because s/he enjoyed some of the aspects of the attention they were getting;
- simply blank what happened out and get on with their lives until the point comes when they feel ready or the need to speak out {e.g. for the sake of a younger child who s/he feels may be at risk};
- may feel conflicted: loving the abuser but hating the abuse.

Example 4: Cross examination of a child witness

Because V was so young {name of defence advocate} was not permitted to question and challenge him/her in the same way, or for the same amount of time, as he would have questioned and challenged an older witness. This does not mean however that V's evidence is not disputed. You are aware of the defence case however from {specify e.g. D / other witnesses / the Defence Statement.}.

Example 5: V's evidence has had to be curtailed before cross examination has been concluded

You will remember that although {name of defence advocate} did ask V some questions, a point came when V was so upset that it would not have been right to ask him/her to continue giving evidence. If cross examination had continued, V would have been asked about {specify points which the defence had identified at the GRH}. You do not know how V would have responded to those questions and you must not speculate about this.

NOTE: this direction may need to be amplified in light of any submissions or arguments raised in the defence closing speech about any resulting disadvantage to D.

Example 6: Evidence capable of supporting the evidence of a child witness

You know that W is only six. It is open to you to convict D on the evidence of the child alone, just as if the complainant was an adult, you could convict D on the word of that adult alone.

NOTE: When reviewing the evidence in summing up, the judge should point out any evidence which does, or which does not, support the complainant's evidence in the same way as in the case of an adult complainant. Care must be taken however to avoid any implication that the evidence of a child requires corroboration.

11. GOOD CHARACTER OF A DEFENDANT

ARCHBOLD 4-484; BLACKSTONE'S F13.1; CrimPD 66

Legal Summary

1. For centuries it has been accepted that evidence of the accused's good character is admissible in criminal trials. In the modern era the courts have accepted that good character evidence may admissible (i) to bolster the accused's credibility and (ii) as relevant to the likelihood of guilt. This has been repeatedly accepted by the Court of Appeal, most prominently in *Vye*[321] and by the House of Lords in *Aziz*[322] and by the 5 member Court of Appeal in *Hunter.*[323]
2. The words of Lord Steyn in *Aziz* should always be borne in mind: judges "should never be compelled to give meaningless or absurd directions." No direction should be given if it is "an insult to common sense" or misleading.
3. Whenever a direction is given the judge must adopt an appropriate form of words to convey the significance of the evidence of good character.
4. In *Hunter* the Court states the principles derived from *R v Vye* [324]and *R v. Aziz* [325] by which it remains bound.

   "a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements ['credibility limb'].

   b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements. ['propensity limb']

   c) Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.

   d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with Vye. The judge then has a residual discretion to decline to give a good character direction.

   e) A jury must not be misled.

   f) A judge is not obliged to give absurd or meaningless directions." [68]
5. It is also important to note what *Vye and Aziz* did not decide:

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[321] [1993] 1 WLR 471.

[322] [1996] AC 41.

[323] [2015] EWCA Crim 631.

[324] *and others* [1993] 1 WLR 471; [1993] 3 All ER 241; [1993] 97 Cr.App.R.134

[325] [1996] AC 41.

> "a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;
>
> b) that a defendant with previous convictions is entitled to good character directions;
>
> c) that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged;
>
> d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt.
>
> e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction;" [69]

6. The Court offered guidance as to the approach to be adopted, identifying 5 categories relating to good character: see paragraph 10 below.
7. If defence advocates do not take a point on the character directions at trial and or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. [98]
8. The Court noted, per curiam:

> "as a matter of good practice, if not a rule, defendants should put the court on notice as early as possible that character and character directions are an issue that may need to be resolved. The judge can then decide whether a good character direction would be given and if so the precise terms. This discussion should take place before the evidence is adduced. This has advantages for the court and for the parties: the defence will be better informed before the decision is made whether to adduce the evidence, the Crown can conduct any necessary checks and the judge will have the fullest possible information upon which to rule. The judge should then ensure that the directions given accord precisely with their ruling."[101]

9. Where there are co-Ds whose character may warrant a different direction from that of the accused, two situations arise:
   (1) If D1 merits a good character direction and D2 has a bad character (whether the jury have heard about it or not) it is incumbent on the judge to direct the jury about D1's good character: *Cain*.[326]
   (2) If D1 merits a good character direction and D2 does not qualify for a good character direction (but nor has his bad character been revealed). There is a danger in this situation that a good character direction given in relation to D1 alone will lead the jury to speculate and conclude that D2 is likely to have a bad character. It is nevertheless incumbent on the judge to give the good character direction to D1, although the judge then has discretion as to what to say about D2. In most situations a warning against speculation is appropriate.

[326] [1994] 1 WLR 1449.

Directions

10. All directions on this topic must be crafted in accordance with the law as set out in the case of *Hunter.*[327] Hallett LJ VP gave the judgment of the Court. In paragraphs 76 to 88, from which the italicised passages below are citations, she set out the need or potential need for directions as to good character in the following **five** categories. The *italicised* passages in the paragraphs below are quotations from the judgment in *Hunter*:

    (1) Absolute good character: This category applies where "*a defendant ... has no previous convictions or cautions ... and no other reprehensible conduct alleged, admitted or proven",* whether or not he has adduced evidence of positive good character.

    It is **only** in this category that there is a **requirement** upon the trial Judge to give a full good character direction i.e. one containing both the "credibility limb" (if D has given evidence or made an out of court statement on which he relies) and the "propensity limb" (see paragraph 2(b) below). *"The judge must tailor the terms of the direction to the case before him/her, but in the name of consistency, we commend the Judicial College standard direction in the Crown Court Bench Book*[328] *as a basis".*

    See Examples 1 and 2 below. Example 1 replicates this standard direction verbatim. Example 2 and the subsequent examples use it as a basis.

    (2) Effective good character: Where "*a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character ... It is for the judge to make a judgment, by assessing all the circumstances of the offence/s and the offender, to the extent known, and then deciding what fairness to all dictates... If the judge decides to treat a defendant as a person of effective good character ... s/he must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure that the jury is not misled".* See Example 3 below.

    (3) Previous convictions/cautions adduced under [section 101(1)(b) CJA 2003] by the defence:

    "Defendants frequently adduce previous convictions or cautions ... which are not in the same category as the offence alleged, in the hope of obtaining a good character direction on propensity from the judge."

    A defendant in this position has no entitlement to either limb of the good character direction. The judge has a broad "*open textured"* discretion whether or not to give any good character direction, and if so in what terms. See Example 4 below, in which only the "propensity limb" is referred to.

    (4) Bad character adduced under section 101 relied on by the prosecution

[327] [2015] EWCA Crim 631.

[328] The Crown Court Bench Book: Directing the Jury - March 2010.

"Where a defendant has no previous convictions or cautions, but evidence is admitted and relied on by the Crown of other misconduct, the judge is obliged to give a bad character direction. S/he may consider that as a matter of fairness they should weave into their remarks a modified good character direction ...This too is a broad discretion ... Where the defendant has previous convictions and bad character is relied upon it is difficult to envisage a good character direction that would not offend the absurdity principle."

(5) Bad character adduced by the defence under section 101 and not relied on by the prosecution

"*That leaves the category of defendants who have no previous convictions but who admit reprehensible conduct that is not relied on by the Crown as probative of guilt."* As in categories (3) and (4) above, the judge has a broad "*open textured"* discretion whether or not to give any good character direction, and if so in what terms.

11. A full good character direction is as follows:

(1) Good character is not a defence to the charge.

(2) However, evidence of good character counts in D's favour in two ways:

(a) his good character supports his credibility and so is something which the jury should take into account when deciding whether they believe his evidence (the 'credibility limb'); and

(b) his good character may mean that he is less likely to have committed the offence with which he is charged (the 'propensity limb').

(3) It is for the jury to decide what weight they give to the evidence of good character, taking into account everything they have heard about the defendant.

12. Where D is of good character but has not given evidence, he is entitled to a full good character direction if he has made an out of court statement (usually to the police) on which he relies, and to a good character direction limited to the "propensity limb" if he has not made such a statement.

13. It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from D's not having given evidence: see Chapter 17-5. See Examples 5 and 6 below.

14. Where the prosecution relies on disputed evidence of previous misconduct on the part of a defendant otherwise entitled to a good character direction, the judge should direct the jury that:

(1) if they are sure the evidence is true, they may take it into account as evidence of bad character, adding an appropriate bad character direction (as to which see Chapter 12 below); whereas

(2) if they are not sure the evidence is true, they should disregard it, adding an appropriate good character direction.

See Example 7 below.

15. A good character direction must never mislead the jury or lead to absurdity.

16. The judge should discuss with the advocates, in the absence of the jury and before closing speeches, the need for and form of any good (and bad) character direction to be given.

17. If a defendant who receives a good character direction has a co-defendant about whom there is no evidence of character the Judge should discuss with the advocate for the co-defendant, whether the jury should be directed "not to speculate" about his character (see Example 8 below) or whether, as will commonly be the preferred option, no direction should be given. Practices differ as to whether, if given at all, to give such a direction immediately after the good character direction or at some different point of the summing up. It is suggested that juries will have recognised by this stage of the case that whereas they have evidence about one defendant's good character they know nothing about the character of a co-defendant, and so any direction can properly be given immediately after the good character direction.

Example 1 [category (1) above]: Standard direction – relevance to D's credibility and propensity – good character is a positive feature of D's case – weight is for the jury.

You have heard that the defendant is a man in his middle years with no previous convictions. Good character is not a defence to the charges but it is relevant to your consideration of the case in two ways. First, the defendant has given evidence. His good character is a positive feature of the defendant which you should take into account when considering whether you accept what he told you. Secondly, the fact that the defendant has not offended in the past may make it less likely that he acted as is now alleged against him.

It has been submitted on behalf of the defendant that for the first time in his life he has been accused of a crime of dishonestly. He is not the sort of man who would be likely to cast his good character aside in this way. That is a matter to which you should pay particular attention.

However, what weight should be given to the defendant's good character and the extent to which it assists on the facts of this particular case are for you to decide. In making that assessment you may take account of everything you have heard about him.

Example 2 [category (1) above]: D has no previous convictions/cautions and there is evidence from character witnesses.

You know / it is agreed that the defendant has no convictions or cautions for any criminal offence and you have also heard unchallenged evidence from witnesses who spoke about his personal qualities. {Here summarise the evidence or tell the jury that this will be summarised later}. He is a man of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but his good character is something you should take into account in his favour in two ways.

First: D gave evidence and you should take his lack of convictions/cautions and his personal qualities into account when you are deciding whether you believe his evidence.

Secondly: the fact that D is now {specify} years old, that he has the qualities about which you have been told and that he has not committed any previous offence may mean that it is less likely that he would have committed the offence/s of {specify}.

You should take D's good character into account in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Example 3 [category (2) above]. D has spent convictions but the judge has decided that he should be treated as someone of "effective good character".

You know / it is agreed that the defendant has two convictions for {specify}. These offences, which are relatively minor, were committed more than 25 years ago when D was still a teenager.

Because of their nature and age he is to be regarded as if he were a person of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but it should be taken into account in his favour in two ways:

First: D gave evidence and the fact that he is to be treated as someone of good character is something that you should take into account when you are deciding whether you believe his evidence.

Secondly: the fact that D is now {specify} years old and has not committed any offence for over 25 years [if appropriate and has never committed any offence of {specify}] may mean that it is less likely that he would have committed the offence/s with which he is charged.

You should take the fact that D is to be regarded as a person of good character into account in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Example 4 [category (3) above]: D has introduced his previous convictions because they are dissimilar to the charges which he faces at trial. The judge decides to give a good character direction limited to the propensity limb.

You know / it is agreed that D has convictions for offences of {specify}. D introduced this evidence because he wanted you to know that he has never been convicted of any offence involving {specify}.

How should you approach the fact that he has no previous convictions for any offence similar to the charge he now faces? This is obviously not a defence to the charge but it may make it less likely that he has committed an offence of {specify}.

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

Example 5: D is of good character; he has not given evidence but made an out of court statement on which he relies; direction on credibility and propensity limbs.

You know / it is agreed that the defendant has no cautions or convictions for any criminal offence. He is a man of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but his good character is something you should take into account in his favour in two ways.

First, although the defendant did not give evidence he did give an account to the police when he was interviewed and he relies on that account in this case. You should take his good character into account when you are deciding whether you accept what he said in that interview. Bear in mind however that this account was not given under oath or affirmation and was not tested in cross-examination.

Secondly: the fact that D has not committed any previous offence may mean that it is less likely that he would have committed the offence/s of {specify}.

You should take D's good character in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

NOTE: It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from the defendant's not having given evidence - see Chapter 17-5 below.

Example 6: D is of good character; he did not make any out of court statement and has not given evidence; direction on propensity limb only.

You know / it is agreed that the defendant has no convictions or cautions for any criminal offence. He is of good character.

This does not mean that he could not have committed the offence/s with which he is charged but it may mean that it is less likely that he would have committed the offence/s.

You should take this into account in D's favour. It is for you to decide what importance you attach to it.

NOTE: It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from the defendant's not having given evidence - see Chapter 17-5 below.

Example 7: D is charged with assaulting V; evidence that D is of positive good character, but the jury have also heard evidence, which D disputes, of his previous bad character / misconduct.

You know that the defendant has no previous conviction or caution for any criminal offence and you have heard from witnesses who spoke about his personal qualities {about which I will remind you in due course}. On the other hand you have also heard evidence that the defendant assaulted V on a number of previous occasions, something which D denies.

How should you approach the evidence of these alleged previous assaults?

If you are sure that one or more of these alleged previous assaults occurred, you should consider whether this shows that D had a tendency to be violent towards V.

If you are sure that he did have such a tendency you could treat this as some support for the prosecution's case, but this would only be part of the evidence against him and you must not convict him wholly or mainly on the strength of it. If you are not sure that he did have such a tendency, then his previous conduct could not support the prosecution's case against him.

If, on the other hand, you are not sure that any of these alleged previous assaults occurred you must ignore them completely and must treat the defendant as a man of previous good character.

This does not mean that he could not have committed the offence/s with which he is charged but his good character is something you should take into account in his favour in two ways.

First: D gave evidence and you should take his lack of convictions/cautions and his personal qualities into account when you are deciding whether you believe his evidence.

Secondly: the fact that he has not committed any previous offence may mean that it is less likely that he would have committed the offence/s of {specify}.

You should take D's good character into account in his favour in the two ways I have just explained. It is for you to decide what importance you attach to it.

Example 8: Co-defendant about whom there is no evidence of character (if any direction is required)

You have heard nothing at all about the character of the co-defendant and you must not speculate about it.

12. BAD CHARACTER

12-1 General Introduction

ARCHBOLD 13-1, 4, 5, and 102; BLACKSTONE'S F12.1 and 22; CrimPR 21

1. The admission of evidence of the bad character of defendants and non-defendants is governed by the statutory regime of CJA 2003, ss.98 – 113.
2. When considering the admission of evidence the court must also look to its case management duties under the Crim PR and in particular r.3.2 and r.3.10. This will involve consideration of the purpose for which it is proposed to admit evidence of bad character whether by agreement or otherwise before it goes before the jury. In *R (Robinson) v. Sutton Coldfield Magistrates' Court*[329] it was accepted that the Court's discretion to extend the time limit under CrimPR 21.6 was not limited to exceptional cases.
3. Judges must have in mind that no evidence is admissible unless it is relevant to the issues in the case; and there is a duty to consider in advance all evidence that the parties propose to place before the jury.
4. For the purposes of determining the admissibility of bad character evidence, its relevance or probative value is on the assumption that it is true, but the Court need not assume it is true if it appears on the basis of any material before the court, that no court or jury could reasonably find it to be true: s.109. See also *Dizaei.*[330]
5. While evidence admitted under s.98(a) and (b) is admitted as evidence directly relevant to the offence rather than under the criteria of s. 100 and any gateway under s.101, it will be prudent to have in mind the statutory safeguards attaching to the admission of evidence under ss.100 and 101 and to consider appropriate directions to the jury on the use to which it should put and, if appropriate, the weight they should attach to that evidence.
6. Once evidence of bad character, whether of a defendant or non-defendant, is admitted it may, depending on the facts be used by the jury for other purposes. As Lord Woolf noted in *Highton*

> "A distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted. It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to

[329] [2006] EWHC 307 (Admin).

[330] [2013] EWCA Crim 88.

propensity to commit offences of the kind with which the defendant is charged."

7. In every case the judge, when identifying the purpose for which evidence may be used, should also identify any potential misuse of such evidence arising e.g. from prejudice, and warn against such use.
8. Where the apparent weight of evidence admitted under these provisions comes to be diminished in the light of other evidence, careful directions must be given to the jury to assist them in assessing weight and deciding whether or not there is real significance to the evidence.
9. Where evidence of D's previous conviction/caution or sentence has been blurted out in error, so not admitted under any of the "gateways" in s.101, it will be usual, if the jury is not discharged, after considering the matter with the advocates to direct the jury that it has no relevance to the issues before them and to ignore it.

12-2 Directions applicable to all CJA s.101(1) "gateways"

ARCHBOLD 13-25; BLACKSTONE'S F12.1 and 15

Directions

1. In the case of disputed bad character evidence the jury must be reminded of the evidence on both sides (whether it be prosecution and defence or co-accused and defence) and warned to rely only on evidence which has been proved (prosecution) or raised to the required standard (co-defendant).
2. Where D has disputed that he is guilty of an offence of which he has been previously convicted, where the conviction has been proved, it is to be presumed that he committed that offence unless the contrary has been proved on the balance of probabilities. See PACE s.74(3); *C.*[331]
3. In many cases evidence of bad character will have been admitted through more than one gateway or have become relevant to more than one issue; in such cases directions must be given in respect of all relevant matters in relation to each gateway.
4. The issues to which the evidence is potentially relevant must be identified in detail and the jury directed about the limited purpose(s) for which the evidence may be used (explanatory of other evidence, relevant to an issue including propensity or "hallmark", rebutting a defence, credibility, correcting a false impression etc.).
5. It is of equal importance to identify any purpose/s for which the evidence may not be used.
6. The jury must be directed to decide the extent to which, if at all, the evidence establishes that for which the party relying upon it contends (e.g. propensity/ credibility).
7. Depending on the nature and extent of the convictions or other evidence of bad character, consideration should be given to a direction on the effect of the bad character evidence on the credibility of D.

NOTES:

- Examples of directions on the use to which evidence of bad character may and may not be put are set out in further sections of this Chapter relating to specific gateways.
- In addition to directing the jury in the summing up, it may help them at the time that the evidence is presented to tell them, in short form, of its relevance and the purposes for which they may, and may not, use it.

[331] [2010] EWCA Crim 2971.

12-3 S.101(1)(a) – Agreed evidence

ARCHBOLD 13-27; BLACKSTONE'S F12.16

Legal Summary

1. See the General Introduction at 12-1.
2. S101(1)(a) allows for evidence of bad character of a defendant to be admitted by agreement between all the parties. Agreement can be tacit.[332]
3. Caution is required in admitting evidence under s.101(1)(a). Even in cases in which the evidence is agreed, it is wise for the judge to seek clarification from the advocates as to what is agreed, and for what purpose, so that the judge can consider how best to direct the jury in summing up.
4. Where the Crown invites D1 to agree his convictions under s.101(1)(a), D2 may be put in an awkward position.[333] It is expected that advocates will draw to the judge's attention any agreed bad character.[334] The matter of the uses to which that can be put by the jury and how they are to be directed can then be ventilated with advocates.
5. In some cases where bad character evidence has been admitted by agreement, it will be capable of being used as "propensity evidence". There must be a careful direction by the judge on the possible uses to which the bad character evidence can be put by the jury. Whether bad character evidence can be used to show propensity will depend on the nature of the evidence, the nature of the charge, the similarity of the bad character evidence with the nature of the offence charged, and all the other relevant circumstances of the case.

Directions

6. Identify the evidence of bad character.
7. Whenever the court is told that bad character is to be admitted by agreement there should be an enquiry before the evidence goes before the jury as to its relevance. This will ensure the parties have considered all its implications and enable the judge to have in mind all relevant aspects of the evidence for summing up.
8. While evidence may be admitted by agreement the court retains duties of case management: i.e. ensuring that any evidence that goes before the jury is relevant to the issues and presented in the shortest and clearest way (preferably in the form of Agreed Facts).
9. Agreed evidence of bad character will usually be evidence that would have been admitted, if contested, through another gateway and the jury must be directed accordingly: see the further sections of this Chapter.

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[332] *Marsh* [2009] EWCA Crim 2696.

[333] *Harper* [2007] EWCA Crim 1746.

[334] *Johnson* [2010] EWCA Crim 385.

10. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury a direction as to the effect of the evidence on D's credibility may be required.
11. Where the evidence is relevant only to credibility, a direction should make it clear that it would be wrong and illogical to consider that the fact that D has been convicted or has behaved badly in the past means it is more likely that he did so on this occasion.
12. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

Example

You have heard about D's convictions/cautions/behaviour. This is/these are set out in {paragraph no. of} the Agreed Facts and the Prosecution and Defence agree that this is relevant evidence. There are certain ways in which you may use - and others in which you must not use - this evidence.

[Here give appropriate directions, depending on the issues to which the evidence is relevant: see other sections in this Chapter.]

12-4 S.101(1)(b) – Evidence of bad character adduced by the defendant

ARCHBOLD 13-28; BLACKSTONE'S F12.17

Legal Summary

1. See the General Introduction at 12-1.
2. Where the bad character evidence is admitted under s.101(1)(b) it may be used by the jury for any purpose for which it is relevant.[335]

   > "In our judgment it would be inappropriate in a gateway (b) situation for a defendant to have carte blanche to make such points as he wishes about his previous record, without facing the possibility that his record does him no favours where credibility is concerned": *Speed*.[336]

3. When summing up, the judge's task is to explain to the jury for what purpose the evidence may, and may not, be used.[337] The jury need careful direction on the uses to which evidence of previous convictions admitted under s.101(1)(b) might be put.[338]
4. In some instances, it may be inappropriate for the jury to use the evidence as evidence going to credibility: *Tollady.* [339] The guidance to the jury may need to include: warning against the danger of placing undue reliance on the bad character, that the evidence of bad character must not be used to bolster a weak case, and that the jury must ignore the bad character if they thought the case against D is a weak one. The jury should also be told that they should not assume that D is guilty simply because of his bad character.
5. A D may choose to adduce evidence of his bad character irrespective of whether or not a co-accused agrees.
6. Where evidence of bad character is not intentionally adduced by D (for example it is blurted out in error) the jury must be directed to ignore the evidence unless it is admissible under one or more of the other gateways.

Directions

7. Identify the evidence of bad character.
8. If D elects to adduce evidence of his own bad character that would otherwise have been admissible through one of the other gateways of s.101(1) the jury must be given directions on the use(s) to which the evidence may and may not be put.

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[335] *Highton* [2005] EWCA Crim 1985; *Edwards* [2005] EWCA Crim 3244; *Campbell* [2007] EWCA Crim 1472.

[336] [2013] EWCA Crim 1650.

[337] *Edwards* [2005] EWCA Crim 3244 at para.3; *Campbell* [2007] EWCA Crim 1472 at paras.37-38

[338] *Edwards and Rowlands* [2005] EWCA Crim 3244 at para.104.

[339] [2010] EWCA Crim 2614.

9. If D elects to adduce evidence of relatively minor bad character, for fear that the jury might speculate that it was something worse, the jury must be directed that they know about his convictions only so that they know about of the whole background and, if appropriate, that the character evidence does not make it more or less likely that D committed the offence.
10. If the evidence of bad character is minor and relates to matters of a completely different character from that with which D is being tried, the judge has a discretion, after consideration with the advocates, to give D the benefit of the "propensity limb" of the good character direction: see Chapter 11.
11. Depending on the nature and extent of the convictions or other evidence of bad character a direction as to the effect of the evidence upon D's credibility may be required.
12. Where the evidence is relevant only to credibility, a direction should make it clear that it would be wrong and illogical to consider that the fact that D has been convicted or has behaved badly in the past means it is more likely that he did so on this occasion.
13. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

Example

D has told you of his convictions for {specify}. There are certain ways in which you may use - and others in which you must not use - this evidence.

[Here give appropriate directions, depending on the issues to which the evidence is relevant: see other sections in this Chapter.]

12-5 S.101(1)(c) - Important explanatory evidence

ARCHBOLD 13-29; BLACKSTONE'S F12.18 and 28

Legal Summary

1. See the General Introduction at 12-1.
2. Section 101(1)(c) allows for the bad character evidence of D to be adduced by either the Crown or a co-accused where it is important explanatory evidence. There is no requirement for the prosecution to satisfy the interests of justice test under s.101(1)(3).
3. The gateway is a narrow one.[340] S.102 provides that

   "Evidence is important explanatory evidence if

   (a) without it, the court or jury would find it *impossible or difficult properly to understand* the other evidence in the case, and

   (b) its value for understanding the evidence as a whole is substantial." [341]

   Care is needed to avoid too readily admitting evidence under s.101(1)(c) that ought to be admitted if at all under s.101(1)(d); "Gateway C is, we emphasise, not a substitute for gateway D. It is not possible to dress up a failed case of gateway D as gateway C."[342] Care is also needed to avoid satellite litigation, particularly since it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances.[343]
4. The overlap with s 98 of the Act (allowing evidence to do with the facts of the alleged offence) should also be borne in mind.[344] See also *R v MckIntosh*[345]
5. This section is capable of applying to adduce evidence of previous gang feuds: *Okokono.*[346]
6. The jury need more than simply a narration of the evidence. It is helpful to address with advocates, as soon as the admissibility of the evidence is raised, the question of how it is proposed that the bad character evidence is to be used and how the jury is to be directed. Having an agreed account is helpful where possible. Evidence admitted under gateway (c) is capable of being used by the jury for any other purpose, and in some cases it will be necessary to give a

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[340] *Gillespie* [2011] EWCA Crim 3152; *Lee* [2012] EWCA Crim 316.

[341] Emphasis added.

[342] See *D,P,U* [2012] EWCA Crim [22] per Hughes LJ. "There is an inevitable tension between admitting previous convictions of a defendant as important explanatory evidence and not for propensity": *Frain* [2007] EWCA Crim 397; *D* [2008] EWCA Crim 1156; *Saint* [2010] EWCA Crim 1924; See also *Sheikh* [2012] EWCA Crim 907

[343] *Sawoniuk* [2000] 2 Cr App R 220.

[344] see *Lunkulu* [2015] EWCA Crim 1350; Sullivan [2015] EWCA Crim

[345] [2006] EWCA Crim 193.

[346] [2014] EWCA Crim 2521

specific warning as to the ways in which the evidence might assist the prosecution case.[347]

Directions

7. Identify the evidence of bad character.
8. Explain why the evidence is put before them e.g. how the defendant came to be in prison or had contact with the complainant.
9. Explain any further purpose/s for which the conviction/s or reprehensible behaviour may be used.
10. Depending on the nature and extent of the convictions or other evidence of bad character a direction as to the effect of the evidence upon the defendant's credibility may be required.
11. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

Example: evidence admitted only as important explanatory evidence

You have heard that the incident of violence that is the subject of the charge took place while D and V were in prison. The fact that they were in prison does no more than provide the setting for this incident and it would have been impossible to understand events without knowing this.

But the fact that D was in prison does not make it more or less likely that he committed this offence and provides no support for the prosecution case, neither does it make it more or less likely that V attacked D.

[347] *Lee* [2012] EWCA Crim 316.

12-6 S.101(1)(d) – Relevant to an important matter in issue between the defendant and the prosecution

ARCHBOLD 13-37; BLACKSTONE'S F12.18 and 36

Legal Summary

1. See the General Introduction at 12-1.
2. S.101(1)(d) allows for evidence of D's bad character to be admitted where it is relevant to an important matter in issue between D and the prosecution. One way in which a matter can be an important matter in issue between them is when the prosecution seeks to rely on the evidence of bad character to demonstrate a propensity to commit the offence. But s.101(1)(d) is not restricted to the admissibility of propensity evidence. Evidence of bad character may for example be relevant to prove D's presence or identity or to rebut coincidence, without engaging propensity.
3. Where evidence is admitted as propensity evidence there are four sub-gateways within s.101(1)(d):
   (1) If it shows he has a propensity to commit "offences of the kind with which he is charged": s.103(1)(a).
   (2) The prosecution may use s.103(1)(a) to show that the defendant has a propensity to commit offences of the kind with which he is charged by showing he has previously committed an offence "of the same description" as this offence.
   (3) The prosecution may use s.103(1)(a) to show that the defendant has a propensity to commit offences of the kind with which he is charged by showing he has previously committed an offence "of the same category"
   (4) S.103(2)-(5): Evidence of the defendant's bad character is admissible if it "shows he has a propensity to be untruthful": s.103(1)(b).
4. In Hanson[348] the Court of Appeal offered general guidance on the questions to be addressed:
   (1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
   (2) Does that propensity make it more likely that the defendant committed the offence charged?
   (3) Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?
5. The section is not limited to propensity: R v Richardson [349] R v Cambridge[350]

[348] [2005] EWCA Crim 824.

[349] [2014] EWCA Crim 1785.

[350] [2011] EWCA Crim 2009.

6. Bad character ought not to be adduced under s 101(1)(d) to bolster a weak case: R v Darnley[351] R v McDonald[352]
7. The sentence for the earlier conviction is not usually helpful in determining admissibility: R v Nelson[353]
8. There is no minimum number of events necessary to demonstrate a propensity: R v Hanson; R v Brown[354] R v Burdess[355] cf R v Bennabou[356]
9. Large numbers of convictions can be admitted under this gateway provided they are relevant to a matter in issue and the judge has considered the potential unfairness: R v Blake,[357]
10. Particular care is needed with hazardous evidence such as identification evidence: R v Dossett,[358] R v Eastlake,[359] R v Holmes,[360] R v Ngando[361]
11. Incidents which have occurred since the incident which is currently the matter of trial may be admitted under s 101(1)(d): R v Adenusi;[362] R v A[363]
12. Particular care is needed in cases where bad character evidence of indecent image possession is relied on as evidence in sexual contact offences: R v D,P,U [2012] 1 Cr App R 8, where Hughes LJ stated:

    "... Possession of child pornography may, depending on the facts of the case, demonstrate a sexual interest in children which can be admissible through gateway D upon trial for offences of sexual abuse of children. It will not always be so. There may be a sufficient difference between what is viewed and what is alleged to have been done for there to be no plausible link." The Court of Appeal accepted that it would have been preferable if the details of the offences had been available, but concluded that since V was an immature teenager known to L since he was aged 9, L would have regarded him as a

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[351] [2012] EWCA Crim 1148.

[352] [2011] EWCA Crim 2933, http://www.bailii.org/ew/cases/EWCA/Crim/2011/2933.html

[353] [2012] All ER (D) 42 (May).

[354] [2011] EWCA Crim 80, http://www.bailii.org/ew/cases/EWCA/Crim/2011/80.html

[355] [2014] EWCA Crim 270.

[356] [2012] EWCA Crim **3088**, http://www.crimeline.info/case/r-v-fouad-benabbou

[357] [2006] EWCA Crim 871.

[358] [2013] EWCA Crim 710, http://www.bailii.org/ew/cases/EWCA/Crim/2013/710.html

[359] [2007] EWCA Crim 603, http://www.bailii.org/ew/cases/EWCA/Crim/2007/603.html

[360] [2014] EWCA Crim 420. **There is a s 4(2) reporting restriction order in relation to this case pending retrial, and the case has been removed from Bailii.**

[361] [2014] EWCA Crim 506, http://www.bailii.org/ew/cases/EWCA/Crim/2014/506.html

[362] [2006] EWCA Crim 1059, http://www.bailii.org/ew/cases/EWCA/Crim/2006/1059.html See also *R v Imiela* [2013] EWCA Crim 2171, http://www.bailii.org/ew/cases/EWCA/Crim/2013/2171.html

[363] [2009] EWCA Crim 513, http://www.bailii.org/ew/cases/EWCA/Crim/2009/513.html

child. The images showed L's sexual interest in children and they were potentially relevant under 101(1)(d).

Directions

13. Identify the evidence of bad character.
14. If the evidence is disputed the jury should be directed that they must be sure matters have been proved before they can rely on them.
15. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
16. Identify in detail the issue/s to which the evidence is and is not potentially relevant e.g. propensity, credibility, identity.
17. Direct the jury that it is for them to decide to what extent, if any, the evidence helps them to decide the issue/s to which it is potentially relevant.
18. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury a direction as to the effect of the evidence upon D's credibility may be required.
19. If the evidence is exclusively within the limits of s. 101(1)(d) the jury should be warned against prejudice against D or over reliance on evidence of bad character and that they must not convict D wholly or mainly on the basis of previous convictions or bad behaviour. If the evidence is in reality "hallmark" evidence and directly relevant to the issue in the case a warning not to convict wholly or mainly in reliance upon it would be inappropriate.
20. On a multi-count indictment, the issue of cross admissibility should be considered: see Chapter 13.
21. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

Example 1: Propensity

You have heard that D has previous convictions for {specify}. You heard this because the prosecution say that they show that he has a tendency to commit offences of this type and so it is more likely that D was {specify: e.g. the aggressor in this incident/ the person who was driving the car /the person who stole the goods}.

The defence say that the previous convictions are {specify: e.g. old/ of a different nature} and do not show that D has a tendency to act as alleged.

It is for you to decide whether these previous convictions do in fact show that D has a tendency to behave in this way.

If you are not sure that his previous convictions show that he has such a tendency then you must ignore them: they are of no relevance to the issues in the case.

But if you are sure that they do show such a tendency then this may support the prosecution case. It is for you to say whether it does and if so to what extent. But the fact that someone has {specify} in the past does not prove that he did so on this occasion. D's previous convictions may only be used as some support for the prosecution case. You must not convict him wholly or mainly because of them.

Example 2: Support for evidence of identification

You have heard that D was picked out on a VIPER identification parade. [See Chapter 15-1 Visual identification.]

The prosecution say that the man picked out on that identification parade was the man who {e.g. burgled the house}. The defence say the identification was mistaken.

I have already told you about the risks surrounding evidence of identification and that you should look to see whether the evidence of identification is supported by other evidence. The prosecution say that the identification evidence is supported by D's previous convictions, which demonstrate that he {e.g. has committed 3 other burglaries in the same street within the last 2 years} and the prosecution say that this makes it more likely that the identification evidence is correct.

The defence accept that D has these convictions {e.g. for burglary} but they remind you that {e.g. the estate on which the burglary was committed was an area of high crime and that there are many other people who have committed burglaries in that area}.

The fact that D has {e.g. committed burglaries in the same street} cannot prove he did so on this occasion but it is evidence you may take into account as support for the prosecution case. How far it supports the prosecution case will depend on your view of (a) how much of a coincidence it is that the person identified as the burglar in this case has {e.g. committed burglaries on the same street in the past} and (b) the defence point about the number of other people who have {e.g. committed burglaries on this street}.

D's previous convictions may only be used as some support for the prosecution case. You must not convict him wholly or mainly because of them.

Example 3: Propensity to be untruthful - bearing only on D's credibility

D has said that … {specify}. It is for you to decide whether that is or may be true. When you are deciding this question you may take into account D's previous convictions for {specify e.g. perverting the course of justice, by giving a false name when driving whilst disqualified, and committing perjury, by making a false accusation that someone else had assaulted his brother when in fact D had done so}.

The prosecution say that those convictions are significant because they show that D is prepared to tell lies to avoid responsibility for offences he has committed and has lied to you for the same reason.

The defence accept that D has these convictions but say they are irrelevant because … {specify: e.g. they happened many years ago}.

You should bear in mind that just because someone has told lies in the past does not mean that he is telling lies now. You must decide whether these convictions help you when deciding whether his evidence is, or may be, true or whether you are sure that it is untrue, but you must not convict him wholly or mainly because of them.

12-7 S.101(1)(e) – Substantial probative value in relation to an important matter in issue between the defendant [D1] and a co-defendant [D2]

ARCHBOLD 13-69; BLACKSTONE'S F12.67

Legal Summary

1. See the General Introduction at 12-1.
2. CJA 2003, s.101(1)(e) allows D1 to adduce evidence of the bad character of D2 if that evidence has "substantial probative value in relation to an important matter in issue between" them. This will usually arise when the defendants are engaged in "cut-throat" defences. The approach to admissibility is set out clearly in *Phillips.*[364] The test for admissibility is quite different from that under s.101(1)(d), and there is no discretion to exclude the evidence if the conditions of s.101(1)(e) and s.104 are satisfied.
3. Evidence that can be adduced under s.101(1)(e) is not limited to evidence directly suggesting that D2 is more likely to be the offender (e.g. evidence of D2's previous convictions for similar behaviour). It can include evidence that undermines D2's credibility where that is an important matter in issue,[365] even though the bad character evidence against D2 does not establish a propensity for untruthfulness.
4. Where the sole purpose of the evidence is to balance D2's attempt to undermine D1's case the direction can be given quite shortly.[366] In *Phillips* Pitchford LJ explained:

   > "The judge has a responsibility to explain to the jury the issues upon which the evidence was relevant and the need for a sequential approach to it: (i) Is it true? (ii) Does it establish the propensity claimed? (iii) Does it assist in resolving the issues between the defendants? (iv) Does a resolution of the issue between the defendants assist the jury to reach their decision as to guilt of one or other or both of them. It does not seem to us that the admission of the pre-indictment evidence would have resulted in unfairness to the co-accused"

5. In *Passos-Carr*[367] the Court of Appeal accepted that:

   > "in an appropriate case, evidence of propensity to be violent can be evidence of substantial probative value as to issues between two defendants in a cut throat case where two defendants blame each other." However considerable care will be needed not to confuse the jury.[368]

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[364] [2011] EWCA Crim 2935. See also Daly [2014] EWCA Crim 2117

[365] *Lawson* [2006] EWCA Crim 2572; *Rosato* [2008] EWCA Crim 1243.

[366] *Rosato* [2008] EWCA Crim 1243 at para.26.

[367] [2009] EWCA Crim 2018.

[368] *Najib* [2013] EWCA Crim 86.

6. In *Turnbull*[369], it was noted that in applying the test in *Phillips*:

> "the judge will need to bear in mind whether or not that evidence is disputed. If it is, and there is a risk that the jury may not accept that it constitutes evidence of bad character, then the judge may be depriving a co-accused of potentially substantial probative evidence if he relies on that evidence in order to exclude other bad character evidence in the event that the jury are not sure that it does demonstrate bad character. This is not a problem, however, where the evidence admitted takes the form of convictions."

Directions

7. Identify the evidence of D1's bad character.
8. In relation to D1:
   (1) if the evidence of his bad character is disputed, the jury may take it into account as part of the case against him only if they are sure that it is true;
   (2) it is for the jury to decide to what extent if at all the evidence which they are sure is true, or which is not disputed, demonstrates the matter in issue (e.g. whether D1 has a propensity to commit offences of the type charged or to be untruthful);
   (3) the jury should be warned against prejudice against D1 arising from the evidence and against over-reliance on it, and directed that they must not convict D1 wholly or mainly on the basis of it; and
   (4) depending on the nature and extent of the evidence, there may have to be a direction as to the effect of the evidence on D1's credibility.
9. In relation to D2:
   (1) if the evidence of D1's bad character is disputed, the jury may take it into account as part of the case for D2 if they think that it is or may be true (though not if they are sure that it is untrue);
   (2) it is for the jury to decide to what extent if at all the evidence of D1's bad character which they think is or may be true, or which is not disputed, demonstrates the matter in issue (e.g. whether or not D2 was involved in the offence charged).
10. The direction is likely to be complex, should be discussed with the advocates before it is given, and should be provided to the jury in writing.
11. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

[369] [2013] EWCA Crim 676 para.24.

Example 1: Undisputed evidence of D1's bad character

D1 and D2 are jointly charged with an offence of violence. Each accepts that he was present at the scene, but says that the other committed the offence alone. On the application of D2, evidence has been admitted under CJA 2003 s.101(1)(e) that D1 has previously been convicted of offences of violence.

D2 introduced the fact that D1 has previous convictions for crimes of violence. He did so because he says that they show that D1 has a tendency to use unlawful violence and it was D1 alone who used the violence on this occasion. How should you approach this question? Your approach to this will be different depending on whether you are considering the case for D2 or the case against D1.

When considering **D2's case**: if, having regard to all of the evidence about D1's convictions {if appropriate: including what D1 himself has told you}, you decide that they show that D1 has, or may have, a tendency to use unlawful violence, you may take that into account as some support for D2's case that the offence was committed by D1 alone and that D2 was not involved.

However, when considering the case **against D1**, because it is for the prosecution to prove his guilt, it is only if you are sure that D1's convictions show that he has a tendency to use unlawful violence that you may use this as some support for their case.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D1 wholly or mainly because of it or allow his previous convictions to prejudice you against him.

Finally, in D1's case, if you are not sure that D1 has a tendency to use unlawful violence his convictions are of no relevance and you must ignore them.

Example 2: Disputed evidence of D1's bad character

D1 and D2 are jointly charged with an offence of violence. Each accepts that he was present at the scene, but says that the other committed the offence alone. On the application of D2, evidence from D2 himself and from a witness called on his behalf that D1 had committed numerous past assaults with which he has never been charged has been admitted under CJA 2003 s.101(1)(e). D1 disputes this evidence.

You have heard evidence from D2 and his witness that D1 has committed many assaults in the past for which he was never arrested. D2 says that this shows that D1 has a tendency to use unlawful violence and it was D1 alone who used the violence on this occasion. D1 disputes that he has committed any assault in the past or that he has such a tendency. You will have to consider these matters separately in relation to each defendant.

When considering **D2's case** you will have to decide whether some or all of the evidence of past assaults by D1 is, or may be, true. If you decide that some or all of it is, or may be, true, and that it shows that D1 has or may have a tendency to use unlawful violence, you may use such a tendency as some support for D2's case that the offence was committed by D1 alone and D2 was not involved.

When considering the use of the evidence in the **case against D1** the position is different. First you must decide whether you are sure that any of the disputed evidence of past assaults is true. If you not sure that any of it is true, you must ignore it completely when considering the case against D1.

If you are sure that some or all of this evidence is true, you will then have to consider whether it shows that D1 has a tendency to use unlawful violence. If you are sure that it does show that D1 has such a tendency, you may use it as some support for the case against him.

The amount of support provided by any such tendency is for you to decide. You must remember that such a tendency would only form part of the evidence. You must not convict D1 wholly or mainly because of it or allow his previous convictions to prejudice you against him.

Finally, if you are not sure that D1 has a tendency to use unlawful violence his convictions are of no relevance and you must ignore them.

NOTE: If D1 is otherwise of good character see also Chapter 11 Good Character: Directions paragraph 14 and Example 7.

12-8 S.101(1)(f) - Evidence to correct a false impression given by the defendant about himself

ARCHBOLD 13-73; BLACKSTONE'S F12.85

Legal Summary

1. See also the General Introduction at 12-1 above.
2. CJA 2003, s.101(1)(f) governs the admissibility of bad character evidence by the prosecution against D to correct a false impression D has sought to create in interview, under caution, or in evidence by D himself or by another at the invitation of the defence.[370] Merely denying the offence will not trigger s.101(1)(f). Section 101(f) only applies if D has given a false impression: *Rahim.*[371]
3. For the purposes of s.101(1)(f) the question whether the defendant has given a "false impression" about himself, and whether there is evidence which may properly serve to correct such a false impression within s.105(1)(a) and (b) is fact-specific.
4. Section[372] 105(3) allows D to avoid being deemed responsible for a relevant assertion "if, or to the extent that, he withdraws it or disassociates himself from it," but merely by conceding in cross-examination that he had lied, a defendant did not dissociate himself.[373]
5. Particular care will be needed if the admission of evidence under s.101(1)(f) might impact on a co-accused.[374]
6. Recent examples include *R v Verdol*;[375] *R v Garrett*;[376] *R v Ovba.*[377]

Directions

7. Identify the evidence of bad character.
8. If the evidence is disputed the jury should be directed that they must be sure matters have been proved before they can rely on them.
9. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.

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[370] CJA 2003, s.105. see e.g. *Verdol* [2015] EWCA Crim

[371] [2013] EWCA Crim 2064.

[372] *Renda* [2005] EWCA Crim 2826 para.19.

[373] *Renda* [2005] EWCA Crim 2826.

[374] *Hickinbottom* [2012] EWCA Crim 783.

[375] [2015] EWCA Crim 502.

[376] [2015] EWCA Crim 757.

[377] [2015] EWCA Crim 725.

10. Identify in detail the issue(s) to which the evidence is and is not potentially relevant. Since the evidence has been admitted to correct a false impression this is likely to include a direction as to the effect upon credibility.
11. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

Example: Evidence to correct a false impression given by the defendant, going to credit and propensity

In his evidence D said that he was not the sort of person who would {specify}. As a result of that, the prosecution were allowed to present evidence that in the past he had been convicted of {specify}.

What use can you make of that evidence?

The prosecution say that the evidence of his convictions shows that he was trying to mislead you when he said he would never {specify}. The defence say that it was not misleading because {specify}. If you are sure D was trying to mislead you about this/these things that does not mean he was trying to mislead you about everything, but it is evidence that you can use when deciding whether or not he was a truthful witness. If you are not sure he was trying to mislead you then his previous convictions will not help you to decide whether or not what he said in evidence was true.

The prosecution also say that the evidence of his previous convictions can help you in another way. They say that those convictions for {specify} show that he is a man who is more likely to {specify}. The defence say that the convictions are {e.g. so old, not really of the same kind} and so do not show he would be more likely to {specify}.

If you are not sure that they show that D1 has such a tendency, you should ignore them: they would be irrelevant.

If you are sure that they show that D has such a tendency, you may use them as some support for the case against him. How much support, if any, they provide is for you to decide, but remember that the convictions only form a part of the evidence in the case and you should not convict D only or mainly because he has been convicted in the past. Neither should you be prejudiced against him because of his past record.

12-9 S.101(1)(g) - Defendant's attack on another person's character

ARCHBOLD 13-78; BLACKSTONE'S F12.91

Legal Summary

1. See also the General Introduction at 12-1 above.

2. CJA 2003, s.101(1)(g) allows for the Crown to adduce evidence of a defendant's bad character where the defendant has attacked the character of another person whether by statements made in interview or by asking questions in cross-examination intended or likely to elicit such evidence or by giving evidence. Admissibility is subject to the discretion in s.103. If the attack made by D (particularly if made in interview) is on the character of a non-witness who was also a non-victim it would be unusual for evidence of D's bad character to be admitted.[378]

3. It may be that evidence is admitted under "gateway (g)" which the Crown had initially unsuccessfully sought to adduce under "gateway (d)", but which becomes admissible because of the way the defence is run. Once the evidence is admitted, it might, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant was charged.[379] The jury will need careful direction on the uses to which it may be put.

4. If the evidence is relevant only to credibility, that needs to be made clear. If the evidence is relevant to a matter in issue between the Crown and defence other than credibility (e.g. propensity) the jury will need to be directed accordingly. In *Lafayette*[380] the Court of Appeal explained:

> "In many cases at least some of the bad character evidence admitted under gateway (g) will also be admissible under gateway (d) and thus entitle the judge to give a propensity direction (see Highton [2005] EWCA Crim 1985). What is the position to-day if the evidence which is admissible under gateway (g) is not admissible under gateway (d) to show propensity? For example, what should the judge say if the evidence under gateway (g) showed only previous convictions for offences of dishonesty and/or drugs offences and/or offences of violence, from any of which the jury would ***not*** be entitled to conclude that they showed on the part of the defendant a propensity to commit the kind of offences with which he is charged? We think that the better course is for the direction to be so fashioned in a "gateway (g) only case" that the jury understand that the relevance of these kinds of previous convictions goes to credit and they should not consider that it shows a propensity to commit the offence they are considering, at least if there is a risk that they might do so. That is not to say that the words "credit" and "propensity" should be or need to be used."

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[378] *Nelson* [2006] EWCA Crim 3412.

[379] *Highton* [2005] EWCA Crim 1985 para. 10.

[380] [2008] EWCA Crim 3238; *Williams* [2011] EWCA Crim 2198.

Directions

5. Identify the evidence of bad character.
6. If the evidence is disputed the jury should be directed that they must be sure matters have been proved before they can rely on them.
7. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.
8. Direct the jury that where a defendant makes an attack upon another person's character the jury are entitled to know of the character of the person making the attack so that they can have all the information about that person and the defendant when deciding where the truth lies.
9. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA s.101(1) "gateways".

Example: Evidence relating to attack made by the defendant on a prosecution witness

You have heard that D has previous convictions for {specify}. The reason you heard about them was because D has alleged that W is/has {specify} and you are entitled to know about the character of the man who makes these allegations when you are deciding whether or not they are true.

[Here specify the arguments of the prosecution and the defence.]

You should bear in mind that just because D has previous convictions, this does not necessarily mean that he is telling lies. You must decide whether these convictions help you when you are considering whether or not he is telling the truth; but you must not convict him of this offence because he has been convicted in the past.

12-10 S.100 – Non-defendant's bad character

ARCHBOLD 13-11; BLACKSTONE'S F14.1

Legal Summary

1. The admissibility of evidence of a non-defendant is governed by CJA 2003, ss.98 and 100.
2. Where evidence of the non-defendant's behaviour is to do with the facts of the alleged offence or misconduct in the investigation, it can be admitted under s.98 even if the behaviour amounts to bad character. Otherwise evidence of bad character of a non- defendant is admissible only under s.100. There are 3 gateways:
   (1) By agreement between the parties.[381]
   (2) Where the bad character evidence is important explanatory evidence. [382]
   (3) Where the bad character is of substantial probative value in relation to matter which
      (a) is a matter in issue in the proceedings and
      (b) is of substantial importance in the context of the case as a whole[383] having regard to s.100(3).
3. This final gateway allows for evidence to be adduced which goes to the issue (e.g. D accused of ABH claims he was acting in self-defence against V's aggression and adduces V's record for violence) or where it goes to the non-defendant's credibility alone.[384] The types of evidence adduced as bad character ought to be strictly monitored. Rarely will mere allegations as opposed to convictions or cautions be admitted.[385] That is not to say that such material will never be admissible. It is of course vital to assess to what issue the bad character is relevant: *Luckett.*[386]
4. In determining whether allegations of bad character against a non-defendant are sufficiently probative to be admitted regard should be had to the likely difficulty the jury would face in understanding the remainder of the evidence if such allegations against a non-defendant were adduced.[387]

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[381] Such agreements should be drawn to the attention of the judge: *Johnson* [2010] EWCA Crim 385

[382] This is a narrow gateway when read in conjunction with s.100(2). S.100(2) "without it...the jury would find it impossible or difficult properly to understand other evidence in the case, and its value for understanding the case as a whole is substantial.

[383] *Garnham* [2008] EWCA Crim 266.

[384] The test to be applied in such cases is set out in *Brewster* [2010] EWCA Crim 1194. See also *Weir (Yaxley-Lennon)* [2005] EWCA Crim 2866 at para.73.

[385] *Miller* [2010] EWCA Crim 1153; *Braithwaite* [2010] EWCA Crim 1082.

[386] [2015] EWCA Crim 1050.

[387] *Dizaei* [2013] EWCA Crim 88.

5. If the bad character relates to a complainant in a sexual case YJCEA s.41 applies.
6. Avoidance of satellite litigation is a relevant consideration.

> "Failure to give a direction that is no more than assistance in applying common sense to the evidence should not automatically be treated as a ground of appeal, let alone as a reason to allow an appeal." [388]

Directions

7. Identify the evidence of bad character.
8. Where the evidence is disputed the jury must decide:
   (1) if the evidence is adduced by the prosecution whether they are sure it is true;
   (2) if adduced by the defence, whether it may be true.
9. Identify the issue/s to which the evidence is potentially relevant.
10. The jury should be directed that it is for them to decide the extent to which, if any, the evidence of bad character of the non-defendant assists them in resolving the potential issue/s.
11. Depending on the nature and extent of the convictions or other evidence of bad character, there may need to be a direction as to the effect on the credibility of the person if he was a witness.

Example

You have heard that W has convictions for offences of violence namely {specify}. You heard about W's convictions because D claims that it was W who started this incident and says that W's convictions support this.

The fact that W has these convictions does not mean that he must have used unlawful force on this occasion but it is something that you may take into account when you are deciding whether or not the prosecution have made you sure that it was D, and not W, who started the violence and that D's use of force was unlawful.

[388] Cited in *Campbell* [2007] EWCA Crim 1472 para20; *Kelly* [2008] EWCA Crim 1456.

13. CROSS ADMISSIBILITY

ARCHBOLD 13-9, 38 and 63a; BLACKSTONE'S F12.58

Legal Summary

1. If the indictment against D comprises more than one count the issue may arise as to whether the evidence relating to one count is "cross admissible" in relation to another, and if so to what uses it may legitimately be put by the jury.
2. Cross admissibility is not an appropriate term to describe the admissibility of evidence from a previous incident that does not form part of the indictment.[389]
3. CJA 2003 s.112(2) provides: "Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except s.101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly."[390]
4. The leading authority is *Freeman and Crawford*[391] which confirms that evidence may be cross admissible in one or both of the following ways[392]
   (1) "(1) The evidence may be relevant to more than one count because it rebuts coincidence, as for example, where the prosecution asserts the unlikelihood of a coincidence that separate and independent complainants have made similar but untrue allegations against the defendant. The jury may be permitted to consider the improbability that those complaints are the product of mere coincidence or malice (i.e. a complainant's evidence in support of one count is relevant to the credibility of another complainant's evidence on another count-an important matter in issue: s.101(1)(d))"; and/or
   (2) "The jury may be sure of the accused's guilt upon one count and if, but only if, they are also sure that guilt of that offence establishes the accused's propensity to commit that kind of offence, the jury may proceed to consider whether the accused's propensity makes it more likely that he committed an offence of a similar type alleged in another count in the same indictment (evidence of propensity: s.101(1)(d) and s.103(1)(a))."
5. In both categories the evidence which is being adduced is evidence of bad character against the defendant under CJA 2003, s.101[393] : see Chapter 13.
6. Whichever approach is employed, the jury must reach separate verdicts on each count and for each defendant.
7. Under the coincidence approach:

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[389] *Suleman* [2012] EWCA Crim 1569.

[390] *Wallace* [2007] EWCA Crim 1760; *Chopra* [2006] EWCA Crim 2133.

[391] [2008] EWCA Crim 1863. See also the very helpful analysis in *McAllister* [2008] EWCA Crim 1544 para.31.

[392] *N(H)*: [2012] EWCA Crim 1568 para.31.

[393] *McAllister* [2008] EWCA Crim 1544 para.13.

(1) Cross admissibility of evidence does **not** involve "propensity" evidence in the way in which that term is used under CJA 2003. The jury is not being invited to reason from propensity; they are merely being asked to recognise that the evidence in relation to a particular offence on an indictment may appear stronger and more compelling when all the evidence, including evidence relating to other offences, is looked at as a whole.[394] In *H*[395] Rix LJ pithily observed: "the reality is that independent people do not make false allegations of a like nature against the same person, in the absence of collusion or contamination of their evidence."

(2) The jury will need to exclude collusion or innocent contamination as an explanation for the similarity of the complainants' evidence before they can assess the force of the argument that they are unlikely to be the product of coincidence.[396] The jury is being invited to consider the improbability that the complaints are the product of mere coincidence or malice.[397] The more independent sources of evidence, the less probable the coincidence. That is so only if, the sources are genuinely independent. The jury are not being invited to reason from propensity. If they conclude that D is guilty on other counts they may also have concluded that he has a relevant propensity, but they are not being invited to reason from a propensity that they have found to his guilt.

8. Under the propensity approach evidence from one count is admissible against another under s.101 as if the counts were being tried as separate trials. The jury is being invited to reason that if D is guilty of one incident that demonstrates he has a propensity for such offending and that propensity may be relevant when they consider a further count. They are reasoning from a propensity they have found to liability for other counts.

9. In some rare cases it may be appropriate to direct the jury that the evidence that is cross admissible is capable of being used to rebut coincidence and for propensity type reasoning. The leading case is *N(H).*[398] Care needed to be taken by the judge before giving both directions. It is important to avoid double accounting – i.e. the jury cannot use evidence from count 1 to rebut coincidence that D committed count 2 and then, having become sure of guilt on count 2, use that as propensity evidence to convict D on count 1.

10. Latham LJ in *Freeman and Crawford* said [399]:

> "In some of the judgments since Hanson, the impression may have been given that the jury, in its decision making process in cross-admissibility cases should first determine whether it is satisfied on the evidence in relation to one of the counts of the defendant's guilt before it can move on to using the

[394] *McAllister* at [14].

[395] *H* [2011] EWCA Crim 2344 para.24.

[396] [2011] EWCA Crim 730.

[397] *Cross* [2012] EWCA Crim 2277.

[398] [2011] EWCA Crim 730 para.31.

[399] [2008] EWCA Crim 1863 para.20.

evidence in relation to that count in dealing with any other count in the indictment. A good example is the judgment of this court in S.[400] We consider that this is too restrictive an approach. Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way we have described. It may be that in some cases the jury will find it easier to decide the guilt of a defendant on the evidence relating to that count alone. That does not mean that it cannot, in other cases, use the evidence in relation to the other count or counts to help it decide on the defendant's guilt in respect of the count that it is considering. To do otherwise would fail to give proper effect to the decision on admissibility."

Directions

11. The terms 'coincidence approach' and 'propensity approach' are used here in the sense explained in the Legal Summary above.

12. In any case in which a cross-admissibility direction is contemplated, it is essential to discuss with the advocates in the absence of the jury and before closing speeches the need for and form of any such direction. While the Examples in this chapter are expressed as oral directions, the jury will inevitably be assisted by some form of written direction.

13. In a 'coincidence approach' case, the jury should be directed as follows:

    (1) They must consider each count separately.

    (2) However, the prosecution rely on similarities between the evidence of the complainants [identify the similarities].

    (3) If the complainants have or may have concocted false accusations against D, any such similarities would count for nothing, and the jury should reject each complainant's evidence.

    (4) If there was no concoction but a complainant had or may have learned what the other/s had said or were going to say about D, and had or may have been influenced by this, consciously or unconsciously, when making his/her own accusations, any such similarities would count for nothing, and the jury should take this matter into account when deciding how far they accept the evidence of the complainant concerned.

    (5) If the jury are sure that there has been no such concoction/influence they should consider how likely it is that two (or more) people would, independently of each other, make similar accusations and yet both/all be lying / mistaken. If the jury thought this unlikely they could, if they thought it right, treat the evidence of each of the complainants as supporting that of the other/s.

    (6) When deciding how much support, if any, the evidence of one complainant gives to another the jury should take into account how similar their

[400] [2008] EWCA Crim 544.

accusations are, since the jury might take the view that the closer the similarities the more likely it is that the complainants were telling the truth.

NOTE: The directions in paragraphs (3) and (4) above should only be given if the issue has arisen in evidence. If the issue has not arisen, the direction in paragraph (5) should be modified accordingly. See Example 1 below.

14. In a 'propensity approach' case the jury direction should be based on Chapter 12-6: Bad Character s.101(1)(d). See also Example 1 in that chapter; and Example 2 below.

15. Depending on the evidence and issues in the case, a direction based on both coincidence and propensity approaches may be appropriate. However, such a direction is likely to be complex and, unless great care is taken, confusing. It is suggested that such a direction be given, if at all, only in cases where the evidence on one or more counts is significantly stronger than that on the other(s), and in which the jury might therefore convict on the stronger count(s) first, and then treat that as establishing a propensity on D's part to commit offences of the kind charged in the other count(s). Examples would be where there is a recording of D's committing one of the offences charged in the indictment; where one or more witnesses say that they saw D committing one of the offences charged; or where D is said to have confessed to committing one of the offences charged.

16. If a direction based on both approaches is given, then to avoid the risk of the impermissible double counting referred to in paragraph 3 above, it is suggested that the jury be directed to consider the propensity approach first: see Example 3 below.

Example 1: The 'coincidence' approach

D is charged in count 1 with a sexual assault on V1 and in count 2 with a similar sexual assault on V2. The only prosecution evidence comes from V1 and V2 themselves. D claims that V1 and V2 have concocted false accounts.

I have already told you that you must consider each count separately.

However, the prosecution rely on the similarities between the allegations made by V1 and V2. [Set out the similarities e.g. in relation to the nature, circumstances, periods of time and locations of the alleged offences.]

D claims that the allegations are similar because V1 and V2 have got together to make up false accusations against him. If you decide that this has or may have happened, the similarities would obviously count for nothing, and you would reject the evidence of both V1 and V2.

Even if you are sure that that V1 and V2 have not made up false allegations together, you should consider whether either V1 or V2 might have learned what the other was saying about D and have been influenced, knowingly or unknowingly, when making his/her own allegations. If you decide that this has or may have happened, the similarities between that complainant's evidence and the evidence of the other complainant would not take the prosecution's case any further, and you would have to take any influence of that kind into account when deciding how far you accepted that complainant's evidence.

However, if you are sure that there has been no such concoction or influence, you should consider how likely it is that two people, independently of each other, would make allegations that were similar but untrue. If you decide that this is unlikely, then you could if you think it right, treat V1's evidence as supporting that of V2, and vice versa.

When deciding how far, if at all, the evidence of each supports the other, you should take into account how similar in your opinion their allegations are. This is because you could take the view that the more similar independent allegations are the more likely they are to be true.

Example 2: The 'propensity' approach

D is charged in count 1 with a sexual assault on V1 and in count 2 with a sexual assault on V2. The prosecution evidence on count 1 is (a) the account given by V1 and (b) a video recording which the prosecution say was made by D as he committed the offence. The prosecution evidence on count 2 is only the account given by V2. D claims that V1 and V2 have concocted false accounts and denies that he is the person shown in the recording.

I have already told you that you must consider each count separately.

However if, but only if, you are sure that the person shown in the recording of events in count 1 is D and that he committed that offence, you should next consider whether that shows that he has a tendency to commit offences of the kind charged in count 2.

If you are not sure that D has such a tendency then your conclusion that he committed the offence charged in count 1 does not support the prosecution's case on count 2. But if you are sure that D does have such a tendency then you may take this into account when you are deciding whether D is guilty of count 2.

Bear in mind however that even if a person has a tendency to commit a particular kind of offence, it does not follow that he is bound to do so. So if you are sure that D does have a tendency to commit offences of the kind charged in count 2, this is only part of the evidence against him on that count, and you must not convict him wholly or mainly on the strength of it.

Example 3: Both approaches

D is charged in count 1 with a sexual assault on V1 and in count 2 with a similar sexual assault on V2. The prosecution evidence on count 1 is (a) the account given by V1 and (b) evidence given by V1's mother that she saw D sexually assaulting her daughter. The prosecution evidence on count 2 is only the account given by V2. D claims that V1 and V2 have concocted false accounts and that V1's mother is lying.

I have already told you that you must consider each count separately.

However there are two ways in which the evidence on one count might support the prosecution's case on the other. You should consider these two ways in the following order.

First consider count 1, where the prosecution rely not only on the evidence of V1 but also on that of her mother. If, having considered their evidence, you are sure that D is guilty of count 1, you should go on to consider whether that shows that he has a tendency to commit offences of the kind charged in count 2.

If you are not sure that D has such a tendency, then your conclusion that he committed the offence in count 1 does not support the prosecution's case on count 2. But if you are sure that D does have such a tendency then you may take this into account when you are deciding whether D is guilty of count 2.

Bear in mind however that even if a person has a tendency to commit a particular kind of offence, it does not follow that he is bound to do so. So if you are sure that D has a tendency to commit offences of the kind charged in count 2, this is only part of the evidence against him on that count, and you must not convict him wholly or mainly on the strength of it.

The second way in which the evidence on one count might support the prosecution's case on the other is this. The prosecution also rely on similarities between the allegations made by V1 and V2, [Set out the similarities e.g. in relation to the nature, circumstances, periods of time and locations of the alleged offences.]

D claims that the allegations are similar because V1 and V2 have got together to make up false accusations against him. If you decide that this has or may have happened, the similarities would obviously count for nothing, and you would reject the evidence of both V1 and V2.

Even if you are sure that V1 and V2 have not made up false allegations together, you should consider whether either V1 or V2 might have learned what the other was saying about D and have been influenced, knowingly or unknowingly, when making her own allegations. If you decide that this has or may have happened, the similarities between that complainant's evidence and the evidence of the other complainant would not take the prosecution's case any further, and you would have to take any influence of that kind into account when deciding how far you accepted that complainant's evidence.

However, if you are sure that there has been no such concoction or influence, you should consider how likely it is that two people, independently of each other, would make allegations that were similar but untrue. If you decide that this is unlikely, then you could, if you think it right, use V1's evidence as support for the evidence of V2. For the same reason, if you had not already reached a conclusion on count 1 on the basis of the evidence of V1 and her mother, you could use the evidence of V2 as support for their evidence.

When deciding how far, if at all, the evidence of each complainant supports the other, you should take into account how similar in your opinion their allegations are. This is because you could take the view that the more similar independent allegations are, the more likely they are to be true.

14. HEARSAY

14-1 Hearsay - general

ARCHBOLD 11-1; BLACKSTONE'S F15.1 and F16.1

Legal Summary

1. The task of the jury is to assess the probative value (weight) and reliability of evidence admitted as hearsay. The Court of Appeal has on several occasions reminded judges of the need for care in crafting directions in order to ensure that hearsay evidence is considered fairly and that the jury are warned about the limitations of such evidence. The strength of the warning depends on the facts of the case and the significance of the hearsay evidence in the context of the case as whole.
2. When summing up the judge should not refer to the statutory provisions under which hearsay came to be admitted; and whereas in many cases it is possible for the jury to know the reason for admitting the evidence (e.g. a witness has died) or the reason why a witness could not be expected to remember the information recorded, in some cases (e.g. fear) generally this cannot be done.

Directions

3. Directions should include the following:
   (1) Whether the evidence is agreed or disputed and, if disputed, the extent of the dispute.
   (2) The source of the evidence should be identified (e.g. a deceased witness or business records) and the jury reminded of any evidence about the maker of the statement so that they may be assisted in judging whether the witness was independent or may have had a purpose of his own or another to serve.
   (3) Where the statement is oral, evidence about the reliability of the reporter should be identified.
   (4) Any other evidence which may assist the jury to judge the reliability of the evidence should be identified (e.g. any mistakes that had been found elsewhere in the business records or information as to the circumstances in which the statement was made).
   (5) Reference should not be made to the statutory provisions under which hearsay came to be admitted.
   (6) In some cases it is possible for the jury to know the reason for admitting the evidence (e.g. the witness has died) or the reason why a witness could not be expected to remember the information recorded, in other cases this cannot be done (e.g. fear).
   (7) Where it is the defence who are seeking to rely on hearsay evidence the directions must be tailored to reflect the fact that the burden of proof is on the prosecution.

(8) It is suggested that as well as giving a direction about hearsay in the summing up, it is helpful to give the jury a summary of the direction, by way of explanation, just before such evidence is adduced.

(9) The jury need to be directed that hearsay evidence may suffer from the following limitations when compared with evidence given on oath by a witness at trial. [401]

(a) There has usually been no opportunity to see the demeanour of the person who made the statement.

(b) The statement admitted as hearsay was not made on oath.

(c) There has been no opportunity to see the witness's account tested under cross-examination, for example as to accuracy, truthfulness, ambiguity or misperception, and how the witness would have responded to this process. In some cases the credibility of the absent witness and/or his consistency will have been challenged under s. 124 of the Act. In such cases the jury needs to be reminded of those challenges and of any discrepancies or weaknesses revealed.

[401] *Grant v The State* [2006] UKPC 2.

14-2 Hearsay - Witness absent - s.116

ARCHBOLD 11-15; BLACKSTONE'S F16.8

Legal Summary

1. Section 116 governs admissibility of first hand hearsay statements (i.e. those which the absent witness could have made if testifying) from identified witnesses who do not testify for one of the specified reasons: the witness (a) is dead, (b) is unfit to be a witness, (c) is outside the UK and it is not reasonably practicable to secure attendance, (d) cannot be found after reasonable steps have been taken or (e) it is in the interests of justice to admit the statement from a witness who, through fear, has either not testified at all or not testified on the matter in his or statement. The witness must have been competent at the time of making the statement: s 123
2. Admissibility in such cases is also dependent on other safeguards including checks on the likely reliability of the evidence and the means by which the jury can assess its reliability.[402] S.114(2) provides a checklist for the judge to use when (a) considering the admissibility of the evidence and (b) if it is admitted, identifying factors to the jury for their consideration in their determination of the reliability of the evidence and the weight it deserves (although, when addressing the jury, reference to the section is not desirable).
3. The section does not permit evidence from unidentified witnesses. Nor does s.116 provide for the admissibility of multiple hearsay.
4. Care is needed to ensure that prejudice does not arise from any assumption that the defendant is the cause of the absence of the witness. This may be especially true of cases in which the witness cannot be found or is in fear. It will not be appropriate to disclose the reason for the absence of the witness unless the defendant has introduced that in evidence.[403] S.116 applies in cases of frightened witnesses who do not testify at all and in cases of witnesses who do not, through fear, testify in connection with the subject matter of the statement. In the latter case, particular care is needed to avoid prejudice.

Directions: see general directions at 14-1 above

[402] *Riat* [2012] EWCA Crim 1509.

[403] *Jennings and Miles* [1995] Crim. L.R. 810. Decided under the equivalent provision in CJA 1988.

Example 1: statement of absent witness read as part of the prosecution case

The statement made by X, who could not/did not give evidence in court [in an appropriate case: because he is {e.g. dead}], was read to you. But the fact that this {particular} statement was read does not mean that the prosecution and the defence agree that it/all of it is true. In particular it is disputed that {specify}.

You must decide how much importance, if any, you give to this evidence and when you are doing so you must bear in mind that this evidence has a number of limitations.

First: Although X signed a formal declaration at the beginning of the statement that it was true and that he knew he could be prosecuted if he deliberately put something into the statement which was false, X's statement was not made under oath or affirmation.

Secondly: if X had given evidence in court he could have been cross-examined, and you do not know how he, and his evidence, would have stood up to that.

[If applicable: Thirdly: when you are deciding whether or not you can rely on what X said in his statement you should also take account of what you know about X, namely {specify … e.g. matters relating to credibility adduced under s. 124}.]

Finally, when you are deciding how much importance, if any you give to X's evidence, you must look at it in light of the other evidence in the case. You will remember that when N gave evidence, his account differed from X's because {specify}. Also, when D gave evidence, he contradicted X's evidence by saying {specify}. So, you should take account of N's and D's evidence when deciding whether X's account was truthful, accurate and reliable.

You must also keep X's evidence in perspective. It only relates to one issue in the case, namely {specify} and this is not the only issue, or even one of the main issues, in this case.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of his.

[Where other witness statements have been read by agreement and their contents are agreed it will be necessary to add: The position in the case of X's statement is different from that relating to the statements of {specify witnesses}. The contents of those statements, which were read to you by agreement, **are** agreed and so, as I explained when the first of those statements was read, they are not in dispute.]

Example 2: additional considerations when the accuracy of the "reporter" of hearsay evidence is in issue

When another witness, W, gave evidence he said that X, who is not available to give evidence himself, told him that {specify}. The fact that X said this is disputed, so you must consider whether what W said about this is true and accurate.

When you are considering this you must bear in mind:

- W's reaction, both in what he said and how he said it, when it was put to him that {specify};
- all that you know about W, namely that {specify}; and
- that when X is alleged to have spoken to W, X was some distance away from him and running away from the scene, apparently in some distress. This could, depending on what you make of the situation, cut both ways. On one hand, the fact that this is alleged to have been said immediately after the incident may make it less likely that X was inventing what he said. On the other hand, if X was in distress, this may have affected how X could take in what had just happened. You should also consider whether the distance between X and W, and the fact that X was running away from the place where W was standing, had any bearing on W's ability to hear clearly and to remember accurately what X said.

Example 3: statement of absent witness read as part of the defence case

D is charged with s.20 wounding; identification evidence is in issue; W gave evidence that a third party, X, admitted committing the offence

When another witness, W, gave evidence he said that X, who has not given evidence himself, told him that {specify}. The prosecution do not accept that X said this or that, if he did say it, it is true. It is for you to decide whether W's evidence is, or may be, true or whether you can be sure that it is not; and if it is, or may be, true whether what X told W was, or may have been, in fact the truth or whether you can be sure that it is not. [Here summarise any arguments raised by the parties.]

It may not surprise you that X has not been at court, so that he could be asked to incriminate himself by admitting this offence. But the fact remains that you have not had the opportunity of seeing and hearing him for yourselves and this is something which may affect the significance which you attach to this evidence. This is because when you see and hear a witness give evidence and be cross-examined you may get a much better idea of whether what they are saying is honest and accurate.

When you are deciding what importance, if any, you attach to this evidence you must look at it in light of all of the other evidence in the case.

14-3 Hearsay - Business documents – s. 117

ARCHBOLD 11-26; BLACKSTONE'S F16.24

Legal Summary

1. CJA 2003 provides several exceptions by which hearsay statements can be admitted when a witness does not testify. The statute provides the relevant criteria for admissibility in such cases.
2. Section 117 governs the admissibility of documentary statements created or received in the course of a trade or business.
3. In many cases there will be no need for a statutory reason for the absence of the witness; it is sufficient that the statement was created/received in the trade or business. "Business records are made admissible . . . because, in the ordinary way, they are compiled by people who are disinterested and, in the ordinary course of events, such statements are likely to be accurate; they are therefore admissible as evidence because prima facie they are reliable": *Horncastle.*[404]
4. In other cases (where the document was prepared for the purpose of pending or contemplated proceedings other than evidence obtained from overseas) the witness must be absent for one of the statutory reasons specified in s.116(2) [see above] or the witness cannot reasonably be expected to have any recollection of the matters dealt with having regard to the time since the statement was made. The section does not specify that the source of the statement needs to be identified (cf. s.116).
5. Admissibility in such cases is also governed by other safeguards including a requirement that the maker of the statement was competent at the time it was made (s.123(2)); checks on the likely reliability of the evidence [405]and the means by which the jury can assess its reliability.[406]
6. S.117 may lead to statements being admitted which involve multiple hearsay, provided each person through whom the information was supplied received it in the course of a trade or business (s.117(2)(c))[407]. In such a case the jury will need a warning regarding the special care appropriate to such statements. The jury may need to be reminded of the different status of the s.117 statements from other non-hearsay documentary evidence they have received.

Directions

7. The judge should identify for the jury:

   (1) whether the evidence is agreed or disputed and, if disputed, the extent of the dispute;

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[404] *Horncastle* [2009] EWCA Crim 87 CACD.

[405] CJA 2003, s.117(7).

[406] CJA 2003, s.124.

[407] *Wellington v DPP* (2007) 171 JP 497.

(2) the source of the evidence should be identified and the jury should be reminded of any evidence about the maker of the statement so that they may be assisted in judging whether the witness was independent or may have had a purpose of his own or another to serve;

(3) any other evidence which may assist the jury to judge the reliability of the evidence e.g. any mistakes that had been found elsewhere in the business records or information as to the circumstances in which the statement was made;

(4) the difficulties, if any, which the other side may have in challenging or rebutting the evidence.

Example - business document – person who recorded information cannot reasonably be expected to have any recollection – accuracy of document questioned.

As part of the prosecution's case, you were shown records made by a number of people who worked in {specify business} in/on {specify type of record/exhibit). Obviously, whilst the people who made entries in/on that record knew the facts which they were recording at the time, it would not be reasonable to expect those people to remember any specific transaction now. Because of this, nobody who made those entries was called to give evidence; and it is the entries themselves which provide the evidence that {specify}.

All of the entries were made as part of the routine process of {specify business} and it is not suggested that any entry was deliberately falsified. What **is** suggested is that a number of entries are inaccurate. In some of those cases, you have seen other documents {specify} which show different details. In light of all of this evidence, you must decide whether or not you can safely rely on the entries in these records as being accurate.

14-4 Hearsay - Introduced by agreement - s.114(1)(c)

ARCHBOLD 11-3C; BLACKSTONE'S F16.6

Legal Summary

1. Hearsay evidence can be admitted by agreement between the parties under CJA 2003 section 114(1)(c).
2. The jury needs to be directed as to the approach they should take and the use they can make of the evidence.[408] *Brown:*[409]
3. In many cases under s.114(1)(c) it will be possible for the jury to know the reason for the non-availability of a witness or the reason why a witness could not be expected to remember the information recorded.

Directions: see general directions at 14-1 above

[408] *Brown* [2008] EWCA Crim 369.

[409] [2008] EWCA Crim 369. *GJ* [2006] EWCA Crim 1939.

Example: although the statement of the absent witness is read by agreement, the contents of the statement are in dispute

The statement made by X, who could not/did not give evidence in court [in an appropriate case: because he is {e.g. dead}], was read to you. Both/all parties agreed that this should be done. But the fact that it was done by agreement does not mean that both/all parties agree with everything in the statement.

[Where other witness statements have been read by agreement and their contents are agreed it will be necessary to add: This situation is different from that relating to the statements made by {specify witnesses}. Both the prosecution and the defence agree with the contents of those statements, so they are not in dispute.]

You must decide how much weight, if any, you give to this evidence and when you are doing so you must bear in mind that this evidence has a number of limitations.

First: Although X signed a formal declaration at the beginning of the statement that it was true and that he knew he could be prosecuted if he deliberately put something into the statement which was false, X's statement was not made under oath or affirmation.

Secondly: if X had given evidence in court he could have been cross-examined, and you do not know how he, and his evidence, would have stood up to that.

[If applicable: Thirdly: when you are deciding whether or not you can rely on what X said in his statement you should also take account of what you know about X, namely {specify … e.g. matters relating to credibility adduced under s. 124}.]

Finally, when you are deciding how much weight, if any you give to X's evidence, you must look at it in light of the other evidence in the case. You will remember that when N gave evidence, his account differed from X's because {specify}. Also, when D gave evidence, he contradicted X's evidence by saying {specify}. So, you should take account of N's and D's evidence when deciding whether X's account was truthful, accurate and reliable.

You must also keep X's evidence in perspective. It only relates to one issue in the case, namely {specify} and this is not the only issue, or even one of the main issues, in this case.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of his.

[Where other witness statements have been read by agreement and their contents are agreed it will be necessary to add: The position in the case of X's statement is different from that relating to the statements of {specify witnesses}. The contents of those statements, which were read to you by agreement, **are** agreed and so, as I explained when the first of those statements was read, they are not in dispute.]

14-5 Hearsay – Interests of justice – s.114(1)(d)

ARCHBOLD 11-3d; BLACKSTONE'S F16.38

Legal Summary

1. Section 114(1)(d) allows for any hearsay statement to be admitted where it is in the interests of justice. In ruling on admissibility regard should be had to[410] the factors listed in s. 114(2) and any other relevant circumstances. Those factors will also be useful when identifying factors for the jury to consider in their determination of the reliability of the evidence and the weight it deserves (although reference to the sections is not desirable).
2. The breadth of the subsection means that it has the potential to apply in a very diverse range of circumstances. In some the witness will be absent. In such a case the jury will need to be warned against speculating as to the reason for absence.
3. In other cases the witness may be present and testifying, but the hearsay adduced under s.114(1)(d) is supplementing that account.[411]
4. S.114(1)(d) may lead to statements being admitted of accusation by one defendant against another. Particular care will be needed in directing the jury in such cases.[412]
5. S.114(1)(d) does not permit anonymous hearsay to be adduced. [413]
6. If multiple hearsay is involved, see Chapter 14-16.

Directions: see general directions at 14-1 above

Examples: see examples at 14-2 above

[410] *Taylor [2006] 2 Cr App R 14.*

[411] *Turner* [2012] EWCA Crim 1786.

[412] *Mclean [2008] 1 Cr.App.R. 11.*

[413] *Mayers* [2009] EWCA Crim 2898; *Ford* [2011] Crim LR 475; *Horncastle* [2010].

14-6 Hearsay – Previous inconsistent statement - s.119

ARCHBOLD 11-33; BLACKSTONE'S F6.49

Legal Summary

1. Under CJA 2003 previous *in*consistent statements may be admissible, not only to show inconsistency but to prove the truth of the facts stated.
2. Under s.119(1)(a) if "a person gives oral evidence and - (a) he admits making a previous inconsistent statement, … the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible." W must give *some* evidence, and secondly, he must *admit* the inconsistency (though not necessarily accepting the truth of the earlier account). If W claims simply to have "forgotten", but refuses to admit the making of his earlier statement, s.119(1)(a) is not applicable. Although in such circumstances W might have satisfied the common law test of hostility, the terms of s.119(1)(a) are not met.
3. The Court of Appeal has repeatedly stated that if evidence is admitted under s. 119, the jury must be given a proper warning as to how to approach this material: *Bennett and another.*[414]
4. Under CJA 2003, a statement retracted by a witness, even a hostile witness [see Chapter 15-7 below], could be evidence of its truth: s.119. It is for the jury to determine whether its contents and the circumstances in which it was made were such that it could safely be relied upon, notwithstanding its retraction.
5. In a rare case where the jury retire with the documentary evidence of the earlier statement, they should be directed not to place undue weight on that by comparison with the other evidence. [415]

Directions

6. The inconsistency and W's final position (either agreement or disagreement with the statement) should be identified in the course of the review of the evidence.
7. The jury should consider whether a particular inconsistency is significant. If they find that it is not significant they should ignore it.
8. If they find that it is significant, they should consider whether they accept the explanation (if any) which the witness gave for the inconsistency. If they accept the explanation, then the inconsistency is unlikely to affect their view of the reliability of W's evidence (as a whole or on this point, depending on the nature and extent of the inconsistency).
9. If they do not accept any explanation given by W, then they should consider what effect this has on their view of the evidence of W (as a whole or on this point, depending on the nature and extent of the inconsistency).
10. It is entirely for the jury to decide the extent to which any inconsistency in W's evidence affects their judgement of his reliability.

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[414] [2008] EWCA Crim 248.

[415] *Hulme* [2007] EWCA Crim 1471.

11. Those parts of the statement which were introduced in the course of W's evidence form part of the evidence in the case. The jury do not have to accept either the account given by the witness in the witness box or the account given in the statement but if they find that what W said in the statement is [or if relied on by the defence, may be] true/accurate and what he said in the witness box is not they are entitled to rely on what he said in the statement rather than what he said in the witness box - and vice versa.
12. It is helpful to explain to the jury that they do not have the statement (subject to the provisions of s.122 CJA) and the reason for that: namely that if they have that part of the evidence in writing it may, albeit unwittingly, be given undue prominence.

Example

What W said about {specify} (a) when he was in the witness box and (b) in the witness statement about which he was cross-examined is all evidence. But it is obvious that these things are different.

It is for you to decide how different they are and whether or not this is important. If you decide that the differences are not important, then you should ignore them. But if you think that the differences are important you should consider the reason W gave for his inconsistency, namely {specify e.g. his memory was fresher at the time he made the statement and it is the statement which is correct and true}.

If you are sure that the explanation W gave for his inconsistency is valid, you may accept what he said in {specify either the evidence given in the witness box or the witness statement, depending on the circumstances}. But if you reject his explanation or you are not sure that it is true you should treat both what he said in his statement and what he said in the witness box with caution. If, having done so, you are sure that one of these two versions of events is accurate, then you may take it into account when you are deciding whether {specify e.g. D is guilty, D did/said …}. If you are not sure whether either version is accurate, then you should not take either into account.

You do not have a copy of W's witness statement. This is because you do not have a copy any other witness's statement, and it is important not to single out W's evidence by having his statement.

[If the jury have a/part of W's witness statement (as an exhibit): The fact that you have W's evidence/part of W's evidence in writing does not make it any more or less important than any other evidence in the case.]

14-7 Hearsay – Previous inconsistent statement of hostile witness - s.119

ARCHBOLD 8-197 and 11-35; BLACKSTONE'S F6.50

Legal Summary

1. Under CJA 2003, s.119, a previous statement made by a hostile witness is admissible as evidence of its truth.
2. The section is only triggered if: the witness gives oral evidence, is proved to be hostile (applying the common law test of hostility in *Gibbons*[416]) and has previously made a statement which is now proved to be inconsistent (under the Criminal Procedure Act 1865)[417].
3. For s.119(1)(b) to apply to a witness who has "forgotten" he must be (i) adjudged to be hostile and (ii) the party calling W must be able to show an inconsistent statement.
4. Where a witness has given evidence in examination in chief, his earlier inconsistent statement(s) may be put in cross examination. If W declines to answer questions in cross examination, s.119(1)(b) applies and the previous inconsistent statement can be put to the witness under ss.4 or 5 of the 1865 Act.
5. The judge retains a discretion to exclude any s.119 statement relied on by the Crown (PACE, s.78) and by the defence (CJA 2003, s.126).
6. The importance of judicial guidance to the jury as to the use to which any previous inconsistent statement/s may be put was also emphasised in *Croft*[418] and *Coates*.[419] The burden of proof must be reflected in the direction. *Billingham* and *Billingham*,[420]
7. In a rare case where the jury retire with the documentary evidence of the earlier statement, they should be directed not to place undue weight on that by comparison with the other evidence. [421]

Directions

8. The jury should be reminded of any particular features of the way in which W came to give his second account in the witness box {e.g. obvious unwillingness to answer questions}.
9. They should be directed that they heard about the (first) statement that the witness made {e.g. to the police/defence solicitor} because although the witness

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[416] [2008] EWCA Crim 1574.

[417] CJA 2003, s.3 hostile witness, ss.4 and 5 previous statements relative to the subject matter of the indictment.

[418] [2007] EWCA Crim 30 para.41.

[419] [2007] EWCA Crim 1471.

[420] [2009] EWCA Crim 19.

[421] *Hulme* [2007] EWCA Crim 1471.

was called by one party on the basis of what he said in that statement the evidence which he gave did not support their case but effectively supported the case of the other/another party. By saying one thing in the statement and another/the opposite in the witness box the witness effectively changed sides.

10. Both what the witness said in the witness box and what he said in the statement are evidence for the jury to consider and it is for them to decide what, if anything, of that witness' evidence they accept.

11. They should take account of the witness' change of account and any explanation he gave for it when considering his reliability as a witness. It is for them to judge the extent and importance of any change and what the significance of that is although, in reality, for a witness to have been turned hostile the change must have been significant.

12. They jury are entitled, depending on what they make of the witness' change and any reason he gave for it, not to rely on any of his evidence at all, but if after careful consideration they are sure that what the witness said, either in the statement or when he was in the witness box, was (or in the case of a defence witness, was or may have been) true, they may take account of it in reaching their verdict/s.

13. It is good practice to explain to the jury that they do not have the statement (subject to the provisions of s.122 CJA) and the reason for that: namely that if they have that part of the evidence in writing it may, albeit unwittingly, be given undue prominence.

Example

Although the {prosecution/defence} called W to give evidence, the evidence he gave did not support their case. Because of this the {prosecution/defence) were allowed to cross-examine W to show that he had previously said something that was different from what he said in court. In effect, W has changed sides.

You should look at everything that W said when he gave evidence and remember how he reacted when he was reminded of what he had said originally and the reason/s he gave for changing his story.

Because W has given two different versions, you must look at all that he said with caution.

If you are sure that one of the versions W gave is true, you can act on it. But if you are not sure which, if either, version is true, you should not take account of anything that W has said, either originally or in court.

[If the jury have a/part of W's witness statement (as an exhibit pursuant to s.122 CJA): The fact that you have W's evidence/part of W's evidence in writing does not make it any more or less important than any other evidence in the case.]

14-8 Hearsay - Statement to refresh memory - ss.139 and 120(3)

ARCHBOLD 11-37; BLACKSTONE'S F6.14

Legal Summary

1. A witness is entitled to refresh his memory from an earlier document or recording before testifying.[422] If mention of this is made in the course of the evidence the jury should be directed that this is normal practice.
2. A witness may be permitted to refresh his memory from an earlier document or recording made or verified by him at an earlier time if:[423]
   (1) he states in his oral evidence that the document records his recollection of the matter at that earlier time, and
   (2) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.
3. The judge retains a discretion as to whether a witness should be permitted to refresh his memory.[424] It is not necessary for the witness to have faltered before he is permitted to do so.[425]
4. If the witness refreshes his memory during the course of, or in a break in, testifying the earlier document may, in some circumstances become admissible as evidence of the truth of its contents independently of the testimony. The statement will only be admissible if:
   (1) the witness has succeeded in refreshing his memory from an earlier document or recording, and
   (2) the witness has been cross examined about the contents of the document from which he has refreshed memory, and
   (3) the content has therefore been received in evidence. [426]
5. The jury may inspect a memory-refreshing document if necessary.[427]
6. If the jury will find it difficult to follow the cross-examination of the witness who has refreshed his memory without having the record, this may be provided to them.[428]
7. A document exhibited under s.120(3) should not accompany the jury when they retire, other than in exceptional circumstances (e.g. it would help following

[422] *Richardson* [1971] 2 QB 484.

[423] CJA 2003, s.139.

[424] *McAfee* [2006] EWCA Crim 2914.

[425] *Mangena* [2009] EWCA Crim 2535.

[426] *Pashmfouroush* [2006] EWCA Crim 2330; *Chinn* [2012] EWCA Crim 501.

[427] *Bass* [1953] 1 QB 680.

[428] *Sekhon (1986) 85 Cr App R 19.*

translated text). [429] If the jury do retire with the document they need to be warned not to attach disproportionate weight to it.[430]

Directions

8. Sometimes a witness may refresh his memory from his witness statement before giving any evidence about a particular topic. In this event if he adopts what he said in his statement (assuming that the statement/part of the statement is read out in court) that is his unequivocal evidence. It will rarely be necessary to give any direction about this. For this reason no Example is given below.
9. On other occasions a witness gives some evidence about a topic, then refreshes his memory from the statement and, in the light of the statement, changes his account. In this event a direction should follow the Example in 14-6.

[429] CJA 2003, s. 122.

[430] *Hulme* [2007] EWCA Crim 1471.

14-9 Hearsay – Statement to rebut an allegation of recent fabrication - s.120(2)

ARCHBOLD 11-36; BLACKSTONE'S F6.42

Legal Summary

1. Under CJA 2003, s.120(2) "If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible." The previous statement will commonly have been made orally.
2. If the witness has made a previous statement consistent with the account given at trial and the earlier account was provided reasonably recently after the events, the previous consistent statement may be admitted as evidence of its truth.
3. Unless it is obvious to the jury that the earlier statement lacks independence, this should be drawn to their attention.[431]
4. If the s.120(2) criteria are not capable of being met, the evidence may nevertheless be admissible under other statutory gateways, *Gilloley*.[432]

Directions

5. It should be explained to the jury that the reason that they heard about W's previous statement was because it was suggested to W that he had invented his evidence and it is relevant to the question whether W has in fact done so and whether his evidence is true or false. It is implicit that the statement will have been made before the point at which the witness is alleged to have invented the evidence.
6. It is for the jury to decide, depending on what they make of the statement whether it rebuts the suggestion that W's evidence is invented.
7. The jury should be directed that the statement, or that part of it which has been used for this purpose, is evidence of the matter/s stated in it and they are entitled to use it to decide whether or not W has been consistent and, if they are satisfied that he has been, that is something they may keep in mind when deciding whether or not his evidence is truthful.

[431] Berry [2013] EWCA Crim 1389,http://www.bailii.org/ew/cases/EWCA/Crim/2013/1389.html

[432] *Gilloley* [2009] EWCA Crim 671.

Example

When W was cross-examined it was suggested to him that he had made up his account of the incident. Because of that suggestion, which W rejected, {advocate for the party by whom W was called} asked W about the statement that he made on {date}, in which he gave the same/a similar account to the one he has given today.

The reason you heard about W's statement is to help you decide whether W has made up what he said in the witness box or whether it is true. Both what W said in the statement and what he said in the witness box are evidence of {specify} for you to consider when you are deciding (a) whether W has been consistent in what he has said about the incident; (b) whether his statement shows that the suggestion that he made up what he said when he gave evidence in the witness box is wrong and (c) whether W's evidence is true.

You do not have a copy of X's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of his.

14-10 Hearsay – Statement as evidence of person, object or place - s.120 (4) and (5)

ARCHBOLD 11-38; BLACKSTONE'S F6.46

Legal Summary

1. Under CJA 2003, s.120(4) and (5), where a witness is testifying at trial, and confirms that he made an earlier statement and that to the best of his belief it was true and in the earlier statement he identified a person, object or place, that earlier statement is admissible as evidence of its truth.
2. What constitutes an identification of a person, object or place is to be broadly construed so as to admit, as evidence of its truth, contents of the document other than the evidence of a bare identification of "a person, object or place": *Chinn.*[433]

Directions

3. The situations in which a specific direction about such evidence will be necessary are likely to be rare and very fact specific. Any direction must be tailored to the facts of the case and discussed with the advocates before speeches.
4. It should be explained to the jury that the statement (or part of it) was put into evidence because W said that, to the best of his belief, he made the statement and, to the best of his belief, it is true.
5. The jury should be directed that if they accept W's evidence that he made the statement (which is unlikely to be in issue) and his evidence about his state of mind (which may be in issue) then the statement is evidence about the person/object/place which they may take into account.
6. If the jury do take the statement into account they should judge the accuracy and reliability of W's recollection at the time he made the statement rather than at the time he was asked to recall matters in court.

Example 1

You have heard evidence that {specify person/object/place and circumstances/significance}. This evidence came from W's witness statement which, when he gave evidence, he said he made on {date} and to the best of his belief is true.

[If the evidence is adduced in the prosecution case: The defence do not dispute that W made the statement, but they do not agree that what he said in it is true. So the first thing to decide is whether or not what W said in his statement is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true, it is evidence of {person/object/place}.]

[433] [2012] EWCA Crim 501.

[If the if the evidence is admitted in the defence case: The prosecution do not dispute that W made the statement, but they do not agree that what he said in it is true. So the first thing to decide is whether or not what W said in his statement is true. If you think it is more likely than not that the statement is not true, you must ignore it. But if you think it is more likely than not that it is true, it is evidence of {person/object/place}.]

When deciding whether or not W's statement is true, you should bear in mind that this was W's recollection when he made the statement on {date} and not when he was asked about this in court.

You do not have a copy of W's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single X's evidence out by having a copy of his.

[Where this evidence is confirmed by another witness: Another witness, X stated that on {date} W told him that {specify}. You can take account of X's evidence when you are deciding whether what W said about {specify} is true, but you will appreciate that X's evidence is not independent because it is only evidence of what W told X. X has no personal knowledge about {specify}. The reason you heard about what W said to X is so that you can consider it when you are deciding whether or not W's statement about this was true.]

Example 2

Following a robbery, W made a 999 call in which he gave the registration number of the getaway car. When giving evidence W said that he had done this but could not remember the number which he saw. The recording of the 999 call was put in evidence.

The Prosecution/Defence do not agree that, when he made the 999 call, W correctly relayed the registration number of the car. It would be unreasonable to expect W to recall the number now {x months} after the event. A trial should not be a memory test for witnesses. You should assess the accuracy of W's observation of the number and his relaying of it in the 999 call at the time of the incident.

[Here summarise any arguments made by the parties]

[If adduced in the Prosecution case: If you think that W's observation and report were or might have been inaccurate then you will ignore this evidence. If you are sure that his observation and report were accurate then you will take what he said in the 999 call into account as evidence in the Prosecution's case.]

[If adduced in the Defence case: If you think that W's observation and report were or may have been accurate then you will take what he said in the 999 call into account in support of the Defence case. If you are sure that his observation and report were inaccurate then you will ignore this evidence.]

14-11 Hearsay – Statement of matters now forgotten - s.120 (4) and (6)

ARCHBOLD 11-39; BLACKSTONE'S F6.21

Legal Summary

1. Under CJA 2003, s.120(4) and (6), where W is testifying at trial and confirms that he made an earlier statement when matters were fresh in his memory, and that to the best of his belief it is true but that he cannot now recall the contents, that earlier statement may be admissible as evidence of its truth.
2. If there is an issue about whether W can reasonably be expected to recall events, it may be necessary to hold a voir dire. If W cannot reasonably be expected to recall, the statement is admissible as evidence of its truth.

> "In such a case when the judge sums up he will explain shortly why the jury can consider the written material, stating why, in the case of this matter and this witness, she could not reasonably be expected to remember that matter well enough to give oral evidence in the proceedings. No reference to hearsay evidence or the statute itself need be necessary. The judge will also, of course, direct the jury to consider the reliability of the witness' earlier recollection of the subject matter of the statement that has been admitted and emphasise that it is for the jury to decide on the weight that they attribute to the evidence in the previous statement."[434]

Directions

3. The situations in which a specific direction about such evidence will be necessary are likely to be rare and very fact specific. Any direction must be tailored to the facts of the case and discussed with the advocates before speeches.
4. It should be explained to the jury that the statement (or part of it) was put into evidence because W said that, to the best of his belief, he made the statement and it is true, that it was made when matters were fresh in his memory and that he can no longer remember them.
5. The jury should be directed that if they accept W's evidence about the statement and his state of mind (which usually will not be in issue) then the statement is evidence which they may take into account.
6. If the jury do take the statement into account they should judge the accuracy and reliability of W's recollection at the time he made the statement rather than at the time he was asked to recall matters in court.

[434] *Chinn* [2012] EWCA Crim 501.

Example

You have heard evidence that {specify}. This evidence came from a witness statement that W made on {date}. When W gave evidence he said that, although he cannot remember these things now, when he made the statement they were fresh in his mind and, as far as he knows and believes, the statement is true.

[If the evidence is adduced in the prosecution case: The defence do not dispute that W made the statement or that he could not be expected to remember now things that happened on/in {date}, but they do not agree that what he said in the statement is true. So the first thing to decide is whether or not what W said in his statement is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true, it is evidence of {specify }.]

[If the if the evidence is admitted in the defence case: The prosecution do not dispute that W made the statement or that he could not be expected to remember now things that happened on/in {date}, but they do not agree that what he said in the statement is true. So the first thing to decide is whether or not what W said in his statement is true. If you think that it was or may have been true it is evidence of {specify}. But if you are sure that it is untrue, you must ignore it.]

When deciding whether or not W's statement is true, you can bear in mind that this was W's recollection on {date}, which was much closer to the time of the incident than now.

You do not have a copy of W's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single W's evidence out by having a copy of his.

14-12 Hearsay - Statement of complaint - s.120 (4), (7) and (8)

ARCHBOLD 11-40; BLACKSTONE'S F6.33

Legal Summary

1. Under CJA 2003. s.120(4), (7) and (8), where the complainant gives evidence in connection with the alleged offence and confirms that he made an earlier statement amounting to a complaint of the offence alleged and that to the best of his belief that statement is true, that earlier statement is admissible as evidence of its truth provided it was not made as a result of a threat or promise.

Directions

2. It should be explained to the jury that the statement (or part of it) was put into evidence because V said that, to the best of his belief, he made the statement and it is true and that the jury are entitled to hear evidence about a complaint which a person made before proceedings started.
3. The jury must be directed about the following:
   (1) The complaint itself falls to be judged as part of the evidence of V;
   (2) Evidence of V's complaint is evidence about what V has said on another occasion and so originates from V himself. Consequently it does not provide any independent support for V's evidence.
4. The jury should also be directed about the following, as appropriate:
   (1) The context in which the complaint was made;
   (2) The length of time which elapsed between the subject matter of the complaint (the event/s complained of) and the making of the complaint;
   (3) The explanation for any delay in making the complaint. For a direction on delay see Chapter 10-4;
   (4) The consistency/inconsistency of the complaint with V's evidence (and sometimes any other complaint made by the same witness). Points of consistency and/or inconsistency should be specified. The jury are entitled to consider this/these when they are deciding whether or not the witness is accurate, reliable and truthful.
5. If it has been suggested that a complaint has been made up, evidence of a complaint made to another person nearer the time of the alleged event may be used as evidence to rebut that suggestion and the jury should be so directed: see Chapter 14-9.
6. Evidence of a statement of complaint may also be given by a witness to whom the statement, whether oral or written, was made. This often applies in cases in which a complainant has made an oral complaint to a friend or relative.

Example 1: complainant's written statement

You have heard evidence that in a statement made to {specify person} on {date} V complained that {specify}. V gave evidence that to the best of his belief he made this statement and that to the best of his belief it is true.

It is not in issue that V made the statement but it is in issue that what he said in it is true. In deciding whether what he said is true or not you should look at all the surrounding circumstances and in particular:

- The fact that, it is not disputed, the complaint was made within minutes of the time when, if it happened, this incident is said to have occurred. In the light of this you should decide whether or not V had time to invent the account which he gave when he made the complaint;
- [Alternatively: The fact that, as is accepted, the complaint was not made for a number of months after the time when, if it happened, this incident (is said to have) occurred. In relation to this delay you should consider the reason/s which V gave for not complaining any sooner: see Chapter 20-1 below.]
- The context in which the complaint was made namely {specify}.
- Any consistency/inconsistency which you find to exist between what V said in the statement and the account which he gave to you in his evidence. In particular {specify}

If, having looked at all the circumstances, you are that what V said in the statement is true then you can take this into account as supporting the evidence that V gave in court. If you are not sure that what V said in the statement is true, or sure that it is not true, this would undermine the evidence that V gave in court.

You do not have a copy of V's witness statement. This is because you do not have a copy of any other witness statement and it is important not to single V's evidence out by having a copy of his.

Example 2: evidence of V's complaint from another witness

W gave evidence that on {date} V told him {specify}. You can take account of this when you are deciding whether V's allegation is true, but you must be aware that this is not independent evidence about what happened between V and D. This is because it is only evidence about what V told W about what he said happened between him and D. W was not there and so did not see what did or did not happen.

The reason you heard about what V said to W is so that you can consider it when you are deciding whether or not V has been consistent in what he has alleged, and whether or not he has told you the truth. When deciding this you should consider: [here adapt points in last example as appropriate].

It is for you to say whether the evidence of V's complaint to W helps you to decide whether V has been consistent and whether his evidence is true, but I remind you that this is not extra or independent evidence of what did or did not happen between V and D.

NOTE: It is often the case that a complainant will have shown distress when making a complaint to a third party. In this event the jury must be directed about how they should approach evidence of distress: see Chapter 20-1.

14-13 Hearsay – Res Gestae – Spontaneous Exclamation - s.118(1) and (4)

ARCHBOLD 11-70 and 74; BLACKSTONE'S F16.55

Legal Summary

1. CJA 2003, s.118, provides for the admissibility of hearsay statements which fall within the common law hearsay *res gestae* exception. The basis for admissibility under this exception is that hearsay can be regarded as more likely to be reliable if the statement was made spontaneously. To be admissible such a statement must:
   (1) have been made by a person "so emotionally overpowered" by an event that the possibility of concoction or distortion can be disregarded; or
   (2) have accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or
   (3) relate to a physical sensation or mental state such as intention or emotion.
2. The law governing admissibility is stated in *Andrews.*[435] It is not always necessary to give a specific direction about the risks in mistaken identification if the speaker was dying at the time of making the statement: *Mills v The Queen.*[436]
3. In some circumstances a res gestae statement can be adduced under s 118 when a witness is available but not called: *Barnaby v DPP.* [437] See also *A-G's Ref (No. 1 of 2003).*[438]

Directions

4. Depending on the reason for the statement having been admitted in evidence the jury should be reminded of the evidence about the statement, in the context of the situation in which it was made.
5. The jury should be directed that:
   (1) before they may rely on the statement they must be sure:
      (a) that the statement has been reported accurately;
      (b) that the statement was spontaneous and genuine and not the result of {insert as appropriate: deliberation, invention, distortion, rehearsal, malice or ill-will};
      (c) that, if sure that it was genuine and spontaneous, it was not made as a the result of a mistake as to the circumstances in/about which it was made;
      (d) and if they cannot be sure about these things they must ignore the statement completely;

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[435] *[1987] A.C. 281 p.300-301.*

[436] [1995] UKPC 6.

[437] [2015] EWHC 232 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/2015/232.html

[438] [2003] 2 Cr App R 453

(2) if, having considered these factors, they are sure that they can rely on the statement, they must decide what weight/significance they should attach to it, bearing in mind any limitations revealed by the evidence e.g. that the maker of the statement is unidentified or is dead and so has not given evidence in relation to the subject matter of the statement or been tested by cross-examination.

Example: arson with intent to endanger life: see over.

W was one of the police officers at the scene. He gave evidence that when the house was completely engulfed in flames, a woman ran from the back door coughing uncontrollably and obviously distressed. W said that this woman turned and pointed at the door and screamed "Jason's inside. He's the one you want". She then ran away up the street and has not been seen since. Within moments, D appeared at the door, badly affected by the smoke but otherwise uninjured.

W then arrested him. W accepts that he did not make any note of what the woman said until he made his witness statement.

When you are looking at this evidence you must bear these points in mind:

- First, before you can rely on W's evidence of what the woman said, you must be sure that his recollection is accurate. If you are not sure that W's recollection of what she said is accurate, you must ignore this evidence.
- If you are sure that W's recollection is accurate, you must next decide whether, when she said "He's the one you want", the woman was saying that D was responsible for the fire. If you are not sure that the woman was saying this, you must ignore this evidence.
- If you are sure that the woman was saying that D was responsible for the fire, you must then decide whether her words were spontaneous – that is to say they just came out – and whether they reflected the situation as she genuinely believed it to be, or whether she had any other reason for saying what she did, such as to make a false accusation against D. If you are not sure that what she said reflected the situation as she genuinely believed it to be you must ignore this evidence.
- If you are sure that what the woman said was spontaneous and genuine, you must next consider whether she was, or may have been, mistaken in believing that D was responsible for the fire. If you decide that she made, or may have made, a mistake, you must ignore what she said.
- If you are sure that she wasn't mistaken, you may take account of this evidence when you are deciding whether the prosecution have proved that D is guilty.

However, when considering what importance you should give to this evidence, you must keep in mind that, because the woman has never been identified, she has not given evidence about this herself. So, you have not been able to see her and do not know how her evidence might, or might not, have stood up to cross-examination. Obviously, if she had given evidence in line with what W told us she said, this would have been challenged in court.

14-14 Hearsay – Statements in furtherance of a common enterprise - s.118(1) and (7)

ARCHBOLD 11-70 AND 33-63; BLACKSTONE'S F16.76

Legal Summary

1. The common law exception admitting hearsay statements made in furtherance of a common enterprise is preserved by the Criminal Justice Act 2003, s.118(1). In short, the acts and declarations of a person engaged in a joint enterprise and made in pursuance of that enterprise may be admissible against another party to the enterprise, but only where the evidence shows the complicity of that other in a common offence or series of offences. [439]
2. Once admitted, the evidence may be considered by the jury when deciding upon the existence of the conspiracy, its objects and purpose, and when deciding whether the defendant was a conspirator.
3. The jury will need direction on several matters:

   (1) It is for them to decide whether the acts and declarations were made by a conspirator.[440] The hearsay evidence may be used when considering whether there was a conspiracy and whether the actor/speaker was a conspirator.

   (2) The jury must not convict D solely on the basis of this evidence: they may only convict him if there is other evidence which implicates him and they are sure on all of the evidence that he is guilty.
4. The jury will also need careful direction to guard against the risk that they will treat the statement as primary evidence of D's involvement without regard to the limitations of the hearsay evidence.[441] These include for example that D was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made; the statement may be ambiguous or incomplete; D will not have had any opportunity to test the evidence in cross examination where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.

Directions

5. A statement, whether made orally or in writing, by one party to a common enterprise may, if a reasonable interpretation is that it was made in furtherance of the common enterprise, be put in evidence to prove that a D who was not party to the statement participated in the common enterprise; provided that there is some other evidence of D's involvement. Such evidence commonly arises out of telephone communication (text or speech) between alleged co-conspirators.
6. The purpose for which the evidence was adduced must be explained to the jury.

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[439] *Gray* [1995] 2 Cr App R 100; *Murray* [1997] 2 Cr App R 136; *Williams* [2002] EWCA Crim 2208.

[440] *King* [2012] EWCA Crim 805**;** *Smart and Beard* [2002] EWCA Crim 772 at [30].

[441] *Jones* [1997] 2 Cr App R 119; *Williams* [2002] EWCA Crim 2208.

7. The limitations of the evidence must also be explained: for example

   (1) D was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made;

   (2) the statement may be ambiguous or incomplete;

   (3) D will not have had any opportunity to test the evidence in cross examination where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.

8. This evidence is only part of the evidence and the jury must consider the evidence as a whole.

9. The jury must not convict D solely on the basis of this evidence: they may only convict him if there is other evidence which implicates him and they are sure on all of the evidence that he is guilty.

Example

You have heard evidence from W that {D1} said {specify evidence of what was said by alleged conspirator}.

This evidence is disputed and so the first question for you to answer is whether or not this evidence is true. If you are not sure that it is true, you must ignore it. But if you are sure that it is true you can use this evidence when you are deciding:

(a) whether the alleged conspiracy actually existed; and

(b) whether any particular defendant was involved in any such conspiracy.

On the question of whether the alleged conspiracy actually existed, you should look at exactly what was said and decide whether it must have been said in order to carry out the alleged conspiracy or whether it could have been said for some other reason. If you are not sure that it was said in order to carry out the alleged conspiracy, you must ignore it.

[In the case of an incomplete sentence or message: Also, the sentence/message is obviously incomplete and you must not guess or make assumptions about what might have been said in the rest of the sentence/message.]

If you are sure that it was said, that may provide some evidence that the conspiracy existed but on its own what was said cannot prove that there was a conspiracy. Your conclusion about whether or not there was a conspiracy depends on what you make of all of the evidence, not just what was said.

If you are sure, on all of the evidence, that there was a conspiracy, you can take account of the evidence of what was said when you are deciding whether or not a particular defendant was involved in it.

In the case of D1, you will have to decide whether or not he is the person who said {specify what was said}. When you are deciding this, you must consider [here give a direction about identification by voice: see Chapter 15-7 below]. If you are sure that D1 was the person W heard, you can take account of what he said, along with the other evidence, when you are deciding whether he is guilty of the conspiracy with which he is charged.

In the cases of D2 and D3, although the person speaking referred to both of them by name, you must be cautious about it and aware that this evidence has a number of limitations. In particular, there is no evidence that either D2 or D3 was present when the person said what he did, so neither was there to respond, whether to agree or to disagree with what was said.

Although D1 gave evidence, he said that he was not the person speaking and so cannot provide any explanation of what was said; and if you think that the person speaking was someone other than D1, it follows that D2 and D3 have not had any opportunity to challenge what was said by having the speaker cross-examined

[If applicable, having regard to the evidence: You should also consider whether, if you are sure that {specify what was said} was said by someone involved in the conspiracy (whoever that was) it may have been said falsely and maliciously in order

to implicate others who were not involved in it.]

Finally you must not convict D2 or D3 just because of this evidence. You can only convict either one of these defendants if there is other evidence that implicates him and you are sure, on all of the evidence, that he is guilty.

14-15 Hearsay – Out of court statements made by one defendant (D1) for or against another (D2)

ARCHBOLD 11-3d; BLACKSTONE'S F17.27

Legal Summary

1. The normal direction is that what one D says out of court is evidence in his case only and not in that of any other D.
2. "The conventional direction ... that has historically been given to juries [is] that what defendant A says to the police is evidence only when considering his case and is to be ignored when considering the case of defendants B, C or D. The reason why that has always been the direction given is that what A says to the police is hearsay so far as B, C or D are concerned."[442]
3. Section 76A PACE 1984 provides for a confession made by D1 to be given in evidence for D2, so long as they are "charged in the same proceedings", so far as it is relevant to any matter in issue in the proceedings, so long as it is not to be excluded on the grounds of (a) oppression or (b) something said or done which is likely to render it unreliable: see s. 76A(2) and (3).
4. Section 114(1)(d) is wide enough to allow for D1's statement about D2 to be admitted in other circumstances.[443] In particular, where D1 seeks to rely on D2's hearsay statement that D2 was the offender where they are not charged in the same proceedings (usually because D2 has pleaded guilty) or where D1 seeks to rely on D2's hearsay statement that D1 was not involved in the offence (that statement not being a confession and hence not admissible under s. 76A), if such a statement is admitted under s. 114(1)(d), the trial judge should *not* give the jury the normal direction.
5. In *Maclean* Hughes LJ said:[444]

   > "If hearsay evidence is admitted in the interests of justice the jury is by law entitled to consider it, to determine its weight and to make up its mind whether it can or cannot rely upon it. It would be a plain nonsense to suggest that such hearsay evidence could be admissible, yet still the jury should be directed that it was not evidence except in the case of [the maker]. There is no doubt that if and when hearsay evidence of this kind is ruled admissible it becomes evidence in the case generally."

6. In *Sliogeris* [445] the Court declined to resolve the further ground of appeal:

   > "whether, once evidence of a confession by a defendant is properly admitted in favour of a co-defendant, it can in principle thereafter be used against all defendants and not merely the maker of the statement. In the light of the purpose behind the provision [s. 114], there is a cogent case for saying that it

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[442] *Mclean* [2007] EWCA Crim 219, at [20] to [21].

[443] *Y* [2008] EWCA Crim 10; *Horsnell* [2012] EWCA Crim 227.

[444] Ibid [20] to [21].

[445] [2015] EWCA Crim 22 http://www.bailii.org/ew/cases/EWCA/Crim/2015/22.html

should not be treated as evidence in the case generally but only in favour of a co-defendant. That would require the judge to direct the jury that it should not treat that statement as evidence against a co-defendant (other than the party making the confession) but that the jury may treat it as evidence in favour of the co-defendant who has successfully applied for it to be admitted. However, we leave that issue to be decided on another occasion."

Directions

7. Unless D1's out of court statement (usually made in interview) has been admitted against D2 under one or more of the hearsay provisions, the jury must be directed that what D1 said about D2 is not admissible in D2's case and they must disregard it, because D2 was not present when the co-defendant made the statement and so was not in a position to comment, challenge or rebut what the co-defendant said.

8. If D1's out of court statement has been admitted as evidence against D2 the jury must be warned about the possible dangers of relying on the statement because:

   (1) D2 was not present when the statement was made and so was not in a position to comment, challenge or rebut it at that time; and they do not know, and must not speculate about, what he might have said if he had been present;

   (2) D1 was being accused of a criminal offence and so had his own position to look after when he was being interviewed and this may, or may not, have best been served by diverting attention towards, and putting blame on, the other defendant.

9. If the statement was admitted as an inconsistent statement made by D1, the jury should only rely on it as evidence against D2 if they are sure that what D1 said in his interview was the truth and that what he said in evidence was untrue.

10. If the statement was made by D1 to a third party, before the jury could rely on it they would have to be sure that the third party's evidence about what D1 said is true, accurate and reliable both as to the fact that the conversation took place and to its contents.

11. If D1 has given evidence the jury should be directed that his evidence is relevant and admissible and that they may have regard to it in D2's case, because the evidence was given in D2's presence and he has had the opportunity to comment, challenge and rebut the co-defendant's account.

Where the confession of D1 has been admitted in evidence as evidence for D2

12. Where the confession of D1 has been admitted as evidence for D2 because it exonerates him, it will also provide evidence against D1. It is possible that in the course of the s. 76A application to admit/exclude it there will have been evidence about oppression and/or things said or done which render it unreliable. Where such issues are explored on the voir dire and are explored again in front of the jury, the judge must give careful directions which will invariably be case-specific: see also Chapter 16-1.

13. Directions should include the following:

   (1) When considering the case of D2, if the jury find:

(a) that the statement was not, or may not have been, obtained by oppression or anything said or done which is likely to render it unreliable [cf. the burden of proof for the admission of such a statement, which is on a balance of probabilities]; **and**

(b) that it is or may be true,

the statement is capable of supporting D2's case.

(2) When considering the case of D1:

(a) Unless the jury are sure that the statement was not obtained by oppression or anything said or done which is likely to render it unreliable, they must disregard it.

(b) If they are sure that it was not obtained by oppression or anything said or done which is likely to render it unreliable and they are sure that the statement is true, they may use it as evidence of that defendant's guilt.

Example 1: D1's out of court statement implicates D2

In his interview with the police D1 said that he was not responsible for {specify} but that it was D2. This was mirrored in D2's interview: he said that he was not responsible but that it was D1.

What one D said about the other in his interview is not evidence against that other D, because the other D was not present at the interview and so had no opportunity to comment on what was said or challenge or explain it.

Also, when each D was being interviewed he was being accused of {specify} and so may have had a reason to protect his own interests by blaming the other defendant.

In addition, depending on whether D1 and/or D2 gave evidence:

But, both Ds give evidence in which each repeated what he said in his interview. What each D said in evidence is evidence against the other because each has heard what the other said in evidence and has had the opportunity to challenge and explain what the other D said.

Or

D1 chose to give evidence but D2 chose not to. What D1 said in his evidence about D2 is evidence against D2 because D2 heard what D1 said in court and was able to challenge it through his advocate. Also, if he had wanted to do so, D2 could have challenged and explained it by giving evidence.

The fact that D2 did not give evidence however means that what he said in his interview about D1 is still not evidence against D1: and you have no evidence from D2 by which he either exonerates himself or implicates D1.

Example 2: D1's out of court statement admitted under s.76A as D1's confession and exonerating D2; D1 alleges unreliable because of inducement offered

In his interview with the police D1 admitted that he had {specify}. If what D1 said is true it is a confession that D1 committed the offence and so is guilty. Also, given the circumstances in this case, if what D1 said is true, it must mean that D2 could not have committed this offence and so D2 is not guilty.

When he gave evidence D1 accepted that he did say that, but told us that it was not true and he only said it because {e.g. just before the interview he was told that the offence was not very serious and if he admitted it he would be given bail and could go home}.

Your approach to this evidence will be different depending whether you are considering the case of D1 or D2.

In the case of D1: Because the prosecution must prove the case against him so that you are sure of it, if you think that D1's explanation for saying what he did in his interview is, or may be, true, you must ignore what he said in the interview: it does not provide any evidence against him. If on the other hand you are sure that his explanation is untrue and that what he said in his interview is true, you can consider what D1 said in the interview as evidence which supports the prosecution's case that he is guilty.

In the case of D2: Because the defence do not have to prove anything to you, if you think that D1's explanation for saying what he did in his interview is, or may be, untrue and that what he said in the interview is, or may be, true, you can consider this as evidence which supports D2's case that he is not guilty.

Example 3: D1's out of court statement exonerating D2 admitted under s.114(1)(d)

When D1 was interviewed he told the police that D2 was not responsible for {specify} because {specify}. This is evidence which you can consider in support of D2's case that he is not guilty.

It is for you to say what significance you attach to this evidence, bearing in mind that you have not heard D1 say this in the witness box, when he would have been under oath or affirmation to tell the truth; and you do not know how he would have responded if he had been cross-examined. You must also bear in mind that D2 does not have to prove that he is not guilty; it is the prosecution to prove that he is.

Example 4: D1's out of court statement implicating D2 admitted under s.114(1)(d)

When D1 was interviewed he told the police that D2 was responsible for {specify} because {specify}. This is evidence which you can consider as evidence which supports the prosecution's case that D2 is guilty.

You must bear in mind that when D1 was being interviewed he was being accused of {specify} and so may have had a reason to protect his own interests by blaming D2.

It is for you to say what significance you attach to this evidence, bearing in mind that you have not heard D1 say this in the witness box when he would have been under oath or affirmation to tell the truth, and you do not know how he would have responded if he had been cross-examined.

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

14-16 Hearsay – Multiple hearsay - s.121

ARCHBOLD 11-41; BLACKSTONE'S F16.90

Legal Summary

1. The Criminal Justice Act 2003 section 121 governs the admissibility of multiple hearsay. The restrictions are strict because multiple hearsay poses greater risks of unreliability.
2. Multiple hearsay is not admissible unless one of the statements involved in the chain is:

   (1) admissible as a business document (s. 117); or

   (2) a previous statement by a witness in the case; or

   (3) all parties to the proceedings agree; or

   (4) where the court is so convinced by the value of the evidence that it can invoke the additional 'safety valve' in s. 121 (1) (c) in which case the court should identify a relevant statutory exception which would apply to admit the first chain of hearsay (e.g. s. 116 or 114(1)(d)) before considering whether it is the further chain(s) are admissible: *Walker*[446]
3. In the rare cases in which multiple hearsay is admitted it will be incumbent on the judge to give a very clear jury warning about the enhanced dangers. The jury will need to be directed about each link in the chain of hearsay.[447]

   > "it is important to underline that care must be taken to analyse the precise provisions of the legislation and ensure that any route of admissibility is correctly identified. In any case of multiple hearsay, that should be done in stages so that each link in the multiple chain can be tested."[448]
4. In some cases s. 121 will render admissible statements made by one accused that incriminated both himself and his co-accused. Particular care is needed in such a case.[449]

Directions

5. If multiple hearsay has been admitted, in addition to the direction/s relating to the pupose for which it has been admitted, further directions tailored to the specific facts of the case must be given, including a "Chinese whispers" direction setting out each stage of the transmission of the information and to direct the jury that they must consider the risks, if any, of a failure to transmit the information in its original form.

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[446] [2007] EWCA Crim 1698.

[447] See *Friel* [2012] EWCA Crim 2871 [22]; *Scorah* [2008] EWCA Crim 1786 [34].

[448] Per Leveson J *Maher v DPP* [2006] EWHC 1271 (Admin) [26].

[449] *Thakrar* [2010] EWCA Crim 1050.

Example

When D was arrested by PC W a number of others were present including X (female) and Y (male). In his evidence PC W said that having arrested D, X told him (PC W) that Y had told her (X) that Y had seen D covered in blood and D had said to Y that this had come from V's head wound. PC W made a note of what X told him in his pocket book and X signed it as being an accurate record, but neither X nor Y have given evidence: the only evidence of D being covered in blood and what he is alleged to have said has come from PC W.

[Having reviewed the evidence]

You must decide what significance, if any, to give to this evidence, but you should bear in mind that it is not agreed: D says that he was not at the scene and so could not have been covered in V's blood.

In these circumstances you must approach this evidence with caution because PC W and X did not witness the incident; and this evidence is of what Y allegedly told X, and then what X told PC W.

You will appreciate that when information is passed from one person to another, and then from that person to someone else, there is a risk that the final version will not be accurate and reliable. So PC W's evidence has a number of limitations.

First, although nobody has suggested that PC W's note of what X said to him was inaccurate, and it is accepted that X signed that note to confirm that the note was accurate, this does not mean that what X said to PC W was itself accurate. Also, X could not know, from her own observation, whether Y saw D or whether, if Y did see D, D had blood on him so X cannot say that what Y said to her was accurate.

Secondly, X and Y did not give evidence in court and so you do not know how each of them would have responded when cross-examined.

When you are deciding what weight, if any, you should give to this evidence, you must look at it in the light of the other evidence in the case. You must also keep PC W's evidence in perspective, because it only relates to three particular issues in the case: namely whether D was at the scene, whether, if he was, he had blood on him and, if he did have blood on him, whether he said what is alleged.

Also, whilst these issues are obviously important, they are by no means the only issues in the case.

15. IDENTIFICATION

15-1 Visual identification by a witness/witnesses

ARCHBOLD 14.1; BLACKSTONE'S F18.1

Legal Summary

1. The risk of honest but mistaken visual identification of suspects is well established. To guard against that risk investigators must comply with the carefully prescribed safeguards in Code D of the Police and Criminal Evidence Act 1984.[450]
2. Code D sets out four possible visual identification procedures:

   (1) Video identification;

   (2) Identification parades;

   (3) Group identification;

   (4) Confrontation.
3. Video identification is the preferred procedure, but an identification parade may be offered if video identification is not practicable or if a parade is both practicable and more suitable than video identification.[451] Group identification may be offered initially only if the officer in charge of the investigation considers it more suitable than either video identification or an identification parade and the identification officer[452] considers it is practicable to arrange.[453] Confrontation is the last resort, only to be used if all other options (including covertly recorded video etc.) are impracticable.[454] Photographs or composite images for identification purposes should not be shown to witnesses for identification purposes if there is a suspect already available to be asked to take part in an identification procedure.[455]
4. There is a need for judges, when determining admissibility, to be alert to the dangers of identification evidence. Breach of the procedures provided by Code D may form the basis of an application to exclude the identification evidence under s. 78 PACE.[456] If evidence obtained in breach of Code D is nonetheless admitted, the jury should be told that the defendant had not received the protection to which

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[450] Code D, para 1.2. Archbold Supplement, Appendix A; Blackstone Appendix 1.

[451] Code D, para 3.14.

[452] An officer not below the rank of inspector who is not otherwise involved in the investigation: Code D, para 3.11.

[453] Code D, para 3.16.

[454] Code D, para 3.23.

[455] Code D, para 3.21 to 3.24.

[456] Breaches of Code D do not inevitably lead to the exclusion of the evidence: *Selwyn* [2012] EWCA Crim 2968. The judge must determine whether the alleged breaches may have caused any prejudice to the defendant and, if so, whether the adverse effect would be such that justice requires the evidence to be excluded: *Malashev* [1997] EWCA Crim 471; *Cole* [2013] EWCA Crim 1149; *Lariba* [2015] EWCA Crim 478.

he was entitled and the possible prejudice in consequence of the breach should be explained.[457]

5. Judges are also required to examine the state of identification evidence at the close of the prosecution case and to stop the case if it is poor and unsupported.[458]
6. In any event the judge has a duty to direct the jury carefully so that they are alert to the risks such evidence carries: *Turnbull*.[459]

Directions

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

   (1) there is a need for caution to avoid the risk of injustice;

   (2) a witness who is honest and convinced in his own mind may be wrong;

   (3) a witness who is convincing may be wrong;

   (4) more than one witness may be wrong (*see paragraph 8 below*);

   (5) a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong.
9. The jury should be directed to put caution into practice by carefully examining the surrounding circumstances of the evidence of identification, in particular:

   (1) the time during which the witness had the person he says was D under observation; in particular the time during which the witness could see the person's face;

   (2) the distance between the witness and the person observed;

   (3) the state of the light;

   (4) whether there was any interference with the observation (such as either a physical obstruction or other things going on at the same time);

   (5) whether the witness had ever seen D before and if so how many times and in what circumstances (i.e. whether the witness had any reason to be able to recognise D);

   (6) the length of time between the original observation of the person said to be D (usually at the time of the incident) and the identification by the witness of D the police (often at an identification procedure);

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[457] *Gojra* [2010] EWCA Crim 1939 para.75, where the investigating officer decided not to require an identification procedure for a witness; *Preddie* [2011] EWCA Crim 312, where the judge failed to explain the significance of the Code D infringements.

[458] *Turnbull* [1977] QB 224; *Fergus (Ivan)* [1994] 98 Cr App R 313.

[459] *Turnbull* [1977] QB 224.

(7) whether there is any significant difference between the description the witness gave to the police and the appearance of D.

10. Any weaknesses in the identification evidence must be drawn to the attention of the jury, for example those arising from one or more of the circumstances set out above, such as:

    (1) the fact that an incident was unexpected/fast-moving/shocking or involved a (large) number of people so that the identifying witness was not observing a single person;

    (2) anything said or done at the identification procedure including any breach of Code D.

11. Evidence which is capable and, if applicable, evidence which is not capable of supporting and/or is capable of undermining the identification must be identified.

12. The jury may also use evidence of description, if they are sure that it comes from a witness who is honest and independent, as support for evidence of identification given by an/other witness/es.

13. Particular care is needed if the defendant's case involves an alibi: see Chapter 18-2 below.

14. Where more than one witness gives evidence of identification the jury should be told that they must consider the quality of each witness' evidence of identification separately and must have regard to the possibility that more than one person may be mistaken. However, as long as the jury are alive to this risk, they are entitled to use one witness' evidence of identification, if they are sure that that witness is honest and independent, as some support for evidence of identification given by an/other witness/es.

15. In every case, the direction must be tailored to the evidence and to the arguments raised by the parties in respect of that evidence.

Example

NOTE: Not all of the following directions need to be given in every case, as shown by the headings. It is suggested that the order is logical but it is for the judge to decide which directions are appropriate and the order in which they should be given.

In every case

You must be cautious when considering this evidence because experience has shown that any witness who has identified a person can be mistaken even when the witness is honest and sure that he is right. Such a witness may seem convincing but may be wrong.

[In a "recognition" case: This is true even though a witness knows a person well and says that he has recognised that person. The witness could still be mistaken.]

You can only rely on the identification evidence if you are sure that it is accurate. You need to consider carefully all the circumstances in which D was identified.

So you must ask yourselves:

- For how long could W see the person he says was D and, in particular, for how long could he see the person's face?
- How clear was W's view of the person, considering the distance between them, the light, any objects or people getting in the way and any distractions.
- Had W ever seen D before the incident? If so, how often and in what circumstances? If only once or occasionally, had W any special reason for remembering D?
- How long was it between the time of the incident and the time when W identified D to the police?
- Is there any significant difference between the description W gave of the person and D's appearance?

You should also think about whether there is any evidence which, if you accept it, might support the identification. In particular you should consider {specify}.

However the evidence of {specify} cannot support the identification because {explain}.

You will also have to look to see if there are any weaknesses in any of the identification evidence, or if there is any evidence which, if you accept it, might undermine the identification evidence. In particular, you should consider {specify}.

<u>In a case where there has been evidence of identification **and** description</u>

In this case you have identification evidence and description evidence.

Identification evidence is where a witness has identified a specific person by {e.g. naming him / pointing him out (whether in the street or at an identification procedure)}.

Description evidence is where a witness has given a description which may or may not be similar to the appearance or clothing of a particular person. However, the description alone does not identify that person, so it can only go to support other evidence, including evidence of identification.

<u>Where there has been an issue arising from a VIPER identification procedure</u>

You have heard that D was picked out on a VIPER identification procedure from a number of images that had been selected by D and his solicitor. {Summarise issue/s arising and evidence relating to those issues.}

Where the defence is alibi

I have already explained how you should consider the evidence of D's alibi [see Chapter 18-2].

If you decide that D lied about where he was, this does not prove that W's identification must be right. But if you decide that he had no innocent reason for putting this alibi forward, you may treat his false alibi as some support for W's identification.

Of course, if you are sure that W's evidence of identification is reliable, it would follow that D's alibi is false.

Where there has been a breach of Code D

The fact that no identification procedure took place broke the rules that should be followed in cases involving disputed identification. These rules, known as the Code of Practice, are designed to provide safeguards for a suspect whom a witness says he can identify, and to test the ability of the witness to identify the suspect.

The failure to hold a formal identification procedure has deprived D of an important safeguard which would have tested W's ability to make an identification under formal and fair conditions. You must bear that in mind when considering the reliability of W's identification.

As no identification procedure was carried out in this case, W's ability to identify a suspect was not tested in this way and D has not had the advantage he might have had if W had failed to pick him out or had picked out another person.

You should take all this into account when you decide whether or not you can be sure that W's identification of D was reliable, and you should ask yourselves whether the fact that there was no formal identification procedure puts the identification evidence in doubt.

15-2 Identification from visual images: comparison by the jury

ARCHBOLD 14-63 and 64; BLACKSTONE'S F18.20

Legal Summary

CCTV evidence generally

1. The proliferation of CCTV cameras has led to the increased reliance on images which purportedly record relevant events as a means of identification.
2. In *Attorney General's Reference (No 2 of 2002)*,[460] Rose LJ held that there were at least four circumstances in which subject to a sufficient warning, the jury could be invited to conclude that D committed the offence on the basis of a photographic image from the scene of the crime which is admitted in evidence:[461]

   (a) "where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock;[462]

   (b) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this;[463] and this may be so even if the photographic image is no longer available for the jury;[464]

   (c) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury;[465]

   (d) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary

[460] [2002] EWCA Crim 2373.

[461] [2002] EWCA Crim 2373 at para.19. The prosecution case was that the defendant was recorded in a CCTV film of indifferent quality taking part in a riot.

[462] *Dodson & Williams* [1984] 1 WLR 971.

[463] *Fowden* [1982] Crim LR 588, *Kajala v Noble* (1982) 75 Cr App R 149, *Grimer* [1982] Crim LR 674, *Caldwell* (1994) 99 Cr App R 73 and *Blenkinsop* [1995] 1 Cr App R 7.

[464] *Taylor v Chief Constable of Cheshire* (1987) 84 Cr App R 191. Ralph Gibson LJ at p.199 held that where the recording is not available or produced, the court "must hesitate and consider very carefully indeed before finding themselves made sure of guilt upon such evidence". In *Selwyn* [2012] EWCA Crim 2968 it was held that a *Turnbull* warning will be necessary in such circumstances.

[465] *Clare* [1995] 2 Cr App R 333.

photograph of the defendant, provided the images and the photograph are available for the jury."[466]

CCTV comparison by the jury

4. In the first category of case, the recording is shown as real evidence and may provide the court with the equivalent of a direct view of the incident in question. In *Dodson & Williams*[467] it was held that although the exercise required of the jury is not expert in nature, the jury should still be warned of the dangers of mistaken identification and of the need to exercise great care in attempting to make an identification from a CCTV recording. A full *Turnbull* warning may not always be appropriate.[468]
5. The recording in question (or photograph taken from it) must be of sufficient clarity.[469] Where D's appearance has changed since the suspect's image was captured on CCTV, the jury should be provided with a photograph of D which was taken contemporaneously with the CCTV image. Other factors which the jury may need to be made aware of in seeking to make a comparison include the extent to which the facial features of the suspect are exposed in the recording or photograph and the opportunity and period of time the jury has had to look at D in the dock.[470] In *Walters,*[471] the court emphasised that the jury's attention should be drawn to the kind of factors that might make recognition from CCTV stills unreliable.
6. In *McNamara*[472] it was held that where a D refused to comply with a jury's request during summing-up to stand up and turn around so they could make comparisons with video evidence, the jury should not be invited to draw an adverse inference from such a refusal. The effect of such a direction would be to reverse the burden of proof.
7. There is no invariable rule that the jury must be warned of the risk that they might make a mistaken identification.[473]

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[466] *Stockwell* (1993) 97 Cr App R 260; *Clarke* [1995] 2 Cr App R 425; *Hookway* [1999] Crim LR 750.

[467] [1984] 1 WLR 971.

[468] *Blenkinsop* [1995] 1 Cr App R 7.

[469] *West* [2005] EWCA Crim 3034 at para.14. In *Faraz Ali* [2008] EWCA Crim 1522, Hooper LJ at paras.36 to 41 doubted that the images relied upon were of sufficient quality to invite the jury to use "the evidence of their own eyes" and repeated that if such an exercise is undertaken, the jury must be given an explicit warning about the dangers of mistaken identification. cf *Najjar* [2014] EWCA Crim 1309 in which the footage provided the jury "with an equivalent of a direct view of the incident and an exceptionally clear view of the perpetrator" (at para.17) and the appeal against conviction was rejected.

[470] *Dodson & Williams* [1984] 1 WLR 971 by Watkins LJ. The need to deal clearly with such factors was highlighted by the Court of Appeal in *Walters* [2013] EWCA Crim 1361 at para.31.

[471] [2013] EWCA Crim 1361.

[472] [1996] Crim LR 750.

[473] *R. v. Shanmugarajah and Liberna* [2015] 2 Cr.App.R. 215(14), C.A

Directions

8. The jury must be given a warning, adapted from *Turnbull*, as to the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that:

   (1) it is possible for anyone, and any one of them, to make a genuine and honest mistake in identification; and it is also possible for all of them to make such a mistake. The fact that a number of people make the same identification does not of itself prove that the identification is correct;

   (2) none of them knew D before they saw him in the dock, so this is the only knowledge on which any of them can base their recognition of him;

   (3) even if the person shown on an image appears similar to D, it may not be him.

9. The jury must also be warned that although they have had the advantage of having been able to observe D in the course of the trial over a significant period, in clear light, from a reasonably short distance and without obstruction or distraction:

   (1) his appearance may have changed since the time that the suspect's image was captured and they must be careful not to make assumptions about what the defendant might have looked like at that time. [This situation will not arise if an image proved/agreed to be that of the defendant taken at the time that the suspect's image was captured has been put in evidence.];

   (2) the image/s with which they are comparing the defendant's features is/are only two dimensional: this is not the same as observing an actual person at the scene.

10. The jury must also be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face.

11. Any obvious difference between the appearance of the defendant and the suspect shown on the image must be drawn to the attention of the jury.

12. Evidence which is capable of supporting, not capable of supporting or capable of undermining the case that the person shown on the image is the defendant must be drawn to the attention of the jury.

Example

You do not have any evidence of this incident from an eye-witness. However, there is CCTV footage and you have got photographs that have been made from that. You are asked to compare D against the person in the footage and photographs.

The prosecution say that you can be sure that it is D. The defence say that you cannot be sure of that, and that {summarise any argument put forward e.g. that the quality of the footage / images makes it impossible / unsafe to make any comparison; or that comparison shows that these are two different people}.

When you compare D against the person in the footage / photographs, you should look for any features which are common to both, and for any features which are different. By 'features' I mean both physical appearance and also other characteristics such as the way a person walks, stands, uses gestures and so on.

When making your comparison you must be cautious for the following reasons.

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are. Also, the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken, and you yourselves must have this in mind when you are making your comparison.
- Although you have been able to look at D during this trial in good light, at a relatively close distance and without any obstructions or distractions, none of you knew D beforehand, so your ability to identify him is not based on previous knowledge or having seen him in several different situations before.
- D's appearance has / may have changed since the time of the incident, and you must not speculate about what he looked like then. [Any points on this topic by either party should be summarised here.]
- [If the jury have a photograph known to be of D and taken at or close to the time of the alleged offence] You have a photograph of D taken on / about {date}. You can compare this with the footage / photographs but you must still keep in mind the points I have just raised,
- The quality of the footage / photographs may affect your ability to make a comparison. You should take account of these points: {specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)}. If you decide that the quality of the footage / photographs does not allow you safely to make any comparison with D, you should not try to do so. However, if you are satisfied that the quality is good enough to allow you to make a comparison, you can study the footage / photographs for as long as you wish.
- The footage / photographs that you have are only two-dimensional and so do not provide the same amount of information as someone at the scene would have. Seeing footage / photographs from the time of the incident is not the same as witnessing it for yourselves. Having said that, a person at the scene only sees the incident once, usually without any warning that it is going to happen; but you have had the advantage of being able to study the footage / photographs several times.

- If you decide that the person shown on the footage / photographs is similar to D, even in several ways, this does not automatically mean that the person shown must be D.

You must also bear in mind that this is only part of the evidence in the case. {Identify any evidence which is capable of supporting, not capable of supporting or capable of undermining the evidence from which the jury are invited to conclude that the person on the footage / photographs is D.}

If you are sure, having considered all of the evidence, that the person shown on the footage / photographs is D, you must then decide whether he is guilty of the offence(s) with which he is charged. If you are not sure that the person on the footage / photographs is D, you must find D not guilty.

15-3 Identification from visual images by a witness who knows D and so is able to recognise him

ARCHBOLD 14-4, 22, 63 and 65; BLACKSTONE'S F18.3 and 20

Legal Summary

1. Evidence may be received from a witness (usually a police officer) who has studied photographs or film footage of a person and who purports to identify him by using the knowledge acquired as a result of his viewing: *Clare and Peach.*[474]
2. In *Savalia*[475] the "special knowledge" category of case was held to extend to the identification of a defendant from CCTV based not only his facial features but on a combination of factors, including physical build and gait.
3. Care will need to be given to ensure that the weaknesses in such evidence are drawn to the jury's attention bearing in mind that the witness will have no specialist training in facial mapping or similar techniques.

Directions

4. It should be noted that such evidence:

   (1) is direct evidence of identification by the witness of D; and

   (2) provides assistance to the jury in making their own comparison of D (and proved/agreed photographs of him) with the suspect shown on the CCTV footage/images. Reference should therefore be made to the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury).
5. The jury must be given a warning, adapted from *Turnbull*, of the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that:

   (1) a witness can make a genuine and honest mistake in identification;

   (2) this is equally so when a witness knows someone and purports to recognise them, because genuine and honest mistakes can be made in recognition even by those who know someone well, such as a close friend or member of their family.

   The jury should be warned that although the witness has had the advantage of being able to study the CCTV footage/images the image/s is/are only two dimensional and this is not the same as observing an actual person at the scene.
6. The jury must also be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face and also the degree and currency of the witness' knowledge of D.
7. Any obvious difference between the appearance of D and the suspect shown on the image must be identified. If D's appearance may have changed since the time

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[474] [1995] 2 Cr App R 333.

[475] [2011] EWCA Crim 1334.

that the suspect's image was captured this must be pointed out and the jury directed not to make assumptions about what D might have looked like at that time. This situation will not arise if an image proved/agreed to be that of D taken at the time that the suspect's image was captured has been put in evidence.

8. Evidence which is capable of supporting, not capable of supporting, or capable of undermining the evidence of identification must be identified for the jury. Evidence capable of supporting the evidence of identification may include the jury's own comparison of D with the suspect shown in the CCTV footage/images and vice versa, in which case the direction must also reflect the features of the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury).

Example

You do not have any evidence from a witness who was at the scene at the time of this incident. What you do have is evidence from W, a local shopkeeper who knows D and who has watched the CCTV footage taken from his shop. W gave evidence that when he saw the footage he immediately recognised the person shown on it as D; and that he confirmed this by studying the footage several times. The defence case is that although W knows D and should be able to recognise him, W is mistaken in his identification of him as the person shown on the footage.

You may consider W's evidence in two ways:

First, it is evidence of W's own identification of D from the footage / photographs.

Secondly, you may also use W's evidence to help you compare what you have seen of D in court with the footage of the incident.

When considering W's evidence you must be cautious for the following reasons.

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are.
- A person may be mistaken even when he could be expected to recognise someone because of previous knowledge of him. It has been known for a person to be sure that he has seen someone, even someone he knows well, only to realise that he could not in fact have seen him and that he was wrong.
- Also, when you are making your own comparison, you must bear in mind that the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken.
- The quality of the footage may affect W's – and your - ability to make a comparison. You should take account of these points: {specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)}.

- The footage from the time of the incident is only two-dimensional and is not the same as seeing it for yourself. Having said that, a person at the scene only witnesses the incident once, usually without any warning that it is going to happen; but you and W have had the advantage of being able to study the footage several times.
- If you decide that the quality of the footage is not good enough for a fair comparison to be made, you must ignore W's evidence and not embark on any comparison of your own.
- However, if you are satisfied that the quality of the footage is good enough for a fair comparison to be made, then you must then decide whether, taking account of W's evidence and your own observations, D is the person shown.

You must also bear in mind that W's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of W.}

If, having considered all the evidence, you are sure that the person on the footage is D. you must then decide whether he is guilty of the offence(s) with which he is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-4 Identification from visual images by a witness who has special knowledge

ARCHBOLD 14-63 and 65; BLACKSTONE'S F18.20

Legal Summary

1. When the prosecution relies both upon the evidence of a witness who recognises D and the jury's own ability to compare the photographic evidence with D in person, the jury may be directed that the evidence and their own examination can be mutually supportive. If so, they should be reminded of the danger that several witnesses can make the same mistake.[476]
2. A modified *Turnbull* direction will be required: see Chapter 15-1 above.
3. The Court of Appeal in *Smith (Dean Martin)*[477] recommended that where a police officer purports to recognise a person viewed on a CCTV, a record should be made detailing information such as the viewer's initial reaction, any failure to recognise at first viewing, what was said, any doubts expressed etc.).[478] This safeguard has since been adapted and incorporated into Code D (introduced with effect from 8 March 2011).[479] The Code also provides that the recording or images should be shown on an individual basis. In *Moss*[480] it was held that such a formal procedure cannot be expected where recognition occurs in an informal context, but something in the nature of an audit trail should be recorded so as to allow to the jury to assess reliability.[481] A wholesale failure to comply with the

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[476] *Caldwell* [1994] 99 Cr App R 73. See also *Faraz Ali* [2008] EWCA Crim 1522 at paras. 34 to 35 in which the CACD (1) doubted that the image from which a police officer purported to recognise the suspect was of sufficient quality to permit recognition (the face was partially obscured) (2) doubted that his recognition would, for this reason, constitute supporting evidence of identification in the absence of evidence given by an expert, and (3) repeated the need for an explicit direction warning of the dangers arising from the purported recognition.

[477] [2008] EWCA Crim 1342. *McGrath [2009] EWCA Crim 1758*; *Watts [2010] EWCA Crim 1743*.

[478] In *Jabar* [2010] EWCA Crim 130 where such procedures were not followed (the trial judge having made his decision before the decision in *Smith* [2008] EWCA Crim 1342), the court expressed concern that recognition evidence was tainted as a result.

[479] Code D, paras 3.35 to 3.37. *Smith* was approved in *Chaney* [2009] EWCA Crim 21.

[480] [2011] EWCA Crim 252. What matters is "not so much slavish adherence to procedure but evidence that enables the jury to assess the reliability of the evidence of recognition however it is provided" at para.20.

[481] In *Spencer* [2014] EWCA Crim 933, the Court of Appeal, citing *Moss*, confirmed that the "mischief" at which the Code was aimed was the "mere assertion the police recognised a suspect without any objective means of testing the accuracy of the assertion". It was significant that the officer in *Spencer* had not been asked to look at the image of the defendant and say whether he recognised a person who had been identified as a suspect. There was no suspect; the officer searched the computer not for images of the defendant, but for the image imprinted in his memory. This was not an identification of a known suspect as envisaged by the Code of Practice.

new provisions of Code D can lead to the exclusion of the identification evidence, as illustrated by *Deakin*.[482]

4. Guidance as to the approach in cases where there have been minor breaches of PACE Code D can be found in *Lariba.*[483]

Directions

5. It should be noted that such evidence:

   (1) is direct evidence of identification by the witness of D; and

   (2) provides assistance to the jury in making their own comparison of D (and proved/agreed photographs of him) with the suspect shown on the CCTV footage/images. Reference should therefore be made to the direction in Chapter 15-2.

6. The jury must be given a warning, adapted from *Turnbull*, of the risk of mistaken identification and the special need for caution before relying on such evidence to avoid injustice. In particular they should be directed that even a witness who has "special knowledge" can make a genuine and honest mistake in identification.

7. The jury should be warned that although the witness has had the advantage of being able to study the CCTV footage/images the image/s is/are only two dimensional and this is not the same as observing an actual person at the scene.

8. The jury must also be alerted to other factors which may make identification more difficult/less reliable such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face and also the degree and currency of the witness' knowledge of D.

9. Any obvious difference between the appearance of D and the suspect shown on the image must be identified. If D's appearance may have changed since the time that the suspect's image was captured this must be pointed out and the jury directed not to make assumptions about what D might have looked like at that time. This situation will not arise if an image proved/agreed to be that of D taken at the time that the suspect's image was captured has been put in evidence.

10. Evidence which is capable of supporting, not capable of supporting, or capable of undermining the evidence of identification must be identified for the jury. Evidence capable of supporting the evidence of identification may include the jury's own comparison of D with the suspect shown in the CCTV footage/images and vice versa, in which case the direction must also reflect the features of the direction in Chapter 15-2 above.

11. Evidence of this kind is subject to the provisions of Code D (D:3.34 – 36) and any breach/alleged breach must be dealt with.

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[482] [2012] EWCA Crim 2637.

[483] [2015] EWCA Crim 478.

Example

You do not have any evidence of this incident from an eye witness. What you do have is evidence from PC W who, although he does not know D, has compared a known photograph/s of D, taken at about the same time, with CCTV footage (and still photographs taken from the footage) of the incident in which D is alleged to have taken part. PC W told us that he spent {number of hours} studying the footage and photographs and comparing them with the photograph/s of D and PC W has identified D as being the man shown {specify e.g. striking V}. The defence case is that PC W's identification of D is mistaken.

You may consider PC W's evidence in two ways:

1. First, it is evidence of PC W's own identification of D from the footage / photographs.
2. Secondly, you may also use PC W's evidence to help your own comparison of the known photograph of D and what you have seen of him in court with the footage and photographs of the incident.

When considering PC W's evidence you must be cautious for the following reasons.

- Experience has shown that when one person identifies another, it is possible for the person to be mistaken, no matter how honest and convinced they are.
- Also, when you are making your own comparison, you must bear in mind that the fact that several people identify a person does not mean that the identification must be correct. A number of people may all be mistaken.
- The quality of the footage may affect PC W's – and your - ability to make a comparison. You should take account of these points: {specify any characteristics relied on by either party e.g. relative position of camera(s) and person photographed (in particular the person's face), distance, focus, colour / monochrome, constant / intermittent, lighting, obstruction(s)}.
- The footage from the time of the incident is only two-dimensional and is not the same as seeing it for yourself. Having said that, a person at the scene only witnesses the incident once, usually without any warning that it is going to happen; but you and PC W have had the advantage of being able to study the footage several times.
- If you decide that the quality of the footage is not good enough for a fair comparison to be made, you must ignore PC W's evidence and not embark on any comparison of your own.
- However, if you are satisfied that the quality of the footage is good enough for a fair comparison to be made, then you must then decide whether, taking account of PC W's evidence and your own observations, D is the person shown.
- [Where there has been a breach of Code D (D:3.35 and/or 36]: PC W should have, but did not {e.g. kept a note of his response and the factors which he says led him to recognise D as the person in the footage}. You should keep this in mind when you are deciding whether his evidence of identification is reliable.

You must also bear in mind that PC W's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of PC W.}

If, having considered all the evidence, you are sure that the person on the footage is D. you must then decide whether he is guilty of the offence(s) with which he is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-5 Identification by facial mapping

ARCHBOLD 14-63 and 66; BLACKSTONE'S F18.21

Legal Summary

1. Facial mapping is a developing technique and expertise. In its simplest form it amounts to little more than the comparison of one image with another.[484] Computer software and photographic technology have created more advanced techniques which enable two separate images to be enhanced and aligned in order to better to make the comparison.[485] The comparison will involve study of the proportions of the face, the juxtaposition of features of the face and its shape.[486]
2. An expert witness may testify as to the perceived similarities between the admitted control image of the defendant and the disputed crime scene photograph of the suspect, together with the absence of material differences. The expert should not however express an opinion upon the probability that the suspect image is the defendant rather than someone else, because there exists no database against which the match probability can be measured. In the absence of such statistical aids, the expert is limited to expressing an opinion based on his experience. The value of such evidence may be extremely limited. In any event, the quality of the evidence may be limited by the experience and scientific objectivity of the expert.[487]
3. The question whether, in the absence of a relevant database, a facial mapping expert should be permitted to express his opinion upon the evidential value of his comparison between the image and the defendant's face was considered (see doubts expressed obiter in *Gray*)[488] in *Atkins*.[489] The Court of Appeal concluded that such evidence was permissible provided the experience and expertise of the expert justified the use of his own relative terms when seeking to interpret his results for the jury. Conventional expressions arranged in a hierarchy (e.g. from "lends no support" to "lends powerful support") should be used instead of numbers. The expert may be expected to be tested on the extent to which he has actively sought out dissimilarities as well as similarities. The jury should be reminded that any expert's expression of opinion is opinion and "no more" and "does not mean that he is necessarily right".[490]

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[484] *Stockwell* [1993] Cr App R 260.

[485] *Clarke* [1995] 2 Cr App R 425.

[486] *Hookway* [1999] Crim LR 750.

[487] *Gray* [2003] EWCA Crim 1001.

[488] [2003] EWCA Crim 1001.

[489] [2009] EWCA Crim 1876.

[490] *Atkins* [2009] EWCA Crim 1876 at para.29 by Hughes LJ.

4. In *McDaid*[491] the Northern Ireland Court of Appeal, citing *Atkins*, confirmed that a suitably qualified expert:

> "may give evidence of facial similarities without being able to make a positive identification and, provided that the factual tribunal is aware that his views are not based upon a statistical database recording the incidence of the features compared as they appear in the population at large, such a witness is entitled is entitled to make use of the assessment framework employed in this case."[492]

5. The Court of Appeal in *Weighman*[493] underlined that whether admissible facial mapping evidence will be left to the jury to consider will depend on the ability of the jury in the light of the quality of the images to make their own assessment.[494]

6. In *Barnes*,[495] the use of "reverse projection evidence" for the purpose of showing that CCTV images of an offender matched the height of the defendant was held to be analogous to facial mapping, and was therefore not to be considered a "new science" but rather a photographic technique "well-known to criminal courts."[496]

Directions

7. In this situation E gives evidence of the comparison which he has made between a known image/images of D with CCTV footage/images of the scene of the incident.

8. The precise content of this direction will depend on how the evidence has developed in both examination in chief and cross examination but the following matters must be covered:

   (1) the extent of expertise and experience of E;

   (2) the fact that E is giving expert evidence of opinion: see Chapter 10-3 above (Expert evidence). In particular this is only a part of the evidence and, as with any other part of the evidence, the jury is entitled to accept or to reject it;

   (3) the strengths and weaknesses of E's evidence in the light of his method and the extent to which he looked for both similarities and differences between the known image/s and the footage/images of the scene;

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[491] [2014] NICA 1 para.10.

[492] [2014] NICA 1 at para.10.

[493] [2011] EWCA Crim 2826.

[494] [2011] EWCA Crim 1605 at para.19.

[495] [2012] EWCA Crim 1605 para.19.

[496] At para.20. In *Rafiq Mohammed* [2010] EWCA Crim 2696, the court assumed (without deciding) that a comparison of walking gait by an expert podiatrist for the assistance of the jury was a legitimate exercise founded on relevant expertise, but allowed the appeal because the images were of insufficient quality for a reliable comparison. In *Otway* [2011] EWCA Crim 3 the court underlined the importance of establishing the proper limitations of such evidence from the outset and the need for advance preparation when its admissibility is to be challenged (at para.23).

(4) that, if it be the case, there is no unique identifying feature linking the appearance of D with the appearance of the suspect;

(5) that E's opinion is not based on any database of the incidence of features appearing in the population at large and consequently is not supported by any statistical foundation of match probability. As a result E's opinion, although informed by experience, is entirely subjective;

(6) that such evidence does not amount to evidence of positive identification (although it could positively exclude a suspect).

9. If E expresses his conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain to them that these terms are no more than labels which E has applied to his opinion of the significance of his findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.

10. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.

11. The jury should be warned that such evidence does not amount to positive identification and that they should be cautious about finding D guilty on the basis of such evidence if it is not supported by other independent evidence. Evidence which is capable of supporting, evidence which is not capable of supporting and evidence which is capable of undermining such evidence must be drawn to the attention of the jury.

12. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to prepare the images upon which their comparisons were made, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

13. A jury will almost always have seen the CCTV footage and/or still images taken from it for themselves and will have been invited to draw their own conclusions as to the correctness of a witness' identification of D from their own viewing of the footage/images and from their own observation of D. In such a case the jury must be given directions which cover the points set out in both this direction and the direction in Chapter 15-2 above (Identification from visual images: comparison by the jury). Subject to this, the jury should be directed that they are entitled to treat their own observation as support for the evidence of the witness and vice versa. See by way of analogy the Example in Chapter 15-3.

Example

E is an expert in facial mapping {summarise relevant qualifications and experience}.

[Give a direction about expert evidence: see Chapter 10-3.]

E explained what he did to compare images of D's face with images of the face of the person involved in the incident. He then went on to point out similarities and differences he found. Finally he gave his opinion on the significance of his findings.

To compare the images E {summarise the steps taken to prepare the images which were used to make a comparison}.

E found that: {summarise the evidence of similarity and dissimilarity}

When you are considering E's opinion, you must keep the following things in mind:

- Although E pointed out similarities between D's face and the face of the person involved in the incident, he said that there is no unique feature which conclusively shows that the faces are the same.
- Experience has shown that two people, who are completely unconnected with one another, can have very similar facial features.
- There are no statistics/is no database against which the chances of two different people having similar facial characteristics can be measured. So, E cannot say how many people have similar features {e.g. a nose which has been broken and deviates to the right}. Because of this, E's opinion, although based on his examination of the images in this case and his experience of {specify number of} cases is only his personal view.
- E stated that his findings provide {e.g. strong support} for the prosecution's claim that D was the person involved in the incident. This is on a scale of "no support, limited support, moderate support, strong support and powerful support". This is not a numerical scale of probability but is a less precise way of explaining the strength which E himself attaches to what he saw.
- In any event, E's evidence is not evidence of positive identification of D.

You must also bear in mind that E's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E.}

If, having considered all the evidence, you are sure that the person on the footage is D. you must then decide whether he is guilty of the offence(s) with which he is charged. If you are not sure that the person on the footage is D, you must find D not guilty.

15-6 Finger prints and other impressions

ARCHBOLD 14-75; BLACKSTONE'S F18.35; CrimPD 33A.6

A. Fingerprints

Legal Summary

1. Expert evidence as to the likely match of fingerprint impressions left at the scene of crime and the defendant's fingerprint impressions have been admissible in evidence for at least one hundred years.[497] Once admitted, it is for the jury to assess its weight.[498] Although properly presented fingerprint evidence may provide sufficient identification (even if unsupported), D must be linked to the relevant prints by admissible evidence.[499] Code D sets out procedures governing the collection of prints.[500]
2. In *Buckley*,[501] Rose LJ held that the judge's discretion to admit fingerprint evidence depends on all the circumstances of the case, including in particular:
   (i) "the experience and expertise of the witness;
   (ii) the number of similar ridge characteristics;
   (iii) whether there are dissimilar characteristics;
   (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and
   (v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination."[502]
3. While in *Buckley* Rose LJ held that the judge would be highly unlikely to exercise his discretion where there were fewer than eight similar ridge characteristics, the police fingerprint bureau in England and Wales have since adopted a non-numerical standard. The latest guidelines emphasise the role of subjective

[497] *Castleton* [1910] 3 Cr App R 74 (appeal Nov 1909), in which the Court of Appeal refused leave to appeal against conviction when the sole evidence of identification was a match, proved by an expert fingerprint examiner, between a print left on a candle at the scene and the defendant's impressions. *Buckley* [1999] EWCA Crim 1191 for a review of the history of fingerprint standards.

[498] *Reed* [2009] EWCA Crim 2698 (concerning DNA evidence) at para.111 discussing expert evidence generally.

[499] *Chappell v DPP* (1988) 89 Cr App R 82.

[500] Code D, paras 4.1 to 4.10. Annex F deals with destruction and speculative searches. See also PACE 1984, ss. 61, 63A, 65 and Sch 2A.

[501] [1999] EWCA Crim 1191.

[502] The editors of Archbold (2015) at para 14-77 suggest that the same standards that apply to fingerprint evidence apply to all other forms of prints, including palm prints.

evaluation in the comparison of prints. See also Codes of Practice and Conduct Fingerprint Comparison 2015.[503]

4. Occasionally, fingerprint experts disagree on the identification of a dissimilar characteristic between the two samples. If there is such a disagreement, careful directions will be required because, if there is a realistic possibility that a dissimilar characteristic exists, it will exonerate the defendant.
5. Since there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity, the terms in which the expert expresses his conclusion and the experience on which it is based will be critical.

Directions

6. The jury should be directed that the expert is giving evidence of opinion: see Chapter 10-3.
7. The following points should be reviewed:

   (1) the experience and expertise of E;

   (2) the number of ridge characteristics said to be similar;

   (3) whether there are any dissimilar characteristics;

   (4) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of a print (i.e. in a smaller area) than in an entire print;

   (5) the quality and clarity of the print (e.g. whether there has been any possibility of contamination, any smearing, or any damage to the finger which left the print);

   (6) if there is a realistic possibility that a dissimilar characteristic (as between the known print of D and the print from the scene) exists, this will exonerate D.
8. If E expresses his conclusions in relative terms (e.g. “no support, limited support, moderate support, support, strong support, powerful support”) it should be explained to the jury that these terms are no more than labels which E has applied to his opinion of the significance of his findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability.
9. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.
10. Evidence which is capable of supporting/not capable of supporting/capable of undermining the expert evidence must be drawn to the attention of the jury.

    Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and

503 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415108/128_FSR_fingerprint_appendix_issue1.pdf

experience, the steps which each took to compare the fingerprint/s, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example

E is an expert in the field of identification by fingerprints: {summarise relevant qualifications and experience}.

[Give a direction about expert evidence: see Chapter 10-3.]

E explained that each person's fingerprint is unique. He described – using the term "ridge characteristics" – how he compared D's fingerprints with the fingerprint/s found at the scene. He pointed out similarities {and differences} between D's fingerprints and the fingerprint/s found at the scene and gave his opinion on the significance of his findings.

To compare the fingerprint/s E {summarise the steps taken to compare the fingerprints}.

E's findings were that: {summarise the evidence of the size and quality of the print/s found at the scene and of the similarity (and any differences) found in the/each comparison} e.g. E found a single print which he said was incomplete in that it had not been made by the whole width of a finger and part of the print had been smudged. He said that:

- the characteristics of 13 ridges could be made out;
- of these 12 were common to both D's known fingerprint and the fingerprint found at the scene;
- the 13th may, or may not, have been common to both D's known fingerprint and the print found at the scene: he could not rule out the possibility that it was different.

E expressed his opinion in terms of his findings providing {e.g. strong support} for the contention that D was the person involved in the incident, this being on a scale of "no support, limited support, moderate support, strong support and powerful support". It is important to recognise that this is not a numerical scale or a percentage of probability, nor are either such measures possible. It is a relatively imprecise way of expressing his subjective opinion about the strength which he attaches to his findings.

E could not say when the print was left or in what circumstances.

You must also bear in mind that E's evidence is only part of the evidence in the case. {Identify any evidence capable of supporting, not capable of supporting or capable of undermining the evidence of E.}

B. Footwear impressions

Legal Summary

12. The taking of footwear impressions is governed by s. 61A PACE and Code D 1.3A. The making of comparisons is governed by s. 63A PACE. “Footwear” is not defined in PACE or in the Code.

13. A foot print is not capable of providing conclusive evidence of identity since the comparison does not depend upon the minutiae of unique ridge characteristics but upon the general size, shape and contours of the foot, together with the juxtaposition of its features. The print may be left by a bare or stockinged foot or by footwear and the comparison is usually demonstrated by the use of an overlay. Directions to the jury concerning the exactness and the limitations of the match will follow a similar pattern to those required for fingerprints. It is unusual to obtain a scene of crime print of such clarity and completeness that an exact match even of these general features can be made. Even if an exact match is obtained it is incapable of excluding others as donor of the crime print. At most it will place D among a group of individuals who could have left the mark and the jury should be so directed. This was confirmed in *T*[504] where the Court of Appeal held that Bayes' theorem and likelihood ratios should not be used by experts in this context:

14. “An opinion that a shoe ‘could have made the mark’ is not in our view the same as saying that ‘there was moderate [scientific] support for the prosecution case’. The use of the term ‘could have made’ is a more precise statement of the evidence; it enables a jury better to understand the true nature of the evidence than the more opaque phrase ‘moderate scientific support’”.[505]

15. However, the court noted that there might be cases, for example where the print was of an unusual size or pattern, in which it might be appropriate for an examiner to go further than “could have made” and express a more definitive opinion. It is clear that the evidence of the expert as to the significance of the match will in all cases require close attention.

16. A clear dissimilarity between a footprint from a crime scene and one taken from D may establish, if not D’s innocence, the fact that he could not have made the print at the scene.

Directions

17. The jury should be given a direction about expert evidence: see Chapter 10-3 above.

18. The jury should be reminded of the evidence, in detail, and directed as to its potential significance and potential limitations, such as lack of clarity or an incomplete impression.

19. Even if an exact match between an impression made by footwear at the scene and an item of footwear attributable to D is obtained, this cannot exclude others

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[504] [2010] EWCA Crim 2439.

[505] [2010] EWCA Crim 2439 at para.73.

as having left the impression at the scene. At best it will put D among a group of individuals who could have left the impression.

20. Any attempt to convert such opinion into a numerical or any other scale should be prevented from the outset and, if necessary, should be addressed with suitable warnings in the summing up.

21. Evidence which is capable of supporting/not capable of supporting/capable of undermining the expert evidence must be drawn to the attention of the jury.

22. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the footwear impressions, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example

[If not already given, an expert evidence direction should be given at this point: see Chapter 10-3 above]

In his evidence E stated that he compared the footwear impression taken from the scene with a trainer taken from D when he was arrested. E found that the size and tread pattern of the footwear that left the impression at the scene were the same as the size and tread pattern of the trainer taken from D. E also said that some damage to the tread of D's trainer was similar to features of the impression taken from the scene.

E agreed that the tread from the impression taken from the scene is the same as the tread of many thousands of trainers and that many thousands of people have size 9 feet. He also agreed that whilst the features of damage on the impression taken from the scene are the same as those on D's trainer, it is not possible to say that the damage is unique or that the impression at the scene must have been made by D's trainer.

E said that on a scale of "no support, limited support, moderate support, strong support and powerful support" his findings provide moderate support for the prosecution's claim that the impression at the scene was made by D's trainer.

It is important to recognise that this evidence does not prove that D's trainer made the impression at the scene or, if it did do so, that D was wearing it at the time. So it cannot prove that he was at the scene. It is simply part of the evidence for you to consider. You must not leap to the conclusion that because the impression at the scene could have been made by D's trainer, he must have been there and so must be guilty. The fact is that the impression at the scene could have been made by any of a very large number of trainers, of which D's trainer is one.

C. Ear impressions

Legal Summary

23. While there is no reason in principle why ear print comparison should not be used as an aid to identification, it is important to be aware of particular difficulties associated with it. In *Dallagher*,[506] the Court of Appeal accepted that evidence of ear print comparison was admissible but allowed the appeal on the ground of fresh expert evidence which tended to undermine the confidence with which the match and its significance were expressed. In *Kempster (No 2)*,[507] Latham LJ gave a helpful description of techniques for lifting and comparing ear prints, and warned against placing undue weight on an apparent match found in the shape and "gross features" of the ear. A reliable match could only be made where the gross features truly provided a "precise match".

24. Ear print comparison suffers a disadvantage in common with facial mapping. While there is general agreement among experts that no two ears are the same, it is virtually impossible to obtain an ear impression which contains all relevant features of the ear. The crime scene impression is also likely to have been subject to variations in pressure and to at least minute movement, either of which will affect the reliability of the detail left. The scope for a significant number of reliable features for comparison is therefore limited and even if there is a match between them there is no means of assessing the statistical probability that the crime scene impression was left by someone other than the defendant.

Directions

25. The jury should be given a direction about expert evidence: see Chapter 10-3 above (Expert evidence).

26. Evidence relating to ear impressions is so case specific that directions must be crafted to take account of the particular features of each individual case. It is essential that any such direction is discussed with the advocates before speeches.

27. Unless the impression taken from D's ear compares so precisely with the impression taken at the scene that it would be open to the jury to conclude from that evidence alone that the impression at the scene was made by D, the jury should be told that they must not find D guilty on the basis of such evidence alone if it is not supported by other evidence.

28. Any specific weaknesses in the evidence of, or concessions made by, any expert witness must be reviewed in detail.

29. Evidence which is capable of supporting/not capable of supporting/capable of undermining such evidence must be drawn to the attention of the jury.

30. Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the impressions, their findings

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[506] [2002] EWCA Crim 1903.

[507] [2008] EWCA Crim 975.

and their opinions should be identified in such a way that their differences are made clear to the jury.

Example

[If not already given, an expert evidence direction should be given at this point: see Chapter 10-3.]

NOTE: Any case involving the comparison of an ear impression with D's ear is bound to be case specific so no example is provided. For a discussion of the issues that may arise see R. v. Kempster[508].

[508] [2008] 2 Crim. App. R. 19

15-7 Identification by voice

ARCHBOLD 14-71; BLACKSTONE'S F18.24

Legal Summary

1. The leading authority is *Flynn and St John*.[509] In that case Gage LJ emphasised:

> "in all cases in which the prosecution rely on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases." [64]

Evidence of a lay witness

2. In all cases of witness identification or recognition by voice, a modified *Turnbull* direction [see Chapter 11-1] is required emphasising the dangers of assuming that recognition or identification of voice is reliable: *Hersey*[510]; *Chenia*.[511] Identification by voice is even less reliable than eye witness identification or recognition; even a confident recognition of a familiar voice by a lay listener may nevertheless be wrong: *Flynn and St John*,[512] para.16. The direction need not follow a "precise form of words… so long as the essential elements of the warning are given to the jury": *Phipps.*[513]
3. If juries are permitted to listen to recordings to try to identify speakers, they should be reminded to bear in mind the evidence of the voice recognition witnesses and warned of the dangers of relying on their own untrained ears: *Flynn and St John (above).*
4. The potential weaknesses of such identification or recognition include the following factors, some of which are not found in a *Turnbull* warning:
   (1) Audibility of speech heard
   (2) Environmental factors affecting hearing of speech
   (3) Duration for which speech heard
   (4) Number of voices heard
   (5) Whether it was heard directly or by phone
   (6) Whether there was an identified attempt to disguise the voice
   (7) Hearer's hearing disability or other impediment (if any)
   (8) Variety of speech heard
   (9) Degree of familiarity with speaker
   (10) Distinctiveness or accent of speaker

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[509] [2008] EWCA Crim 970.

[510] [1997] EWCA Crim 3106.

[511] [2002] EWCA Crim 2345.

[512] [2008] EWCA Crim 970.

[513] [2012] UKPC 24.

(11) Whether speaker spoke in native tongue

(12) Lapse of time between hearing and identification process.

Expert Opinion Evidence [514]

5. The principal methods by which voice comparisons are conducted by experts are (a) auditory analysis (where the expert compares recordings by listening repeatedly); (b) acoustic analysis (involving computerised comparisons of the voice samples). Both are admissible forms of evidence in England and Wales: *Flynn* n 394 above (cf. *Doherty*[515] rejecting auditory as too unreliable). Voice expert evidence can be highly complex evidence of a kind which it is not easy for a jury to evaluate. A jury needs the assistance of the judge: *Yam*.[516] Particular care may be needed where translators are also involved in the exercise: see *Tamiz*.[517]
6. If, juries are permitted to listen to recordings to try to identify speakers, they should be reminded to bear in mind the evidence of the voice recognition witnesses: *Flynn and St John* (above).

Directions

7. If an expert witness has given evidence, a direction about such evidence should be given if it has not already been given: see Chapter 10-3 above.
8. What follows is a non-exhaustive list of possible considerations.

(1) Identification by voice recognition is more difficult than visual identification.

(2) As with visual identification, a genuine, honest and convincing witness who purports to identify a voice may be mistaken and a number of such witnesses may all be mistaken. This is so even when the witness/witnesses are very familiar with the known voice i.e. the basis for recognition is strong.

(3) Voice recognition evidence of a witness who is not an expert may be admitted but the ability of a lay listener correctly to identify voices is subject to a number of variables which require such evidence to be treated with great caution and great care having regard to, inter alia, these factors:

(a) the quality of the recording of the disputed voice;

(b) the length of time between the listener hearing the known voice and his attempt to recognise the disputed voice;

(c) the extent of the listener's familiarity with the known voice;

(d) the nature, duration and amount of speech which it is sought to identify;

(e) the nature and integrity of the process by which the purported identification was made, in particular whether or not a voice comparison exercise in

[514] Crim. L.R. 2001, Aug, 595-622.

[515] [2002] NICA B51.

[516] [2010] EWCA Crim 2072.

[517] [2010] EWCA Crim 2638.

which the disputed voice is put with the voices of several others (similar to an identification procedure) was used.

(4) Voice identification is likely to be more reliable when carried out by (i) an expert listener using auditory phonetic analysis and/or (ii) an expert in voice analysis using acoustic recording and measurement (quantitative acoustic analysis).

(5) Evidence which is capable of supporting/not capable of supporting/capable of undermining such evidence must be drawn to the attention of the jury.

(6) Any direction must be modified if two or more experts with differing views give evidence on this topic. In particular their relative levels of qualification and experience, the steps which each took to compare the recordings, their findings and their opinions should be identified in such a way that their differences are made clear to the jury.

Example 1: non-expert witness

W gave evidence that at {specify time} on {specify date} she received a 'phone call from D, in the course of which he told her {specify details}. It is not in dispute that W received such a phone call but D denies that it was made by him. He says that W is mistaken in thinking that the voice was his.

When considering this evidence you need to be especially cautious because experience has shown that any witness who gives evidence of identification can be mistaken; and this is so even when the witness is honest and convinced that she is right. Such a witness may well seem convincing but this does not mean that the witness cannot be wrong. This is so even when a witness knows a person well and says that she has recognised that person.

In this case, where the evidence is that W recognised the voice but did not see the caller, the danger of such recognition being wrong is even greater.

So before you could decide that it was D who made this 'phone call you would have to be sure that W's evidence that she recognised his voice is accurate and reliable. You need to look carefully at all the circumstances in which W heard the voice.

You must ask yourselves:

- What was the content and the context of the call?
- How long was W listening to the voice of the person she says was D?
- How clear was the telephone? You don't have any recording of the conversation so the only way you can judge this is by the description that W gave when she was questioned about it.
- Did anything distract W during the 'phone call?
- How well does W know D's voice?
- Is there anything distinctive about D's voice or the way he speaks which might make it any easier to identify?
- How long was it between the time of the 'phone call and the time that W told the police that the voice was D's?
- Is there any marked difference between W's description of the voice and speech that she heard during the 'phone call and D's voice and the way in which he speaks?

When you consider whether there are any weaknesses in W's evidence you should bear in mind:

that whilst W knows D well, she does not have any training or experience in voice recognition;

W was speaking and listening to the caller on a 'phone, which does not provide the same quality and definition as a face to face conversation.

You should also consider {specify any other matter}.

The following evidence is capable of providing support for/undermining W's evidence {specify}. I should point out that the evidence that {specify} is not capable of supporting W's is {specify}.

Example 2: expert witness (with auditory but not acoustic analysis)

There is a recording of a 2 minute conversation between a man alleged to be D and

another man which, it is not disputed, implicates D in the offence with which he is charged. The conversation was recorded using a microphone inserted into a hole in a party wall between terraced houses. The wall had been drilled but the voices are muffled: some but not all words can be made out. There is also some "over-talking". The questioned speech has been compared with D's known speech as heard on his 37 minute tape-recorded interview.

E is an expert in analysing sound, including sound made by the human voice {summarise qualifications and experience}.

[If not already given, an expert evidence direction should be given at this point: see Chapter 10-3 above]

When you are deciding whether or not to accept E's evidence you must be cautious for the following reasons:

- The quality of the original recordings of the conversation {e.g. recorded through the wall at the house is compromised because of the muffling effect of the wall, as was apparent when the enhanced versions were played, and as E accepted in his evidence, only certain words are sufficiently clear to be understood as individual words};
- The amount of speech in question {e.g. is small: the total amount of time during which the man said to be D was speaking is 49 seconds and on 3 occasions, for a total duration of 17 seconds, both men were speaking at the same time};
- Although E compared a recording of D's voice with the recording of the conversation, he does not know D himself and is not as familiar as a close relative or friend would be;
- E did not test his comparison by comparing the recordings of D's voice and the speech in question with either recordings of other voices which are similar in pitch, tone, accent and speed or with the voices of any of the other defendants;
- Nor did E carry out any acoustic analysis by using a computer to compare the recorded conversation and the recording of D's voice.

Although you have heard the recording of the conversation in question for yourselves, the only reason for that was so that you know (a) what was said and (b) the material on which E has based his opinion. But you are not experts in voice recognition and you must not base any conclusion on your own inexpert and untrained comparison between the recorded conversation and the recording of D's voice.

The following evidence is capable of providing support for/undermining W's evidence {specify}. I should point out that the evidence that {specify} is not capable of supporting W's is {specify}.

15-8 Identification by DNA

ARCHBOLD 14-81; BLACKSTONE'S F18.27

Glossary

Term	Definition
Allele	One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.
Allele "drop in"	An apparently spurious allele seen in electrophoresis which potentially indicates a false positive for the allele. Known as a "stochastic effect" of LCN when the material analysed is less than 100-200 picograms (one 10 millionth of a grain of salt).
Allele "drop out"	An allele which should be present but is not detected by electrophoresis, giving a false negative. Known as a "stochastic effect" of LCN as above.
DNA	Deoxyribonucleic acid in the mitochondria and nucleus of a cell contains the genetic instructions used in the development and functioning of all known living organisms.
DNA profile	Made up of target regions of DNA codified by the number of STR (see below) repeats at each locus
Electrophoresis	The method by which the DNA fragments produced in STR are separated and detected.
Electrophoretogram	The result of electrophoresis produced in graph form.
Locus/loci	Specific region(s) on a chromosome where a gene or short tandem repeat (STR) resides. The forensic scientist examines the alleles at 10 loci known to differ significantly between individuals.
Low template DNA/ Low copy numbering:	By increasing the number of PCR cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample
Masking	When two contributors to a mixed profile have common alleles at the same locus they may not be separately revealed; hence pair "masks" the other.
Mixed profile	Profile from more than one person, detected when there are more than two alleles at one locus. There will frequently be a major and a minor contributor in which the minor profile is partial.
NDNAD	National DNA Database.
PCR:	Polymerase chain reaction, a process by which a single copy or more copies of DNA from specific regions of the DNA chain can be amplified.

Term	Definition
SGM Plus	Second Generation Multiplex Test: an Amplification kit used to generate DNA profile. It targets 10 STR loci plus the gender marker.
Stochastic threshold	Above which the profile is unlikely to suffer from stochastic effects, such as allelic drop out.
STR	Short tandem repeat, where a part of the DNA molecule repeats. Comparison of the pattern or blocks produced is the modern form of DNA profiling, in use since the 1990s.
Stutter	The PCR amplification of tetranucleotide short tandem repeat (STR) loci typically produces a minor product band shorter than the corresponding main allele band; this is referred to as the stutter band or shadow band. They are well known and identified by analysts
Voids	A locus at which no alleles are found in the crime specimen probably through degradation of the material. The defendant may say that the alleles which should have been there might have excluded him.

Legal Summary

Profiling DNA material

1. Different regions or "loci" in the DNA chain contain repeated blocks of "alleles". Modern analysis concentrates on 10 loci in the chain which are known to contain alleles which vary widely between individuals. There is also a gender marker. The sample is amplified using PCR. The blocks are identified using electrophoresis. Analysis of the result is achieved by means of laser technology which detects coloured markers for the alleles, converted by a computer software programme to graph form. The alleles are represented by numbers at each of the 10 known loci.

Low template DNA

2. Despite at one time being subjected to criticism and even being temporarily suspended following the decision in *Hoey*,[518] low template DNA (the technique by which a minute quantity of DNA can be copied to produce an amplified sample for analysis) was endorsed in an expert review commissioned by the Forensic Science Regulator.[519] The report also reached a favourable conclusion in respect of the precautions taken in UK laboratories against contamination. In a thorough review of the state of science, the Court of Appeal in *Reed, Reed and Garmson*[520] held that the technique could be used to obtain profiles capable of reliable interpretation if the available quantity of DNA is above the stochastic threshold of between 100 and 200 picograms.[521] Challenges to the validity of the technique where the quantity is above that threshold should no longer be permitted in the absence of new scientific evidence.
3. In *C*[522] it was held that the decision in *Reed* had not purported to lay down a rule establishing the need for a set minimum quantity of DNA; the only question was whether a reliable quantity could be produced despite the low quantity. *Broughton*[523] reached a similar conclusion, namely that the court in *Reed* had not said that evidence of DNA analysis was inadmissible where the quantity of available material fell below the stochastic threshold, but rather that:

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[518] [2007] NICC 49.

[519] http://police.homeoffice.gov.uk/publications/operational-policing/Review_of_Low_Template_DNA_12835.pdf?view=Binary

[520] [2009] EWCA Crim 2698. The judgment is a valuable source of information on the following topics: (1) the technique of conventional DNA analysis (paras.30 to 43); (2) the technique of analysis of Low Template DNA by the Low Copy Numbering (LCN) process and the phenomenon of stochastic effects (paras.44 to 49); (3) match probability (paras.52 to 55); (4) expert evidence of the manner and time of transfer of cellular material (paras.59 to 61; 81 to 103; paras.111 to 127); (5) the procedural requirements of CPR 33 for the admission of expert evidence (paras.128 to 134); and (6) analysis of mixed and partial profiles and the effect of that analysis upon the need for careful directions in summing up (paras.18 to 25; 178 to 215).

[521] See para.74 for further discussion.

[522] [2010] EWCA Crim 2578.

[523] [2010] EWCA Crim 549.

"… above this threshold a challenge to the validity of analysing LTDNA by the LCN process should not be permitted in the absence of new scientific evidence. However, the court did not hold or make at any observation to the effect that below the stochastic threshold DNA evidence is not admissible. To the contrary, the court explained at paragraph 48:

"… Above that threshold … the stochastic effect should not effect the reliability of the DNA profile obtained. Below the stochastic threshold the electrophoretograms may be capable of producing a reliable profile, if for example there is reproducibility between the two runs.'"[524]

4. Thomas LJ concluded the answer was not to be found in a minimum threshold but in the general principles governing the admissibility of expert evidence:

"A court must consider whether the subject matter of the evidence is part of a body of knowledge or experience which is sufficiently well organised or recognised to be accepted as a reliable body of knowledge or experience. If the field is sufficiently well established to pass the ordinary tests of reliability and relevance, then that is sufficient. The weight of the evidence should then be established by our familiar adversarial forensic techniques."[525]

5. In *Dlugosz*,[526] Thomas LJ offered guidance on the direction to a jury on Low Template DNA:

"that provided it is made clear to the jury the very limited basis upon which an evaluation can be made without a statistical database, a jury can be assisted in its consideration of the evidence by an expression of an evaluative opinion by the experts. We consider that on the materials with which we have been provided, there may be a sufficiently reliable scientific basis on which an evaluative opinion can be expressed in cases, provided the expert has sufficient experience (which must be set out in full detail in the report) and the profile has sufficient features for such an opinion to be given. If the admissibility is challenged, the judge must, in the present state of this science, scrutinise the experience of the expert and the features of the profile so as to be satisfied as to the reliability of the basis on which the evaluative opinion is being given. If the judge is satisfied and the evidence is admissible, it must then be made very clear to the jury that the evaluation has no statistical basis. It must be emphasised that the opinion expressed is quite different to the usual DNA evidence based on statistical match probability. It must be spelt out that the evaluative opinion is no more than an opinion based upon [the expert's] experience which should then be explained. It must be stressed that, in contrast to the usual type of DNA evidence, it is only of more limited assistance."

[524] [2010] EWCA Crim 549 at para.31.

[525] [2010] EWCA Crim 549 at para.32. Citing *Reed* [2009] EWCA Crim 2698 at paras.111 to 113.

[526] [2013] EWCA Crim 2.

Mixed and partial profiles

6. Each parent contributes one allele at each locus. The analyst may find in the profile produced from the crime scene specimen more than two alleles at a single locus. If so, the specimen contains a mix of DNA from more than one person. The major contribution will be indicated by the higher peaks on the graph. Separating out the different profiles is a matter for expert examination and analysis. The presence of mixed profiles allows the possibility that, while both contain the same allele at the same locus, one allele masks the other. Further, the presence of stutter, represented by stunted peaks in the graphic profile, may mask an allele from a minor contributor.

7. There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (e.g. degradation), no alleles are found at one or more loci. These are called "voids". The significance of voids lies in the possibility that the void failed to yield alleles which could have excluded the defendant from the group who could have left the specimen at the scene. In statistical terms a matching but partial profilewill increase the number of people who could have left their DNA at the scene. It was the proper statistical evaluation of a partial profile which was the subject of appeal in *Bates*.[527] The Court of Appeal held that a statistical evaluation based upon the alleles which were present and did match (in that case 1 in 610,000) was both sound and admissible in evidence provided that the jury were made aware of the assumption underlying the figures and of the possibilities raised by the "voids".

Interpreting results

The role and obligations of the expert

8. Interpretation is a matter of expertise. The analyst compares the blocks of alleles at each locus as identified from the crime specimen with their equivalent from the suspect's specimen. The statistical likelihood of a match at each locus can be calculated from the forensic science database of 400 profiles. If a match is obtained at each of the 10 loci a match probability in the order of 1 in 1 billion is achieved. The fewer the number of loci in the crime specimen producing results for comparison, the less discriminating the match probability will be.

9. When the expert testifies, he should not overstep the line separating his province from that of the jury. As held in *Doheny*,[528] his role is to explain the nature of the match between the DNA in the crime stain and the defendant's DNA, and give the jury the random occurrence ratio. The expert should not be asked his opinion as to the likelihood that it was the defendant who left the crime stain and should be careful to avoid terminology which could lead the jury to believe that he was expressing an opinion.

10. The court in *Reed* emphasised the importance of the expert following the obligation in CrimPR, r 33.3(1)(f) and (g) to identify areas in the report in relation to which there is a range of opinion. The scope of opinion should be summarised

[527] [2006] EWCA Crim 1395.

[528] [1996] EWCA Crim 728.

and reasons for the expert's own opinion be given. Any qualifications to the opinion should be made clear.[529]

Match probability

11. If a person's DNA profile matches that of a crime sample, it is the expert's role to evaluate the significance of the match using statistical means. The "random occurrence ratio" (or "match probability") is the statistical frequency with which the matchin profile between the crime scene sample and someone unrelated to D will be found in the general population. A probability of 1 in 1 billion is so low that, barring the involvement of a close relative, the possibility that someone other than D was the donor of the crime scene sample is effectively eliminated. This significantly reduces the risk that the "prosecutor's fallacy" will creep into the evidence or have any evidence upon the outcome of the trial.[530]

The "prosecutor's fallacy"

12. The "prosecutor's fallacy" confused the random occurrence ratio with the probability that the defendant committed the offence. In *Doheny and Adams*,[531] Phillips LJ demonstrated it by reference to a random occurrence ratio of 1 in 1 million. This did not mean that there was a 1 in a million chance that someone other than the defendant left the stain. In a male population of 26 million there were 26 who could have left the stain. The odds of someone other than the defendant having left the stain depend upon whether any of the other 26 is implicated.[532]

The need for a sufficiently reliable scientific basis

13. In *Dlugosz*,[533] three conjoined appeals which each raised issues as to the evaluation of low template and mixed DNA evidence, it was argued that unless statistical evidence of the relevant DNA match probability could be given, an evaluative opinion should not be admitted either. The court rejected the argument that the jury in such cases lacked a firm basis on which to evaluate the significance of the evidence given. Although in determining the admissibility of any expert evidence the court must be satisfied that there is a sufficiently reliable scientific basis for it,

> "provided the conclusions from the analysis of a mixed profile are supported by detailed evidence in the form of a report of the experience relied on and the particular features of the mixed profile which make it possible to give an evaluative opinion in the circumstances of the particular case, such an opinion is, in principle, admissible, even though there is presently no statistical basis

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[529] [1996] EWCA Crim 728 para.131.

[530] *Gray* [2005] EWCA Crim 3564 at para.21 to 22.

[531] [1996] EWCA Crim 728. See also *Gordon* [1995] 1 Cr App R 290.

[532] Blackstone's at F18.30: "it may be that only one person in 1000 wears size 14 shoes, but even if D and the offender each wears size 14 shoes that does not mean there is only one chance in 1000 of D being innocent. There may indeed be other suspects, each of whom wears size 14 shoes."

[533] [2013] EWCA Crim 2.

to provide a random match probability and the sliding scale cannot be used."[534]

Procedural requirements

14. In *Reed, Reed and Garmson*,[535] the court emphasised the importance of pre-trial preparation and management, and the role of CrimPR 33 [now 19]. Thomas LJ gave the following guidance:

"131 In cases involving DNA evidence,

i) It is particularly important to ensure that the obligation under Rule 33.3(1)(f) and (g)[536] is followed and also that, where propositions are to be advanced as part of an evaluative opinion … that each proposition is spelt out with precision in the expert report.

ii) Expert reports must, after each has been served, be carefully analysed by the parties. Where a disagreement is identified, this must be brought to the attention of the court.

iii) If the reports are available before the PCMH, this should be done at the PCMH; but if the reports have not been served by all parties at the time of the PCMH (as may often be the case), it is the duty of the Crown and the defence to ensure that the necessary steps are taken to bring the matter back before the judge where a disagreement is identified.

iv) It will then in the ordinary case be necessary for the judge to exercise his powers under Rule 33.6 and make an order for the provision of a statement.

v) We would anticipate, even in such a case, that, as was eventually the position in the present appeal, much of the science relating to DNA will be common ground. The experts should be able to set out in the statement under Rule 33.6 in clear terms for use at the trial the basic science that is agreed, in so far as it is not contained in one of the reports. The experts must then identify with precision what is in dispute – for example, the match probability, the interpretation of the electrophoretograms or the evaluative opinion that is to be given.

vi) If the order as to the provision of the statement under Rule 33.6 is not observed and in the absence of a good reason, then the trial judge should consider carefully whether to exercise the power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the judge may well exercise that power. A failure to find time for a meeting because of commitments to other

[534] [2013] EWCA Crim 2 at para. 28. See also *Thomas* [2011] EWCA Crim 1295. The expert in the case was entitled to base her opinion on simulation experiments and on her lengthy experience as a forensic scientist. Her evidence could be tested in cross-examination and it was for the jury to assess its limitations and weight.

[535] [2009] EWCA Crim 2698 at paras.128 to 134.

[536] Now CPR, r 33.4(f) and (g).

matters, a common problem with many experts as was evident in this appeal, is not to be treated as a good reason.

132 This procedure will also identify whether the issue in dispute raises a question of admissibility to be determined by the judge or whether the issue is one where the dispute is simply one for determination by the jury."

15. The use of hearsay statements from laboratory staff and others engaged in the process of analysis is now expressly permitted by section 127 Criminal Justice Act 2003.

The need for independent evidence linking the defendant and the crime

16. Where the crime is one such as simple possession of a weapon a matching DNA profile may be sufficient to establish guilt. The jury is being invited to use the DNA evidence to establish the link between D and the article in question. Subject to being satisfied about the way the DNA was transferred the jury can convict on that evidence.[537] The Court of Appeal explained:

> "the presence of DNA is not relied on as evidence of the presence of the defendant at a particular place at a particular time; rather, the essence of the offence is possession of the article. So there is a much closer connection in this case between the DNA evidence and the commission of the offence. The presence of DNA on the article, on the muzzle of a gun in this case, is capable of being evidence of possession of the article …
> The possibility of indirect transfer was a matter for the jury to address on the basis of all of the evidence in the case. If they concluded that it might be the case that it was indirectly transferred in some way, then they would of course have to acquit, but that was not a necessary conclusion and the matter was properly left to them, provided that they were correctly directed as to the burden and the standard of proof."[538]

17. More commonly, some independent evidence beyond a matching DNA profile is required in order to establish a nexus between the defendant and the crime: *Ogden*.[539]

18. In Reed, Reed and Garmson,[540] the Court of Appeal approved the trial judge's approach of explaining to the jury at the outset of his consideration of the DNA evidence:

> "The important thing is this. No one suggests that this evidence on its own conclusively proves the guilt of the defendant on any count or goes anywhere near doing that. If all you had was the DNA evidence you could not begin to find [the defendant] guilty on any of these counts because all the DNA evidence does (at the most) is show that he is one of the men who may have committed these offences and that is perhaps to put it at its highest."

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[537] *Sampson* [2014] EWCA Crim 1968.

[538] See also FNC [2015] EWCA Crim 1732

[539] [2013] EWCA Crim 1294.

[540] [2009] EWCA Crim 2698 at paras.128 to 134.

Directions

19. DNA evidence, if disputed, is always intricate both in terms of the scientific process and the factual detail. In most cases the existence of DNA is unlikely to be in issue: the main issue is likely to be the interpretation of the scientific findings in terms of match probability, which is usually expressed in terms of the probability of a match between people of the same gender who are unrelated being in the order of one in so many (often expressed in millions or even one billion). The summing up must focus on the real issues in relation to such evidence.

20. A direction about expert evidence will be necessary: see Chapter 10-3 above.

21. The direction is likely to be complex and should be discussed with the advocates in the absence of the jury before closing speeches.

22. Depending on the issues in the case the following matters may need to be considered when reviewing such evidence for the jury:

    (1) A brief summary of the evidence which has been given to explain what DNA is and how evidence of its presence may be relevant in the trial process. This may include evidence of full and/or partial profiles.

    (2) A summary of the DNA findings.

    (3) Where there is evidence of a partial DNA profile the jury must be made aware of its inherent limitations.

    (4) Where there is evidence of a mixed sample (DNA from more than one person) care must be taken to remind the jury of the detail of the findings and any opinion/s expressed in relation to those findings.

    (5) Avoiding the "prosecutor's fallacy", the random occurrence ratio or, if used, the likelihood ratio, should be explained. The direction should be expressed in terms of probability: for example

        > "…if you accept the scientific evidence called by the Crown there are probably only 4 or 5 white males in the UK from whom the semen stain could have come. You must look at that scientific evidence and all the other evidence in order to decide whether it was D who left that stain or whether it is possible that it was left by another of the small group of men who share the same DNA characteristics".

    (6) A summary of any explanation given by D in relation to the DNA findings: in most cases D will accept that DNA which matches his DNA profile is his and will give an explanation as to how it came to be where it was found.

    (7) The jury should be reminded that the DNA findings are of themselves only evidence of a probability of contact between D and the place from which the sample was taken and to the extent shown by the profile. In considering their verdict the jury must have regard to all of the evidence in the case.

    (8) The jury should be reminded of evidence which is capable of supporting, not capable of supporting and capable of undermining the DNA evidence.

    (9) Where the profile of DNA found at a particular location does not match that of D, this may, depending on the circumstances of the case, be capable of

providing powerful evidence which undermines the prosecution case. If this is so, the jury must be directed appropriately.

Example

Explanation of DNA

NOTE: It is important that any explanation is a summary of the evidence given by a forensic scientist and not "evidence" given by the judge. This example is adapted from an expert witness statement made in 2013.

DNA (Deoxyribo-nucleic acid) is a complex chemical found in almost all cells in the human body which may be deposited onto an item or onto another person. Where DNA is found it is possible to prepare a DNA profile, that is to say a "picture" of the components of the DNA, which may then be compared with another DNA profile, obtained from a reference sample or reference samples taken from one or more people. If the DNA profiles which are compared are different then the DNA could not have originated from the person with whose reference sample the DNA found has been compared. If they are the same then the evidential significance of the match may be evaluated.

No person's DNA profile is unique, and so two or more people will have the same DNA profile. Because of this, the existence of a particular DNA profile in a particular situation cannot prove that a particular person was involved in that situation but instead the existence of the profile together with other scientific data may be used to give an indication of the probability, not of that particular person being involved, but of one of a group of people, of which that person is one, being involved.

This indication of probability is provided by reference to the "random occurrence ratio". This is the frequency with which DNA characteristics matching the DNA sample found in a particular situation are likely to be found in the population at large.

The DNA analysis technique used in this case examined 10 areas, plus another area that indicates the gender of the source of the DNA. Within each area are 2 results: one from the mother and one from the father of the person whose DNA it is. The presence of more than 2 results at one area in the DNA profile indicates the presence of a mixture of DNA from more than one person. Where a mixture of DNA is present it can still be possible to make a statistical assessment of the likelihood of the findings if a person has contributed to the DNA, rather than that they have not and the results are present by chance.

Analysis in a particular case

In this case we heard of DNA being found on/at {location}. We also heard that this DNA has been compared with a sample of DNA which was taken from D and that the DNA which was found matches D's DNA. It also matches {number} other members of the population. Based on this evidence E said that the probability of the DNA which was found having been left on/at {location} by someone other than D was {data}. That is the random occurrence ratio in this case.

If you accept this evidence, it means that there are probably only {number and category … e.g. 5 people/males/white males} in the UK from whom that DNA could have come. D is one of them. What you must decide on all the evidence is whether you are sure that it was D who left that DNA or whether it is possible that is was one of that other small group of {people/males/ white males} who share the same DNA characteristics.

Defendant's explanation: denial that DNA is his and assertion that the exhibits have been contaminated

D denies that the DNA which was recovered from {location} is his and has suggested in his evidence that a possible reason for this is that the DNA taken from {location} has somehow been exposed to his DNA sample during the course of the scientific examination of these exhibits at the laboratory. You should bear in mind that, as it is for the prosecution to prove the case against D, it is for the prosecution to establish that the DNA taken from {location} has not been contaminated: it is not for D to establish that it has.

As to this issue you will remember the evidence which E gave about this possibility when he was cross-examined, namely that {review evidence}. If having considered that evidence you decide that the DNA taken from {location} may have been contaminated, then you will take no account of this evidence at all. If on the other hand you are sure that the DNA taken from {location} has not somehow been mixed with D's DNA then you are entitled to take the evidence about DNA into account when you are considering whether it has been proved, so that you are sure of it, that D is guilty.

Defendant's explanation: admission that the DNA is his and suggestion of how it may have been in the place in which it was found

D has accepted that the DNA found at/on {location} is his but he has given evidence that {review evidence}. V's evidence on the other hand is that {review evidence}.

You will have to consider these two conflicting accounts and decide whether the account which D has given is, or may be true, or whether you can be sure that it is V who has told you the truth. If you find that D's account is, or may be, true then this would provide a possible explanation for the presence of his DNA at/on {location} which is not incriminating. On the other hand if you find V's account is true, it follows that you will reject D's account, and in this event you are entitled to consider the DNA evidence when you are deciding whether the prosecution have established, so that you are sure of it, that D committed the offence.

Other factors

A direction in relation to expert evidence must also be given (see Chapter 10-3 above) which should include a similar warning to this:

I should point out to you that the expert's findings and evidence are in themselves only evidence of a probability of contact between D and the location from which the DNA sample was taken. This evidence does not in itself prove that D committed the offence with which he has been charged and, in order to reach your verdict, you must have regard to all of the evidence in the case of which this is but a part.

As to the other evidence in the case which is capable of supporting/not capable of supporting/undermining the DNA evidence {review evidence}.

16. DEFENDANT – THINGS SAID

16-1 Confessions

ARCHBOLD 15-310; BLACKSTONE'S F17.1

Legal Summary

1. For the purposes of PACE, a confession is "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise": s. 82(1).

Mixed statement

2. The evidential effect of a 'mixed statement' (i.e. comprising both admissions and exculpatory/self-serving assertions) was explained by Lord Lane CJ in *Duncan*[541] (since approved by the House of Lords in *Sharp*):[542]

> "… the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies."

3. While *Duncan* concerned a D who had not given evidence, the principle that the whole statement is admissible as evidence of the truth of the matters stated applies whether D gives evidence or not. As to the weight to be attached to the exculpatory part of a mixed statement, Lord Lane CJ held that:

> "… where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight."[543]

4. In *Hamand*[544] the Court of Appeal held that the exculpatory parts of a mixed statement were capable of discharging an evidential burden on D (e.g. to raise the issue of self-defence or loss of control).

5. In *R v Papworth*,[545] applying *R v Garrod*[546] it was held that the rule is based on fairness to D and simplicity for the jury. The judge should be encouraged to estimate at the end of the evidence whether the Crown placed significant reliance on the incriminating statements; if so, "the more it is likely that the jury should be told that the parts which explain or excuse those incriminating parts are also evidence in the case."

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[541] (1981) 73 Cr App R 359 at 365.

[542] [1988] 1 All ER 65.

[543] (1981) 73 Cr App R 359 at 365.

[544] (1985) 82 Cr App R 65.

[545] [2007] EWCA Crim 3031,

[546] [1997] Crim LR 445. See also *R. v. Shirley* [2013] EWCA Crim 1990.

6. Where the Crown rely on a series of inculpatory remarks in interview the judge should not direct the jury to dismiss them as merely reaction.[547] Care needs to be taken not to misdescribe mixed statements. See also Greenhalgh[548] where the judge was in error to describe a mixed statement as "not capable of being evidence in the case"

Admissibility of confessions

7. A confession may be excluded on the following grounds:

   (1) Under s. 76 PACE, that the confession was obtained:

      (a) by oppression[549] of the person who made it; or
      (b) in consequence of anything said or done[550] which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof.

   (2) Under s. 78 PACE, that having regard to all the circumstances, including the circumstances in which the evidence was obtained (e.g. in breach of Code C), the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[551]

   (3) Under the court's common law discretion to exclude evidence so as to protect D from an unfair trial (preserved by s. 82 PACE).

8. Under PACE the admissibility of the confession is a matter for the judge; if admitted, the weight to be given to the confession is a matter for the jury. If the judge rules a confession inadmissible following a voir dire, the jury should *not* normally be told anything about it.[552]

9. If the confession is admitted in evidence, D is not precluded from raising before the jury matters relevant to their consideration of the reliability and truth of the confession.[553] If D continues to argue that the confession was obtained in circumstances rendering it inadmissible, the jury should not be told that the judge has already considered such matters and ruled the confession admissible.[554]

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[547] *Gijkokaj* [2014] EWCA Crim 386.

[548] [2014] EWCA Crim 2084

[549] Defined in s. 76(8) to include "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)".

[550] A breach by the police of an obligation under PACE or PACE Code C will not lead to automatic exclusion of a confession obtained in consequence (*Delaney* (1988) 88 Cr App R 338), though it may, on its own or in combination with other factors, provide evidence that s 76(2)(b) has not been complied with.

[551] Even a clear and admitted breach, though it is to be deplored, will not lead to the confession being excluded if it has not operated in a way prejudicial to the accused: *Canale* [1990] 2 All ER 187.

[552] *Mushtaq* [2005] UKHL 25 at [37].

[553] *Murray* [1951] KB at 393; *Chan Wei Keung* [1967] 51 Cr App R 257 at 265; *Mustaq* [2005] 1 WLR 1513 at 500.

[554] *Mitchell* [1998] AC 695; *Thompson* [1998] AC 811.

10. Particular care will be needed where the confession is the sole evidence upon which the Prosecution rely: Berres.[555]

11. Where a confession made by a "mentally handicapped"[556] person not in the presence of an independent person is received in evidence, and the case against the accused depends wholly or substantially on a confession by him, the court must warn the jury that there is a "special need for caution before convicting the accused in reliance on the confession" (s. 77 PACE).[557] In practice such a confession is likely to be excluded under either s. 76 or s. 78.[558]

NOTE: For confessions in cases where there are co-accused see Chapter 14-15.

Directions

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

13. Specific directions will depend on the circumstances of the case but the following should be considered:

    (1) A review of the terms of the confession.

    (2) If the fact of the confession is disputed, the jury must decide whether they are satisfied that a confession was made. Accordingly, the jury should be reminded of any evidence tending to support and any evidence tending to rebut the making of the confession.

    (3) If the fact of the confession is admitted but it is disputed that it is true, the jury should be reminded of any evidence relevant to this issue.

    (4) If it is alleged that the confession was made to the police as a result of oppression, the jury must be directed that only if they are sure that there was no oppression may they rely upon the confession. The jury should be reminded of any evidence relevant to this issue.

    (5) If the confession is said to have been made in breach of the Codes of PACE, the breach/es alleged and the prosecution's response should be reviewed and the jury directed that if they consider there was, or may have been, a breach of the Code they must consider the effect that this may have upon the reliability of the confession and the weight that they attach to it.

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[555] [2014] EWHC 283 (Admin)

[556] This is the term used in s. 77.

[557] By PACE s. 77(3), "independent person" does not include a police officer or person employed for, or engaged on, police purposes; "mentally handicapped" means a person in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.

[558] The court in *Moss* (1990) 91 Cr App R 371 thought that s. 77 was aimed at two possible cases: (a) where a confession has been properly obtained from a mentally handicapped person in the absence of an independent person in the course of an 'urgent interview' as permitted by Code C; (b) where the interview was in breach of Code C but there was only 'one interview during a comparatively short period of custody'.

(6) If a confession is said to have been made by a D who is “mentally handicapped” and was not made in the presence of an independent person, the jury must be warned that there is a special need for caution before convicting D in reliance on that confession.

Example 1: where the fact of the confession is not accepted

(a) Where there is an issue that D said what is alleged

W gave evidence that while he and D were {specify circumstances} D told him that {specify alleged words of confession}.

Although when he gave evidence D accepted that he and W were together {specify circumstances} he denied that he said this to W: D's case being that W's evidence about this is untrue and that W has invented it because {specify}.

You must first decide whether D did make this admission to W, taking account of all of the evidence which bears on this point namely {specify}. Unless you are sure that D did make this admission, you must take no account of it at all. If on the other hand you are sure that he did make it, then you must go on to decide whether it was true and reliable. If you are sure that it is true and that you can rely upon it, then you may treat it as evidence which supports the prosecution's case. If you are not sure that it is true then you must ignore it altogether.

(b) Where there is an issue whether what was said amounts to a confession

D's case is that although he did say these things they do not amount to a confession and when you come to decide whether you can safely rely upon this evidence you must consider D's explanation for having said what he did and the interpretation which he invites you to put on these words.

If you are not sure that what D said amounts to a confession then you must take no account of it and ignore it completely. If you are sure that it does amount to a confession then you must go on to decide whether it is true and reliable. If you are sure that it is true and that you can rely upon it, then you may treat it as evidence which supports the prosecution's case. If you are not sure that it is true then you must ignore it altogether.

Example 2: Where the confession is admitted but said to be untrue or unreliable

The prosecution rely on evidence that when D was interviewed he said that {specify that part of the interview which is relied on as a confession} and they say that this amounts to a confession that he is guilty of the offence.

(a) Where there is an issue whether the confession is true

D's case is that although he did say these things they are not true and he only said what he did because {specify}. When considering this you should have regard to all the circumstances in which it came to be made and decide whether any of those circumstances might cast doubt upon its truthfulness.

If you are not sure that it is true (or if you are sure that it is not true) then you must ignore it completely. If you are sure that the confession is true then you may treat it as evidence which supports the prosecution's case {even if it was or may have been made as a result of oppression or other impropriety - [see below]}.

(b) Potential unreliability

You should also have regard to the terms in which D's alleged confession is made and consider whether he appears to have admitted something/s which cannot in fact be true. In particular {specify any weaknesses in the confession evidence which may have a bearing on its reliability}. Plainly if you find that the confession cannot be true,

then you cannot rely on it and you must ignore it completely. If you are sure that the confession is true then you may treat it as evidence which supports the prosecution's case.

(c) Where oppression/other impropriety is alleged

D has alleged that although he did make this confession it is not true and that before he made it he had been told that ….{specify: e.g. he would not be going home until he had admitted what he had done} and if you find that that was, or may have been, said to him you will have to go on to decide whether despite that D's confession was made voluntarily or whether it was, or may have been, made as a result of …. {specify}. If you are sure that it was made voluntarily then you are entitled to take that into account when you are deciding whether or not the confession is in fact true. If you are not sure that it was made voluntarily, or sure that it was not, then this is an important factor which you must take into account when you are deciding whether or not the confession was true. If you are not sure, for whatever reason, that the confession is true you must disregard it. If, on the other hand, you are sure that it is true you may rely on it as evidence in support of the prosecution's case, even if it was or may have been made as a result of oppression or other improper circumstances.

(d) Breach of Code C – no caution

It is common ground that when D was arrested on/at …{specify} he was cautioned…{remind the jury of the words of the caution}. It is also common ground that when he was interviewed at the police station on/at …{specify} the caution was not repeated, nor was D reminded of it, and that in the course of that interview D said a number of things which may, depending on what view you take of them, support the prosecution's case. When D gave evidence he said that if he had known that he did not have to say anything, he would not have done so.

The failure to caution D or make any mention of it was a breach of a Code of Practice with which the police are obliged to comply when interviewing any suspect – and you must consider what effect this may have had on the reliability of what D said in the course of the interview and also on the weight, if any, which you decide to attach to it, given that D had not been told, or reminded, that he did not have to say anything.

You should bear in mind the points which have been made by both the prosecution and the defence about this, namely that {specify}

If, having considered these points, you are sure that notwithstanding the fact that when D was interviewed he was not cautioned, or reminded of the caution, what he said was the truth and that it would be fair to rely on this evidence as supporting the prosecution case then you may do so. If on the other hand you are not sure that what D said in interview was the truth, and that it would be unfair to rely upon it, then you must take no account of what D said in the interview at all.

16-2 Lies

ARCHBOLD 4-461; BLACKSTONE'S F1.21

Legal Summary

1. A D's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt.[559] A lie is only capable of supporting other evidence against D if the jury are sure that[560]:
   (1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake;
   (2) it relates to a significant issue;
   (3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt.[561]
2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D's lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt.[562] It is important that care is taken to make clear these criteria.[563]
3. If the issue for the jury is whether to believe the prosecution witnesses rather than D, and doing so will necessarily lead them to conclude that D was lying in the account he gave, such a direction is not necessary.[564]
4. Similarly, a lies direction is not needed where D's explanation for his admitted lies can be dealt with fairly in summing-up.[565]
5. A lies direction is normally only required in four situations[566] (which may overlap) as described in *Burge and Pegg:*
   (1) "Where the defence relies on an alibi; [567]
   (2) Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other

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[559] *Goodway* 98 Cr App R 11

[560] *Lucas* 73 Cr App Rep 159, CA. See also *Burge and Pegg* [1996] 1 Cr App Rep 163

[561] *Goodway* 98 Cr App Rep 11; *Taylor* [1998] Crim LR 822, CA.

[562] *Strudwick and Merry* (1994) 99 Cr App R 326 at p. 331

[563] *Sunalla*

[564] *Harron* [1996] 2 Cr App R 457, if the jury were told they could rely on such lies as evidence of his guilt they would be likely to engage in circular reasoning – "we believe V therefore D is a liar therefore that is a good reason to believe V and convict D." see *Middleton* [2001] Crim LR 251

[565] *Saunders* [1996] 1 Cr App R 463 at pp. 518–19.

[566] *Burge* [1996] 1 Cr App R 163

[567] see also *Lesley* [1996] 1 Cr App R 39 on the desirability of warning the jury of false alibis sometimes being invented to bolster a genuine defence.

evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by D;

(3) Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved;

(4) Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so."

6. Where D told lies in interview and did not mention matters on which he has relied in his defence a single direction should be given which addresses both points: giving separate directions about lies and possible s. 34 CJPOA inferences is always unhelpful.

Directions

7. Whether a direction should be given to the jury in respect of any admitted or proved lie/s should be the subject of discussion with the advocates before speeches. In particular care should be taken to identify with the advocates the lie/s in respect of which the direction is to be given.

8. Before the jury may use an alleged or admitted lie against D they must be sure of **all** of the following:

(1) that it is either admitted or shown, by other evidence in the case, to be a deliberate untruth: i.e. it did not arise from confusion or mistake;

(2) that it relates to a significant issue; and

(3) that it was not told for a reason advanced by or on behalf of D, or some other reason arising from the evidence, which does not point to D's guilt.

9. The jury must be directed that unless they are sure of **all** of the above the [alleged] lie is not relevant and must be ignored.

10. If the jury are sure of all of the above they may use the lie as some support for the prosecution case, but it must be made clear that a lie can never by itself prove guilt.

11. In a case in which by telling lies in interview the defendant failed to mention matters on which he now relies in his defence, so that a s. 34 inference direction is required [see Chapter 17-1] a direction combining both of these features, rather than two separate directions, should be given.

Example 1: D admits telling a lie and gives a reason for having done so

When D was {e.g. arrested/interviewed/ charged} he said {specify} D admits that he said this and accepts that it was a lie, but gave an explanation namely {specify}

When you are considering this evidence you must decide why he lied. In doing so you must bear in mind that a defendant who tells a lie is not necessarily guilty: sometimes a defendant who is not guilty will tell a lie for some other reason. The reason which D gave for telling this lie is that he was scared that he would not be believed if he gave the account which he gave in evidence (which he said is the truth) and in a state of panic instead said the first thing that came into his head; and if you find that that is, or may be, true you must take no notice of this lie and not hold it against him.

[Only if there is an evidential basis for the following: If you are satisfied that this was not the reason that D lied, you should also consider whether D may have been, and still is, afraid to tell the truth because {e.g. although it would exonerate him he has not wanted to incriminate any of his co-defendants and, for obvious reasons, has not felt able to say so}; and if you find that this is, or may be, the reason for him to have lied then again you will take no notice of this lie and not hold it against him.]

If however you are sure that D did not have this/these reason/s for lying, you may use this as evidence which supports the prosecution's case, but D is not to be convicted either wholly or mainly on the basis that he lied.

Example 2: D denies saying what is alleged

The prosecution say that when D was {e.g. arrested/interviewed/ charged} he said {specify} They say that this was a deliberate lie which he made up in an attempt to cover up the fact that {specify}. D denies that he said this at all.

In considering this evidence you must answer three questions:

Did D say this? If you are not sure that he said it, then you must ignore this point completely.

1. If you are sure that D did say this, was it a deliberate untruth or may it have been said because of {e.g. confusion, mistake}. If you are not sure that it was a deliberate untruth then again you must ignore this point.
2. If you are sure that it was a deliberate untruth, why did D lie? In answering this question you must bear in mind that a defendant who tells a lie is not necessarily guilty: sometimes a defendant who is not guilty will tell a lie for some other reason. In this case, given the evidence that {specify} you should consider whether D lied, or may have lied, because {specify}.

If, having considered these questions you are sure that D did say this, that it was a deliberate lie and that D did not have any “innocent” reason for lying, you may use this as evidence which supports the prosecution's case, but D is not to be convicted either wholly or mainly on the basis that he lied. The fact that he lied does not, on its own, prove that he is guilty.

NOTE: These examples may be tailored to fit cases in which D admits that he said what is alleged but denies that it was untrue. The warning that D is not to be convicted wholly or mainly on the basis that he lied must be given in every case.

Example 3: D admits telling a lie in interview, gives a reason for having done so and accepts that by lying he did not mention something on which he has relied in court

Before his interview Defendant was cautioned in these words: 'You do not have to say anything but it may harm your defence if you fail to mention when questioned anything which you later rely upon in court.' D then went on to give an account to the police in which he said {specify}.

As part of his defence the Defendant has relied on {specify}.

D did not mention these things when he was questioned, but instead (as he accepts) told lies, and this may, as he was told in the words of the caution, "harm his defence". This is because you are entitled, subject to certain conditions, to draw the conclusion that these things are not true and have since been invented by him to support his defence.

The conditions which must be satisfied before you are entitled to draw that conclusion are that:

1. the prosecution case being put to him at the time of his interview was such that it called for an answer; and
2. he could reasonably have been expected to mention the matters on which he now relies when he was interviewed; and
3. the only sensible reason that he did not do so is that he had not yet thought of them.

The Defence ask you not to draw this conclusion from the fact that D did not mention these things in interview and rely on his evidence that he didn't tell the police about these things, and instead told the police what he now accepts are lies, so that/because {specify}.

If you find that this is or may be right, then you should not hold it against D that he did not mention these things in his interview, but instead told lies, and neither the fact that he did not mention them, nor that fact that he lied, could provide any support for the prosecution case.

If on the other hand you are sure there was no good reason for D not to put forward in interview the account on which he now relies, and for him to tell lies instead, you are entitled to use this as some support for the prosecution case; but you must not convict him wholly or mainly on the strength of it.

17. DEFENDANT – THINGS NOT SAID OR DONE

17-1 Matters not mentioned when questioned or charged

ARCHBOLD 4-456 and 15-361; BLACKSTONE'S F19.3

Legal Summary

1. Sections 34(1) and (2) Criminal Justice and Public Order Act 1994 provide that if D is questioned under caution or charged with an offence and he fails to mention a fact later relied on in his defence at trial which, in the circumstances then prevailing, he could reasonably have been expected to mention, the jury, in determining whether D is guilty of the offence charged, may draw such inferences from the failure as appear "proper".
2. The object of s. 34 is to deter late fabrication and to encourage early disclosure of genuine defences: *Brizzalari*.[568] In *Smith*[569] it was held that to give a s. 34 direction where D had put forward no more than a bare denial would amount to a direction that guilt could simply be inferred from the exercise of the right to silence. This was not the purpose of s. 34.

Access to legal advice

3. By s. 34(2A),[570] no inference may be drawn unless D was given the opportunity to consult a solicitor before being questioned or charged. In *McGowan v B*,[571] it was acknowledged that there was no rule to be derived from ECtHR jurisprudence that the right of access to legal advice during police questioning could only be waived if D had received advice from a lawyer as to whether or not he should do so. *Saunders*[572] makes clear that a waiver should be "voluntary, informed and unequivocal" in order to be effective.

Defendant's failure to mention facts

4. The statutory right to draw inferences is aimed at the failure to mention facts on which reliance is placed at trial, not mere silence itself.[573] Facts may be relied upon notwithstanding D has not asserted them in evidence. A positive case put in cross-examination may be sufficient.[574] If a prepared statement is submitted by or on behalf of D in lieu of answers to questions posed in interview, no inference is

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[568] [2004] EWCA Crim 310.

[569] [2011] EWCA Crim 1098.

[570] Added by s 58 of the Youth Justice and Criminal Evidence Act 1999, to ensure compliance with *Murray v UK* [1996] 22 EHRR 29.

[571] [2011] 1 WLR 3121.

[572] [2012] 2 Cr App R 321.

[573] *Brizzalari* [2004] EWCA Crim 310; *Argent* [1997] 2 Cr App R 27 at [32]; *T v DPP* [2007] EWHC 1793 (Admin) at [20] and [26]. An admission by the defendant during his evidence of a fact relied on by the prosecution does not without more constitute reliance by the defendant: *Betts* [2001] EWCA Crim 224 at [33]. cf *Daly* [2001] EWCA Crim 2643.

[574] *Webber* [2004] UKHL 1.

available unless D later relies on facts which do not appear in the prepared statement.[575] A direction must not be given if, in the case of a D who gives evidence, he is not asked about the fact that he did not answer questions in interview.[576]

Lies and section 34

5. Where the criticism is that D has varied his account between his statement (or interview) and his evidence, the right approach may be to consider a lies direction rather a direction under section 34.[577] In *Hackett*,[578] it was confirmed that where s. 34 and lies overlap it will usually be unhelpful to give two separate directions. The judge should select and adapt the more appropriate direction given the evidence in the case.[579] Having regard to these cases, Sir John Thomas emphasized in *Khan*[580]that "*it is obvious that a jury needs tailored directions in cases of this kind*".

6. A failure to mention a fact which is admittedly true cannot found an adverse inference since the inference contemplated by s. 34 is that the disputed fact is not true.[581]

Which D could reasonably have been expected to mention

7. The question whether D, in the circumstances prevailing at the time, could reasonably have been expected to mention the relevant fact may depend upon a variety of factors which, usually, should be left for the jury to determine. In *Argent*,[582] Lord Bingham CJ identified the following factors:

> "The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time." [583]

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[575] *Knight* [2003] EWCA Crim 1977.

[576] *Walton* [2013] EWCA Crim 2536

[577] *Turner* [2003] EWCA Crim 3108.

[578] [2011] EWCA Crim 380.

[579] *Rana* [2007] EWCA Crim 2261 at [10] to [11]. Where both directions are given, they should be logically justifiable and include those warnings which are appropriate to the facts: *Stanislas* [2004] EWCA Crim 2266 at [11] to [13].

[580] [2012] EWCA Crim 774.

[581] *Webber* [2004] UKHL 1 at [28]; *Wheeler* [2008] EWCA Crim 688; *Chivers* [2011] EWCA Crim 1212 and *Zeinden* [2012] EWCA Crim 2489.

[582] [1997] 2 Cr App R 27.

[583] At [32].

8. *M*[584] confirms that the factors listed by Lord Bingham CJ do not create a closed list.[585]

9. Where D gives evidence, his reason for the failure to disclose should be explored.[586] An adverse inference will only be appropriate where the jury concludes that the silence can only sensibly be attributed to D not having an answer, or none that would withstand questioning.[587]

Legal advice and privilege

10. Ds often cite advice from a legal representative as the reason for remaining silent in the face of questioning: like any other reason (see *Argent* above), this is for the jury to examine.[588] Conversations between the suspect and his solicitor are subject to legal professional privilege. D is not bound to waive the privilege; if it is not waived, the right must be respected.[589] Privilege will be waived if D and/or his solicitor give evidence of the content or reason for the advice,[590] but in such circumstances privilege will not be waived generally.[591] In *Seaton*,[592] the Court of Appeal confirmed that privilege is waived only to the extent of "opening up questions which properly go to whether such reason can be the true explanation for his silence … That will ordinarily include questions relating to recent fabrication, and thus to what he told his solicitor of the facts now relied on at trial."[593]

11. The question whether D could *reasonably* have been expected to mention the fact now relied on may ultimately depend on whether the jury is satisfied that legal advice is the *true* reason for the failure to disclose (*Betts* by Maurice Kay LJ)[594] endorsed by Lord Woolf CJ in *Beckles.*[595] In *Hoare*,[596] it was held that the question is whether D remained silent "not because of [the] advice but because he had no or no satisfactory explanation to give."[597]

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[584] *M* [2012] 1 Cr App R 3.

[585] At [27].

[586] *T v DPP* [2007] EWHC 1793 (Admin).

[587] *Daly* [2002] 2 Cr App R 201; *Petkar* [2004] 1 Cr App R 270.

[588] *Condron v UK* (2001) 31 EHRR 1.

[589] *Beckles* [2004] EWCA Crim 2766 at [43].

[590] *Bodwen* [1992] 2 Cr App R 176; *Loizou* [2006] EWCA Crim 1719 at [84].

[591] *Seaton* [2011] 1 Cr App R 2.

[592] [2011] 1 Cr App R 2.

[593] At [43(g)] by the Vice President.

[594] *Betts* [2001] EWCA Crim 224 at [53], approved in *Hoare* [2005] 1 WLR 1804 at [54] to [55].

[595] [2004] EWCA Crim 2766.

[596] [2005] 1 WLR 1804.

[597] At [51].

The right to silence and the fairness of the trial

12. The ability of the jury to draw an inference of guilt from D's failure does not infringe the right to a fair trial enshrined in article 6 ECHR. The ultimate question is whether the inference could fairly be drawn in the circumstances. The judge is required to emphasise D's right to silence and to ensure that the jury understand "that it could only draw an adverse inference if satisfied that the applicants' silence … could only sensibly be attributed to their having no answer or none that would stand up to cross- examination."[598]

13. However, in *Murray v UK*[599] and *Beckles v UK*,[600] the ECtHR emphasised that a conviction based wholly or mainly on the adverse inference infringed D's right to silence. Section 38(3) of the 1994 Act prohibits conviction based "solely" upon an adverse inference.

14. In *Chenia*[601] the Court of Appeal advised that trial judges should follow the then JSB's latest specimen direction (2001) since it seemed to have acquired the approval of the ECtHR in *Beckles v UK*. That direction included the words, "If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it".[602]

The inferences available

15. The inferences available will depend on the development of the evidence in the case. The issue should be faced by the parties during the course of the evidence and requires discussion with the advocates before speeches. Possible inferences or conclusions will include the following:

    (1) The fact now relied on is true but D, for reasons of his own, chose not to reveal it;

    (2) The fact now relied on is irrelevant;

    (3) The "fact" now relied on is of more recent invention;

    (4) D's present answer to the prosecution case is fabricated;

    (5) D is guilty.

16. The obvious inference from a failure to mention a fact is that the "fact" is not true. Rejection of the fact which D failed to mention may, or may not, justify a further adverse inference. If the fact now relied on is, in effect, D's defence to the charge, his failure to mention it may undermine his whole defence as a recent invention, put forward only after D had the opportunity to tailor his account to the prosecution evidence. Alternatively, the fact now relied on may be peripheral or secondary or irrelevant, such that the falsity of it would not necessarily undermine

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[598] *Condron v UK* [2001] 31 EHRR 1 at [61]. See also *Beckles v UK* [2003] 36 EHRR 162 at [64].

[599] [1996] 22 EHRR 29.

[600] [2003] 36 EHRR 162.

[601] [2002] EWCA Crim 2345.

[602] That a direction to this effect is required was confirmed in *Petkar* [2003] EWCA Crim 2668.

the defence. The appropriate inference may be that the "fact" was invented to improve the defence, leaving open the question whether the defence is true or false.

17. Finally, the jury may be sure that D could reasonably have been expected to mention the fact but not sure that any adverse inference should be drawn, even an inference that the "fact" is false. An adverse inference is not limited to recent fabrication.[603] It follows that care must be taken to ensure that the jury understands the range of permissible inferences and, if necessary, that the inference they may draw may be of no assistance or of limited assistance in judging D's guilt.

The Mountford problem

18. Particular difficulties may arise when it is argued on behalf of D that the jury cannot determine the reason for D's failure to mention his defence without first deciding whether the defence is true. In *Mountford*,[604] the defendant, charged with possession of heroin with intent to supply, put forward the defence that the actual dealer was W, the main prosecution witness. His explanation for failing to reveal this defence at interview was that he was reluctant to expose W to prosecution. The Court of Appeal held that the jury could not properly reject the defendant's reason for not mentioning this fact without first concluding that the fact was untrue: the very issue on which the defendant's guilt turned. In these circumstances, the judge should not have left section 34 to the jury.

19. *Mountford* has been much debated. It was followed in *Gill*,[605] but doubted in *Daly*,[606] and *Gowland-Wynn.*[607] In *Chenia*,[608] it was held that the *Mountford* approach would only be appropriate in the "rare case", while in *Webber*[609] the House of Lords (while not going so far as to specifically overrule *Mountford)* considered that the section 34 direction had been rightly given in *Mountford*.[610]

20. If faced with the *Mountford* dilemma, the judge should leave the section 34 decision to the jury. He will need to explain that the jury must *first* decide whether the defendant could reasonably have been expected to mention the fact on which he now relies and, *second* and if so, what, if any, inferences are available from his failure to do so. The jury might be sure of the first but not the second. The judge's responsibility is to ensure that the jury is properly guided.

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[603] *Milford* [2001] Crim LR 330.

[604] [1999] Crim LR 575.

[605] [2001] 1 Cr App R 160.

[606] [2002] 2 Cr App R 201.

[607] [2002] 1 Cr App R 569.

[608] [2003] 2 Cr App R 83.

[609] [2004] 1 All ER 770.

[610] See also *Adetoro v UK* [2010] ECHR 609, app no 46834/06 at [51] to [54].

The Direction

21. The trial judge should always consider whether a s 34 direction will assist on the facts of the particular case.[611]

22. There will be rare circumstances in which, although section 34 applies, the judge may be required to warn the jury against drawing any inference.

23. When a direction is given, in *Pektar*[612] Rix LJ stated that

> "the following matters should be set before a jury in a well-crafted and careful direction:
>
> (i) The facts which the accused failed to mention but which are relied on in his defence should be identified…:
>
> (ii) The inferences …which it is suggested might be drawn from failure to mention such facts should be identified, to the extent that they may go beyond the standard inference of late fabrication…:
>
> (iii) The jury should be told that, if an inference is drawn, they should not convict "wholly or mainly on the strength of it"…The first of those alternatives ("wholly") is a clear way of putting the need for the prosecution to be able to prove a case to answer, otherwise than by means of any inference drawn. The second alternative ("or mainly") buttresses that need.
>
> (iv) The jury should be told that an inference should be drawn "only if you think it is a fair and proper conclusion"…
>
> (v) An inference should be drawn "only if … the only sensible explanation for his failure" is that he had no answer or none that would stand up to scrutiny…In other words the inference canvassed should only be drawn if there is no other sensible explanation for the failure. That is analogous to the essence of a direction on lies.
>
> (vi) An inference should only be drawn if, apart from the defendant's failure to mention facts later relied on in his defence, the prosecution case is "so strong that it clearly calls for an answer by him"…
>
> (vii) The jury should be reminded of the evidence on the basis of which the jury are invited not to draw any conclusion from the defendant's silence…This goes with point (iv) above, because it is only after a jury has considered the defendant's explanation for his failure that they can conclude that there is no other sensible explanation for it.
>
> (viii) A special direction should be given where the explanation for silence of which evidence has been given is that the defendant was advised by his solicitor to remain silent".

24. The judge is not prohibited from making fair comment on the evidence. [613]

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[611] *Essa* [2009] EWCA Crim 43.

[612] [2004] 1 Cr App R 22.

[613] Sakyi [2014] EWCA Crim 1784.

Directions

25. The jury must be reminded that D was cautioned, highlighting the facts that he was told that:

    (1) he did not have to say anything - and so he had a right to say nothing;

    (2) it might harm his defence if he did not mention when questioned something which he later relied on in court; and so he was aware that conclusions might be drawn against him if he failed to mention facts when he was being interviewed which he later relied on; and

    (3) anything he did say might be given in evidence.

26. The following should be identified in discussion with the advocates before speeches and then in the summing up to the jury:

    (1) the fact/s which the accused failed to mention but which is/are relied on in his defence;

    (2) the reason/s, if any, which D gave for failing to mention those facts;

    (3) the conclusion/s which it is suggested might be drawn from his failure to mention those facts, usually that it has been made up after the interview and is not true.

27. The jury must be directed that they may only draw such an inference:

    (1) if apart from D's failure to mention facts later relied on in his defence, the prosecution case as it appeared at the time of the interview was such that it clearly called for an answer; and

    (2) if there is no sensible explanation for D’s failure other than that he had no answer at that time or none that would stand up to scrutiny. In this regard the jury must consider any explanation which D gave for his failure (including legal advice) and be told that unless they are sure that that was not the genuine reason for his failure they should not draw any conclusion against him as a result of it; and

    (3) if they think it is fair and proper to draw such a conclusion.

28. The jury must be directed that if they do draw such a conclusion they must not convict D wholly or mainly on the strength of it.

29. A special direction should be given if evidence has been given that D’s reason for silence/not mentioning a fact/facts was that he had been advised by his solicitor to remain silent. The jury should be directed that:

    (1) if they decide that D was, or may have been, so advised this is an important matter for them to consider but it does not automatically prevent them from drawing any conclusion against him from his silence, because a person who is given legal advice can choose whether to follow it or not and was made aware at the time of the interview that his defence might be harmed if he did not mention facts on which he later relied at trial;

    (2) in deciding whether, despite having been advised to remain silent, D could reasonably have been expected to mention the fact/s on which he now relies they should take account of such things as his age, his maturity, the complexity of the facts on which he now relies and any evidence about the

reason for the advice being given;

(3) if they find that D had a good defence but chose to say nothing on his solicitor's advice they should not draw any conclusion against him;

(4) if they are sure that the real reason for D's silence was that he had no defence to put forward and merely hid behind the legal advice which he had been given, they would be entitled to draw a conclusion against him.

30. If the judge has decided that no adverse conclusion should be drawn from D's failure to mention a fact/s the jury must specifically be directed that they must not hold the fact that, when he was questioned, D did not mention the fact/s against him.

Example

Before his interview D was cautioned in these terms: 'You do not have to say anything but it may harm your defence if you fail to mention when questioned anything which you later rely upon in court.' He went on to give an account to the police in which he said {specify}

As part of his defence D has relied upon {specify}. These are matters that he did not mention when he was questioned and it may, as he was told in the words of the caution, "harm his defence". This is because you are entitled, subject to certain conditions, to draw the conclusion that they are not the truth and have since been invented by him to support his defence.

The conditions which must be satisfied before you are entitled to draw that conclusion are:

1. The prosecution case being presented at the time of his interview was such that it called for an answer.
2. He could reasonably have been expected to mention the matters he now relies on at the time he was interviewed and
3. The only sensible reason for not raising these matters is that he had not yet thought of them.

The Defence invite you not to draw any adverse conclusion from D's silence. They argue that he didn't tell the police about {specify} because {specify} and he told the police what he now accepts are lies so that {specify}.

If that is/may be right then his failure to mention {specify} in his interview would have an innocent explanation and in those circumstances it wouldn't provide any support for the prosecution case.

[Where there is evidence that D was silent on the advice of his legal representative: D gave evidence that he did not answer questions because he had been advised not to do so by his legal representative. If you accept that D was given that advice, it is important to consider this, but it does not automatically prevent you from drawing any conclusion from his silence. This is because someone who is given legal advice has a choice whether or not to accept it; and D was warned at the start of the interview that if he did not mention things when he was questioned which he relied on at his trial, this might harm his defence.

You should also take into account {specify: e.g. D's age, reasons for advice given, complexity of facts relied on at trial}. Having considered these things, you should decide whether the D could reasonably have been expected to mention the facts on which he now relies. If, for example, you think that he had, or may have had, an answer but that he genuinely relied on the legal advice which he was given to remain silent (whether or not you think it was reasonable for him to do so) you should not draw any conclusion against him. But if, on the other hand, you are sure that D had no answer and merely decided to hide behind the legal advice that he had been given, you would be entitled to draw a conclusion against him, subject to the directions which I have already given you.]

So, if you are sure there was no good reason for putting forward in interview the account he now relies on you are entitled to consider that failure as providing some support for the prosecution case but you must not convict him wholly or mainly on the strength of it."

17-2 No account given for objects, substances or marks CJPOA s.36 or presence at a particular place CJPOA s.37

ARCHBOLD 15-382 and 384; BLACKSTONE'S F19.34

Legal Summary

Section 36

1. Section 36 CJPOA permits the jury to draw an inference adverse to D from his failure or refusal, when requested, to account for any object, substance or mark. "Substance or mark" includes the condition of clothing or footwear. The section concerns only the refusal to account for the object, substance or mark. Any adverse inference arising from the fact of possession of the object or the presence of the substance or mark is additionally available at common law.
2. The qualifying conditions are:[614]
   (1) D was arrested by a constable (constable includes a customs officer);
   (2) There was on his person, clothing or footwear, or otherwise in his possession, or in a place where he was at the time of his arrest, any object, substance or mark;
   (3) That constable or another constable investigating the case reasonably believed that the presence of the object, substance or mark may be attributable to the participation of D in an offence which the constable specified;
   (4) The constable informed D of his belief and requested him to account for the presence of the object, substance or mark;
   (5) The constable informed D in ordinary language, when making the request, of the effect under the section of a failure or refusal to account for the object, substance or mark;[615]
   (6) If the request was made at an authorised place of detention, D was allowed the opportunity to consult a solicitor before the request was made;[616]
   (7) D failed or refused to account for the object, substance or mark.
3. Section 36, unlike s. 34, has no qualifying condition of reasonableness;[617] the sole question is whether the suspect accounted for the object, substance or mark. [618]
4. The strength of the inference increases with the suspicious nature of the circumstances. In *Connolly*,[619] the defendant had been given an opportunity to

[614] Unless stated, CJPOA 1994, s 36(1).

[615] CJPOA 1994, s 36(4). See also PACE 1984, Code C, paras 10.11/11.

[616] CJPOA 1994, s 36(4A).

[617] Per Rose L.J. in *Roble* [1997] Crim. L.R. 449 at 3.

[618] *Compton* [2002] EWCA Crim 2835.

[619] 10 June 1994, unreported.

account for an incriminating receipt in his pocket and his presence near the scene of the crime but remained completely silent. The Court of Appeal for Northern Ireland accepted that it had been proper to draw an inference[620] that the defendant intended to sit out the interrogation and assess the strength of the case against him, thereby keeping his options open in the event of being charged.

5. The direction laid down in *Cowan* "related to a case involving section 35 but it is common ground that the same principles apply when dealing with section 36": *Milford.*[621]

6. In *Compton*[622] Buxton LJ emphasised the importance of correct directions being given. The most crucial point is that the jury must be told that they can only hold against a defendant a failure to give an explanation if they are sure he had no acceptable explanation to offer.

Section 37

7. Section 37 CJPOA permits the jury to draw an inference adverse to D from his failure or refusal to account, when requested, for his presence at a place[623] where an offence was committed.

8. The qualifying conditions are:[624]

   (1) D was arrested by a constable (constable includes a customs officer);

   (2) D was found at a place at or about the time an offence was allegedly committed;

   (3) that constable or another constable investigating the offence reasonably believed that D's presence at that place and time may be attributable to his participation in the commission of the offence;

   (4) the constable informed D of his belief and requested him to account for his presence;

   (5) D was told in ordinary language by the constable making the request of the effect under the section of a failure to account for his presence;[625]

   (6) if the request was made at an authorised place of detention, D had been allowed an opportunity to consult a solicitor before the request was made;[626]

   (7) D failed or refused to account for his presence.

9. Section 37 does not require a finding that D could *reasonably* have been expected to account for his presence.

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[620] Under provisions equivalent to ss 36 and 37.

[621] *[*2002] EWCA Crim 1528 at [25].

[622] [2002] EWCA Crim 2835

[623] As defined in CJPOA 1994, s 38(1).

[624] Unless stated, CJPOA 1994, s 37(1).

[625] CJPOA 1994, s 37(3). See also PACE 1984, Code C, paras 10.10/11.

[626] CJPOA 1994, s 37(3A).

10. D shall not have a case to answer or be convicted of an offence solely or mainly on an inference drawn under the provisions: s. 38(3). [627]

Directions

NOTE: The content of the directions in respect of cases concerning ss. 36 and/or 37 are similar and follow the same pattern.

11. The jury must be reminded of the qualifying conditions:

    (1) D was arrested by a constable;

    (2) D was arrested at a place at or about the time the offence for which he was arrested is alleged to have been committed or had on his person, or in or on his clothing or footwear or otherwise in his possession the object, substance or mark the subject of the direction.

    (3) A constable told D either at the scene or in the course of questioning that he believed the place D was at and/or any object/substance/mark found on him was attributable to his participation in the offence.

    (4) The constable asked D to account for his presence at the place or the presence of the object/substance/mark.

    (5) The constable told D in ordinary language of the consequences of failing to account for his presence or the presence of the object/substance/mark namely that at any trial the court would be entitled to draw such inference as appeared proper: e.g. that he did not have an explanation to give.

12. The following should be identified in discussion with the advocates before speeches and then in the summing up to the jury:

    (1) the explanation relied on at trial for his presence or the presence of any object/substance/mark which D failed to mention at the time he was asked on arrest/in interview;

    (2) the reason/s, if any, which D gave for failing to mention those facts;

    (3) the conclusion/s which it is suggested might be drawn from his failure to mention those facts - usually that it has been made up after the interview and is not true.

13. The jury must be directed that they may only draw such an inference if they are sure there is no sensible explanation for D's failure other than that he had no answer at that time or none that would stand up to scrutiny. In this regard the jury must consider any explanation which D gave for his failure and be told that unless they are sure that that was not the genuine reason for his failure they should not draw any conclusion against him as a result of it.

14. A special direction should be given if evidence has been given that D's reason for silence/not mentioning a fact/facts was that he had been advised by his solicitor to remain silent. The direction should be in the same terms as that when a defendant fails to mention a matter subsequently relied on in court [see Chapter 17-1].

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[627] *Murray* (1996) 22 E.H.R.R. 29 at [47].

15. If the judge has decided that no adverse conclusion should be drawn from D's failure to mention a fact/s the jury must specifically be directed that they must not draw any adverse conclusion.

16. The jury must be directed that if they do draw such a conclusion they must not convict D wholly or mainly on the strength of it.

Example: failing to account for presence at the scene and presence of an object

On arrival at {specify} the police found D. On arrest he was discovered to have in his possession a {specify}

In interview D was asked why he had been there and why he had a {specify} with him. He was warned at the time that if he failed to give an explanation for his presence at {specify} or possession of {specify} it might harm his defence. He answered "No comment" to all questions.

In his evidence D said {set out explanation} He said that he had not answered any questions in interview because {specify}.

The prosecution invite you to conclude that at the time he was interviewed he had no explanation for his presence at {specify} or his possession of {specify} and that the account he has given to you is one he has made up since.

The defence say that the account he has given to you is true and is an explanation for both his presence and the possession of {specify} and that you should accept the reason he gave for not providing the explanation at the time of interview.

If you consider D's account of why he did not give an explanation at the time is or may be true then the fact that he did not give it at the time is irrelevant.

If you are sure that his account for this is untrue you can take that into account as providing some support for the prosecution case, though you must not convict him wholly or mainly on the basis of his failure to explain these things.

17-3 Refusal to provide intimate samples

ARCHBOLD: 15-181; BLACKSTONE'S: F19.54

Legal Summary

1. By section 62(10) Police and Criminal Evidence Act 1984

   "Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence - …(b) the court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper".

2. An intimate sample may only be taken if appropriately authorised and by consent [628] and before it is taken an officer must inform the person of the following:

   (1) the reason for taking the sample;

   (2) the fact that authorisation has been given and the provision under which it has been given; and

   (3) if the sample is taken at a police station the fact that it may be the subject of a speculative search[629].

3. The person must also be warned of the possible consequences of a refusal to give consent.

Directions

4. The police have a statutory power to request a suspect to provide samples of fingerprints/footwear/DNA/hair etc.: [ss. 61 and 62 PACE].

5. The suspect does not have to provide a sample but he refuses without good cause it may harm his defence.

6. The reason/s for refusal will have been explored in evidence and should be revisited with the advocates before speeches.

7. D may seek to rely upon legal advice for an initial refusal but the question of whether there was a subsequent opportunity to provide a sample is likely to have been explored in evidence and must be incorporated in the direction.

[628] PACE 1984, s. 62(1) (subject to s. 63B)

[629] PACE 1984, s. 62(5)

Example

When the police went to investigate a burglary at {location} they found blood staining on the inside of the broken window through which the burglar had entered. D was arrested having been seen running away from the scene. He denied being the burglar. He was asked, when arrested, to provide a sample against which his DNA could be compared to that of the blood found within the house he was also warned that a failure to provide a sample might harm his defence.

The comparison of D's DNA with that from the blood within the house could either have provided very powerful evidence that D was the burglar or it might have provided evidence that he could not have been the man whose blood was within the house.

D declined to provide a sample for comparison. You have also heard that further opportunities to provide a sample were offered to him on two occasions when he appeared at this court for preliminary hearings in this case.

He has told you that he declined to provide a sample on the advice of the solicitor who was representing him at the police station and has told you that he has not had further advice.

We have not heard what advice he was given; such advice is confidential between solicitor and client. Whatever the advice was both D and his solicitor knew that a refusal to provide a sample might harm his defence.

But if you consider it was or may the case that D's refusal to provide a sample has throughout been because he was in good faith following the advice of his solicitor you would be entitled to conclude that would be a good reason for failing to provide a sample and not hold his refusal against him.

If however you are sure that he is using advice given to him by his solicitor as an excuse for not providing the sample you are entitled to use his refusal as evidence

You could not convict D wholly or mainly on the evidence of a refusal to provide a sample, you are entitled to use it as evidence in support of the prosecution case.

17-4 Failure to make proper disclosure of the defence case

ARCHBOLD 12-81; BLACKSTONE'S D9.1 and 29

Legal Summary

1 The disclosure obligations on the defence are set out in the CPIA,[630] the Code of Practice issued under it and the CrimPR Part 15.[631]

2 By s. 5 CPIA, once the case is sent to the Crown Court and the prosecution case is served, D is required to serve a "defence statement" on the prosecution and the court.[632] This written statement should set out the basis on which the case will be defended.

3 Service of the statement must be within 28 days of the prosecutor complying or purporting to comply with the duty of primary disclosure.[633]

Contents of a defence statement

4 Section 6A(1)[634] sets out the areas which the defence statement must cover:

(1) The nature of D's defence, including any particular defences on which he intends to rely;
(2) The matters of fact on which D takes issue with the prosecution, including the reasons why;
(3) Particulars of the matters of fact on which D intends to rely for the purposes of his defence;
(4) Any points of law which D wishes to take, including any authorities on which he intends to rely.

5 A general denial accompanied by a positive but unspecified challenge to the evidence of a witness will not be enough (*Bryant*),[635] whereas a statement which advances no positive case and which simply puts the Crown to proof will satisfy the requirements of section 6A (*Rochford*).[636]

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[630] As amended by the CJA 2003 and the CJIA 2008.

[631] The legislative scheme is further supplemented by (1) the A-G's Guidelines on Disclosure of Information in Criminal Proceedings (see also the A-G's Supplementary Guidelines on Disclosure: Digitally Stored Material); (2) the Court of Appeal's Protocol for the Control and Management of Unused Material in the Crown Court (the "Crown Court Protocol"); (3) the CPS/Police Disclosure Manual; (4) the Protocol for the Control and Management of Heavy Fraud and Other Complex Cases; and (5) the Code of Practice for Arranging and Conducting Interviews of Witnesses Notified by the Accused.

[632] To respect privilege against self-incrimination, the defence duty is limited to revealing the case which will be presented at trial. It does not extend, as in the case of the prosecution, to unused material.

[633] Criminal Procedure Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011 (SI 2011 No 209), reg 2(3). Check

[634] As amended by the CJA 2003, s 33(2) and the CJIA 2008, s 60(1).

[635] [2005] EWCA Crim 2029.

[636] [2011] 1 WLR 534. See also *Malcolm* [2011] EWCA Crim 2069.

6 The Crown Court Protocol provides that judges will expect a defence statement to contain a "clear and detailed exposition of the issues of fact and law in the case."[637] As part of what is described as the need for a complete change of culture, the judge must examine the defence statement with care to ensure that it complies with section 6A. In doing so, the judge should take into account what can reasonably be expected of the defence in light of how clearly the prosecution case has been put, including for example whether inferences the prosecution will be asking the jury to draw from the evidence have been spelled out).

7 In relation to Alibi, see section 6A(2)[638] and Chapter 18-2.

Details of defence witnesses

8 Separately to the defence statement, by section 6C[639] the defence must also notify the court and prosecutor of any witnesses they intend to call at trial, other than the defendant himself and any alibi witnesses already notified.[640] Details consisting of names, addresses and dates of birth must be provided or, if any such details are unknown, other identifying information. Notice of intention to call a witness must be given within 28 days from the date when the prosecutor complies or purports to comply with his initial duty to disclose.[641] In *Rochford*[642] the Court of Appeal confirmed that these obligations are designed to abolish trial by ambush.

Breaches of defence disclosure requirements and sanctions

9 The following breaches of requirements on the defence attract the sanctions of section 11:[643]

(1) Failure to serve a defence statement or to serve within time: ss. 5 and 11(2)(a) and (b);

(2) Failure to give notice of defence witnesses or to provide it within time: ss. 6C and 11(2)(d) and (e);

(3) Setting out inconsistent defences in the defence statement: s.11(2)(e);

(4) Putting forward at trial a defence not mentioned in the defence statement: s.11(2)(f)(i);

(5) Relying on any matter at trial which should have been put but was not mentioned in the defence statement: ss. 6A(1) and 11(2)(f)(ii);

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[637] At [35]. See also the *Criminal Practice Direction* [2013] EWCA Crim 1361 at 22A.1: "Disclosure is a vital part of the preparation for trial… All parties must be familiar with their obligations."

[638] As amended by the CJA 2003, s 33(2).

[639] Added by the CJA 2003, s 34.

[640] Under the CrimPR 2013, r 22.4, the defendant must also serve any defence witness notice given under section 6C on the court officer and prosecutor.

[641] Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011 (SI 2011 No 209), reg 2(3).

[642] [2011] 1 WLR 534, citing *Penner* [2010] EWCA Crim 1155.

[643] Section 11(2), as amended by the CJA 2003, s 39 and the CIJA 2008, s 60(2).

(6) Giving evidence of alibi or calling a witness to give evidence in support of an alibi without giving notice in the defence statement: ss. 6A(2) and 11(2)(f)(iii) and (iv).

10 The sanctions provided by s.11(5) are:

(1) the court or any other party may make any such comment as appears appropriate;[644]

(2) the court or jury may draw such inferences as appear proper in deciding whether the defendant is guilty of the offence concerned.

11 Breaches of defence requirements under CPIA can only be met by the sanctions set out in s. 11. A breach of s. 6A is not punishable as a contempt of court (*Rochford)*[645] and waiting until a very late stage to provide material on which cross-examination is based does not entitle the court to refuse to allow D to put forward matters in cross-examination which go to a relevant issue (*T*).[646]

12 The sanctions only come into play in the Crown Court when the case has survived the close of the prosecution case. There is no provision equivalent to section 34(2) CJPOA: see Chapter 17-1.

13 It is of critical importance to the ability of the jury to draw an adverse inference that the defence statement, if any, was made by D. Section 6E provides that a defence statement submitted by D's solicitor under section 5 shall, unless the contrary is proved, be deemed to have been given with the authority of the accused. The effect of the presumption is to require D to provide an explanation if he is to avoid responsibility for the absence of a defence statement or for its contents.

14 The court in *Essa*[647] rejected the contention that s. 11(5) was incompatible with the right to a fair trial under article 6 ECHR. The court noted that the use of s. 11(5) is subject to judicial controls, in particular the ability to interfere and stop unfair cross-examination or to tell the jury to disregard it.

Comment on inference

15 The first question for the trial judge is whether he is going to direct the jury that an adverse inference is available. Discussion with advocates is essential: *Wheeler* [648] (in which the court also suggested that Defence Statements should be signed so as to acknowledge their accuracy and avoid disputes).

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[644] By CPIA 1996, s 11(6), if the matter not mentioned was a point of law (including admissibility of evidence), comment by another party may be made only with the leave of the court.

[645] [2010] EWCA Crim 1928.

[646] [2012] EWCA Crim 2358. However, a failure to provide a defence statement resulting in additional expense for the prosecution may result in a wasted costs order: *SVS Solicitors* [2012] EWCA Crim 319.

[647] [2009] EWCA Crim 43.

[648] [2001] 1 Cr App R 10.

16 The only significance to the jury of a breach of D's disclosure obligations is likely to be the potential inference that a fact on which D now relies is false, either because it was, without justification, advanced late, or is inconsistent with a previous account in the defence statement. In practice, therefore, the judge will need to decide whether to explain that the adverse inference is available, or, to warn the jury against drawing it.

17 In the straightforward case, where D has signed the defence statement and he is now advancing a different case from that disclosed, there will usually be little difficulty in framing directions. Where, however, D maintains that he was not responsible for the inaccuracy a specific direction to the jury on how to approach the inconsistency may be necessary, especially where the defendant's credibility is crucial to his case.[649] Where the judge directs the jury that they may draw an inference on the basis of an apparent inconsistency, it will usually be unhelpful for the judge also to give a *Lucas* direction.[650] If, however, the facts are such that the defendant is entitled to the protection of a *Lucas* direction, that protection should be incorporated into the direction concerning the inference: see Chapter 16-2 Lies.

18 The judge's directions as to legitimate inferences will be similar to those required for s. 34 CJPOA: see Chapter 17-1.

19 In considering what direction to give to the jury when D has put forward a defence which is different from that advanced in the defence statement, the judge must have regard to (a) the extent of the difference/s; and (b) whether there is justification for it.[651] D may not be convicted solely on the basis of an adverse inference: s. 11(10).

Directions

20 Some explanation, in simple terms and without going into the detail of the legislation, must be given to the jury as to the obligation to provide a defence statement, if a D is to rely on matters in court, and its purpose. This should be done either when the defence statement is first raised in the course of the evidence and/or in the summing up.

21 If no adverse inference is to be drawn the jury must be directed accordingly.

22 In a case in which there is potential for the jury to draw an adverse inference the jury must be reminded of:

(1) the failure to provide or period of delay in providing the defence statement;.

(2) the difference/s between the defence statement and the matters on which the defendant has relied in court;

(3) the particular adverse inference/s which they have been invited to draw.

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[649] *Wheeler* [2000] 164 JP 565. The court suggested that defence statements should be signed so as to acknowledge their accuracy and avoid disputes.

[650] *Hackett* [2011] 2 Cr App R 35.

[651] CPIA 1996, s 11(8).

23 The jury should be directed that whether or not they do draw such inference/s will depend on whether or not they find that the reason/s advanced by D for not providing any details of the matter/s on which he has relied in court any earlier than he did or at all are, or may be, good reasons.

24 If the jury find that there are or may be good reasons for the failure then they should ignore the fact that D did not provide such details in the defence statement or at all.

25 If the jury are satisfied that there was no good reason and that D's failure to provide the details any earlier or at all can only be explained by the fact that he did not have any defence, or any defence which would stand up to scrutiny, they may bear this in mind when they are deciding whether his account is true and whether the prosecution have proved the case against him. But they may only do so if they conclude that it is fair and proper to do so; and they must not convict D solely or mainly because he did not disclose the matters on which he has relied in court any earlier than he did.

26 The example below is based on the premise that there was a sufficient case to answer, D was in breach of his statutory duty to file his Defence Statement and he elected to give evidence. In the circumstances the failure does not require the qualification that the jury should only use it as some support for the Prosecution's case if the case is sufficiently strong to call for an answer.

Example

As I explained when the issue first arose the prosecution are under a duty to disclose in advance all of the evidence upon which they intend to rely at trial and the defence are under an obligation to notify the court in a formal document known as a defence statement (a) those parts of the prosecution case with which D takes issue and (b) the facts upon which he is to rely in his defence.

This is so that each side has a chance to prepare for trial and neither is taken by surprise by any matters raised. In this case the defence statement was due to be filed no later than {date} and when it was not filed reminders were given to the defence solicitors and to D in person on {date}. Despite these reminders no Defence Statement was in fact served until {date}.

The prosecution say that this was because D had no real defence and the delay in filing the defence statement was because he had no yet thought of one. The defence say that D was having difficulties in {specify e.g. finding answers to the prosecution case} and that was the reason for the late service of the defence statement.

It is for you to decide whether the reason put forward by D for failing to provide a defence statement in good time is acceptable or not. If you accept his account the failure to file the defence statement is on no evidential significance, if however you reject his account you are entitled to consider that his failure should count against him and consider the prosecution suggestion that he had not then thought of the defence he is putting before you.

It is always for the prosecution to make you sure of D's guilt, his failure to file the defence statement may if you consider it appropriate provide some support for the prosecution case but you must not convict him wholly or mainly on the basis of that failure.

17-5 Defendant's silence at trial

ARCHBOLD 4-377; BLACKSTONE'S F19.41; CrimPD 26P

Legal Summary

1. By section 35(2) of the CJPOA, the jury may draw an inference adverse to D from his failure to give evidence at his trial.
2. The qualifying conditions are:[652]
   (1) D's guilt is in issue;
   (2) It does not appear to the judge that the physical or mental condition of D makes it undesirable for the defendant to give evidence;[653]
   (3) The trial judge has satisfied himself in the presence of the jury that D was aware that:
      (a) the stage had been reached at which evidence could be given for the defence;
      (b) he could if he wished give evidence;
      (c) if he chose not to give evidence or, having been sworn, without good cause, refused to answer questions it would be permissible for the jury to draw such inferences as appear proper;
   (4) D declined to give evidence or refused, without good cause, to answer questions.
3. In respect of condition 2(2) above:
   (1) medical evidence will almost certainly be required;[654]
   (2) a *voir dire* may be required to determine whether there is an evidential basis for a s 35(1)(b) ruling, though the judge is under no obligation to initiate the procedure if defence counsel does not seek to do so;[655]
   (3) In assessing whether it is "undesirable", the judge is entitled to weigh the likely significance of the defendant's evidence to the issues in the case with the nature and consequences of the mental condition revealed by the expert evidence.[656]
4. In respect of condition 2(3) above, on whether D has voluntarily decided not to testify see *Farooqi.*[657]

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[652] CJPOA 1994, s 35(1),(2) and (5).

[653] See *Friend* [1997] 1 WLR 1433 (defendant's low IQ and expert evidence suggesting that he might find it difficult to do himself justice in the witness box did not make it "undesirable" for him to give evidence.

[654] *Kavanagh* [2005] EWHC 820 (Admin).

[655] *A* [1997] Crim LR 883.

[656] *Tabbakh* [2009] EWCA Crim 464.

[657] [2013] EWCA Crim 1649.

5. In respect of condition 2(4) above, by CJPOA 1994, s 35(5), the defendant is to be taken to have refused to answer without due cause unless he is entitled, by virtue of any other enactment or on the ground of privilege, to answer, or, the trial judge excuses him from answering under his general discretion.
6. Section 35(2) and CrimPD 26P.1 require the court, at the conclusion of the prosecution evidence, to satisfy itself that D is aware that the stage has been reached at which evidence can be given for the defence and that D's decision not to give evidence or, if he does give evidence, his failure to answer questions, without a good reason, may lead to inferences being drawn against him.
7. The provision is mandatory. The jury may not draw an adverse inference from D's decision not to give evidence unless the judge has asked the relevant questions of D or his advocate. This remains the case even if D has deliberately absented himself from the trial, thus putting it beyond the power of the defence advocate to obtain instructions.[658]
8. Where there is a potential issue as to the defendant's capacity, it is particularly important to ensure that the relevant considerations are made clear to the defendant.[659]
9. No inference can be drawn where the facts adduced by the prosecution are unchallenged and the only issue is whether they amounted to the offence charged.[660]
10. If D refuses to remove the niqab before giving evidence, she should not be allowed to give evidence; the judge should in such circumstances give an adapted direction about this.[661]
11. A conviction should not be based solely upon D's decision not to give evidence.[662]

Inferences available

12. By s. 35(3), the adverse inference which it may be proper to draw is that D is "guilty of the offence charged".
13. The jury must be satisfied that there is a case to answer before they draw an adverse inference.[663] The jury need not resolve disputed issues of fact before concluding there is a case to answer.

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[658] *Gough* [2001] EWCA Crim 2545.

[659] *Cox* [2013] EWCA Crim 1025.

[660] *McManus* [2001] EWCA Crim 2455.

[661] *R v D(R)* unreported, 16 Sept 2013, Blackfriars Crown Court (HHJ Murphy).

[662] *Cowan* [2003] EWCA Crim 2668. Lord Taylor held that "[t]he effect of section 35 is that the court or jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case. It cannot be the only factor to justify a conviction and the totality of the evidence must prove guilt beyond reasonable doubt." This ensures compliance with *Murray v UK* (1996) 22 EHRR 29, where it was held that the defendant should not be convicted "solely or mainly" on an inference from silence.

[663] *Cowan* [2003] EWCA Crim 2668.

14. In *Cowan*[664] the Court of Appeal rejected the contention that section 35 should be confined to exceptional cases; this was clear from the plain wording of the provision.[665]

15. There are no special rules which apply to cases in which the defence to a murder charge is diminished responsibility.[666]

16. The nature of the inference available will depend on the way in which the evidence has developed and the strength of the prosecution case. The stronger the case, the more powerful the incentive to provide an answer, if there is one. In the Northern Ireland appeal in *Murray v DPP*[667] Lord Slynn offered the following analysis:

> "…if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt. On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty."[668]

Cowan[669] essentials for summing up on section 35

17. Lord Taylor CJ in Cowan observed:

> "there are certain essentials which we would highlight. (1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. (3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be

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664 [2003] EWCA Crim 2668.

665 Followed in *Napper* (1997) 161 JP 16.

666 *Barry* [2010] 1 Cr App R 32.

667 [1994] 1 WLR 1.

668 At p 11.

669 *Cowan* [2003] EWCA Crim 2668

attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.

It is not possible to anticipate all the circumstances in which a judge might think it right to direct or advise a jury against drawing an adverse inference".

Summing up the defence case

18. In *Scott Clarke*[670], where the case against the appellant was entirely circumstantial and he had given lengthy answers in interview but elected not to give evidence, the Court of Appeal emphasised the importance of placing the defence case before the jury in summing up.

Special provisions on a charge of causing or allowing a child or vulnerable adult to die or suffer serious physical harm

19. Special provision is made by ss.6 and 6A Domestic Violence, Crime and Victims Act 2004 for the inferences to be drawn where a person fails to testify when charged with an offence under section 5 of that Act (causing or allowing a child or vulnerable adult to die or suffer serious physical harm).

20. Section 6(2) provides that where the jury is permitted to draw a proper inference in relation to the section 5 offence, they may also draw such inferences in determining whether he is guilty or murder or manslaughter (or of any other offence of which he could lawfully be convicted on those charges), even if there would otherwise be no case to answer in relation to that offence. Similar provision is made in section 6A in relation to inferences about relevant offences where the defendant is charged with allowing a child or vulnerable adult to suffer serious harm.

Directions

21. No adverse inference can be drawn unless the judge has given the necessary warning at the time D's opportunity to give evidence arose. The warning is as follows:

(1) Where D is represented:

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

(2) Where D is not represented:

"You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath [or affirmation], and be cross-examined like any other witness. If you do not give evidence or, having been sworn [or having affirmed] without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court or lead any agreed evidence. Afterwards you

[670] [2010] EWCA Crim 684.

may also, if you wish, address the jury. But you cannot at that stage give evidence. Do you now intend to give evidence?"

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

23. In some cases it will be appropriate to remind the defence advocate that no reason for the failure can be advanced.

24. The adverse inference is open to the jury if:

    (1) D's guilt is in issue;

    (2) D's physical or mental condition is not such that it is undesirable for him to give evidence;

    (3) D, having been given the statutory warning at the time when he could have given evidence, declined without good cause to do so.

25. Where no adverse inference arises, for example because of the physical or mental condition of D or because D is absent, the jury must be directed about this.

26. Where the adverse inference is appropriate directions must include:

    (1) D had an absolute right not to give evidence.

    (2) The burden of proving the case rests throughout upon the prosecution.

    (3) The fact that D did not give evidence means that there is no evidence from him to rebut, contradict or explain the evidence of prosecution witnesses.

    (4) The jury should be reminded of the warning given to D at the time his opportunity to give evidence arose.

    (5) If they are sure that

        (a) the prosecution case is sufficiently strong to call for an answer; and

        (b) there is no sensible reason for D not to have given evidence, other than that he has no answer to the prosecution case or none that would stand up to cross examination

        the jury may conclude that the reason he did not give evidence is because he has no answer or none that would stand up to cross-examination and they may regard the fact that he did not give evidence as lending some support to the prosecution case.

27. A warning that an inference drawn from the fact that D did not give evidence cannot of itself prove guilt.

28. Where the adverse inference is not appropriate directions must include:

    (1) D had an absolute right not to give evidence.

    (2) The burden of proving the case rests throughout upon the prosecution.

    (3) Although the fact that D did not give evidence means that there is no evidence from him to rebut, contradict or explain the evidence of prosecution witnesses, the fact that he did not give evidence must not be held against him.

Example 1: Where inference may be drawn, D does not give evidence but relies upon account in interview

D chose not to give evidence. That is his right but it has these consequences:

1. He has not given evidence in the trial to contradict, or undermine the evidence of the prosecution witnesses that {specify}. When he was interviewed D gave an account to the police on which you know through his advocate he relies. That interview is part of the evidence, but unlike the evidence from Mr X and Mr Y, witnesses called by the prosecution that evidence was not given on oath and has not been tested in cross-examination.
2. You will remember when I asked Mr A, D's advocate at the time he told us of D's decision not to give evidence whether D understood that if he failed to so the jury may draw such inferences as appeared proper. In other words did he understand that you would be entitled to conclude that he did not feel he had an answer to the prosecution case that would stand up to cross-examination.

It is your decision whether or not his failure to give evidence should count against him. It is a decision you should only reach if you are sure that the prosecution case is of such strength that it calls for an answer AND you are sure that the true reason for not giving evidence is that he did not have an answer that he believed would stand up to questioning.

If you are sure the case is of such a strength that it called for an answer and that D's reason for not giving evidence was that he did not have an answer or answers that would stand up to the cross examination then you are entitled to regard his failure as providing support for the prosecution case.

You must remember it is for the prosecution to prove the guilt of the defendant and while his failure to give evidence can provide support for the case you cannot convict the defendant wholly or mainly because of that failure.

Example 2: Where no adverse inference may be drawn, D does not give evidence and relies upon prepared statement

D did not give evidence. That is his right. Under our law no one is required to give evidence at his trial and you must not hold it against D that he has exercised that right.

It does however mean that there is no evidence from him on oath to contradict or undermine the evidence of witnesses for the prosecution. The prepared statement D gave to the police through his solicitor before declining to answer further questions is evidence in the case but it was not, as you know on oath, nor was it subject to questions by the police and it has not been subject to cross examination in the way witnesses called by the prosecution have been cross-examined by D's advocate. That is a matter you can take into account when deciding what weight to give to aspects of the evidence in the case.

18. DEFENCES - GENERAL

18-1 Self-defence/prevention of crime/protection of household

ARCHBOLD 19-45; BLACKSTONE'S A3.54

Legal Summary

1. A defence is available in a case where D's explanation for his use of force is that he believed it was necessary for him to do so to protect himself, others[671], property[672] or prevent crime or conduct a lawful arrest.[673] The defence takes slightly different forms in different contexts (see below) but these overlap substantially. All share the same basic structure with two crucial limbs (see in particular *Keane and McGrath*[674]).

   (1) Did D believe or may he have believed that it was necessary to use force to defend himself an attack or imminent attack on himself or others or to protect property or prevent crime? (subjective question)[675]; and

   (2) Was the amount of force D used reasonable[676] in the circumstances, including the dangers[677] as D believed them to be? (objective question)[678]?

2. The defence is for the prosecution to disprove to the criminal standard once sufficient evidence has been raised. Where there is evidence which if accepted could raise a prima facie case of self-defence, this should be left to the jury even if the accused has not formally relied upon self-defence.[679] If D was, or may have been, acting in lawful self-defence he is not guilty. The jury should be reminded that D may have acted in the heat of the moment without the opportunity to weigh precisely the amount of force needed to repel the attack D anticipated.[680] The jury may take account of D's physical characteristics but not psychiatric conditions, unless there are exceptional circumstances making the evidence especially probative.[681] If D does no more than he instinctively believes to be necessary that is strong, though not conclusive, evidence that it was reasonable.[682] D cannot rely on any belief in the need for force which the jury

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[671] Section 76(10)(b) CJIA 2008; *Duffy* [1967] 1 Q.B. 60.

[672] Section 76(2)(aa) CJIA 2008.

[673] Section 3 Criminal Law Act 1967.

[674] [2010] EWCA Crim 2514, para [4]. See also *Hayes* [2011] EWCA Crim 2680.

[675] Section 76(3) CJIA 2008, *Williams* (1984) 78 Cr App R 276, 281; *Beckford* v *The Queen* [1988] AC 130, 144.

[676] *Keane* above.

[677] *Shaw v The Queen* [2001] UKPC 26 at [19].

[678] Section 76((6) CJIA 2008.

[679] *DPP (Jamaica) v Bailey* [1995] 1 Cr App R 257.

[680] Section 76(7); s 76(4); *Palmer* [1971] AC 814.

[681] *Martin* [2002] 1 Cr App R 27; [2013] EWCA Crim 1849 Oye [2013] EWCA Crim 1725.

[682] *Keane* (above); s 76(8).

find to have been induced by voluntary intoxication.[683] If D is the initial aggressor he is not automatically denied the defence where 'the tables had been turned', but D cannot rely on self-defence where he has set out to engineer an attack by V which will allow him, D, to respond with greater violence under the guise of self-defence.[684] The defence remains available to a defendant who has made a pre-emptive strike in anticipation of an actual or perceived *imminent* attack.[685] Similarly, the defence is not precluded if D failed to retreat from what was or what he believed to be an attack; failure to retreat is a relevant factor in assessing whether the use of force was reasonable in the circumstances.[686]

3. Where D has a belief in the need to use protective force and that belief is based on an insane delusion no consideration of his insane state should be included in the objective evaluation.

> "An insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity. In truth it makes as little sense to talk of the reasonable lunatic as it did, in the context of cases on provocation, to talk of the reasonable glue-sniffer." [687]

4. In a case of murder, self-defence is available in a different but partially overlapping range of circumstances than loss of control under the Coroners and Justice Act 2009, s 54[688] : see Chapter 19-2.

The forms of the defence

5. Common law defence of self/other or property: The common law defence of protection of self, others or property is "clarified" by s. 76 CJIA as amended.[689]

6. Prevention of crime under s. 3 Criminal Law Act 1967:

> "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

By s. 3(2):

> "Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

7. This statutory defence applies only when the force is used by D while a criminal offence is taking place or has in fact occurred. It is not available if D has used force in the mistaken belief that a crime is being or has been committed. Care is

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[683] Section 76(5); *Hatton* [2006] 1 Cr App R 16.

[684] *Harvey* [2009] EWCA Crim 469.

[685] *Beckford* [1988] AC 130, 141.

[686] Section 76(6A); *Bird* (1985) 81 Cr App R 110.

[687] *R. v. S.O. (aka R. v. Oye)* [2013] EWCA Crim 1775

[688] See *Dawes* [2013] EWCA Crim 322.

[689] Section 76(10)(a)(ia) CJIA 2008; *Faraj* [2007] EWCA Crim 1033.

needed particularly as to whether a crime is on-going (*Atwood*[690]) and where D is relying on powers of citizen's arrest under s. 24A PACE: see *Morris*.[691] The defence extends to the use of force against an innocent third party where such force is used to prevent a crime from being committed against someone else. [692]

8. Householder cases: The common law defence is modified in a "householder case" (s. 76(8A) CJIA)[693] that is (i) where D is lawfully in a dwelling and (ii) while in or partly in a building, or part of a building, that is a dwelling (iii) D uses force (iv) against someone D believed to be in, or entering, the building or part of it as a trespasser. In such a case, when considering the second limb of the defence "*the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.*"[694] The modified defence applies only where D is defending himself or others, but not his property.[695]

Directions

9. Whilst the phrase "self-defence" is used, these directions can be adapted to cover cases where force is used in defence of another, defence of property, prevention of crime and for lawful arrest.
10. Once an issue of self-defence is raised, it is for the prosecution to disprove.
11. If D was, or may have been, acting in lawful self-defence he is not guilty.
12. There are two aspects of the defence:

    (1) A belief that there is a need to use force; and

    (2) The use of no more than reasonable force in the circumstances as D believed them to be. In a "householder" case, to which s.76(8A) CJIA applies, presuming "that the defendant genuinely believed that it was necessary to use force to defend himself, the questions are:

    (a) was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer is "yes", he cannot avail himself of self-defence. If "no", then;

    (b) was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he has a defence. If it was unreasonable, he does not." [696]

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[690] [2011] RTR 173

[691] [2013] EWCA Crim 436

[692] *Hichens* [2011] EWCA Crim

[693] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192945/self-defence-circular.pdf),

[694] s 5A of the CJIA 2008.See also *R (Collins) v Secretary of State for Justice* [2015] EWHC 33.

[695] For cases involving shared and mixed use accommodation see ss. 76(8B) and 76(8C).

[696] *Collins* [20] per Leveson P

13. Self-defence does not apply if the jury are sure that D did not believe he needed to defend himself or if they are sure that the force he used was more than was reasonable in the circumstances as D believed them to be.

14. It may be necessary to add further directions e.g. in the heat of the moment D cannot be expected to work out exactly how much force to use; and/or that if D used or may have used no more force than he genuinely believed was necessary, that would be strong evidence that the force used was reasonable.

15. A jury does not have to be told the whole of the law: they need directions to enable them to resolve the issue of whether D should be found guilty or not guilty.

16. In some cases the only real issue for a jury is whether they are sure that the force used by D was unlawful or whether it may have been used in lawful self-defence; i.e. the issue of the reasonableness of the force used does not arise because the parties agree that if the force was used in self-defence it was reasonable. In such circumstances there is no need to burden the jury with directions about the second limb.

17. Whilst the phrase “self-defence” is used, these directions can be adapted to cover cases where force is used in defence of another, defence of property, prevention of crime and for lawful arrest.

18. Once an issue of self-defence is raised, it is for the prosecution to disprove.

19. If D was, or may have been, acting in lawful self-defence he is not guilty.

20. There are two aspects of the defence:

    (1) A belief that there is a need to use force; and
    (2) The use of no more than reasonable force in the circumstances as D believed them to be, though in a “householder” case, in which s.76(8A) CJIA applies, the jury should be directed that the force used by D is to be regarded as reasonable unless it was grossly disproportionate in the circumstances as D believed them to be.

21. Self-defence does not apply if the jury are sure that D did not believe he needed to defend himself or if they are sure that the force he used was more than was reasonable in the circumstances as D believed them to be.

22. It may be necessary to add further directions e.g. in the heat of the moment D cannot be expected to work out exactly how much force to use; and/or that if D used or may have used no more force than he genuinely believed was necessary, that would be strong evidence that the force used was reasonable.

23. A jury does not have to be told the whole of the law: they need directions to enable them to resolve the issue of whether D should be found guilty or not guilty.

24. In some cases the only real issue for a jury is whether they are sure that the force used by D was unlawful or whether it may have been used in lawful self-defence; i.e. the issue of the reasonableness of the force used does not arise because the parties agree that if the force was used in self-defence it was reasonable. In such circumstances there is no need to burden the jury with directions about the second limb.

Example 1: where the issue of the extent of the force used arises the direction must include the second limb.

D has agreed that he struck V but has said that he was not acting unlawfully but was acting in lawful self-defence. The prosecution have to prove the case, so it is for them to make you sure that D was the aggressor and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If a man is under attack or believes that he is about to be attacked he is entitled to defend himself so long as he uses no more than reasonable force. In this case when D struck V he says it was because he believed V was about to hit him.

If on the evidence you are sure that D was the aggressor and did not believe he was under threat from V then no question of self-defence arises and, subject to the other elements of the offence being proved, your verdict will be one of Guilty. If, however you consider it was or may have been the case that D was or believed he was under attack or believed he was about to be attacked you must go on to consider whether his response was reasonable. If you were to consider that what he did was, in the heat of the moment when fine judgments are difficult, no more than he genuinely believed was necessary, that would be strong evidence that what he did was reasonable; and if you consider D did no more than was reasonable, he was acting in lawful self-defence and is not guilty of the charge. It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find D believed them to be. If you are sure that even allowing for the difficulties faced in the heat of the moment he used more than reasonable force, he was not acting in lawful self-defence and, if the other parts of the offence have been proved, he is guilty.

Example 2: where the only issue is whether the force used was unlawful or in self-defence.

D has agreed that he struck V but has said that he was not acting unlawfully but was acting in lawful self-defence. The prosecution have to prove the case, so it is for them to make you sure that D was the aggressor and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If someone is or believes he is under attack or believes he is about to be attacked he is entitled to defend himself. In this case D says he struck V because V had hit him / he believed that V was about to hit him - and D believed that he needed to defend himself.

If you are sure that D was the aggressor and did not believe that he was under attack or threat of attack then self-defence does not arise and, subject to the other elements of the offence being proved, your verdict will be one of Guilty. If however you consider that D believed, or may have believed, that he was under attack or about to be attacked, there is no suggestion that the force he used was unreasonable, and the prosecution will not have proved that D was acting unlawfully and your verdict will be Not Guilty.

Example 3: voluntary intoxication

A man is not entitled to claim that he was acting in lawful self-defence if his belief that he was under attack/ was about to be attacked by V was mistaken and that mistake arose only because he was intoxicated, either from drink and/or drug that he had chosen to take.

(a) If the mistake is as to a belief in the need for self-defence

So if you are sure that D was mistaken in his belief that he was about to be attacked/was under attack and the mistake was only made because he was drunk/ had taken drugs and is not one that he would have made if he had been sober then he was not acting in lawful self-defence and, subject to the other elements of the offence being proved, your verdict will be one of Guilty.

(b) If the mistake is as to the extent of force

If D was mistaken in his belief that V had a weapon and that he needed a weapon to defend himself and the mistake was only made because he was drunk/ had taken drugs and is not one that he would have made if he had been sober then he was not acting in lawful self-defence and, subject to the other elements of the offence being proved, your verdict will be one of Guilty

Example 4: where the issue is one of self-defence by a householder

D has agreed that he struck V but has said that he was not acting unlawfully but was acting in lawful self-defence. The prosecution have to prove the case, so it is for them to make you sure that D was the aggressor and was not acting in lawful self-defence.

The law of self-defence is really just common sense. If a man who is at home/in a dwelling is under attack or believes he is about to be attacked by someone he believes to have broken in/be a trespasser he is entitled to defend himself so long as the force that he uses is reasonable. It is for you to decide whether in all the circumstances it was reasonable but it would plainly not be reasonable if what he did was grossly disproportionate, that is to say wholly over the top. In this case when D struck V he says that he did so because he believed that V had broken into the house and was about to hit him.

If you are sure that D was the aggressor and did not believe that V had broken into the house or did not believe that he was under threat of attack from V, then no question of self-defence arises and, subject to the other elements of the offence being proved, your verdict will be one of Guilty.

If however you consider it was, or may have been, the case that D was in his own home/a dwelling and was under attack or believed he was about to be attacked by someone who had broken in/was a trespasser, you must go on to consider the second question which is whether his response was reasonable. If you were to decide that D, in the heat of the moment when fine judgments are difficult, may have done what he instinctively thought was necessary, that would be strong evidence that what he did was reasonable. It is only if you are sure that he used grossly disproportionate force and went wholly over the top that he would have acted unlawfully. If you are sure about that, then he is guilty of the charge.

NOTE: If the issue arises as to whether D was in a dwelling at the time force was used the jury may have to directed in the alternative as to the force D is entitled to use in self-defence. It is difficult to see how this could be done without a route to verdict.

Route to verdict for example 4:

There is no issue that D used force on V which caused V an injury. Answering the following questions will lead you to your verdict.

Question 1:

Are we sure that when D injured V he was the aggressor and did not believe he was under attack?

- If your answer is “Yes” your verdict will be ‘Guilty’.
- If your answer is “No” go on to answer question 2.

Question 2:

Are we sure that D was not at home/in a dwelling at the time of the incident?

- If your answer is “Yes” go on to answer question 3.
- If your answer is “No” go on to answer question 4.

Question 3:

Are we sure that D used more force than was reasonable on the facts as he believed them to be to defend himself/others/property?

- If your answer is “Yes” your verdict will be ‘Guilty’.
- If your answer is “No” your verdict will be ‘Not Guilty’.

Question 4:

Are we sure that the force used by D to defend himself/others (not property) was unreasonable and that he went wholly over the top?

- If your answer is “Yes” your verdict will be ‘Guilty’.

If your answer is “No” your verdict will be ‘Not Guilty’.

18-2 Alibi

ARCHBOLD 4-391 and 461; BLACKSTONE'S D17.14 and F1.22

Legal Summary

1. Alibi is defined by section 6A of the CPIA as:

   > "evidence tending to show that by reason of the presence of an accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."

2. Where the Crown's case turns on D's presence at a particular place and time, and D denies such presence by asserting a positive case that he was elsewhere, D has an obligation to provide particulars of the alibi: s.6A CPIA 1996; *Rochford*[697] [16]. Failure to disclose the alibi and the particulars or to have referred to it in interview may trigger an adverse inference warning: see Chapter 17-1 and 17-4.

3. Where D relies on alibi, it is for the Crown to disprove the alibi to the criminal standard: *R v Wood (No 2)*[698]. If the alibi is demonstrably false, that fact alone does not entitle the jury to convict. The jury should, where appropriate, be reminded that an alibi is sometimes invented to bolster a genuine defence: *R v Lesley*.[699] A lies direction may be needed: see Chapter 16-2.

Directions

4. An alibi is evidence that D was somewhere other than alleged by the prosecution at the time that the offence was committed.

5. It is not for D to prove he was elsewhere: once the issue is raised it is for the prosecution to satisfy the jury so that they are sure he was where they allege.

6. If the jury are sure that the alibi raised is false that does not of itself prove the guilt of D. A false alibi may be raised by a defendant who thinks that it is easier or better for him to invent an alibi than to tell the truth. A lies direction may be necessary.

7. If the jury are sure that D was present as the prosecution allege the jury must also be satisfied of any other elements of the offence that are in issue.

8. An alibi direction must be considered in the context of:

   (1) Any failure to mention the alibi when interviewed under caution;

   (2) Any failure to comply with provisions as to notice to be given in the defence statement;

   (3) Any change from any earlier notified alibi.

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[697] [2010] EWCA Crim 1928

[698] (1967) 52 Cr App Rep 74

[699] [1996] 1 Cr App R 39

The existence of any of the above considerations will give rise to the need for further directions and should be discussed with the advocates before speeches.

Example

The defence is one of alibi. That is to say D says that he was not at the scene but elsewhere when the crime was {allegedly} being committed.

Because it is for the prosecution to prove D's guilt, he does not have to prove that he was at {specify place asserted by D}: it is for the prosecution to prove that he was at {specify place asserted by Prosecution}.

If the prosecution do prove that D's alibi is false, that does not in itself mean that he is guilty. It is something which you may take into account, but you should bear in mind that sometimes an innocent person who fears that the truth will not be believed may instead invent an alibi.

If you are sure that D was where the prosecution say he was, you must also be sure {specify any other issues/elements of the offence}.

18-3 Duress

ARCHBOLD 17-119; BLACKSTONE'S A3.35

Legal Summary

1. A defendant who commits a crime under duress may, in certain circumstances, be excused liability. The defence can arise where the duress results from threats[700] or from the circumstances in which D finds himself. [701]
2. Duress in either form is not a defence to those charged with murder, attempted murder and a limited number of other very serious offences.[702] It is available to a conspiracy to murder: Ness and Awan.[703] If manslaughter is left as an alternative then it seems appropriate to direct that the jury cannot convict of that unless sure D was not under duress.
3. The defence is not available to a person who becomes voluntarily involved in criminal activity where he knew or might reasonably have been expected to know that he might become subject to compulsion to commit a crime.[704]

Duress by threats

4. The elements of the defence, set out in full in *R v Hasan,*[705] are:

   (1) that D reasonably believed that threats of death or serious injury had been made against himself or a member of his immediate family or someone for whom he might reasonably feel responsible. False imprisonment[706] or threat of serious psychological injury[707] are insufficient. Also, there is no substantive law defence for someone who commits a crime as a result of having been trafficked;[708]

   (2) that D reasonably believed the threats would be carried out (almost) immediately and the threat was effective in the sense that there was no reasonable avenue of escape open to D to avoid the perceived threat. It should be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some

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[700] *R v Hasan* [2005] UKHL 22.

[701] *R v Martin* [1989] 88 Cr App R 343.

[702] *R v Howe* [1987] AC 417; Gotts [1992] 2 AC 412.

[703] [2011] Crim LR 645

[704] *R v Hasan* [2005] UKHL 22; *R v Ali* [2009] EWCA Crim 716.

[705] [2005] UKHL 22, at para 21.

[706] *R v Dao* [2012] EWCA Crim 717

[707] *R v Baker* [1997] Crim LR 497, CA.

[708] *R v N* [2013] EWCA Crim 379.

other way, to avoid committing the crime with which he is charged.[709] It is not necessary to spell out for the jury all the risks that D claims he faced if he did not take a reasonable opportunity.[710]

(3) that the threat (or belief in the threat) of death or serious violence that was the direct cause of D committing the offence. It is not correct to direct the jury that the threat of death or serious injury must be the sole cause: *R. v. Ortiz*;[711]

(4) that a sober person of reasonable firmness of D's age, sex and character would have been driven to act as D did. On characteristics see *R. v. Bowen*[712]: the reasonable person will not share the defendant's vulnerability to pressure, timidity, or emotional instability. Characteristics attributable to addiction to drink or drugs, are also irrelevant: *R v Flatt.*[713]

5. It is for the defence to raise the issue of duress. Once raised it is for the prosecution to disprove. The defence ought to be left to the jury if there is any evidence of it. [714]

6. If the jury consider that the evidence of <u>each</u> of the above four matters is, or may be, true D is not guilty. If the prosecution satisfy the jury so they are sure that one or more of the above four matters is untrue the defence fails and D is guilty.

<u>Duress of circumstances</u>

7. The same restrictions on the availability apply as to duress by threats. The classic statement of the law is that in *R v Martin.*[715] The threat that arises from the circumstances must be extraneous to the defendant.[716] The threat must be operative at the time of the offence.[717]

Directions

8. If an offence is committed under "duress" D is excused criminal liability except in cases of murder, attempted murder and a limited number of other very serious offences.

9. The defence is not available to a person who becomes voluntarily involved in criminal activity where he knew or might reasonably have been expected to know that he might become subject to compulsion to commit the act now charged.

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[709] *R v Z* [2005] UKHL 22 at [28] per Lord Bingham of Cornhill.

[710] *R v Arldridge* [2006] EWCA Crim 1970.

[711] (1986) 83 Cr App R 173.

[712] [1996] 2 Cr App R 157.

[713] [1996] Crim LR 576.

[714] Cf Bianco [2002] 1 Archbold News 2 which suggests that it is not appropriate to leave it to the jury if no reasonable jury properly directed could fail to find it disproved.

[715] [1989] 88 Cr App R 343. See also *R v Shayler* [2001] EWCA Crim 1977 at [49] per Lord Woolf CJ.

[716] *R v Rodger* [1998] 1 Cr App Rep 143.

[717] *R v Pommell* [1995] 2 Cr App Rep 607.

10. It is for the defence to raise the issue of duress; once raised it is for the prosecution to disprove it. The defence must adduce evidence of <u>each</u> of the following four matters:

    (1) That D was threatened; **and**

    (2) That D was threatened in such a way that he believed that he, or a member of his immediate family, or someone for whom he felt responsible, would be subject to immediate or almost immediate death or serious violence and there was no reasonable avenue of escape open to D to avoid the threat/s; **and**

    (3) That the threat/s was/were the direct cause of D committing the offence; and

    (4) That a sober person of reasonable firmness of D's age, sex and character would have been driven to act as the defendant did.

11. If the jury consider that the evidence of each of the above four matters is or may be true, the defendant is not guilty. If the prosecution satisfies the jury so they are sure that one or more of the above four matters is untrue the defence fails and the defendant is guilty.

12. In a case of duress of circumstances, the jury should be directed

> "to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was yes, then the jury would acquit." [718]

<u>NOTE:</u> <u>It is difficult to see how this defence can be made intelligible to a jury without a Route to Verdict.</u>

<u>Example - Duress by threats</u>

<u>NOTES:</u>

- <u>In this Example it is assumed that all the elements of the offence concerned have been proved, subject to the defence of duress.</u>
- <u>This Example has been drafted with numbered paragraphs to assist in covering the different combinations of issues that may arise.</u>

1. D has raised the defence of duress. He says that he was driven to do what he did by threats, namely {specify}.
2. Because it is for the prosecution to prove D's guilt, it is for them to prove that the defence of duress does not apply in this case. It is not for D to prove that it does apply.

[718] *R. v. Martin.*

3. You must first decide whether the threats to which D referred were ever in fact made. If you are sure that they were not made, the defence of duress does not arise and your verdict will be 'Guilty'. However if you decide that the threats were or may have been made, they might provide a defence to the charge. Whether they actually do so depends on your answers to the following questions:

   (1) First you must ask whether D acted as he did because he genuinely and reasonably believed that if he did not do so he / a member of his immediate family would be killed or seriously injured either immediately or almost immediately. If you are sure that this was not the case, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide that this was or may have been his belief you must go on to consider a further question. [Here go to paragraph (2) if the issue of escape from / avoidance of the threats arises. Otherwise go to paragraph (3).]

   (2) You must next ask whether, before acting as he did, D had an opportunity to escape from / avoid the threats without death or serious injury, which a reasonable person in D's situation would have taken but D did not. [Here refer to any escape or avoidance route canvassed during the trial, e.g. calling for help or going to the police.] If you are sure that this was the case, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide there was or may have been no opportunity to escape or avoid the threatened action you must go on to consider a further question.

   (3) You must next ask whether a reasonable person, in D's situation and believing what D did, would have done what D did. By a reasonable person I mean a sober person of reasonable firmness of D's age and sex [here refer to any other relevant characteristics that may have been canvassed during the trial - see the Legal Summary above]. If you are sure that a reasonable person would not done what D did, the defence of duress does not apply, and your verdict will be 'Guilty'. However, if you decide that a reasonable person would or may have done what D did:

      [**either,** if the issue referred to in paragraph (4) does not arise,] the defence of duress does apply and your verdict will be 'Not Guilty'

      [**or,** if the issue referred to in paragraph (4) does arise,] you must go on to consider one final question.

   (4) You must finally ask whether D had voluntarily put himself in a position in which he knew or ought reasonably to have known that he might be compelled to commit crime by threats of violence from other people. The prosecution say that he did by {e.g. getting involved with other criminals who might make such threats if he let them down or came to owe them money]. But it is for you to decide. If you are sure that D did voluntarily put himself in such a position, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide that he did not do so or may not have done so, the defence of duress does apply and your verdict will be 'Not Guilty'.

Route to verdict - duress by threats

NOTES:

- In this Route to verdict it is assumed that all the elements of the offence concerned have been proved, subject to the defence of duress.
- It is also assumed that the issues referred to in questions 3 and 5 both arise. If either or both did not do so, the route to verdict must be drafted in such a way as to reflect this.

Question 1

Was D threatened in the way he says he was?

- If you are sure that he was not, return a verdict of 'Guilty' and disregard the following questions.
- If you decide that he was or may have been, go to question 2.

Question 2

Did D do what he did because he genuinely and reasonably believed that if he did not do it, he / a member of his immediate family would be killed or seriously injured either immediately or almost immediately?

- If you are sure that this was not the case, return a verdict of 'Guilty' and disregard the following questions.
- If you decide that this was or may have been the case, go to question 3.

Question 3

Before D acted as he did, did D have an opportunity to escape from / avoid the threats without death / injury to himself which a reasonable person in D's situation would have taken?

- If you are sure that this was the case, return a verdict of 'Guilty' and disregard the following questions.
- If you decide that this was not or may not have been the case, go to question 4.

Question 4

Would a reasonable person, in D's situation and believing what D did, have been caused to do what D did?

- If you are sure that this is not the case, return a verdict of 'Guilty' and disregard question 5.
- If you decide that this was or may have been the case, go to question 5.

Question 5

Had D voluntarily put himself in a position in which he knew or ought reasonably to have known that he might be compelled to commit crime by threats of violence made by other people?

- If you are sure that this was the case, return a verdict of 'Guilty'.
- If you decide that this was not or may not have been the case, return a verdict of 'Not Guilty'.

18-4 Sane Automatism

ARCHBOLD 17-84; BLACKSTONE'S A3.12

Legal Summary

1. A defendant has a complete defence to any charge if he was a "sane automaton" and that automatism was not self-induced. Sane automatism arises where the defendant claims that his act alleged to constitute a crime was involuntary and was not caused by a disease of the mind within the meaning of the *M'Naghten Rules*; see Chapter 18-5. Examples might include reactions to anaesthetics, states of concussion following a blow to the head and hypnotic influences.
2. In a case of sane automatism other than by intoxication

   > "two questions fall to be decided by the judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say, a case which falls within the M'Naghten Rules, or one of non-insane automatism." [719]

3. Automatism is only available if the defendant suffered a complete destruction of his ability to exercise voluntary control.[720] In the case of driving offences, it is clear that the ability to drive in a purposeful manner (steering etc.) is inconsistent with involuntariness. The onus is on the defendant to raise evidence of a sufficient case of automatism fit to leave the issue to the jury.[721] That will usually require medical evidence.[722] Once the issue of automatism is left to the jury the burden is on the prosecution to disprove it to the criminal standard. [723]
4. If the automatism is self-induced (other than by taking alcohol to excess or recklessly taking drugs, whether prescribed or otherwise) the jury will need to be directed in relation to voluntary intoxication: see Chapter 9.

Directions

5. Once evidence is raised by the defence that when D did the act alleged he was unable to exercise any control over his actions, it is for the prosecution to make the jury sure that D had not completely lost his ability to exercise that control.
6. If the jury consider D was, or may have been, completely unable to exercise any control over his actions and this arose, or may have arisen, from some wholly involuntary cause D is not guilty.

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[719] *Burgess* [1991] 2 QB 92, CA.

[720] *R v Coley* [2013] EWCA Crim 223; *Attorney General's Reference No 2 of 1992*, 97 Cr App R 429, 434.

[721] *Hill v. Baxter [1958] 1 Q.B. 277 DC; Broome v. Perkins , 85 Cr.App.R. 321, DC; R v Burgess [1991] 2 Q.B. 92 CA.*

[722] *Bratty v A-G for Northern Ireland* [1963] AC 386; see also *R v C* [2007] EWCA Crim 1862.

[723] *Bratty v A-G for Northern Ireland* [1963] AC 386 HL.

7. Automatism which is self-induced (other than by taking alcohol to excess or recklessly taking drugs, whether prescribed or otherwise) - e.g. by taking alcohol while using some types of prescribed drugs or failing to have regular meals while taking insulin – may still provide a defence, provided that D was not at fault to the degree required by the offence with which he is charged. In some cases the question of fault may be resolved by considering whether D was reckless in causing the state of automatism to exist.

Example 1: Automatism

The central issue in this case is whether, when he {specify}, D was in control of his actions or whether he was, or may have been, because of {specify cause e.g. concussion}, in a state of automatism*; that is to say his state at that time was such that he acted involuntarily and was unable to exercise any control over his actions. A person is only in a state of automatism if he is unable to exercise any control at all over his actions: someone who is partially in control of his actions is not in that state.

It is not for D to prove that he was in such a state but for the prosecution to prove, so that you are sure of it, that he was not. If you are sure that he was **not** in a state of automatism, then, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty. If on the other hand you decide that he was, or may have been, in a state of automatism, then you will find D not guilty.

As to this issue {review evidence}.

NOTE:*The word “automatism”, despite being a legal term, is used since (a) it is likely, where this is an issue, that this word will have been mentioned at some point during the case and (b) it is useful ‘shorthand’ to describe a complete loss of the ability to exercise control over a person’s actions.

Example 2: where automatism is self-induced – offence of specific intent

The central issue in this case is whether, when he {specify e.g. wounded V}, D was in control of his actions or whether he was, or may have been, in a state of automatism*; that is to say his state at that time was such that he acted involuntarily and was unable to exercise any control over his actions. A person is only in a state of automatism if he is unable to exercise any control at all over his actions: someone who is partially in control of his actions is not in that state.

It is not for D to prove that he was in such a state but for the prosecution to prove, so that you are sure of it, that he was not. If you are sure that he was **not** in a state of automatism then, subject to the elements of the offence being proved so that you are sure of them, you will find D guilty.

If on the other hand you decide that D was, or may have been, in a state of automatism, you must go on to consider what caused him to be in that state. The evidence about the cause of this state is {specify e.g. D was on a course of prescribed drugs, which were supplied with a written warning not to drink any alcohol whilst taking them, but that shortly before the incident he had drunk {e.g. 7 pints of lager}.

If you decide that although he was, or may have been, in a state of automatism you are sure that this was caused by D, against written advice which he knew about, mixing prescribed drugs with alcohol then, in law, he is responsible for being in a state of automatism. In these circumstances, whilst he could not have formed any intent to {specify e.g. cause V really serious harm} and so is not guilty of {specify e.g. wounding with intent} he is nevertheless guilty of the “simple” offence of {specify e.g. wounding} because if he had not taken alcohol whilst on a course of prescribed drugs, he would not have got into a state of automatism.

18-5 M'Naghten insanity including insane automatism

ARCHBOLD 17-74; BLACKSTONE'S A3.23

Legal Summary

1. When, at the time of the commission of the *actus reus* of the offence,[724] D is suffering from a disease of the mind which gives rise to a defect of reason such that D either did not know the nature and quality of his act or that it was legally wrong,[725] he is entitled to be found Not Guilty by Reason of Insanity.[726] It is not sufficient for the defence that D acted under uncontrollable impulse.[727]
2. The verdict must be returned by a jury; it is not for the judge to endorse an agreed plea.
3. The question is not whether D suffers from some recognised mental illness; a defendant can be treated as insane in law if the defect of reason arises from a medical condition that affects the "mental faculties of reason memory and understanding" [728] such as epilepsy,[729] diabetes,[730] or sleepwalking,[731] or a tumour.[732] It is a question of law not of medicine.
4. The burden of proof is on D to establish on the balance of probabilities that he was insane at the time of the offence. The jury may only return a special verdict of not guilty by reason of insanity on the evidence of two or more registered medical practitioners at least one of whom is duly approved. [733]
5. If there is an issue as to D's mental state at the time of trial, that is dealt with by the rules governing fitness to plead: see Chapter 3-2.
6. The plea of insanity may take the form of insane automatism (i.e. that D has a total loss of control as a result of some disease of the mind). The defence is mutually exclusive from that of sane automatism which requires that the total loss of control arises from some external factor[734]: see Chapter 18-4. It is for the judge to distinguish clearly between them as a matter of law. Where the evidence is capable of supporting both insanity and sane automatism (because the defendant

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[724] If the Crown fail to prove the *actus reus* he must be acquitted: *A-G's Reference (No 3 of 1998)* [2000] QB 401

[725] *R v Windle* [1952] 2 QB 826; *R v Johnson* [2007] EWCA Crim 1978, [2008] Crim LR 132.

[726] Section 2(1) of the Trial of Lunatics Act 1883 (as amended by section 1 of the Criminal Procedure (Insanity) Act 1964.

[727] *R. v. Kopsch , 19 Cr.App.R. 50, CCA*

[728] *R v Sullivan* [1984] AC 156.

[729] *R v Sullivan* [1984] AC 156.

[730] *R v Hennessy* [1989] 2 All ER 9.

[731] *R v Burgess* [1991] 2 QB 92.

[732] *R v Kemp* [1957] 1 QB 399.

[733] Criminal Procedure (Insanity) Act 1964 s 6.

[734] *R v Burgess* [1991] 2 QB 92.

suffers a combination of internal and external factors) the sane automatism defence should be left to the jury.[735] The direction will be complicated by the fact that the burden of proof is on the Crown in sane automatism and on the defendant in a case of insanity.[736]

7. In a case where the defence is one of self defence based on insane delusions the jury will need careful guidance.[737]
8. In a murder trial the Crown may, in rebuttal of a defence of diminished responsibility prove the defendant's insanity: see Chapter 19-1.

Directions

9. Explain to the jury that every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for his/her crimes unless the contrary is proved.
10. It is for D to prove, on the balance of probabilities, that as a result of disease of the mind he was labouring under such a defect of reason that he did not know (a) the nature and quality of his act or (b) that what he was doing was wrong.

[735] *R v Roach* [2001] EWCA Crim 2698.

[736] *R v Burns* (1973) 58 Cr App Rep 364.

[737] *R v* Oye [2013] EWCA Crim 1725.

Example

D has raised the defence of insanity; insanity being a legal term used to describe the effect of a medical condition on the functioning of the mind. Insanity does not have to be permanent or incurable: it may be temporary and curable.

In law, a person is presumed to be sane and reasonable enough to be responsible for his actions. But if a person proves that it is more likely than not that, when he did a particular act, because he was suffering from a disease of the mind either he did not know what he was doing or he did not know that what he was doing was wrong, by the standards of reasonable ordinary people, he is to be found "not guilty by reason of insanity".

You should address this aspect of the case in two stages:

Firstly, you must decide whether D has proved that at the time he {specify action/s} it is more likely than not that he was suffering from a disease of the mind. In this case you have heard evidence from {specify witnesses and their opinions}.

If D has not proved that he was suffering from a disease of the mind, then he does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find him guilty.

If however you decide that it is more likely than not that D was suffering from a disease of the mind, then you must go on to decide whether, as a result of that disease, it is more likely than not that:

- either D did not know what he was doing when he {specify};
- and/or D did not know that what he was doing when he {specify} was wrong by the standards of reasonable ordinary people.

If D has not proved either of these things then he does not have a defence of insanity and, subject to the elements of the offence being proved so that you are sure of them, you will find him guilty. If D has proved that it is more likely than not that as a result of his disease of mind he did not know what he was doing and/or he did not know that what he was doing was wrong, then you will find him not guilty by reason of insanity.

NOTE: In many cases there is no issue that D was suffering from a disease of the mind; the real issue is whether as a result of that he did not know what he was doing and/or that what he was doing was wrong. Directions must be tailored to reflect this.

19. DEFENCES - MURDER

19-1 Diminished responsibility - abnormality of mental functioning

ARCHBOLD 19-79; BLACKSTONE'S B1.18

NOTE: The term "diminished responsibility" survives as the statutory title of this defence but whenever it is raised the focus is on abnormality of mental functioning and the use of the words "diminished responsibility" are not helpful when directing the jury.

Legal summary

1. Section 52 of the Coroners and Justice Act 2009 substitutes a new form of the defence of diminished responsibility into s 2 of the Homicide Act 1957 applicable in relation to any murder wholly after 4th October 2010**.**
2. The partial defence is available only to murder. It is not available following a finding of unfitness to plead[738] under the Criminal Procedure (Insanity) Act 1964, s 4A(2).
3. It requires the defendant charged with murder to prove on the balance of probabilities[739] that
   (1) he was suffering from an "abnormality of mental functioning"
   (2) The abnormality of mental functioning must arise "from a recognised medical condition." This is designed to be wider than the familiar list of bracketed causes in the original definition in s 2 of the 1957 Act.
   (3) There was a substantial impairment of his ***ability*** to do one or more of the things in s 2(1A), i.e. (a) to understand the nature of D's conduct; (b) to form a rational judgment; and (c) to exercise self-control.
   (4) The abnormality of mental functioning from a recognised medical condition must be a cause or contributory cause of (or possibly merely an explanation of) the accused's conduct in killing.
4. In practice, the defence will only be available if D adduces expert evidence of his mental state.[740]

Abnormality of mental functioning

5. Under the old s 2 test (of "abnormality of mind"), the determination of "abnormality" could be left to the jury: *Byrne*.[741] Lord Parker CJ in *Byrne* stated (at p 403) that "abnormality" of mind means:

   " . . . a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal…."

[738] *Antoine* [2001] 1 AC 340, HL.

[739] *Foye* [2013] EWCA Crim 475.

[740] *Bunch (Martin John)* [2013] EWCA Crim 2498.

[741] [1960] 2 QB 396.

6. Lord Parker CJ was defining the composite expression "abnormality of mind", but that has been superseded by the test of abnormality of mental functioning. There is no doubt that the new law is stricter. D has to prove an abnormality of mental functioning, and the mental functioning must relate to one of the three capacities in subs (1A) – his capacity to understand the nature of his conduct, form a rational judgment or exercise self control.

Recognised medical condition

7. The abnormality of mental functioning must arise "from a recognised medical condition. Whether something is a medical condition is capable of being answered by an expert, but the question is not one of medicine but of law. This was confirmed in *Dowds*,[742] in which the Court of Appeal held that even though voluntary "acute intoxication" is a medical condition, in that it is recognised as being such by both medical manuals, it is not a "*recognised* medical condition" for the purposes of establishing diminished responsibility.

Mental responsibility impaired

8. The defendant has to show a substantial impairment of his ability to do any of these:

   (1) to understand the nature of D's conduct;

   (2) to form a rational judgment;

   (3) to exercise self-control.[743]

9. These are matters of psychiatry. The question is whether there is a "substantial impairment" of one or more of these abilities. Since the question whether there is impairment of ability is a purely psychiatric question, it would also seem to be appropriate for the expert to offer an opinion on whether there is "substantial" impairment.

10. The impairment must be substantial. That term is to be interpreted as in *Golds*[744] where the Court of Appeal concluded that the jurisprudence on how to direct jurors was clear:

> "Judges … should either refuse to provide any further explanation of the term, … or if asked for further help, they should be given a direction of the kind adopted in R v Simcox Times (February 25, 1964) [to the effect that it is possible for the jury to find that an impairment could have a modest impact which is more than minimal or trivial yet which still could not properly be described as substantial]" [72].

An explanation for D's conduct in killing

11. The defence is narrowed further by the requirement that the abnormality of mental functioning, arising from a recognised medical condition and substantially impairing the defendant's ability in a relevant manner must also "explain" his acts in killing. By subsection (1B), "an explanation" for D's conduct is provided "if it

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[742] *Dowds* [2012] EWCA Crim 281.

[743] See *Byrne* [1960] 2 QB 396; and *Khan* [2009] EWCA Crim 1569.

[744] [2014] EWCA Crim 748.

causes, or is a significant contributory factor in causing, D to carry out that conduct." Several problems arise. Subsection 1B does not say that for the defence to succeed a sufficient explanation can **only** be provided if the abnormality of mental functioning is a cause. On this basis a causal link is just one of the ways in which the killing might be "explained." There may be cases where the abnormality provides an explanation sufficient to mitigate the conduct to manslaughter even if there is no causal link. However, the language in Parliamentary debates was clearly envisaging a causal link.

Intoxicated defendants

12. Two situations need to be considered:

(1) D who has a recognised medical condition (including alcohol dependency syndrome) *and* is also drunk at the time of the alleged killing: jury must decide whether D was diminished ignoring the voluntary intoxication. [745] Following *Dietschmann,* in a case where a defendant is suffering from an abnormality of mental functioning and was intoxicated at the time of the conduct leading to the killing, the focus must be on whether, *ignoring the intoxication*, there was an abnormality of mental functioning arising from a recognised medical condition. If so, the question should be whether that abnormality of mental functioning substantially impaired his ability in a relevant way, and if so, whether that abnormality of mental functioning was a cause of the conduct by which D killed. D should be entitled to the defence even if D might not have killed had he not been drunk, provided the abnormality of mental functioning arising from the recognised medical condition nevertheless explains his conduct in killing[746]

(2) D who is acutely intoxicated, but not suffering alcoholic dependence: no defence of diminished arises on the basis of acute voluntary intoxication: *Dowds.*

Withdrawing murder

13. The expert may now offer opinions on (i) whether there is an abnormality of mental functioning; (ii) whether there is a recognised medical condition; (iii) whether the defendant had an a substantial impairment of ability to understand/form rational judgment/exercise control; and (iv) whether it is a cause or explanation for the killing. Following *Brennan* [747] the judge may withdraw murder where there is uncontradicted medical evidence of diminished, even if there is some other evidence of murder. The court endorsed the approach in the *Crown Court Bench Book* where an illustrative form of words for directing the jury is

> "Where, as here, there is no dispute about findings made by an expert you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason to reject them."

[745] *Dietschmann* [2003] UKHL10.

[746] See also *Stewart* [2009] EWCA Crim 593; *Williams (Dean)* [2013] EWCA Crim 2749.

[747] [2014] EWCA Crim 2387.

Procedural relationship with insanity

14. Where D, being charged with murder, raises the defence of diminished responsibility and the Crown have evidence that he is insane within the M'Naghten Rules, they may adduce or elicit evidence which tends to show that this is so. This is settled by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1964, s 6[748] – resolving a conflict in the cases. That Act also provides for the converse situation: where D sets up insanity, the prosecution may contend that he was suffering only from diminished responsibility. The roles of prosecution and defence may be reversed, according to which of them is contending that D is insane. It seems clear that the Crown must establish whichever contention it puts forward beyond a reasonable doubt,[749] so it must follow that D rebuts the Crown's case if he can raise a doubt.

Disposal and jury

15. The disposal on conviction is not something for the jury's consideration: *Edgington.*[750]

Directions

16. In practice this defence is sometimes raised in conjunction with others such as lack of intent (Chapter 8-1), self-defence (Chapter 18-1) and loss of control (Chapter 19-2).

17. It is suggested that the direction to the jury should follow as closely as possible the provisions of s.2(1), (1A) and (1B) of the Homicide Act 1957 set out in section 52(1) of the Coroners and Justice Act 2009.

18. It is appropriate to provide the jury with a written summary of the law and/or a list of questions (route to verdict).

19. The direction must refer to the following essential features of the defence:

    (1) The defence of abnormality of mental functioning reduces what would otherwise be an offence of murder to one of manslaughter.

    (2) It is for D to establish the defence, on the balance of probabilities.

    (3) The defence will be made out if, when D killed or was a party to the killing of V, he was suffering from an abnormality of mental functioning which:

        (a) arose from a recognised medical condition (s.2(1)(a)); and

        (b) substantially impaired D's ability to understand the nature of his conduct and/or to form a rational judgment and/or to exercise self-control (ss.2(1)(b) and (1A)); and

        (c) caused or was a significant contributory factor in causing D to kill or be a party to the killing of V (ss. 2(1)(c) and (1B)).

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[748] By s 52(2) of the 2009 Act, 'In section 6 of the Criminal Procedure (Insanity) Act 1964 (c.84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for "mind" substitute "mental functioning"'.

[749] *Grant* [1960] Crim LR 424, Paull J.

[750] [2013] EWCA Crim 2185.

20. In practice medical evidence will be adduced on some or all of the matters referred at 4(3) above. A direction on expert evidence (see Chapter 10-3 above) will therefore be necessary, as will a careful analysis of the medical evidence.

21. In relation to 4(3)(b) and (c) above, the jury should be directed that 'substantially impaired' and 'significant contribution' mean that although the impairment and the contribution need not be total they must be more than merely trivial.

Example

The prosecution must make you sure that D killed V and that at the time he did so he intended to kill or to cause V really serious injury. This is not in dispute and ordinarily would make D guilty of murder.

However, D's defence to murder is that at the time he did this he was suffering from an abnormality of mental functioning such that it reduces his crime from murder to manslaughter.

It is for D to establish this defence but he is not required to prove it to the same high standard as the prosecution by making you sure. The defence must prove that it is more likely than not that D was suffering from an abnormality of mental functioning.

The defence of abnormality of mental functioning has a particular legal meaning. D must establish that all of the following three things were more likely than not.

1. When D stabbed V, D was suffering from an abnormality of mental functioning arising from a recognised medical condition. [Here summarise the evidence about this and any arguments relied on by the defence and the prosecution.] and
2. The abnormality of mental functioning substantially impaired D's ability to understand the nature of his conduct and/or to form a rational judgment and/or to exercise self-control. Substantially means that the impairment need not be total but must be more than merely trivial. [Here summarise the evidence about this and any arguments relied on by the defence and the prosecution.] and
3. The abnormality of mental functioning caused, or was a significant contributory factor in causing, D to stab V. To be significant, a contributory factor need not be total but must be more than merely trivial. [Here summarise the evidence about this and any arguments relied on by the defence and the prosecution.]

If, but only if, the defence establish that all three of these things are more likely than not to have been the case, then D will be not guilty of murder but guilty of manslaughter. If D fails to establish that any one of these things is more likely than not to have been the case, then he will be guilty of murder.

Route to Verdict

1. When D stabbed V, is it more likely than not that D was suffering from an abnormality of mental functioning which arose from a recognised medical condition?

- If Yes, go on to answer question 2.
- If No, your verdict will be 'Guilty of Murder' and you will go no further.

2. Is it more likely than not that the abnormality of mental functioning substantially impaired D's ability to understand the nature of his conduct, and/or to form a rational judgment and/or to exercise self-control?

- If Yes, go on to answer question 3.
- If No, your verdict will be 'Guilty of Murder' and you will go no further.

3. Is it more likely than not that the abnormality of mental functioning caused, or was a significant contributory factor in causing, D to stab V?

- If Yes, your verdict will be 'Not Guilty of Murder but Guilty of Manslaughter'.
- If No, your verdict will be 'Guilty of Murder'.

19-2 Loss of control

ARCHBOLD 19-54; BLACKSTONE'S B1.24

Legal Summary

1. Sections 54 to 56 of the Coroners and Justice Act replace the common law provocation defence. The defence is available only to a charge of murder, whether as a principal or secondary party.[751] If successful it results in a manslaughter conviction. The defence may be pleaded alongside diminished responsibility. Note the different burdens of proof (as under the old law). as the Lord Chief Justice emphasised in *Gurpinar* [752]it "should rarely be necessary to look at cases decided under the old law of provocation. When it is necessary, the cases must be considered in the light of the fact that the defence of loss of control is a defence different to provocation and is fully encompassed within the statutory provisions."

Withdrawing the defence

2. Under s 54(6), the defence must be left if "sufficient evidence is adduced to raise an issue with respect to the defence" and this is when "evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply."
3. In *Dawes*,[753] the Lord Chief Justice observed that the section requires a judgment, not the exercise of a discretion. Irrespective of whether D has positively advanced the defence, the task of the trial judge requires:

> "… a commonsense judgment based on an analysis of all the evidence. To the extent that the evidence may be in dispute, the judge has to recognise that the jury may accept evidence which is most favourable to the defendant, and reject that which is most favourable to the prosecution, and so tailor the ruling accordingly. That is merely another way of saying that in discharging this responsibility the judge should not reject disputed evidence which the jury might choose to believe."

4. In *Gurpinar* [754] it was made clear that if there is not "sufficient" evidence on any one of the three elements, the defence should not be put to the jury. In deciding whether to withdraw the defence, the judge must bear in mind that the jury may take a different view of the evidence and favour the defendant:

> "However as the Act refers to "sufficient evidence", it is clearly the judge's task to analyse the evidence closely and be satisfied that there is, taking into account the whole of the evidence, sufficient evidence in respect of each of the three components of the defence".

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[751] Section 54(8).

[752] [2015] EWCA Crim 178

[753] [2013] EWCA Crim 322. See also *Workman* [2014] EWCA Crim 575 *Jewell* [2014] EWCA Crim 414.

[754] [2015] EWCA Crim 178

5. The judge is bound to consider the weight and quality of the evidence in coming to a conclusion: see *R v Jewell* [755] at paragraphs 51-54.

6. As the task facing the trial judge is to consider the three components sequentially, and then to exercise his judgement looking at all the evidence, it follows from the terms of the Act (as clearly set out in both *Clinton* and *Dawes)* that if the judge considers that there is no sufficient evidence of loss of self-control (the first component) there will be no need to consider the other two components. Nor if there is insufficient evidence of the second will there be a need to address the third.

   > "…a trial judge must undertake a much more rigorous evaluation of the evidence before the defence could be left to the jury than was required under the former law of provocation." [12] – [14]

7. In *Gurpinar* the Lord Chief commented at [15] that

   > ..a judge must be assisted by the advocates. It is generally desirable that the possibility of such an issue arising should be notified to the judge as early as possible in the management of the case, even though it may not form part of the defence case. If, at the conclusion of the evidence, there is a possibility that the judge should leave the issue to the jury when it is not part of the defence case, the judge must receive written submissions from the advocates so that he can carefully consider whether the evidence is such that the statutory test is met.

Elements of the defence

8. As Lord Thomas CJ stated in *Gurpinar*

   > "the three limbs of the defence should be analysed sequentially and separately. However, it is worth emphasising that in many cases where there is a genuine loss of control, the remaining components are likely to arise for consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used."

No considered desire for revenge

9. The defence cannot apply where there is "a considered desire for revenge" (s 54(4)) even if D lost control as a result of a qualifying trigger. It may be worth considering this qualification before any other element of the defence.

10. There is nothing to suggest that the desire for revenge needs to exist before any potential qualifying trigger arises.

11. The restriction must also be seen in combination with the requirement in s 55(6)(a): even if D has lost his self-control, if D's loss of control was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence, the qualifying triggers are not available. In *Clinton et al*,[756] it was held that the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self-control. The Lord Judge CJ explained:

[755] [2014] EWCA Crim 414

[756] [2012] EWCA Crim 2.

> "In the broad context of the legislative structure, there does not appear to be very much room for any "considered" deliberation. In reality, the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self control." [10]

In that case (*Evans,* conjoined with *Clinton* on appeal), the trial judge had directed that if the jury found that the attack was "deliberate and considered" or "thought about" the defence was not available.

No defence if self-induced trigger

12. D's fear of serious violence or sense of being seriously wronged is to be disregarded if D brought that state of affairs upon himself by, for example, looking for a fight by inciting something to be said or done (s 55(6)(a) or (b)), as the case may be.

Loss of control

13. The loss of control does not have to be sudden, as reaction to circumstances of extreme gravity may be delayed. The length of time between the qualifying trigger and the killing will remain important, but it is no longer essential that the time gap is short. It must be temporary. It may follow from the cumulative impact of earlier events. It is a subjective test: *Dawes*.[757] If D is of an unusually phlegmatic temperament and it appears that he did not lose his self-control, the fact that a reasonable person in like circumstances would have done so will not assist D in the least. The test may be best understood as being founded on whether D has lost his ability to maintain his actions in accordance with considered judgment or whether he had lost normal powers of reasoning. It is a high threshold.

> "For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger do not often cross the threshold into loss of control." [758]

14. The jury should be directed to consider the loss of control element before examining the qualifying triggers. The burden is on the Crown to disprove the element once D has raised evidence of it.

15. The Court in *Gurpinar*[759] found it unnecessary to resolve "whether the loss of self-control had to be a total loss or whether some loss of self-control was sufficient."

Qualifying triggers

16. D's loss of control must have been attributable to one or both of two specified "qualifying triggers":

    (1) D's fear of serious violence from V against D or another identified person; and/or

    (2) things done or said (or both) which

        (a) constitute circumstances of an extremely grave character and

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[757] [2013] EWCA Crim 322

[758] *Dawes*

[759] [2015] EWCA Crim 178 at [18] to [21]

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

Fear of serious violence

17. Section 55(3) provides:

> "This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person." [760]

18. The defence is limited under this qualifying trigger to cases where D fears violence from V to himself or an identified other. There is no requirement that the fear is of imminent serious violence. The relationship between this defence and self-defence under s 76 of the Criminal Justice and Immigration Act 2008 needs to be approached with care.

(1) This defence is available only on a charge of murder. Self-defence is available on any charge.

(2) The defence of self-defence is available if D believes there is a threat to him or others of *any* violence. The new defence is available if D believes himself to be at risk of *serious* violence. Violence in s 55 is undefined.

(3) If the degree of force used by D is, viewed objectively, excessive, that will deprive D of a defence of self-defence, but will not automatically deprive D of the loss of control defence. The question is whether a person with a normal degree of tolerance and self restraint "might use" such force.

(4) The position will be even more complex where D has killed when attacking a trespasser in a dwelling and the self-defence plea is based on s 76 of the Criminal Justice and Immigration Act 2008 as amended by the Crime and Courts Act 2013: see Chapter 18-1 paragraph 7.

(5) Self-defence and this s.54 defence may both be pleaded. Care is needed. Unlike self-defence, D has lost control. Unlike self-defence, D can rely on fear of future non-imminent attack. If D has intentionally killed V, pleads self-defence but is alleged to have used excessive force, the complete defence of self-defence might fail, but D may still be able to rely on the new partial defence, the excessive amount of force being explicable by reference to the "loss of self control". Section 54(5) requires only that sufficient evidence is adduced to raise an issue under s 54(1). Thereafter, the prosecution shoulders the legal burden of proving, to the criminal standard of proof, that the defence is not satisfied.

(6) As with self defence, in *Asmelash*,[761] the Lord Chief Justice held that the jury ought to be directed to consider whether they were sure that a person of D's sex and age with a normal degree of tolerance and self-restraint and in the same circumstances, *but unaffected by alcohol,* would not have reacted in the same or similar way.

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[760] See *Skilton (Adam)* [2014] EWCA Crim 154.

[761] [2013] EWCA Crim 157.

Things said or done; circumstances of an extremely grave character, etc.

19. There must be some evidence of the qualifying trigger. The new law follows the old on this: *Acott.*[762] As Lord Judge commented in *Clinton*,[763] "the question whether the circumstances were extremely grave and whether the defendant's sense of grievance was justifiable require objective evaluation." This was reiterated in *Dawes*,[764] in which the Court stated that whether a circumstance is of an *extremely* grave character and whether it leads to a *justifiable* sense of being seriously wronged requires objective assessment by the judge at the end of the evidence. The existence of a qualifying trigger is *not* defined solely on the defendant's say so. The defendant must have been caused by the things done or said to have a "justifiable sense of being seriously wronged" (s 55(4)). The Lord Chief Justice in *Dawes*[765] stated that the fact of the breakup of a relationship, of itself, will not normally constitute circumstances of an extremely grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged.

20. D's loss of control that is attributed to anything said or done and which constitutes sexual infidelity it is to be disregarded (s 55(6)(c)). Sexual infidelity *on its own* cannot qualify as a trigger for the purposes of the second component of the defence. Problematic situations will arise when the defendant relies on an admissible trigger (or triggers) for which sexual infidelity is said to provide an appropriate context for evaluating whether the trigger relied on is a qualifying trigger for the purposes of subsection 55(3) and (4). When this situation arises the jury should be directed:

    (1) as to the statutory ingredients required of the qualifying trigger(s);

    (2) as to the statutory prohibition against sexual infidelity on its own constituting a qualifying trigger;

    (3) as to the features identified by the defence (or which are apparent to the trial judge) which are said to constitute a permissible trigger(s);

    (4) that, if these are rejected by the jury, in accordance with (b), sexual infidelity must then be disregarded;

    (5) that if, however, an admissible trigger may be present, the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate that trigger and whether the statutory ingredients in (a) may be established.

21. It is possible for a defendant to rely on both qualifying triggers in combination – that he killed having lost control because he was in fear of serious violence and had a justifiable sense of being seriously wronged.

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[762] ibid.

[763] [2012] EWCA Crim 2.

[764] [2013] EWCA Crim 322.

[765] [2013] EWCA Crim 322

Degree of tolerance and self-restraint

22. Under s 54(1)(c) the requirement is that "a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D." By s 54(3):

> "In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint."

23. The reference to "tolerance" excludes the person with unacceptable attitudes as well as those with an unacceptable temper. Guidance was proffered by the Lord Chief Justice as to how this limb of the defence ought to be applied in a case where D is voluntarily intoxicated in *Asmelash.*[766] There is now no positive requirement that D's individual circumstances have to affect the gravity of the triggering conduct in order for them to be *included* in the jury's assessment of what the person of D's age and sex might have done. Section 54(3) only appears to exclude a circumstance on which D seeks to rely if its sole relevance is to diminish D's self restraint. The circumstance has to be relevant to *D's* conduct and not to the conduct or words of those that triggered his loss of control.

Directions

24. The need for a direction about loss of control will arise only if sufficient evidence is adduced to raise the defence, as to which see ss.54(5) and (6) of the Coroners and Justice Act 2009.

25. In practice, this defence is often raised in conjunction with others such as lack of intent (see Chapter 8-1), self-defence (Chapter 18-1) and abnormality of mental functioning (Chapter 19-1).

26. It is suggested that the direction to the jury should follow the provisions of ss.54 and 55 of the 2009 Act as closely as possible, and should avoid as far as possible efforts to paraphrase or re-state those provisions.

27. Given the complexity of the defence, it will usually be appropriate to provide the jury with a written summary of the law and/or a list of questions (route to verdict).

28. The direction must refer to the following essential features of the defence.

    (1) The defence of loss of control reduces what would otherwise be an offence of murder to one of manslaughter (s.54(7)).

    (2) It is not for D to prove that the defence applies. It is for the prosecution to make the jury sure that it does not (s.54(5)).

    (3) The defence does not apply if, when he killed V, D was acting in a considered desire for revenge (s.54(4)).

    (4) The defence is available to D only if:

[766] [2013] EWCA Crim 157.

(a) D's killing or being a party to the killing of V resulted or might have resulted from D's loss of self-control, whether sudden or not (s.54(1)(a) and (2)); and

(b) the loss of control was or might have been caused by D's fear of serious violence from V against D or another identified person and/or by a thing or things done or said, or both, which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged (ss.54(1)(b) and 55(1) to (5) - and note that it may be necessary to expand this part of the direction by reference to s.55(6)); and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D (s.54(1)(c) - and note that it may be necessary to expand this part of the direction by reference to s.54(3)).

29. The direction should identify in summary form any evidence which is capable of supporting or undermining any of the propositions referred to at 5(3) and (4) above that arise as issues in the case.

Example

D admits that he killed V by stabbing him and that at the time he did so he intended to kill or cause V really serious injury. That would normally make D guilty of murder. However, D relies on the defence of loss of self-control. If that defence applies to D in this case, it would not excuse him completely, but it would reduce his crime from murder to manslaughter.

Because it is the prosecution's task to make you sure of D's guilt, it is for them to prove that the defence of loss of self-control does not apply in this case. D does not have to prove that it does.

The first matter to consider is whether or not D stabbed V as the result of a loss of self-control. If you are sure that D did not in fact lose his self-control at all, then the defence of loss of self-control would not apply and your verdict would be 'Guilty of Murder'. Or, if you are sure that D acted as he did in a considered desire for revenge, whether this was done calmly or in anger, then he would not have lost his self-control and the defence would not apply. [Here summarise the evidence about this and arguments relied on by the prosecution and the defence.]

If you decide that D did lose or may have lost his self-control the next matter to consider is what triggered it.

D cannot rely on a loss of self-control unless it was triggered by either or both of the following two things:-

(1) D feared serious violence from V against D [or another identified person].

(2) Something(s) done or said (or both) which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged.

[If necessary expand this part of the direction by reference to s. 55(6).]

If you are sure that D's loss of self-control was not triggered by either of these things, the defence of loss of self-control would not apply and your verdict would be 'Guilty of Murder'. [Here summarise the evidence about this and arguments relied on by the prosecution and the defence.]

If you decide that D's loss of self-control was or may have been triggered by one or both of these things, you will then have to consider, finally, whether a person of D's sex and age, with a normal degree of tolerance and self-restraint and in D's circumstances, might have reacted in the same or a similar way to D. [If necessary expand this part of the direction by reference to s.54(3).]

If you are sure that such a person would not have reacted in such a way, the defence of loss of self-control would not apply and your verdict would be 'Guilty of Murder'. If however you decide that such a person would or may have reacted in such a way then the defence of loss of self-control would apply and your verdict would be 'Not Guilty of Murder but Guilty of Manslaughter'. [Here summarise the evidence and arguments relied on by the prosecution and the defence.]

Route to Verdict

Question 1

When D caused the fatal injury to V, are you sure that he had not lost his self-control?

- If Yes, your verdict will be 'Guilty of Murder' and you will go no further.
- If No, go on to answer question 2.

Question 2

Are you sure that any loss of self-control was not triggered by:-

(a) D's fear of serious violence from V against D [or another identified person]; and/or

(b) Something(s) said or done (or both) which amounted to circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged?

- If Yes, your verdict will be 'Guilty of Murder' and you will go no further.
- If No, go on to answer question 3.

Question 3

Are you sure that a person of D's sex and age, with a normal degree of tolerance and self-restraint, and in D's circumstances, would not have reacted in the same or a similar way to D?

- If Yes, your verdict will be 'Guilty of Murder'.
- If No, your verdict will be 'Not Guilty of Murder, but Guilty of Manslaughter'.

20. SEXUAL OFFENCES

20-1 Sexual offences – The dangers of assumptions

ARCHBOLD 20-27a; BLACKSTONE'S B3.39

Legal Summary

1. In *D*[767] the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and (iii) a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner.
2. This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in *Miller* [768]

   > "In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, R v. MM [2007] EWCA Crim 1558, R v. D [2008] EWCA Crim 2557 and R v. Breeze [2009] EWCA Crim 255).

3. In *Miller*, the Court of Appeal endorsed the following passage from the 2010 Benchbook "Direction the Jury"

   > "The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice."

4. The use of such a direction, properly tailored to the case does not offend the common-law principle that judicial notice can be taken only of facts of particular

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[767] [2008] EWCA Crim 2557 .se also *Breeze* [2009] EWCA Crim 255.

[768] [2010] EWCA Crim 1578.

notoriety or common knowledge.[769] Parties are not permitted to adduce generic expert evidence of the range of known reactions to non-consensual sexual offences.

5. This direction may be given at the outset of the case [see Chapter 1-5] or as part of the summing up. Whenever it is given it is advisable to discuss the proposed direction with counsel.[770] Considerable care is needed to craft the direction to reflect the facts of the case[771] and to retain a balanced approach.[772]

6. In *GJB*[773] the CA approved the direction of the trial judge in *Miller* on the delay issue. "We entirely accept that in a suitable case, and this was one, the judge is entitled to and should comment on the reluctance or difficulty of the victim of sexual abuse to speak about it for long afterwards. In this connection, we refer to the judgments of this Court in *D (JA)*[774] and in *Miller.*[775] However, it is important that the comment should not assume the guilt of the defendant, and that his case should be made clear. The direction in *Miller* was a model in this respect. The summing up in that case included the following passage:

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

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[769] *Miller*

[770] *Miller*

[771] *Smith* [2012] EWCA Crim 404.

[772] *CE* [2012] EWCA Crim 1324

[773] GJB [2011] EWCA Crim 867; *F* [2011] EWCA Crim 1844

[774] [2008] EWCA Crim 2557

[775] [2010] EWCA Crim 1578

be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship."

Directions

7. There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.
8. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant:
   (1) Of untruthfulness:
      (a) Delay in making a complaint.
      (b) Complaint made for the first time when giving evidence.
      (c) Inconsistent accounts given by the complainant.
      (d) Lack of emotion/distress when giving evidence.
   (2) Of truthfulness:
      (a) A consistent account given by the complainant.
      (b) Emotion/distress when giving evidence.
   (3) Of consent and/or belief in consent:
      (a) Clothing worn by the complainant said to be revealing or provocative.
      (b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.
      (c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.
      (d) Some consensual sexual activity on the occasion of the alleged offence.
   (4) Of consent and/or belief in consent and/or lack of involvement:
      (a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.
      (b) A defendant who is in an established sexual relationship.
9. Such directions must be crafted with care and should always be discussed with the advocates. Thought should be given as to when may be the most appropriate time to give such directions: at the outset of the trial or in the course of summing up?
10. It is of particular importance in cases of this nature to listen to the closing speeches of the advocates with care and if necessary review the directions to be given.

Example 1: Delay (in the context of the complainant's allegations)

When you come to consider why this allegation was not made any earlier, you must avoid making an assumption that because it was delayed it must be untrue.

The defence say that the fact that the complaint was not made at the time shows that V is not telling the truth and that she has made up her story. When this was suggested to her in evidence she said {insert e.g. that she was a child aged 12 and afraid to tell anyone because D had told her that if she did so she would not be believed and this was "our little secret"; and that she only overcame her fear when her own daughter was approaching the age that she was when she said D did this to her }.

To decide this point, you should look at all the circumstances including the reason that V gave for not having complained at the time that she says this incident occurred. Different people react to particular situations in different ways. Some, if they have experienced something of the kind complained of in this case, may tell someone about it straight away, whilst others may not be able do so, whether out of shame, shock, confusion or fear of getting into trouble, not being believed, or breaking up the family. In this case, if V's complaint is true, she was a child of 12 when it happened and was living in the same family as D, and you should consider whether or not those things would have affected her ability to complain at that time.

The fact that a complaint is not made at the time does not necessarily mean that it must be untrue any more than the fact that a complaint is made immediately means that it must be true. I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true.

Example 2: Complaint made for the first time when giving evidence

It is not in issue that until V gave evidence she had not mentioned {specify} to anyone before. The defence say that this shows that she has invented this allegation: they say that she was "making it up as she went along" [if applicable: and that all of her story is untrue]. The prosecution say that {e.g. it is not surprising that when she was having to think about things which happened a long time ago and answer detailed questions about them this triggered her memory so that she was then able to remember this for the first time}.

No doubt you will want to consider these arguments but you should bear in mind that the fact that someone does not mention something at the outset and only mentions it at a late stage does not mean that she cannot be telling the truth, any more than the fact that someone who consistently makes the same allegation must be doing so.

The memory of someone who has had an experience of the kind about which V complains may be affected in different ways. Such an experience may have a bearing on that person's ability to take in, register and recall it. Also, after such an event, some people may go over and over it in their minds with the result that their memory may become clearer whilst other people may try to avoid thinking about it and consequently, whilst the incident did occur, they may have difficulty in recalling it accurately or, in some cases, at all.

I mention these points so that you think about them but I am not expressing any

opinion. It is for you to decide whether or not V's evidence is true; and when you are considering this you should look at all of the circumstances in which V made her original complaint, the way she gave her account to the police officer in the interview, the way she gave evidence and what she said when it was suggested to her that she had invented this [if applicable: and all of her account.]

If you are sure that V's account is true then you may rely on it in reaching your verdict. If you are not sure that it is true, or sure that it is untrue, then you cannot rely on it.

Example 3: Inconsistent accounts

When you come to consider whether or not this allegation is true, you must avoid making an assumption that because V has said something different

to someone else her evidence to you is untrue.

You have heard that when V gave a statement to/was interviewed by the police s/he said {insert} whereas when s/he gave evidence s/he said {insert}.

[Either] There is no issue that these two accounts are inconsistent with one another and you will have to consider why this is so.

[Or] You will have to compare these two accounts and, if you find that they are inconsistent, you will have to consider why this is so.

The mere fact that V has not been consistent in the accounts that s/he has given does not necessarily mean that her/his evidence is not true. Experience has shown that inconsistencies in accounts can arise whether a person is telling the truth or not. This is because the memory of someone who has had an experience of the kind complained of in this case may be affected by it in different ways and this may have a bearing on that person's ability to take in, register and recall it. Also, after such an event, some people may go over and over it in their minds with the result that their memory may become clearer whilst other people may try to avoid thinking about it and consequently, whilst the incident did occur, they may have difficulty in recalling it accurately.

I mention these points so that you think about them but I am not expressing any opinion. It is for you to decide whether or not V's evidence is true. To answer this question you must look at all of the evidence including any inconsistencies which you find exist and decide what effect these have on V's truthfulness. If you are sure that V's account is true then you are entitled to rely on it. If you are not sure that it is true, or sure that it is untrue, then you cannot rely upon it.

Example 4: Consistent account

You have been asked to find that V's account is true because s/he has been consistent in what s/he said to {e.g. her sister/the police} and in her evidence about this [alleged] incident. The mere fact that a person gives a consistent account about an event does not necessarily mean that account must be true, any more than the fact that a person who gives inconsistent accounts must mean that the event did not happen. In deciding whether or not V's account is true you should look at all of the evidence. If, having done so, you are sure that V's account is true then you are entitled to rely on it. If you are not sure that it is true, or sure that it is untrue, then you cannot rely on it.

Example 5: Lack of emotion/distress when giving evidence

You have been reminded/you will remember that when V gave evidence s/he appeared completely calm and gave his/her account in a matter-of-fact way without showing any emotion. It is entirely for you to decide what you make of V's evidence but it would be wrong to assume that the manner in which he/she appeared to give evidence is is an indication of whether or not it is true.

This is because experience has shown that people react to situations and cope with them in different ways. Some people who have experienced an incident of the kind complained of in this case, when they have to speak about it, show obvious signs of emotion and distress, whereas others show no emotion at all. Consequently the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

Example 6: Show of emotion/distress when making a complaint and/or giving evidence

You have been reminded/you will remember that at a number of points in his/her evidence V became distressed and emotional. It is entirely for you to decide whether or not V's evidence is true but you must not simply assume that because V showed distress and emotion it must be true. It is perfectly possible for a witness to become distressed and emotional when describing an incident such as this, whether or not their account is true. The presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

Example 7: Clothing worn by the complainant said to be revealing or provocative

[Questioning on this subject should have been restricted, but there will be occasions where such evidence has emerged.]

You have been reminded of/you will remember the fact that when V went out on the evening of {date} she was dressed in {specify}. The defence suggested to her that this was because she was "out on the pull" and looking for sex and you will remember her response that {insert}. You should consider this evidence and decide what you make of it but you must not assume that because V was dressed in that way that she must have been either looking for or willing, if the opportunity presented itself, to have sex. People may dress in a variety of ways for a variety of reasons and the mere fact that someone dresses in revealing clothing does not necessarily mean that that person is inviting or willing to have sex or that someone else who sees and engages with that person could reasonably believe that that person would consent to it.

Example 8: Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others

V has accepted that she was very drunk on the night of {insert} but it is important that you do not assume that because she got into that state she was either looking for, or willing to have, sex. When it was suggested to her in cross-examination that she was out that night to get drunk and then to have sex she said {insert}. You should consider this evidence and decide what you make of it but you must not assume that because she was drunk she must have wanted sex. People do go out at night and get drunk, sometimes for no apparent reason at all, and it would be wrong to leap to the conclusion that such a person must be out looking for, or willing to have, sex or that someone else who sees and engages with that person could reasonably believe that that person would consent to it.

Example 9: Previous sexual activity between the complainant and the defendant

It is common ground that V and D knew one another and that, whilst they have not been in an established sexual relationship, they have had sexual intercourse on a number of previous occasions. It is important to recognise that the mere fact that V has had consensual sexual intercourse with D on other occasions does not mean that she must have consented to have sexual intercourse with him on this occasion or that this would have given D grounds for reasonably believing that she consented to it. A person who has freely chosen to have sexual activity with another person in the past does not, as a result, give general consent to have sexual intercourse with that person on any occasion: each occasion is specific and whilst at one time a person may want to have sex, at another time that person may not want it at all and will not consent to it.

Also, if and when you come to consider whether D may reasonably have believed that V consented, you must not assume that because V had had sexual intercourse with him on a number of previous occasions this, in itself, gave him grounds for believing on this occasion. You must resolve this issue by looking at all of the evidence.

Example 10: Some consensual sexual activity on the occasion of the alleged offence

It is common ground that on the night in question V took D back to her home, gave him a cup of coffee and that for a while they engaged in kissing one another, something to which V consented. According to V she then said she had to get up early the next morning and asked D to leave but he refused to go and then forcibly had sexual intercourse with her against her will. D gave evidence that kissing led to further sexual touching and then to sexual intercourse to which V fully consented.

It is for the prosecution to prove that V did not consent to D having sexual intercourse with her and you must decide this issue by looking at all the evidence. When you do so it is important to recognise that the mere fact that V let D into her home and willingly engaged in kissing D does not mean that she must have wanted to go on to have sexual intercourse and must have consented to it. A person who engages in sexual activity is entitled to choose how far that activity goes and is also entitled to say "No" if the other person tries to go further; the fact that V willingly engaged in kissing does not mean that she must have wanted to have sexual intercourse.

If you are sure that V did not consent to having sexual intercourse with D the prosecution must also prove that D did not reasonably believe in V's consent. This too is an issue which you must resolve by looking at all of the evidence but you must not assume that because V had been kissing him willingly before sexual intercourse took place this in itself gave him grounds for believing that she consented to him having sexual intercourse with her.

Example 11: Fear; although no use or threat of force, physical struggle and/or injury

It is not suggested that, before or at the time that D had sexual intercourse with V he either threatened her with force or that he used any force upon her and V has accepted that she did not put up any struggle. It is also common ground that V did not suffer any injury.

The defence say that this is because V fully consented to what took place. V on the other hand gave evidence that when D started to undo his trousers and then undid her jeans she was so frightened that she could not move: she said she was "petrified with fear". You will have to resolve this issue by looking at all of the evidence but it is important to recognise that the mere fact that D neither used nor threatened to use any force on V and that she did nothing to prevent D from having sexual intercourse with her and was uninjured does not mean that V consented to what took place or that what V has said about what happened cannot be true.

Experience has shown that different people may respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event whilst others may, whether through fear or personality, whilst they did not consent, be unable to do so.

It is important to draw a distinction between consent and submission. A person consents to something if, being capable of making a choice and being free to do so, s/he agrees to it. Consent in some situations may be given enthusiastically, whereas in others it is given with reluctance, but nevertheless it is still consent. But when a person is so overcome by fear that she lacks any capacity either to give consent or to resist, that person does not consent but submits to what takes place.

It is for you to say, having considered all of the evidence, what the situation was in this case, bearing in mind that it is for the prosecution to prove that V did not consent to D having sexual intercourse with her and that D did not reasonably believe that she consented. What they do not have to prove is (a) that D used or threatened to use any force or that V put up a struggle or was injured or (b) that V communicated her lack of consent to D.

Example 12: Defendant is in an established sexual relationship with another person

It is not disputed that V was raped: what is in dispute is that it was D who raped her; and the evidence of identification of D as the person responsible is challenged. As part of the evidence you heard from D and also from his wife that they have a mutually fulfilling sex life, and it is D's case that he had no need to have sexual intercourse with a stranger and much to lose by doing so.

You will of course consider this evidence when you are deciding where the truth lies but you must not assume that a man who is married and, if you find that it is or may be the case, who has a fulfilling sex life cannot resort to sexual activity with any other person. In pointing this out I am not suggesting what you should make of the evidence of D or of his wife, but simply alerting you to the danger of making an assumption which, depending on your assessment of their evidence, might flow from it.

Example 13: Defendant is a homosexual man

You have heard that D is gay and lives with/goes out with {specify}. You have heard this as part of the background to the case. It is not relevant to the issue of guilt.

It is no more likely that a man who lives with another man has a sexual interest in young boys than it is that a man who lives with a woman will have an interest in young girls. The fact that D is gay is of no significance at all.

20-2 Sexual offences – Historical allegations

ARCHBOLD: 4-465, 20-9b and 20-27a; BLACKSTONE'S: B3.3

Legal Summary

1. It is important in historic cases that the judge gives full and detailed reasons for decisions and provides clear guidance for the jury on the difficulties faced by the defence as a result of the lapse of time.
2. As the Court made clear in *PS.*[776] The essential matters that a direction should address were identified as being:

   > "i) delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case when the defence was essentially a simple denial (the defendant was saying that he had not acted as alleged);
   >
   > ii) the longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available – indeed, it may be unclear what has been lost;
   >
   > iii) when considering the central question whether the prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and
   >
   > iv) a summary of the main elements of prejudice that were identified during the trial." [35**]** per Fulford LJ

3. Having reviewed a number of authorities[777] Fulford LJ remarked that

   > "no two cases are the same and whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case. We stress, therefore, that the need for a direction, its formulation and the matters to be included will depend on the circumstances of, and the issues arising in, the trial."

4. The court suggested that the problems of delay are:

   > "often (although not necessarily always) best addressed by a short, self-contained direction that focuses on the defendant rather than amalgamating it with other aspects of the relevance of delay, for instance as regards the victim or victims. The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principal means of protecting the defendant, is diluted and its force is diminished."[37]

5. As regards the absence of documents and witnesses, see *D*[778] D was convicted of sexual offences on his nieces and daughter between 39 and 63 years earlier. The Court was clear – the length of delay is nothing more than a statement of

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[776] [2013] EWCA Crim 992.

[777] *Henry* (1998) 2 Cr App R 61; *Graham* [1999] 2 Cr App R 201; *M* [2000] 1 Cr App R 49.

[778] *D* [2013] EWCA Crim 1592.

fact. What matters is not how long it is since the alleged offence but whether the delay has an effect on the fairness of the trial and the safety of any resultant convictions.

Directions

6. In some cases of alleged historical sexual abuse, complaints may have been made before, sometimes a long time before, the complaint which has given rise to the investigation and prosecution with which they jury are concerned. In some cases such earlier complaints may have been made to a friend or a family member, in others they may have been made to the police or some other person in authority. There may be one or more records of such complaints.
7. In these cases, evidence of such complaints may be adduced as hearsay, to establish consistency or inconsistency, to rebut a suggestion of recent fabrication or, possibly, to refresh memory. If such evidence is adduced in this way, appropriate directions must be given: see Chapter 15-12 above.
8. If the jury are being invited to make the assumption that if the allegation were true, complaint would have been made at the time, the jury should be directed accordingly: see Chapter 20-1 above.
9. Such directions must be crafted with care and discussed with the advocates. It may also be necessary to discuss these directions after speeches, depending on the arguments advanced by the advocates.

Examples

See the Examples in Chapter 14-12 and Example 1 in Chapter 20-1.

20-3 Sexual offences – grooming of children

ARCHBOLD: 20-91; BLACKSTONE'S: B3-119

Legal Summary

1. Although an offence of meeting a child following sexual grooming is created by section 15 Sexual Offences Act 2003, other behaviour, often innocent itself but intended to gain favour with and/or the trust of a child with a view to sexual activity, is properly described as "grooming".

Directions

2. Where grooming is alleged to have occurred, whether or not this gives rise to a separate count on the indictment, the concept of grooming and the potential difficulties of a witness' realisation and/or recollection of innocent attention becoming sexual should be explained.

Example 1: young child

The prosecution case is that before he sexually assaulted V he "groomed" her. That is to say he won her trust by doing things which in normal circumstances would be innocent, such as playing games with her including play-fighting and tickling, before he went on to touch her sexually. In this situation, a child is unlikely to realise that she is at any risk at all and, when the nature of touching changes from something "innocent" to something which is sexual, the child may not realise that there is anything wrong and may accept it without any feeling of discomfort or dislike and will not make any complaint about it or resist or protest when it happens again. In these circumstances a child is unlikely to be able to say when touching which had been "innocent" changed to touching which was sexual.

In making these observations I am not suggesting what you should find did, or did not, happen in this case: I am simply alerting you to a potential difficulty which a child in such a situation could face. Whether or not you find that this was a situation faced by V is entirely for you to decide.

Example 2: older child

You have heard evidence in this case that V was 12 years of age and in the care of the Local Authority when she met D.

The prosecution say V was, because of her situation, especially impressionable and vulnerable. She has said in evidence that when she first met D she was impressed by {specify e.g. rides in his car/gifts of alcohol, flattery etc.} and that she liked him and became prepared to do things for him that she would not otherwise have done.

In many relationships, sexual or otherwise, one party will seek to please the other with gifts but in this case the prosecution say that the purpose of D's gifts was to make V dependent upon him and so effectively to remove her capacity to say no.

The defence say there was no sexual relationship and that although V was 12 she obtained alcohol from a variety of sources and was in no way dependant on him.

You must look at the evidence of the relationship between V and D. If you are sure that the gifts etc. were intended to and did make her so dependent on him that she was prepared to submit to {specify} you are entitled to conclude that was not true consent. If you are not sure that was the case and you consider D's account is or may be true then you could not be sure that she did not consent when {specify}.

NOTE: For a further comprehensive direction on the difference between consent and compliance or submission, approved by the CACD, see *R. v. Ali and Ashraf*.[779]

[779] [2015] EWCA Crim 1279 para 15

20-4 Sexual offences – consent and reasonable belief in consent

ARCHBOLD 20-10, 25 and 25a; BLACKSTONE'S B3.19, 26, 30 and 33

Legal Summary

1. When the charges involved are those under ss. 1 - 4 of the Sexual Offences Act 2003, the Crown must prove that V was not consenting to the act alleged.

General consent cases

2. Otherwise than in the exceptional cases under ss. 75 and 76 [see below] the jury is to determine whether V was consenting, applying the definition of consent provided in s. 74:

   'For the purposes of this part, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice'.

3. An absence of consent can therefore arise by reason of mere lack of agreement as well as by force, threat of force, fear of force, a lack of capacity owing to unconsciousness,[780] sleep,[781] drink or drugs: for capacity and voluntary intoxication see Chapter 20-5.

4. The jury may need to be alerted to the distinction between consent and mere submission: see *Doyle*[782] in which the Court of Appeal described the distinction between (i) reluctant but free exercise of choice, especially in a long-term loving relationship, and (ii) unwilling submission due to fear of worse consequences. In *Zafar,* Pill J directed that: 'C may not particularly want sexual intercourse on a particular occasion, but because it is her husband or her partner who is asking for it, she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner i[t i]s still consent.'

5. There have been a number of recent cases in which judges have had to direct juries in cases where apparent consent, particularly of young victims or those in ongoing relationships, arises out of prior abuse. [783]

6. In some cases, particularly where there is evidence of exploitation of a young and immature person who may not understand the full significance of what he or she is doing, that is a factor the jury can take into account in deciding whether or not there was genuine consent. [784]

7. There is no requirement that V must communicate her lack of consent to D.[785]

8. Where the suggestion is that V lacks mental capacity to consent the jury should be directed that a person lacks capacity if he lacks the capacity to choose,

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[780] See s.75.

[781] See s.75.

[782] [2010] EWCA Crim 119.

[783] See *Robinson* [2011] EWCA Crim 916

[784] Ali [2015] EWCA Crim 1279.

[785] *Malone* [1998] 2 Cr App R 447.

whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason.[786]

9. It is not necessary for the judge to direct on all aspects of the law of consent when they do not arise on the facts.[787]

Sections 75 and 76

10. When evidential (s. 75) or conclusive (s. 76) presumptions about consent arise (a) the jury must be carefully directed and (b) any such directions must be discussed with the advocates: see example below.

D's reasonable belief in consent

11. Under ss. 1 - 4 of the Sexual Offences Act 2003, the mental element comprises two questions:

    (1) May D have genuinely believed that V was consenting?

    (2) Was D's belief reasonable in the circumstances?

12. D's intoxication is irrelevant. [788]The reasonableness of D's belief must be evaluated as if he had been sober. Delusional thinking, psychotic or otherwise, can never be considered to be reasonable.[789] There may be cases where the personality and abilities of the accused (short of delusional or psychotic states) are relevant to whether his positive belief in consent was reasonable. [790]

13. It is for the jury to determine whether the belief D held is a reasonable one. It is not a question of whether D thought it was reasonable. There is no obligation on D to have taken any specific steps to ascertain consent, but where steps have been taken they must be taken into account by the jury in deciding whether D's belief was reasonable. Depending on the facts of the case, D's age, general sexual experience, sexual experience with this complainant[791] learning disability and any other factor that could have affected his ability to understand the nature and consequences of his actions (particularly the ability to appreciate the risk of non-consent) may be relevant.

Directions

14. The prosecution must prove that V did not consent to the sexual activity alleged.

15. The prosecution must also prove that D did not reasonably believe that she consented.

16. The absence of consent may be proved by evidence of one or more of the following:

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[786] *A(G)* [2014] 2 Cr.App.R. 73(5).

787 *H* [2006] EWCA Crim 853; *Taran* [2006] EWCA Crim 1498

[788] Grewal [2010] EWCA Crim 2448.

[789] *Braham* [2013] EWCA Crim 3.

[790] *Braham* [2013] EWCA Crim 3.

791 *McAllister [1997] Crim LR 233.*

(1) submission

(2) fear, without threat or use of force

(3) D continuing after V made it clear that s/he did not consent.

(4) express or implied threats*

(5) oppression (e.g. previous abuse)

(6) force*

(7) deceit as to the nature and/or purpose of the act

(8) deceit as to the identity of D.

17. Directions must be tailored to the factual issues in a particular case and the concept of consent explained by reference to those factual issues.

18. Where there has been an allegation of non-consensual sexual activity within or immediately after a long term relationship, further guidance will be required about the distinction between the "give and take" that occurs within a relationship and the absence of consent.

NOTE:

- Section 75 Sexual Offences Act 2003 provides for evidential presumptions to be made about lack of consent and lack of belief in consent, where it is proved that (i) D did the relevant act (ii) any of these circumstances existed and (iii) D knew that these circumstances existed, provided that there is insufficient evidence to raise an issue as to whether V consented. In reality these criteria seldom arise.
- S.76 Sexual Offences Act 2003 provides for a conclusive presumption to be made about lack of consent and lack of belief in consent, where D intentionally deceived V in one or more of these ways. In reality these criteria seldom arise.

Example 1: Consent

The prosecution must prove, so that you are sure of it, that when D {specify act}, V did not consent to it. A person consents to something if, being capable of making a choice and being free to do so, s/he agrees to it.

Example 2: Reasonable belief in consent

If the prosecution have proved that V did not consent, they must also prove that D did not reasonably believe that s/he consented.

This involves two questions:

(a) Did D genuinely believe, or may he have genuinely believed, that V consented? and

(b) If he did, or may have done so, was his belief reasonable?

If you are sure that D did not genuinely believe that V consented, this element of the offence will have been proved and so the question of whether belief was reasonable will not arise.

If you decide that D did genuinely believe that V consented, or may have done so, you must then decide whether his belief was reasonable. Whether or not his belief was reasonable is for you to say, having considered all the evidence; and you must decide whether an ordinary reasonable man, in the same circumstances as D, would have believed she was consenting. This includes looking at any steps D took to find out whether she was consenting or not. [If appropriate: The fact that D gave evidence that he thought that it was reasonable is something for you to take into account but the question is whether, in your view, it was reasonable, not whether D thought that it was.]

Sequence of questions for jury (to be provided in writing)

Question 1

Are you sure that when D {specify act}, V did not consent to it?

- If your answer is "Yes" – i.e. you are sure that she did not consent - go to question 2.
- If your answer is "No" – i.e. you decide that she did consent or may have consented - your verdict will be "Not Guilty".

Question 2

Are you sure that D did not genuinely believe that V consented?

- If your answer is "Yes" – i.e. you are sure that he did not genuinely believe that V consented – your verdict will be "Guilty".
- If your answer is "No" – i.e. you decide that D did genuinely believe or may genuinely have believed that V consented – go to question 3.

Question 3

Are you sure that D's belief in V's consent was unreasonable?

- If your answer is "Yes" – i.e. you are sure that D's belief in V's consent was unreasonable - your verdict will be "Guilty".
- If your answer is "No" – i.e. you decide that D's belief in V's consent was or may have been reasonable - your verdict will be "Not Guilty".

Example 3: Submission, without threats or force

V gave evidence that although D did not threaten her or use any force on her, she did not consent to {specify act} but submitted to it, because {specify}. It is important to draw a distinction between consent and submission. Consent in some situations may be given enthusiastically, whereas in others it is given with reluctance, but it is still consent. Where however a person gives in to something against his/her free will, that is not consent but submission. It is for you to say, having considered all of the evidence, where the line is to be drawn in this case bearing in mind that it is for the prosecution to prove that V did not consent to {specify act}.

It is not necessary for the prosecution to prove, in order to prove that V did not consent, that s/he was subjected to threats or violence, or that s/he was overpowered or put up a struggle or that s/he told D that s/he did not consent. What you have to decide is whether the prosecution have made you sure that at the time that {specify act} took place, V did not consent to it.

Example 4: Fear, without threat or use of force

V gave evidence that although D did not threaten her or use any force on her, she did not consent to {specify act} because she was so frightened by what D was doing that she froze and was unable to speak or to move. It is important to draw a distinction between consent and submission. A person consents to something if, being capable of making a choice and being free to do so, s/he agrees to it. Consent in some situations may be given enthusiastically, whereas in others it is given with reluctance, but nevertheless it is still consent. Where however a person is so overcome by fear that she lacks any capacity either to give consent or to resist, that person does not consent but is submitting to what takes place.

Example 5: Express indication that V did not consent; belief in consent

V gave evidence that when D started to touch her breast she made it clear to him that she did not want him to continue, by repeatedly saying “No. Stop” but he ignored her and carried on. D gave evidence that V said nothing of the kind.

Your conclusions about this will be important when you are looking at two things:

(a) whether you are sure that V did not consent; and

(b) if you are sure that V did not consent, whether you are sure that D did not reasonably believe that she consented;

but your final decision must be based on all the evidence.

Example 6: Non-consensual sexual activity within or immediately after a long term relationship

It is common ground that D and V have had a long term sexual relationship. This is plainly relevant to the question of whether or not, on this occasion, V consented to D {specify act}, because the situation between two people who have/have had such a relationship is quite different from a situation in which two people are strangers or have met one another only a few times.

When two people have/have had such a relationship, there is likely to be some give and take between them in relation to any number of things, including their sexual relationship, and sometimes a partner who is not feeling enthusiastic may nevertheless reluctantly give consent.

This is not to say however that when two people are/have been in such a relationship it must follow that both of them will consent to any sexual activity which takes place. One party is fully entitled to say “no” to the other notwithstanding their relationship. What you must decide in this case is (a) whether V consented freely and by choice, albeit reluctantly, to what took place or whether she did not consent but submitted to it and (b) whether, in the light of all of the evidence including the nature of the [previous] relationship between V and D, D may have reasonably believed that she was consenting.

20-5 Sexual offences - capacity and voluntary intoxication

ARCHBOLD 17-116, 20-10; BLACKSTONE'S: B3.22

Legal Summary

1. When the charges involved are those under ss. 1 - 4 of the Sexual Offences Act 2003, V's voluntary intoxication may be relevant to (a) V's ability to consent or (b) whether V consented to sexual activity. D's voluntary intoxication may be relevant to his belief in consent, but is not relevant to the reasonableness of such belief: see Chapter 20-4.
2. If in proceedings for such an offence it is alleged that D did the relevant act, at a time when V was unconscious and D knew that, under s. 75 of the Act V is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether V consented, and D is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.[792]
3. Otherwise than in such cases, the jury is to determine whether V was consenting, applying the definition of consent provided in s. 74:

   'For the purposes of this part, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice'.

   V's voluntary intoxication is a factor which may bear upon consent and the issues of capacity and freedom to agree. [793]
4. Applying section 74, if V has voluntarily consumed alcohol and/or drugs but remains capable of choosing whether or not to have sexual activity and agrees to do so, she has consented to it. Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently, but consent given in such a state is still a valid consent if a person has the capacity to agree by choice. Where V through intoxication no longer has the capacity to agree, there will be no consent. V will not have capacity if her understanding and knowledge are so limited that she was not in a position to decide whether or not to agree to the act.
5. The Court of Appeal has addressed the question of how a judge should direct the jury when V was intoxicated and may have lacked capacity. The leading case is that of *Bree* [794] where Lord Judge stated:

   "We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion."[795]

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[792] Section 75.

[793] In the case of spiked drinks etc s 75(2)(f) applies.

[794] [2008] QB 131

[795] See also *Coates* [2008] 1 Cr App R 52 at [44] per Sir Igor Judge P.

6. The question of capacity is not dependent on whether V might afterwards have regretted what happened or had a poor recollection of what happened, or behaved irresponsibly. [796]
7. In some cases, it will be necessary to direct the jury as to the distinction between an allegation that V was unconscious, and an allegation that although she was capable of consenting, despite her state, she was not in fact consenting and was giving clear indications that she was rejecting D.
8. Where a question of capacity arises it should be left to the common sense of the jury, with an appropriate direction.[797]
9. When directing a jury as to capacity, the words 'a drunken consent is still a consent' can cause distress and are best avoided.
10. When lack of capacity has not been a live issue, it should not be left to the jury.
11. The Court of Appeal in *Kamki* [798] provided the following guidance:

> "a. A person consents if he or she agrees by choice and has the freedom and capacity to make that choice,
>
> b. When a person is unconscious, there is no such freedom or capacity to choose,
>
> c. Where a person has not reached a state of unconsciousness and experiences some degree of consciousness, further considerations must be applied,
>
> d. A person can still have the capacity to make a choice and have sex even when they have had a lot to drink (thereby consenting to the act),
>
> e. Alcohol can make people less inhibited than when they are sober and everybody has the choice whether or not to have sex,
>
> f. If through drink a woman has temporarily lost the capacity to choose to have sexual intercourse, she would not be consenting,
>
> g. Before a complete loss of consciousness arises, a state of incapacity to consent can nevertheless be reached. Consideration has to be given to the degree of consciousness or otherwise in order to determine the issue of capacity,
>
> h. …the jury would have to consider the evidence of [V] to determine what her state of consciousness or unconsciousness was and to determine what effect this would have on her capacity to consent,
>
> i. If it is determined that the complainant did have the capacity to make a choice, it would then have to be considered whether she did or may have consented to sexual intercourse".

[796] See Archbold para 20-10.

[797] *Hysa* [2007] EWCA Crim 2056.

[798] [2013] EWCA Crim 2335.

Directions

12. Depending on the evidence, the prosecution may put its case in the alternative: (a) that V lacked the capacity to give consent and (b) that V did not consent, in which event the jury should be given directions about each. The jury should not be directed about lack of capacity if this has not been a live issue in the case.

13. If the jury are sure that V was unconscious, she could not have consented because she would not have had the freedom or capacity to do so.

14. If the jury are sure that, although V was not unconscious, s/he was so intoxicated by reason of drink or drugs that s/he was unable to make a free choice, V was not consenting.

15. If the jury consider that V had, or may have had, the capacity to make a choice they must go on to consider whether V did in fact consent bearing in mind:

    (1) that alcohol (and some drugs) can make a person less inhibited than she might be when sober;

    (2) consent given when a person is under the influence of drink and/or drugs is still consent even if it would not have been given when sober.

16. If the jury are sure that V did not consent, when considering whether D reasonably believed that V was consenting:

    (1) whether or not D held that belief is to be decided having regard to D's state, which includes whether s/he was sober or drunk;

    (2) The reasonableness of D's belief is to be decided on the basis of whether it would have been reasonable had D been sober.

Example: V and D intoxicated by alcohol: V's capacity to consent and lack of consent in issue.

It is not in dispute that on the night in question D had sexual intercourse with V. What is in issue is whether she consented to that and, if she did not consent, whether D reasonably believed that she consented.

It is not in dispute that both V and D had had a great deal to drink during the preceding evening {briefly summarise evidence}. According to V, she can remember nothing from the time that {specify} until {specify}. She cannot say what, if any, sexual activity took place but she says that, if any activity did take place, she would not have consented to it. D has given evidence that he and V had sexual intercourse and that, whilst V did not say anything at all, she did not resist in any way and he believed that she was consenting.

As to V's state of mind: it is for the prosecution to make you sure that V did not consent to sexual intercourse. V will have consented if, being capable of making a choice and being free to do so, she agreed to have sexual intercourse with D, whether or not she expressed that in words.

You will have to decide whether the amount which V had had to drink affected (a) her ability to make a free choice or, if she was able to make such a choice, (b) the decision which she made about whether or not to have sexual intercourse.

If you find that V was so drunk that she was in fact unconscious, then she would not have been able to make a free choice and could not have consented. Also, if you find that, although she was not unconscious, V was so drunk that she was not capable of making any choice, then in this event also she could not have consented.

If on the other hand you find that despite what she had had to drink V was, or may have been, able to make a choice and chose, or may have chosen, to have sexual intercourse then she will have consented: consent which is given when disinhibited by drink, even if it would not have been given if sober, is nevertheless consent. If having considered these things you find that V consented, or may have consented, you will find D not guilty.

As to D's state of mind:

If you are sure that D did not believe that V consented then you will find D guilty. If on the other hand you find that D believed, or may have believed, that she consented you must go on to consider whether that belief was reasonable.

On this question you should look at all of the circumstances, including whether D took any steps to find out whether or not V was consenting. You must take no account of the fact that D was drunk; you must approach this question by considering what he would have believed if he had been sober.

If you are sure either (a) that D should have realised that, because of the state she was in, V was incapable of making any choice about whether or not to have sexual intercourse with him or (b) that if sober he should have realised that she was not agreeing to do so by choice, then his belief will not have been reasonable, and you will find him guilty. If on the other hand you find that his belief was, or may have been, reasonable, you will find him not guilty.

21. VERDICTS AND DELIBERATIONS

NOTE: There are no Legal Summaries in this chapter, the subject matter being covered by the "Directions and Procedure" sections. Also, in some sections, there are no references to Archbold or to Blackstone's because the topic is not separately covered in those works.

21-1 Unanimous verdicts and deliberations

ARCHBOLD 4-491; BLACKSTONE'S D19.34; CrimPD 39K 26Q.

Directions and procedure

1. The jury must be directed that:
   (1) their verdict must be unanimous {in respect of each count and each defendant}; and
   (2) they may have heard of majority verdicts but they should put this out of their minds and concentrate on reaching a unanimous verdict/s. If a time were to come when the court could accept a majority verdict the jury would be invited to come back into the court room and given further directions. This would only happen if the judge were to decide that it is an appropriate course to take.
2. The jury should also be advised that it may help their deliberations if they select one of their number to chair their discussions and that, in any event, one of them will have to speak on their behalf when they return to the court room to deliver their verdict.
3. It is also helpful to reassure the jury that there will inevitably be some debate in the jury room and, at least initially, different views will be expressed. If they all discuss the case by expressing their own views but also taking account of the views of others they are likely to find that they will reach a verdict/verdicts on which they all agree.
4. If any jurors are smokers, the jury may be told about the arrangements for smoking breaks. (Local practices to apply.)
5. In courts without catering facilities, the jury should be told about the arrangements for lunch breaks.

Example

It is important that you try to reach a verdict/verdicts which are unanimous: that is to say a verdict/s on which all of you agree.

The following is a form of words suggested by the CrimPD

"As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction."

The following is an alternative form, elaborating on CrimPD wording

You may have heard of majority verdicts but please put this completely out of your mind. Should the time come when I could accept a verdict which is less than one on which you all agree I would invite you back in to court and give you further directions. But, first this would not be for quite some time and, second, the initiative for this must come from me: so please do not send me a note asking if you can return a majority verdict or stating, for example, "Our voting strengths are X and Y."

So please concentrate on reaching a unanimous verdict. You may take as long as you need: you are not under any pressure of time at all.

[In an appropriate case, e.g. in a long case or one in which the jury must reach several verdicts}: … and please don't worry about having to remain here long after our usual court hours. If you do not finish your discussions today, I shall ask you to return to court shortly before 4.30 and then, unless you want to have some more time at that point, I will ask you to continue your deliberations in the morning and give you a few directions about leaving the case behind overnight.

Further in any event

It is entirely up to you how you run your discussions, but you may find it helpful to select one of your number to chair them, so that everyone is able to have their say. When you begin your discussions, a number of different views may be expressed on particular topics but if you each then listen to the views of others experience shows that in almost all cases juries are able to reach a verdict/s with which they are all able to agree.

In any event, when you have reached your verdict/s you will all come back into court to deliver it and at this point the clerk will ask one of you – usually referred to as "the foreman", though of course this may be a man or a woman – to stand, and that person will then speak on behalf of you all.

The delivery of a verdict is entirely straightforward: the clerk of the court asks short questions to which the answers are given in no more than one or two words.

21-2 Adjournments during deliberation

ARCHBOLD 4-502; BLACKSTONE'S D19.8

Directions and procedure

1. If it is necessary for the jury to separate before they have reached their verdict/s, usually either to get refreshments at lunchtime or to leave the court at the end of the court day, the jury should be invited to return to court and should be asked informally by the judge, whether they have reached verdicts on **all** counts upon which they are all (or if a majority direction has been given, upon which the required majority) are agreed. If they have not reached verdicts they must be given the following directions as per *R.v.Oliver*[799] in full on the first separation and given a brief reminder at each subsequent separation.
2. It is not necessary to use any precise form of words provided that the jury are directed that:
   (1) when they leave the court room and until they return to the courtroom {specify e.g. this afternoon/tomorrow morning} they must not talk about the case to anyone;
   (2) this includes talking to one another because, if any of them were to do so, they would not be deliberating as a jury but having separate discussions in which not all the jury would be involved;
   (3) they must decide the case on the evidence and the arguments that they have seen and heard in court and not on anything that they may see or hear outside the court room. For this reason no juror must look for or receive any further information about the case, whether by talking to someone or by making their own investigations e.g. on the internet.
3. These directions should be adapted and explained to a jury who are to separate during the day for smoking breaks or if deliberations have to be suspended for any other reason.

[799] 1996 2 Cr.App.R 514

Example

I shall not ask you to continue your deliberations any further today: we will now adjourn until tomorrow morning at {time}.

In the meantime not only is it essential that you do not speak to anyone outside your own number about the case, but you must also not even talk about it to one another until you have come back into the court room tomorrow morning when, after the ushers have been re-sworn, I shall ask you to go to your jury room and continue with your deliberations.

The reason for this is that if you were to talk to one another about the case now, or in the morning before you have returned to your jury room, you would not be deliberating together as a jury but simply chatting on the stairs or in the jury waiting area in ones and twos; and not all members of the jury would be involved.

I must also remind you, though I am sure that you need no reminder, that the evidence is now closed and that you must decide the case only on the evidence and the arguments that you have seen and heard in court, that you must not do any work on the case at all between now and when you continue your deliberations together in the morning. This means that there must be no research, for example on the internet, no private study or making notes and no communication of any kind. This is because you work together on this case as a team when you are at court and not as individuals when you are away from it.

21-3 Taking partial verdicts

ARCHBOLD 4-516; BLACKSTONE'S D19.69

Procedure

1. In most cases the jury will and should return their verdicts on all counts in respect of all defendants at the same time.
2. When a jury have indicated that they have reached some, but not all, verdicts it may, depending on the particular case, be preferable not to take any verdict until all verdicts have been reached.
3. If verdicts are taken on some, but not all, counts consideration should be given to the need for orders under s.4(2) Contempt of Court Act 1981 to postpone the reporting of the verdicts initially returned, until the jury have completed their deliberations and returned all verdicts.
4. If there are counts upon which a jury cannot ultimately agree, publicity of the verdicts which they have returned may prejudice a further trial and a further postponement of reporting of these verdicts must be considered.

21-4 Majority verdicts

ARCHBOLD 4-509; BLACKSTONE'S D19.35; CrimPD 26Q

Directions and procedure

1. No majority verdict direction can be given unless the jury has been deliberating for at least 2 hours 10 minutes. In practice, to allow time for the jury to go from the court room to their retiring room and vice versa, more than the minimum of 2 hours and 10 minutes should be allowed.
2. It is for the judge to decide when a majority direction is to be given, although it is good practice to inform the advocates of this intention. Sometimes advocates may ask the judge when he is likely to give such a direction. The judge is under no obligation to give any indication, although in practice this may be done.
3. If the judge has decided to give a majority direction the jury will be sent for and, when they have returned to court the clerk will announce the period during which the jury has been deliberating. The clerk will then ask the jury if they have reached a verdict on which they are all agreed. Assuming that the answer to this question is "No" the jury should be directed that:

   (1) They should still, if at all possible, reach a unanimous verdict.

   (2) If however they are unable to reach a unanimous verdict the time has now come when the court could accept a verdict which is not unanimous but one on which a majority of at least 10 of them agree; that is to say a majority of 10/2 or 11/1.
4. The above assumes that the jury has 12 members: if there are fewer than 12 members the majority permitted is:

   (1) if there are 11 jurors: at least 10;

   (2) if there are 10 jurors: at least 9;

   (3) if there are 9 jurors no majority verdict is permitted.

Example

In a moment I shall ask you to go back to your room to continue to consider your verdict. It is important that, if you can, you continue to reach a verdict on which all of you agree.

But if you find that you really cannot all agree on your verdict, I may now accept a verdict on which fewer than 12 of you agree. However I can only accept such a verdict, whether of Guilty or Not Guilty, if at least 10 of you are agreed: that is to say there must be a majority of either 10 to 2 or 11 to 1.

Please will you now return to your room and continue with your deliberations.

21-5 The Watson direction

ARCHBOLD 4-492; BLACKSTONE'S D19.88

Directions and procedure

1. Although some recent decisions in the Court of Appeal have discouraged the giving of a Watson direction, describing it as an exceptional course,[800] in the most recent case of *R. v. Logo*[801] the court, pointing out that *Watson*[802] was still the leading case, stated these principles, per Saunders J, sitting with Hallett VP and McGowan J, at paragraph 20:

   > "…First, such a direction should only be given after the majority direction has been given and after some time has elapsed or a further direction is sought from the judge by the jury. That is a gloss on Watson which has become generally accepted in other cases. Secondly, there will usually be no need for a direction. Thirdly, the judge should follow the wording set out in the headnote to Watson … Those principles are to be culled from the cases and, we would add, while the decision is one for the judge's discretion, he or she should normally invite submissions from counsel as to the way in which the discretion is exercised.

   He went on, at paragraph 25:

   > "Given the difficulties that this direction can cause, trial judges may wish to think long and hard before exercising their discretion to do so and, as we have said, they will also be well advised to seek the submissions of counsel to assist them reach a considered decision."

2. Circumstances in which this direction is given will therefore be rare. They will not arise unless and until the jury have been deliberating for a significant time in the context of the particular case and after they have been given a majority direction and have had further time in retirement.
3. If the judge receives a note from the jury asking for help, or stating that they are having difficulty in reaching a verdict, after discussion with the advocates, the judge may give a further direction if he decides that it is appropriate to do so.
4. If the judge does decide to give any further direction the words of the direction formulated by Lord Lane CJ in *Watson* should be followed without deviation (subject, it is submitted, to reference to affirmation in a case in which one or more jurors have affirmed).
5. The judge must avoid putting the jury under any pressure or creating any perception that he is doing so.

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[800] *Arthur* [2013] EWCA Crim 1852; *Malcolm* [2014] EWCA Crim 2508.

[801] [2015] 2 Cr.App.R. 17.

[802] [1988] QB 690, 87 Cr.App.R. 1 CA.

The Watson direction

"Each of you has taken an oath [or made an affirmation] to return a true verdict according to the evidence. No one must be false to that oath [or affirmation] but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes with you into the jury box your individual experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath (or affirmation). That is the way in which agreement is reached. If unhappily [ten of] you cannot reach agreement, you must say so."

21-6 If the jury ultimately cannot reach verdicts

Procedure

1. There may come a time when it is clear that, however much time they are given, the jury will not be able to reach even a majority verdict.
2. If that time comes, what is to happen must be discussed with the advocates in the absence of the jury.
3. Thereafter, the jury should be invited to return to the court room and asked if they have reached any verdicts on the counts or remaining counts upon which at least the required majority has agreed.
4. If there are counts on which they are unable to agree, the jury should be asked whether, if given further time, there is any reasonable prospect of them reaching a verdict/s. The jury should then be asked to retire (probably briefly to an ante-room) to consider this question.
5. In the event that the jury are unable to agree on all/some of the counts they should be discharged from giving verdicts on those counts and thanked for their work.

21-7 Final remarks to the jury

Procedure

1. The judge should always thank the jury for the work that they have done on the case.
2. The judge must not give any indication of his own view of the jury's verdict, particularly if it is adverse.
3. The jury should be reminded although they may now discuss with others their experience of being on a jury and speak about what took place in open court, they must never discuss or reveal what took place in the privacy of their jury room: this being absolutely forbidden by Act of Parliament and, if done, would amount to a contempt of court.[803] See also Chapter 3-1 paragraph 18.

[803] *R. v. Turford, R. v. Saffery, R. v. McGuigan* CACD

22. APPENDIX I

EXAMPLE OF OFFENCE DIRECTIONS, ROUTE TO VERDICTS AND FLOW CHART

Scenario

Prosecution case:

On Friday 10th July an argument developed between D and V in the White Horse public house in the course of which D picked up a pint glass from the bar and struck V on the side of the head with the glass and with such force that it broke causing a serious wound to V's face.

Defence case:

D agrees there was an argument. He says it was started by V who was threatening to strike him. He denies picking up a glass and says he had been drinking and had it in his hand throughout. He says V raised his arm as though he was going to punch him. D lifted his arm in self-defence not realising that he was holding a glass. He says V's wound was caused as the glass broke on impact.

Charges

Count 1: S18 wounding with intent

Count 2: S20 unlawful wounding.

Directions

Written Directions may take a number of forms and it may be appropriate to provide more than one e.g. a narrative direction and route to verdict.

Narrative direction

1. It is agreed that on Friday 10th July D and V were drinking in the White Horse and an argument broke out between them. In the course of the argument V sustained a serious wound to his face.
2. It is agreed that the wound was caused as a pint glass held by D broke against the side of V's face.
3. D faces two alternative counts alleging:

   Count 1

   Wounding with intent, contrary to section 18 Offences against the Person Act 1861.

   Count 2 (the alternative and less serious count)

   Unlawful wounding, contrary to section 20 Offences against the Person Act 1861.

4. In order to prove guilt on Count 1 the prosecution must make you sure that:

   (a) D struck a deliberate blow to V's face.

   (b) The blow caused the V's wound.

(c) D was acting unlawfully i.e. he was not acting in lawful self-defence.

(d) D intended to cause V a really serious injury.

5. In order to prove guilt on Count 2 (the alternative) the prosecution must make you sure that:

   (a) D struck a deliberate blow to V's face.

   (b) The blow caused V's wound.

   (c) D was acting unlawfully i.e. he was not acting in lawful self-defence.

   (d) D realised he might cause him some injury.

6. Explaining the offences:

   (a) A Deliberate Blow

   The prosecution must make you sure that the wound was caused by a deliberate blow. The defence say there was no deliberate blow; they say D raised his arm to fend off a blow from V.

   If you are not sure there was a deliberate blow you would find D not guilty of both Count 1 and Count 2.

   If you are sure there was a deliberate blow you will have to go on to consider self-defence and the issue of intention.

   (b) Self Defence

   (i) If a man is attacked or believes he is about to be attacked he is entitled to use reasonable force to defend himself and if he does so he is acting in lawful self-defence.

   (ii) Because it is for the prosecution to prove the case against D it is for the prosecution to prove that he was not acting in lawful self-defence.

   (iii) If you are sure that D was the aggressor and did not believe he was about to be attacked by V then self-defence does not arise; he was acting unlawfully.

   (iv) If you are sure the blow struck by D was deliberate but that this was or may have been because he believed that V was about to strike him and that he needed to defend himself then you must go on to consider whether his response was reasonable.

   (v) When you are considering this, if you think that what D did was no more than he thought was necessary in the light of the circumstances as he believed them to be, that would provide strong support for the view that what he did was reasonable.

   (vi) Your decision whether D knew he had a glass in his hand when he struck V may help you to decide whether D was or may have been acting in lawful self-defence.

   (vii) If you decide that D was or may have been acting in lawful self-defence you will find him not guilty of both Count 1 and Count 2.

   (viii) If you are sure that D was not acting in lawful self-defence you must go on to consider his intent at the time that he struck V with the glass.

(c) An intention to cause a really serious injury (Count 1)

The words on the indictment "intending to cause grievous bodily harm" mean that the prosecution must make you sure that at the time D delivered the blow he meant to cause a really serious injury. A really serious injury does not have a legal definition. It does not have to be life threatening it but must be an injury which you regard as really serious.

This is not a case where it is suggested there was a plan to cause serious injury: any intention must have arisen very shortly before or as the blow or blows were being struck.

Factors that will be relevant to your decision may include; where the blow was aimed and whether D realised he had a glass in his hand.

(d) Realising he might cause some injury (Count 2)

The prosecution do not have to prove an intention to cause an injury but they do have to prove that D realised that striking V with the glass might cause some injury. This does not have to be serious; any injury, e.g. a bruise, would be sufficient.

(i) If you are sure that D struck a deliberate blow, that it was not in lawful self-defence and that he intended to cause a really serious injury your verdict will be guilty of Count 1 and you will not consider Count 2.

(ii) If you are not sure that D is guilty on Count 1 you will return a verdict of not guilty on that count and go on to consider the alternative of Count 2.

(iii) If you sure that D struck V deliberately and that when he did so he was not acting in lawful self-defence and that when he struck him he realised that he might cause some injury your verdict will be guilty of Count 2; if you are not sure about any of these things your verdict will be not guilty.

Route to Verdict – see over:

Route to Verdict

It is agreed that V sustained a wound and that this was caused when a pint glass held by D broke against the side of V's face.

Questions for Verdicts

Question 1

Are we sure that D struck V deliberately?

- If your answer is "No" your verdict will be one of Not Guilty on Count 1 and Count 2.
- If your answer is "Yes", go on to Question 2.

Question 2

Are we sure that when D struck V he was not acting in lawful self-defence?

- If your answer is "No" your verdict will be one of Not Guilty on Count 1 and Count 2
- If your answer is "Yes", go on to Question 3.

Question 3

Are we sure that when D struck V he intended to cause a really serious injury?

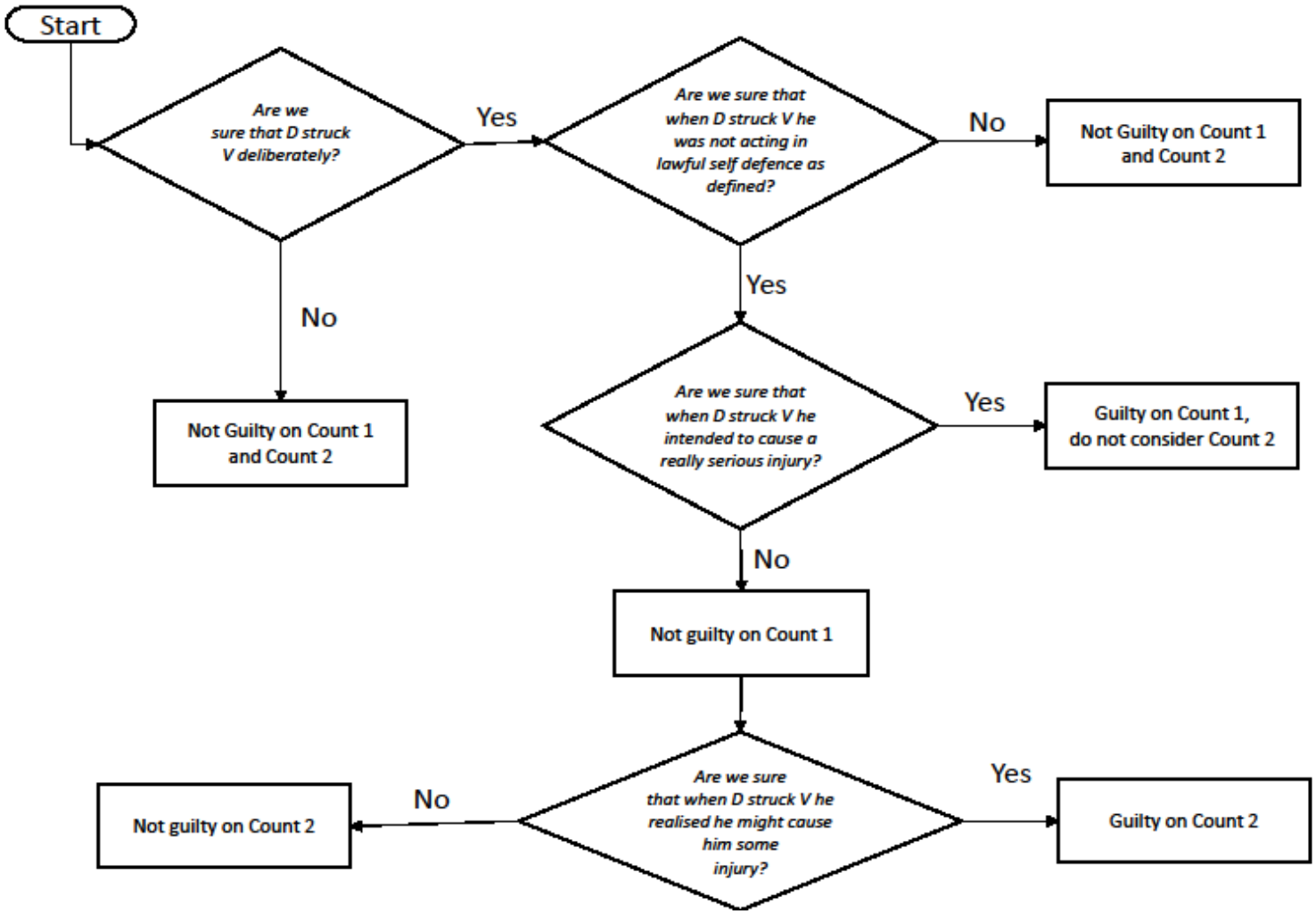
- If your answer is "No" your verdict will be Not Guilty on Count 1 and you must go on to consider Question 4.
- If your answer is "Yes" your verdict will be Guilty on Count 1 and you will not consider Count 2.

Question 4

Are we sure that when D struck V he realised he might cause him some injury?

- If your answer is "No" your verdict will be one of Not Guilty on Count 2.
- If your answer is "Yes" your verdict will be one of Guilty to Count 2.

Flow Chart


Start
Are we sure that D struck V deliberately?
Yes
Are we sure that when D struck V he was not acting in lawful self defence as defined?
No
Not Guilty on Count 1 and Count 2
No
Not Guilty on Count 1 and Count 2
Yes
Are we sure that when D struck V he intended to cause a really serious injury?
Yes
Guilty on Count 1, do not consider Count 2
No
Not guilty on Count 1
Are we sure that when D struck V he realised he might cause him some injury?
Yes
Guilty on Count 2
No
Not guilty on Count 2

23. APPENDIX II

SAMPLE JURY QUESTIONNAIRE

The following questionnaire incorporates examples which have been produced from a number of court centres. It is provided as an example only. The questionnaire created for any particular case will need to be tailored to its location, subject matter and length. It is a matter for the judge, with the assistance of the advocates, to craft a questionnaire suitable for the case which is about to start.

JUROR QUESTIONNAIRE

You will be required to sit on this case up to the week ending Friday *[insert date]*. You will be required between *[insert time]* and *[insert time]* each weekday. Please take account of the time you will need to get to and from court when deciding whether you will have difficulty in sitting on this trial.

1. **Please read and consider each question carefully.**
2. **Please answer every question. If you need to check information with family, friends, employers, etc., please do so before answering.**
3. **If the answer to any question is "Yes", please <u>give details in the box provided.</u>**
4. **Please hand your completed questionnaire to the usher.**
5. **WHEN ANSWERING PLEASE USE BLOCK CAPITALS.**

<table>
<tr><td>JUROR NAME:</td><td colspan="2"></td></tr>
<tr><td>QUESTION</td><td colspan="2">ANSWER
Please circle your answer</td></tr>
<tr><td>1. Do you know or recognise [insert name] who is the defendant in this case? Do you know any members of his family?</td><td>YES</td><td>NO</td></tr>
<tr><td colspan="3">If you answered YES, please provide details.</td></tr>
<tr><td>2. Do you or any members of your family or close friends know any of the following people associated with the case? [insert list of names here]</td><td>YES</td><td>NO</td></tr>
<tr><td colspan="3">If you answered YES, please provide details.</td></tr>
</table>

3. Have you or any members of your family or close friends ever worked for, had any business with or any other personal connection to *[insert organisation]* located at *[insert address]?*	YES	NO
If you answered YES, please provide details.		
4. Have you booked and paid for a holiday to be taken at any time between now and the estimated end of the trial?	YES	NO
If you answered YES, please provide dates and details. Please be ready to provide document(s) to support this. If you do not have documents with you, you will be asked to provide them when you next come to court.		
5. Do you have any medical condition which requires inpatient treatment or regular outpatient appointments or visits to your doctor?	YES	NO
If you answered YES, please provide details and dates (if known):		
6. Are you caring for a young child or a sick or elderly relative **and** cannot arrange this to be covered by others during the time you are needed at court?	YES	NO
If you answered YES, please provide details:		

7. Is there anything exceptional about your work, whether employed or self-employed, or in regard to any educational course being undertaken, such as examinations, which would make it impossible for you to sit on this jury?	YES	NO
If you answered YES, please provide details and dates (if known):		
8. This case will involve reading a number of documents. They will be explained to you by the advocates and the judge. Do you have difficulty reading because English is not your first language, or for any other reason?	YES	NO
If you answered YES, please provide details:		
9. Do you use English as a second language, and are you concerned for this or any other reason that you will be unable to keep up with the evidence?	YES	NO
If you answered YES, please provide details:		
10. Do you have problems with reading or watching TV screens for any length of time? *[Also, where the evidence is presented in colour coded documents or diagrams]* Are you colour blind?	YES	NO
If you answered YES, please provide details:		

11. Are you aware of any other factor that could prevent you from serving as a juror on this case, or is there any other information which you think the court would find helpful in deciding whether you could serve as a juror on this case?	YES	NO
If you answered YES, please provide full details:		