SWEET & MAXWELL

Issue 6 26 July 2019

Archbold Review

Cases in Brief

Evidence—intermediary—reference to in cross-examination and co-defendant's speech

MAHOMUD [2019] EWCA Crim 667; 3 April 2019

M was convicted of murder with co-defendants after running a cut-throat defence at a trial at which he was granted an intermediary for the whole trial. He appealed on grounds including that counsel for G, one of the co-defendants, had repeatedly sought to undermine the need for an intermediary, adducing from the co-defendants that M was considered the brightest of them, and suggesting that use of the intermediary was a smokescreen to shield M from cross-examination and a means of misrepresenting himself to the jury. He also complained that the judge's summing-up failed to adequately address these issues.

(1) In considering the grounds, it was necessary to take note of the role of an intermediary. It was not to provide expert or professional opinion on the level of cognitive skills or intellectual functioning of a defendant or witness (the intermediary in M's case had correctly declined to assess M's IQ or emotional issues, as she had been invited to do by M's solicitors). If evidence of cognitive skills or intellectual functioning were both relevant and admissible, it should come from a qualified expert. No such evidence was called. Thus, there was no evidence of the appellant's intellectual functioning, other than the jury's assessment of the appellant and the evidence of his co-accused. M suggested that they did not know him well enough or were not expert enough to comment upon it. On the contrary, they certainly knew him well enough to comment on his general level of functioning. That an intermediary had been granted carried with it no implications as to the level of M's intellectual functioning. The only implication was that he may need assistance in communicating and participating.

(2) In a cut-throat defence, it was often the case that grave allegations were made by one accused against another. M had alleged that G was a murderer. It was the duty of G's counsel to do his best to challenge the prosecution case and to undermine that allegation. He was, therefore, bound to attempt to undermine the credibility of M. This included challenging the provision of an intermediary for him and linking that to his level of intellectual functioning. G's counsel should not have laboured the point, nor, in his closing speech, contravened the clear directions given by the judge on further references to the intermediary (made on the invitation of M's counsel during a break). However, he was entitled to suggest that M was sheltered from more robust questioning by the provision of an intermediary. That was a standard argument advanced and indeed the Court of Appeal had more than once said that a judge should direct the jury to the effect that a special measure may mean that an advocate may not ask questions of the witness in the usual form. G's counsel was also entitled to ask questions about the level of M's functioning, relevant to the issue of his credibility.

(3) The judge's directions corrected any wrong impression as to how the jury should approach the role of an intermediary. Balancing the interests of all the parties, the judge could not properly have gone any further. Thus, while G's counsel crossed a line, in doing so he did not cause M the kind of prejudice that would call into question the safety of the conviction.

Homicide—gross negligence manslaughter—foresight of a serious and obvious risk of death—whether requires proof of factually foreseeable risk of death for specific victim—class in respect of whom duty owed—attribution of knowledge of facts giving rise to membership of class by company to "owner"

KUDDUS [2019] EWCA Crim 837; 16 May 2019

K was the sole director and effective owner a take-away food company, operating from an Indian restaurant in which he

CONTENTS

was a chef and his co-accused, R (who also worked there), managed the company. A friend of the victim ordered a meal through a website, entering the words "nuts, prawns" in a comment box, as the victim was believed to have a mild allergy to those ingredients. The victim ingested peanut proteins and died as a result of a severe allergic reaction. Both R and K were convicted of manslaughter. R saw the comment in the print-out supplied to the company, but not K. There was evidence that the systems in the restaurant were inadequate, with the result that the complete range of hazards was not fully identified in the minds and practices of the staff.

(1) K argued that the jury should have been directed that they must find as a fact that there was a serious and obvious risk that the breach of duty would cause this specific victim to die (the medical evidence was that the severity of her reaction could not have been predicted from her previous medical history). The court rejected this ground of appeal – to focus on the particular circumstances of this specific victim was to misunderstand what had to be established to prove gross negligence manslaughter. There was no requirement to prove a serious and obvious risk of death for the specific victim who died. The question was whether the defendants' breach gave rise (as an objective fact) to a serious and obvious risk of death to the class of people to whom the defendant owed a duty, in this case, members of the class of nut allergy sufferers. The individual idiosyncrasies of individuals at potential risk, on the assumption that they would be unknown to the defendant, could not determine the question whether there was, in fact, a serious and obvious risk of death.

(2) So understood, it was not entirely clear whether serious and obvious risk of death was in issue in this case: *if* the factual existence of a serious and obvious risk of death was in issue in future cases (which in rare cases it may be), that should be clearly identified and, if not conceded, was a necessary fact that must be proved.

(3) The summing up treated giving notice of allergy to the restaurant or the business as sufficient to demonstrate notice to both R and to K. There was no evidence that K was notified about the terms of the order. That K was the sole director of the company placed upon him the duty of ensuring that appropriate systems were in place to avoid the risk that a customer with a declared allergy was not served food which contained the allergen. That was the corresponding duty to the breached duty in *Rose* [2017] EWCA Crim 1168, [2018] Q.B. 328 of conducting an appropriate examination. In both cases, the risk, however, was the risk that a customer/patient might present with the underlying condition which the system should have been designed to prevent, rather than the obvious and serious risk of death. If a reasonable person possessed of the knowledge available to the defendant would have foreseen only a chance that the risk of death might arise, that was not enough to justify a conviction for gross negligence manslaughter. Armed with notice that an individual fell into the class the system was designed to protect, the reasonable restaurateur or optometrist would have foreseen an obvious and serious risk of death, but in neither case was there, in fact, such notice.

(4) This was not to say that the responsibilities of the owner of a restaurant could be ignored, simply by ensuring that he or she was unsighted on specific orders and allergy requirements. In addition to liability in negligence, unless an appropriate system was in place and enforced, the owner or manager would also be guilty of regulatory offences (K had pleaded guilty to breaches of the Health and Safety at Work etc Act 1974 and the Food Safety and Hygiene (England) Regulations 2013).

In addition to *Rose*, the court considered *Zaman* [2017] EWCA Crim 1783; *Winterton* [2018] EWCA Crim 2435, [2019] Crim. L.R. 336; *Adomako* [1995] 1 AC 171; *SAAMCO v York Montagu* [1997] AC 191; *Gurpal Singh* [1999] Crim L.R. 582; *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr.App.R. 21; *Rudling* [2016] EWCA Crim 741; and *Sellu* [2016] EWCA Crim 1716, [2017] 1 Cr.App.R. 24.

Jury—breaks during deliberation for booked holidays—approach—assistance to jurors—fact-specific nature—factors to be taken into account

WOODWARD AND OTHERS [2019] EWCA Crim 1002; 13 June 2017

A ten-handed trial for murder and associated offences with an original time estimate of eight to ten weeks overran into the summer period during which jurors had pre-booked holidays (the jury having been selected on the basis of the original time estimate in relation to holidays). The judge allowed a break of three weeks for jurors' holidays, after they had been deliberating for about two days. During the break, attempts were made to draw up summaries of the prosecution case and those of each defendant, but they proved fruitless. On their return, the judge referred the jury to various documents they had available and directed them to send a note if they needed reminding of any of the evidence. After their return, and at the request of the jury, the judge agreed to a further break of three weeks (after a further five days of jury deliberation). After returning the second time, there were no further directions and the jury delivered mixed verdicts after another two days.

(1) Jury service was a public duty which inevitably involved disruption to the lives of those called to serve. Jurors were entitled to consideration in relation to their individual needs, which included recognition of the desirability of not cancelling booked holidays. However, there would be cases (particularly long cases) where the convenience and even the needs of the jury must cede to the wider interest of trying cases in accordance with the overriding objective. The court adverted to the rules allowing some compensation for missed holidays. The constraints on those were plain, but the system may provide an alternative to letting the jury disperse for holidays.

(2) The provision of summaries by the parties proved unworkable, and such guidance would be better given by the judge, who was entitled to ask for and receive assistance from the parties.

(3) The real issue was whether the second break should have been allowed. There was no over-arching principle governing such a break in deliberations. In each case, a judge would have to consider whether the time has come when the case should be withdrawn from a jury. The length of breaks would be a factor; but it was a fact-sensitive question for the trial judge.

(4) It was not necessary for the judge to have reminded the jury about the documents after the second break, but it would have been prudent to remind them that they could ask to be reminded of the evidence.

(5) The court considered whether, overall, the conduct of the trial made the convictions unsafe, considering the American

case of *People v Santamaria* (1991) 229 Cal App 3d 272 and *Kellard, Dwyer* and *Wright* [1995] 2 Cr.App.R. 134; *Rember and Richards* [2004] EWCA Crim 2633 and *A, Heppenstall and Potter* [2007] EWCA Crim 2485. There was no general rule which determined that a particular length of time that a jury had been dispersed during deliberations necessarily rendered a trial unfair and a conviction unsafe. Material considerations included (a) the quality of the summing up (*A, Heppenstall* [33], [42], *Kellard*, 150A-C). The summing up in this case was clear and provided considerable assistance; (b) the extent and quality of the materials available to the jury on retirement; (c) the gap in the jury's consideration between the summing up and the final verdicts. The longer the gap, the greater the risk. In this case, the cumulative period was considerable and unsatisfactory; (d) it may be relevant whether an application had been made to discharge the jury at the time. There had been an application in this case, so it was not an appeal based on a matter not foreshadowed at trial. On the other hand, judges must be prepared to make robust case management decisions and expect such decisions to be upheld on appeal; (e) the presence or absence of indications that the jury were unable to discharge their functions as a result of the length of the trial or retirement; and (f) the verdicts themselves. Did they suggest, for example, that the jury were assessing the evidence in relation to each defendant or were unable to do so?
(6) Recognising that the second break in the jury deliberations was very far from satisfactory, the court nonetheless did not consider that it resulted in a process that was unfair to the appellants, and the convictions were safe.

Road traffic—Road Traffic Offenders Act 1988 s.1(1)(c), s.2—notice of intending prosecution not served within 14 days—reasonable due diligence

PLEDGE [2019] EWCA Crim 912; 6 June 2019

P, convicted of dangerous driving, was not warned at the time of the offence, and did not receive the notice of intended prosecution within 14 days as required by the Road Traffic Offenders Act 1988 s.1(1)(c). The issue on his appeal was whether the bar to conviction was lifted by s.2, because his address could not have been ascertained in time with reasonable due diligence. Due diligence was a matter for the judge, not the jury: *Bolkis* (1934) 24 Cr.App.R. 19. The police civilian employee who observed the offence had found an address for P via a Google search for his company name, which was close to the location of his observation of the offence, and had spoken to him. The notice of intending prosecution was then sent to the wrong postal address, in a distant town, being that recorded on the DVLA database, from which the PNC database was compiled. The Recorder was entitled to conclude that the prosecution acted with reasonable diligence. While the police employee had made additional enquiries, which revealed the location of the company, he had then used the usual route of obtaining the address from the PNC, which provided the erroneous address. The employee gave evidence that it was not unusual for the registered address of a vehicle to be located somewhere not automatically associated with the keeper. It had been unnecessary for him to send copies of the notice on a speculative basis to addresses which appeared on the website of the company. There was no evidence that, save exceptionally, the records obtained from the DVLA were inaccurate. In those circumstances, the police were entitled to conclude that the information the DVLA provided was accurate. Knowledge of a different address on a website for a company did not materially raise the possibility that the DVLA address was wrong.

Trial—submission of no case—role of judge

BUSH AND SCOULER [2019] EWCA Crim 29; 30 January 2019

It was important that a trial judge in dismissing charges or upholding a submission of no case to answer did not usurp the function of the jury. But, (endorsing the approach in *R (Inland Revenue Commissioners) v Crown Court at Kingston* [2001] EWHC Admin 581, [2001] 4 All E.R. 721 in relation to an application for transferred fraud charges to be dismissed by a Crown Court judge under the Criminal Justice Act 1987, repealed), where evidence was capable of more than one reasonable interpretation, a trial judge was not obliged to proceed on the basis that every possible adverse inference must be drawn against a defendant, especially where he or she considered the totality of the evidence pointed in the opposite direction. There may be a fine balance between withdrawing a case from a jury and thereby usurping their function and leaving a case to the jury where the evidence was barely sufficient. Hence the margin of judgement that the Court of Appeal allowed a trial judge who has heard the evidence and seen the witnesses.

SENTENCING CASE

CHALL AND OTHERS [2019] EWCA CRIM 865, 16 May 2019

Severe psychological harm

These conjoined appeals raised the following issues concerning the correct approach to assessing whether the victim of a crime has suffered severe psychological harm. (1) Must the court obtain expert evidence before making a finding of severe psychological harm? (2) If not, on what evidence can it act? (3) Can the court make such a finding on the basis only of the contents of a Victim Personal Statement (VPS)?
The Court stated that when assessing whether a victim has suffered severe psychological harm/the degree of psychological harm, a judge is required to make a judicial assessment of the factual impact of the offence upon the victim, not a medical judgment. Expert evidence may assist in this, but is not always essential.
The Court was not persuaded that a checklist to assist the assessment of psychological harm would be necessary, appropriate, or workable. The sentencing judge will act upon evidence and will give reasons for their decision. If there is insufficient foundation for the judge's assessment, the point can be raised on appeal. The relevant evidence as to the effect of the offence on the victim will often come, and may exclusively come, from the VPS, and the court may act on this. If judges feel that a formal medical diagnosis is necessary, they must raise the matter with counsel and take steps to obtain any necessary expert evidence. Important principles as to the operation of the VPS scheme are set out in the case of Perkins [2013] 2 Cr.App.R (S) 72 and Part VII F of the Criminal Practice Direction. In cases where there is no VPS, it must not be assumed that this indicates an absence of harm. Whether there is evidence of psychological harm and, if so, of its degree, will depend on the facts and circumstances of the case.

The Court went on to make comments regarding practical features of the VPS scheme. First, it was unsatisfactory that a VPS may not always provide up to date information. Paragraph F.2 of the Practice Direction permits the serving of a further VPS any time prior to the disposal of the case. Secondly, the intensely personal nature of a VPS may sometimes call for caution as to whether the harm suffered by the victim may, unintentionally, have been overstated. The judge must make a dispassionate assessment. Whilst the defence are entitled to cross-examine the author of a VPS, that it is a right which will only very rarely be exercised. Thirdly, a VPS must comply with the Practice Direction and those involved in advising victims must ensure that the limitations set out in the Practice Direction are communicated. Fourthly, the requirement in the Practice Direction that a VPS be served "in good time" must be observed.

The Court summarised their views on the common issues raised in the cases as follows: (1) Expert evidence is not an essential precondition of a finding that a victim has suffered severe psychological harm. (2) A judge may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a VPS, and may rely on their observation of the victim whilst giving evidence. (3) Whether a VPS provides evidence which is sufficient for a finding of severe psychological harm depends on the circumstances of the particular case and the contents of the VPS. (4) A VPS must comply with the requirements of the Criminal Practice Direction and be served on the defence in sufficient time to enable them to consider its contents and decide how to address them. If late service gives rise to genuine problems for the defence, an application for an adjournment can be made.

Features

Environmental crime at Ambridge

By Stephen Tromans QC[1]

The strapline of "The Archers" used to be "an everyday story of country folk". If that's right, to judge from recent story-lines, such folk are not above some quite serious environmental crime. One example is the case of Brian Aldridge, who in 2019 pleaded guilty in Borchester Magistrates' court to two offences under reg.12(1)(b) of the Environmental Permitting (England and Wales) Regulations 2010: one of causing or knowingly permitting an unpermitted discharge into the River Am and the other of causing or knowingly permitting a "groundwater activity" by polluting the groundwater. For these offences he was fined £120,000.

As devotees will know, Aldridge was a farmer in a fairly big way. About 40 years ago he took money from some dubious-sounding people to let them dispose of some canisters of waste into a hollow formed by a drained pond which he was filling in order to level a field.[2] The drums turned out to contain a highly polluting chemical called TCE,[3] and in 2018 the canisters rusted through: the TCE got out, polluting the ground-water and the river, causing serious damage to aquatic wildlife. The contamination was discovered in January 2018, by local eco-warrior Kirsty Miller spotting dead fish, whilst on a wild swim in the Am. Subsequently, contamination of groundwater was picked up in June 2018 by Environment Agency testing. At first Aldridge lied about it, but eventually told the truth to his family, though not the Agency, and had to spend a lot of money on remedial works, as well as being prosecuted. He considered pleading not guilty but decided, in the end, to plead guilty to both counts – polluting the Am and polluting the groundwater. The case prompts some reflections on the strict liability nature of the offence under which Aldridge was convicted.

Possibly the only criminal environmental cases which a law student will encounter are the two House of Lords authorities dealing with the approach to offences of strict liability: *Alphacell Ltd. v Woodward*[4] and *Environment Agency v Empress Car Co. (Abertillery) Ltd.*[5] *Alphacell* was an appeal from a majority decision of an extremely strong Divisional Court (Lord Parker CJ, Widgery LJ and Bridge J (dissenting)) which had dismissed an appeal by case stated against the conviction of the appellant for having caused polluting matter to enter the River Irwell, contrary to s.2(1) of the Rivers (Prevention of Pollution) Act 1951. The section created the alternative offences of causing or knowingly permitting the entry of the polluting matter into rivers and other "controlled waters". The appellant manufactured paper. Polluting liquid from the process passed into tanks located near a river. Pumps should have prevented the liquid in the tanks rising to a level at which it would overflow into the river. As a result of blockage by vegetation, the pumps failed and the liquid overflowed through a channel into the river. The essence of the appellant's argument was that a person could not be said to cause polluting matter to enter a stream if they were ignorant of the entry and had not been negligent in any respect. This was buttressed by reliance on principles of interpretation, which it was argued told against finding that an "absolute offence" had been created in the absence of very clear language. The respondent, represented by Iain Glidewell QC, as he then was, put it in terms that:

> if a factory owner does an act or creates a set of circumstances which result in the discharge of polluting matter into the river without any intervening act over which he has no control, then he causes that discharge.

1 39 Essex Chambers.

2 I am most grateful to Professor John Spencer, QC, an Archers listener, for providing an initial summary of the facts, and to Simon Tilling, partner with Burges Salmon and adviser on legal issues to the scriptwriters, for checking and confirming its accuracy.

3 The same solvent chemical which polluted the borehole of Cambridge Water Company in the 1990s, leading to the famous tort case of *Cambridge Water Company Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264.

4 [1972] AC 824.

5 [1999] 2 AC 22.

The "causing" was a series of acts: installing plant and equipment in a place where it could overflow into the river; carrying on a manufacturing business which produced the polluting matter; and the fact that the pumps which should have carried away the polluting matter and preventing its overflow into the river had failed to function. The respondent preferred to describe the offence as "strict" rather than "absolute", drawing an analogy with liability in tort under the rule in *Rylands v Fletcher*.[6]

All members of the House of Lords reached the same conclusion, but by different, and arguably over-complex, processes of reasoning. Lord Wilberforce interpreted "causing" as involving some active operation or chain or operations involving as the result of the pollution of the water. It was to be given a common sense meaning and the introduction of legal refinements was to be deprecated: as it was not a case where the act of a third party was concerned, it was in his Lordship's view a comparatively simple case where the appellants by their deliberately conducting their industrial operation had caused the polluting matter to enter the river. Viscount Dilhorne, after a fuller analysis of the facts, reached the same conclusion: it was because of the acts of the appellants in operating their works that the pollution had occurred. His Lordship rejected the argument that Parliament had intended that an essential ingredient of the offence was that the entry be intentional – this would impose a burden of proof which could seldom be discharged. The intentional element related to the operation of the factory, not the entry of the polluting matter. Lord Pearson could see no other possible cause of the overflow than the positive activities of the appellants; similarly, he rejected the need for intention to discharge or knowledge of the discharge. Lord Cross of Chelsea was initially attracted by the dissenting reasoning of Bridge J, but ultimately could not accept the argument that the cause was not the acts of the appellants but the brambles which had been found wrapped around the vital parts of the pump. In his opinion, the appellants could only escape liability:

> … if they proved that the overflow of the tank had been brought about by some other event which could fairly be regarded as being beyond their ability to foresee or control.[7]

Lord Salmon stressed that the cause of an event was capable of being ascertained by ordinary common sense rather than metaphysical inquiry.[8] He observed, correctly, that causing had nothing to do with intentionality or culpability: someone might deliberately smash a porcelain vase, or might handle it negligently so that it broke, or might without negligence stumble against it and smash it: in each case they would have caused its destruction. In this case there was causation by the appellants' active operation of their plant. It was Lord Salmon who was most explicit about the importance of environmental protection as providing policy support for an interpretation which did not require intention or negligence. If

> …this appeal succeeded and it were held to be the law that no conviction could be obtained under the Act of 1951 unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognised that as a matter of public policy this would be most unfortunate. Hence section 2 (1) (a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it.

What was clear from each speech is a rejection of the argument that knowledge of the polluting entry or intention to bring it about was required. Further, fault in the sense of negligence was not relevant. The magistrates, as set out in the case stated, had originally convicted on the basis that the appellants had caused the polluting matter to enter the river:

> …by their failure to ensure that the apparatus was maintained in a satisfactory condition to do the job for which it was provided.

This was not the basis of the House of Lords' reasoning: criminal liability rested not on anything the appellants had left undone or neglected, but on what they *had* done in establishing and running their operations.

Some members of the House of Lords regarded the categorisation of the offence as "acts which are not criminal in any real sense"[9] as supportive of their approach.[10] This is an unfortunate rationalisation. As Lord Salmon's porcelain vase analogy makes clear, the act of causing might range from wicked and wilful destruction to a moment's innocent inattention. The same is, of course, true of environmental offences, which at their worst (for example mass fly tipping) might be every bit as culpable as crimes against the person or property, or which might be entirely accidental (for example a leak from a defective pipe which could not have reasonably been detected). One issue with environmental offences is that they may result from lack of adequate investment in proper systems, maintenance or human resources. In such cases the deterrent effect of the penalty becomes particularly important in convincing those running companies that it is in their interests to make such investment. Historically, regarding environmental offences as not "proper crime" has led to inadequate – indeed sometimes derisory – fines being imposed. This is discussed further below.

The other leading case is *Empress Cars*. This was arguably a less clear-cut case than *Alphacell*, because the act of another person was also involved. The appellants kept a diesel tank in a yard. The yard drained directly into the river. Any spillage from the tank should have been contained within the bund around it, but for reasons of convenience the appellants had connected the tap from the tank to a hose which was draped over the bund wall, largely negating the purpose of the bund. Someone, possibly a malicious intruder, turned on the tap (which had no lock) with the result that a large quantity of diesel oil entered the river. The appellant was convicted by the magistrates of the offence of causing poisonous, noxious or polluting matter to enter the river, contrary to s.85 of the Water Resources Act 1991. They ap-

6 [1972] AC 824 at p. 832.
7 Ibid. p. 847.
8 Ibid. p. 847.

9 See *Sweet v Parsley* [1970] AC 132, 149, 163; *Sherras v De Rutzen* [1985] 1 QB 918, 922.
10 See Viscount Dilhorne at p. 839; Lord Salmon at p. 848. Lord Pearson categorised the offence as in the nature of a public nuisance, as a recognised exception to the general requirement for *mens rea*: p. 842-3.

pealed unsuccessfully to the Crown Court, and then on the case stated to the Divisional Court, and then to the House of Lords. The legal position was complicated by the fact that since *Alphacell* there had been a series of conflicting authorities on the interpretation of causing.

Unlike *Alphacell*, there was a single main judgment delivered by Lord Hoffmann, with whom three others (Lords Browne-Wilkinson, Lloyd and Nolan) agreed, Lord Clyde giving a separate judgment. Lord Hoffmann first reiterated that, while causing something did require some positive act on the defendant's part, it need not have been the *immediate* cause of the pollution. Just as in *Alphacell* maintaining a paper factory and its associated tanks was doing something, so maintaining a tank full of diesel was doing something: it was wrong to ascribe the cause of the pollution to something else, such as a blockage, or the laws of gravity. Lord Hoffmann also took up and ran with the views expressed in *Alphacell* that causation in this context was a commonsense issue. An event could have many causes and all that mattered was the question of whether the defendant caused the pollution. The fact that some other person or phenomenon might also be said to have caused it is not relevant.

Where Lord Hoffmann's analysis went beyond what was decided in *Alphacell* was his consideration of the intervention of third parties. Here he made the point that there is an initial question of law to be asked, which relates to the content of the rule imposing liability: for example, does the rule rest on a duty to take certain precautions (as much of health and safety law does)? In the case of the water pollution offence provisions, it was clear to Lord Hoffmann that liability was strict and that doing something to create a situation in which a third party did something deliberate that gave rise to pollution could itself constitute an offence. A striking example, discussed by Lord Hoffmann, was *National Rivers Authority v Yorkshire Water Services Ltd*,[11] in which the company's conviction for having caused pollution to enter a river was upheld in a case where an unknown person had discharged solvent into the sewerage system operated by the company. At the same time, however, Lord Hoffmann pointed out that liability is not absolute, in the sense that it is not sufficient to show that pollution emanated from the defendant's land: it must be shown that they did something to cause it. This question does not turn on whether the defendant was negligent or whether the act of the third party was foreseeable. As Lord Hoffmann pithily put it: "People often cause things which they could not have foreseen."[12] In trying the find the appropriate boundary for that principle, Lord Hoffmann lighted on a distinction between:

> … acts and events which, although not foreseeable in the particular case, are in general a normal and familiar fact of life, and acts or events which are abnormal and extraordinary.[13]

Into the category of normal facts of life fell things like leaky lagoons and pipes, leaves falling off trees and blocking pumps, people putting unlawful substances into sewers, and "ordinary vandalism". On the other hand, a terrorist outrage might be regarded as "abnormal and extraordinary", as might some extreme natural catastrophe. The distinction was:

> …one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.[14]

Lord Clyde gave a concurring speech, making clear that the question was not one of foreseeability or fault, but rather the unnatural, extraordinary and unusual nature of the event.

The approach of Lord Hoffmann has been controversial with academic criminal lawyers, particularly as it has been seen as replacing a principled approach based on causation with an ad hoc approach of purposive statutory interpretation: as put by Sullivan and Simester,[15] presenting:

> … a real danger that the underlying general principles of causation are becoming abandoned in favour of ad hoc resolutions to causal questions that are customised to reach a policy-driven outcome.

However, Sullivan and Simester acknowledge that on the facts of *Empress Cars*, the defendant company bore a degree of responsibility (causal or otherwise) for the pollution because its oil storage facilities, though lawful, were well below state of the art and vulnerable to the kind of vandalism that occurred, so that the company was at least responsible for creating the risk, and no doubt the purpose and scope of the environmental legislation was served by extending liability.

Lord Hoffmann's approach does not seem to have given rise to a great deal of controversy among environmental lawyers, or indeed to have generated much case law. It was applied to a spill of cream from a dairy in *Express Ltd v. Environment Agency*.[16] In the context of causing death by driving as an unlicensed, disqualified or uninsured driver the Supreme Court in *Hughes*[17] rejected a simple legally causative approach such that that there must be something open to a proper criticism of the driving of the defendant, beyond the mere presence of the vehicle on the road which contributed in some more than minimal way to the death. But in *Natural England v Day*[18] the Court of Appeal, *obiter*, rejected an argument that the *Hughes* approach be applied to strict liability offences of causing to be carried out operations likely to damage a site of special scientific interest and said it saw strong arguments for following the *Empress Cars* approach in that context.[19] The facts of *Day* are worthy of another Archers' plotline. Day was a wealthy businessman who owned a woodland, part of which had been designated as a Site of Special Scientific Interest (SSSI). He wanted to operate a commercial pheasant shoot and under his estate manager's direction, a track was constructed wide enough to take vehicles. As a result, large areas were stripped of trees and flora, exposing large expanses of soil and rock. After Natural England discovered the damage and the works had ceased, Day tried to use his wealth to intimidate the local community and to avoid criminal proceedings being brought against him. He then, presumably in mitigation, tried to argue that something more than ripping out trees and vegetation was needed to justify a finding of causing damage to a SSSI.

11 [1995] 1 AC 444.
12 [1999] AC 22, p. 34.
13 [1999] AC 22, p. 34.
14 [1999] AC 22, p. 36.
15 G.R. Sullivan and A.P. Simester, "Causation without limits: causing death while driving without a licence, while disqualified, or without insurance" [2012] Crim L.R 753. See also Jo Miles, "Black letter law, with a hint of grey" [2008] CLJ 17. The issues are helpfully summarised from an environmental law perspective by Julie Adshead, "Doing justice to the environment" [2013] J. Crim. L. 215.
16 [2004] EWHC 1710; [2005] Env L.R 7.
17 [2013] UKSC 56; [2013] 1 W.L.R 2461.
18 [2014] EWCA Crim 2683; [2015] 1 Cr.App.R. (S.) 53; [2015] Env. L.R. 15.
19 Ibid.[23].

Turning to Brian Aldridge, the case seems a straightforward application of *Alphacell*. While the offence under the Environmental Permitting Regulations is causing or knowingly permitting a water discharge or groundwater "activity", this simply recasts within the context of an overarching permitting regime the offences of causing or knowingly permitting the entry of polluting matter under the Acts of 1951 and 1991 considered in *Alphacell* and *Empress Cars*. There was no third party involved: the question was whether Aldridge had done something which had caused[20] the TCE to get into the river and groundwater. Plainly he had, albeit 40 years ago, in burying the drums in his landfill.[21] Whether he intended that the drums would leak, or whether this was foreseeable, or whether he buried them in a negligent manner, are irrelevant. This does not seem an unjust approach. The mischief of the statute is, and always has been, preventing the pollution of water resources. Aldridge had created a situation from which the pollution occurred. If it was necessary for the prosecution to prove *mens rea* or negligence, securing a conviction would be highly problematic and as Lord Salmon put it, pollution would go "unpunished and undeterred". Nor could Aldridge get off by blaming the effects of rust on the drums and gravity on their contents.

The possible harshness of strict liability can be ameliorated by either the decision as to whether to prosecute, pursuant to the enforcement policy of the Environment Agency,[22] or by the penalty imposed on conviction.[23] As mentioned above, the courts have been concerned in recent years as to the overlenient fines imposed in some cases,[24] and there are now mandatory sentencing guidelines[25] which would have been applied in Aldridge's case to give the fine of £120,000. These require account to be taken of culpability, the degree of damage caused, and the scale of the defendant's operations.

In *Aldridge,* no third party intervention occurred. Arguably, it might be said that the combination of lack of fault as per *Alphacell* and the causation approach in *Empress Cars* could give rise to injustice in some cases. In *Empress Cars* it was quite easy to categorise the defendant's conduct as culpable – dangling a hose from an unsecured tap over the bund around the oil tank is not exactly responsible behaviour, as adverted to by Lord Clyde in his speech. However, culpability is not necessary (as is clear from *Yorkshire Water*, where presumably the sewerage company could have done nothing to prevent someone from tipping solvent down the sewer). Lord Hoffmann obviously felt uneasy about the possible imposition of liability in extreme cases, hence his ordinary/extraordinary distinction. Absent such an exception in the law, it could make Aldridge guilty if he lawfully and properly stored weed-killer in his barn 20 miles away from any river and a person with a grudge against the local anglers' group breaks in and steals it, and then uses it deliberately to pollute a river. In the hopefully unlikely event of a prosecution of Aldridge on such facts, the courts would be able presumably to find that this was not a normal fact of life, but an extraordinary and abnormal event. The distinction between *Empress* and *Yorkshire Water* is that, in those cases, the infrastructure or system provided by the defendant was such that the act of the trespasser/solvent discharger would naturally result in the pollution of water, whereas in the case of weed-killer stored in the shed 20 miles from the river there was no such direct risk. The distinction identified by Lord Hoffmann therefore appears capable of being operated to draw sensible distinctions and avoid possible injustice, while ensuring that those whose activities cause pollution bear the consequences.

20 Whether he might also have knowingly permitted is a more complex issue beyond the scope of this article.

21 It might be argued that retrospectivity issues are in play. Certainly, most prosecutions under these provisions relate to recent acts, but what was essentially the same offence was on the statute book at the time Aldridge buried the drums. The offence under the Environmental Permitting Regulations is framed to bite on the discharge or entry of the polluting substance into water. The acts which caused this may – as in Aldridge's case – have occurred many years before. But the offence was not new: causing polluting matter to enter water was an offence long before Aldridge buried the drums and if the pollution had occurred immediately or soon after Aldridge buried them, there would plainly have been an offence committed. In fact, he may also have committed the offence of depositing poisonous waste contrary to either the Deposit of Poisonous Waste Act 1972 or the Control of Pollution Act 1974: see Stephen Tromans, *Contaminated Land* (3rd edition, 2019, Sweet & Maxwell) paras 9-02-9.05. However, there is a further point on which Aldridge may have had a legitimate complaint, in that the penalties applicable under the Environmental Permitting Regime are substantially more severe than under the legislation in place at the time he buried the drums. Article 7 of the ECHR of course precludes the imposition of a heavier penalty than the one applicable at the time that the criminal offence was committed. The problem for Aldridge is that no offence was committed until the TCE entered the river or groundwater.

22 https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy. Accessed 10 May 2019.

23 See Carolyn Abbott, "Friend or foe? Strict liability in environmental licensing regimes" (2004) E.L.M 67.

24 See e.g. *Thames Water Utilities Ltd* [2010] EWCA Crim 202; [2010] 2 Cr.App.R (S) 90.

25 Sentencing Council Environmental Offences Definitive Guideline (effective from 1 July 2014). https://www.sentencingcouncil.org.uk/wp-content/uploads/Environmental-offences-definitive-guideline-Web.pdf. Accessed 10 May 2019.

Prosecuting historic sex offences by children

By Jonathan Rogers[1]

There has been a substantial increase in prosecutions for sex offences which were allegedly committed last century. In such historic cases, the Sexual Offences Act 1956 must be applied, and the courts must recall other rules of substantive law of the day, both in determining liability and in observing maximum sentence levels.

A longstanding concern is the neglect of the time limits in the Sexual Offences Acts of 1956 and 1967 for consensual buggery, indecency with males and underage sexual intercourse with girls between 13-15 years old. In both *Silverwood* [2] and *Coatman*[3], the Court of Appeal bemoaned the continued volume of oversights on this matter.

But our topic here is historic sex offences committed by defendants who were themselves children at the time. The collection of mistakes by counsel and the trial judge in *LDG*[4] suggest that there is particular cause for concern in this area, because both maximum sentencing levels and special rules of substantive law operated differently at various times in relation to very young defendants in the late twentieth century.

1 Jonathan Rogers, Lecturer in Criminal Justice, University of Cambridge.

2 [2015] EWCA Crim 2401.

3 [2017] EWCA Crim 392.

4 [2018] EWCA Crim 2264.

The sentencing error in *LDG*

In *LDG*, the defendant was a man who, when he was eleven years old in the mid-1970s, had indecently assaulted his slightly younger sister, by way of "sexual experimentation" albeit purely on his own part. LDG pleaded guilty to two counts of indecent assault in 2018. There is no indication in the report as to why the complaint was so long delayed. The trial judge found that there had been some penile penetration by LDG and sentenced him to twenty months imprisonment, using contemporary guidelines on rape to assess the gravity of the offence.

LDG appealed against his sentence on the basis that he could not lawfully have been sentenced to any imprisonment at the time of the offences. He succeeded. The Court followed *Forbes*[5] where it was noted that at the same material time, detention was not available for indecent assault by virtue of s.53 of the Children and Young Persons Act 1933, as amended; and borstal training and detention centre orders could not be imposed on children under 14.

The Court concluded (at [22-24]):

> The appellant has committed no further offence of a sexual nature for over 40 years and has been in a number of relationships. We have given careful consideration to whether it would be appropriate to impose a probation order at this stage in substitution for the sentences which we must set aside. But, against the background to which we have referred, we cannot see any need for the kind of guidance that the Probation Service could offer in those circumstances.
>
> In those circumstances, it seems to us that the only realistic outcome is to make the appellant the subject of a short conditional discharge which, in the circumstances, will be six months … We understand that this outcome may come as a shock to the victim of the offences.

It might be noted that the unlawfulness of any term of imprisonment was only noticed by a Complex Case Officer in the Court of Appeal Office.

Oversight of the sexual incapacity of boys under 14

The Complex Case Officer also noticed that at the time of LDG's offences, there was an irrebuttable presumption that boys under 14 years old were incapable of (penetrative) sexual intercourse. This rule was abolished only by s.1 of the Sexual Offences Act 1993. So, the judge should arguably have not reached his sentence of twenty months by "measured reference" to guidelines on rape.

We might go further: the judge should not have found that there had been any penetration, nor should he have been asked to do so. There is no warrant for treating the presumption as irrebuttable at the stage of liability but as something less than irrebuttable when sentencing.

The oversight of the irrebuttable presumption of sexual capacity makes one wonder whether all participants at the trial of LDG also overlooked that the (rebuttable) presumption of *doli incapax* also applied (on all charges) to children under 14 years old at the time of the incident.

Doli incapax

By virtue of the rebuttable presumption of *doli incapax*, the prosecution had to prove that the eleven-year-old LDG knew that his acts were seriously wrong and not merely naughty. The doctrine was only abolished by s.34 of the Crime and Disorder Act 1998, and so still falls to be applied to offences committed by children before that date. As already noted in this journal[6], its continued application to cases from the last century has been overlooked in a number of other cases.

It seems likely that it was overlooked here too, given the volume of material to support its application. The judge found that LDG was struggling with his sexual emotions and had no effective adult supervision. He was brought up solely by his mother, who was sexually active with other men in his presence, thus creating what the court described as a "sexually charged environment". This might have raised an inference that LDG thought that sexual activity was the norm in the family home. Even at school, children were barely taught about relationships and the importance of consent in the 1970s.

Further, the presumption of *doli incapax* did not even require the defendant to adduce any evidence. The Crown had to introduce evidence to rebut the presumption in every case involving a defendant under fourteen. The nature of the evidence required was considered by Lord Lowry in *C v DPP*[7]:

> In order to obtain that kind of evidence, apart from anything the defendant may have said or done, the prosecution has to rely on interviewing the suspect or having him psychiatrically examined (two methods which depend on receiving co-operation) or on evidence from someone who knows the defendant well, such as a teacher…

Lord Lowry suspected that this requirement was often overlooked, and that many courts would accept evidence of normal mental development as evidence of moral discernment, although the two are not the same.

No evidence of the sort required is mentioned in *LDG*. Since LDG's offences were not detected at the time, no inquiry was made as to his understanding between naughtiness and wrongfulness; and it is surely very difficult to reconstruct his mindset many years later. Even LDG himself might, in his late fifties, have limited insight on his maturity at eleven years old.

Nor is there any mention of any other contemporary evidence capable of showing beyond doubt that LDG understood the wrongfulness of his acts. Indeed, it is hard to see how there could be. Even if LDG had apologised to his sister, that might reflect only a later understanding of the wrongfulness of his conduct. Similarly, many juvenile efforts to conceal the activity at the time would presumably not necessarily indicate knowledge of wrongfulness as opposed to recognition of mere naughtiness or embarrassment.

We might note that LDG also faced other and more serious charges, also dating from this period, to which he pleaded not guilty, and of which he was acquitted after trial. If the presumption was overlooked here too, then LDG was put at risk of a long prison sentence on account of the oversight.

Prosecutorial decison-making

In an historic case where there is evidence that D was *doli capax*, or in a slightly less historic case where the the defendant was under 14 but the facts alleged took place after the presumption was abolished, how should the public interest test be decided?

5 [2016] EWCA Crim 3288.

6 P Jarvis "The Surprising Second Life of *Doli Incapax*" (2018) 3 *Archbold Review* 6-9.

7 [1996] AC 1, at 39.

Lack of guidance from CPS

Remarkably, there is no public interest guidance where *both* the offence is old *and* the offender was very young at the time. Indeed, the recent (eighth) Code for Crown Prosecutors (2018) offers no public interest guidance on historic offences at all. The Code does advise restraint where the offender was under eighteen, but it also recognises, as did previous versions, that exception may be made where the offence was "serious": para 4.14 (d).

So, anyone following the Code, as well as the CPS guidance on prosecuting sexual offences, and who has not the time to give any further thought, might well decide that prosecuting someone for an offence committed twenty years ago when the defendant was eleven years old is nothing more than a standard case of determining whether the offence alleged was "serious".

Seriousness should not be decisive

It is submitted here that when both the offence is old and was committed by a very young person, it is not possible to put the same weight on the element of "seriousness" as is afforded elsewhere; and this is as true of sexual offences as it is of other offences.

For it is one thing to say that the contemporary juvenile should be prosecuted in order to prevent imminent reoffending. It is also in itself unobjectionable to say that the passing of time might not matter when an offence was committed by a then adult, for he presumptively knew what he was doing, and in the case of a sexual offence he may have been responsible for the complainant delaying the allegation for so long.

But putting the two factors together does matter. None of the reasons for prosecuting in the above paragraph seems applicable to the defendant who has long outgrown his offending and cannot be expected still to feel fully responsible for his activities at eleven. Indeed, the decision that no probation order was appropriate in *LDG* is perhaps the most significant point in the judgment. Prosecutors who deal with slightly later offences, by which time it had become possible to imprison an eleven-year-old for an indecent assault, might properly ask themselves:

> … if there would similarly be no point in a probation order in this case either, then why we should be seeking to have the defendant punished in any other way?

Reasons for prosecuting

It is suggested then, that when considering historic offences by children, prosecutors should not stop at deciding that the alleged offence was serious, but should treat that rather as an essential starting point. The more urgent question should then be: what reasons still exist to seek to have the defendant punished? For the prosecutor should have a clear objective in mind in deciding to prosecute the offender, and it should be supported by the facts (meaning that in some cases, further inquiries might be necessary).

One objective which may still justify a prosecution might be that punishment would assist the victim in coming to terms with the offence (in some cases it may send the valuable message that the abuse was really not her fault). Pursuing such an objective may be justified, if there is real reason to suppose that punishment may make such a difference; but it would be important to ascertain whether the defendant could in fact receive a custodial sentence, which as we have seen will depend on the law in force at the time, for otherwise the outcome of the trial may be further disappointment – as apparently anticipated in *LDG*.

A prosecution might also be justified to force the defendant to accept responsibility for what he did, either for the sake of the victim (or even for the sake of his own mental health, if he entertains feelings of guilt for what he has done and punishment might in fact be welcome as a form of closure). Again, there should need to be facts which support such a conclusion, but this may be feasible, especially where the offences occurred within a family setting.

If, for example, the defendant has over the years tried to discourage the complainant from contacting the police, or from seeking counselling through fear that she will be encouraged to report the offence, then this may suggest that the passing of time has not in fact enabled the defendant to accept the wrongfulness of what he did. Punishment might still have a valuable communicative role to play for both parties, regardless of whether it is possible to imprison the defendant.

Ideally, specific guidance for such cases should be issued by the CPS. In cases where it is neglected, the defendant might then be in a position to raise an abuse of process argument. Often such arguments fail because it must also be shown that the decision to prosecute was "oppressive": *Moss and Son Ltd v CPS*.[8] But establishing "oppression", one wonders, may not be so difficult to establish where a defendant is being prosecuted irregularly for a juvenile offence committed decades ago.

Conclusions

Some suggest that time limits should be introduced for sexual offences, where the defendants themselves were very young at the time.[9] Assuming that this will not appeal to government, however, particular thought needs to be given to such cases by prosecutors on a case-by-case basis. Ideally CPS guidance would be issued after some consultation, including with those who have worked both with child victims of abuse but also with researchers on signs of desistance.

But the case of *LDG* suggests that more needs to be done. One wonders whether many practitioners of today were not in practice in the 1990s and may not have encountered problems with time limits, *doli incapax*, and the irrebuttable presumption of sexual incapacity for boys under 14. Some of these issues may seem so obsolete that they would be hard to consider for those not already in the know.

If this is right, then one way forward may be to issue a fact sheet concerning historic anomalies (as they now appear to be), such as *doli incapax* and the presumption of sexual incapacity, to trial judges through the Judicial College. Consultation with Case Officers at the Court of Appeal Office would, on the clear evidence of *LDG*, be invaluable in drafting such a document. Judges might then be required to alert counsel to any applicable point which he or she has reason to believe has been missed.

The impression is that today's judges are (rightly) trained on such matters as special measures and the cross-examination of complainants in sexual offences. But the legal problems with trying historic sex offences may have been rather neglected by comparison. Such is the apparent volume of prosecution of these cases that the balance should be redressed.

8 [2012] EWHC 3658 (Admin).

9 See "Comment by the Editor" (2016) 2 *Archbold Review* 5.

Editor: Professor J.R. Spencer, CBE, QC
Cases in Brief: Professor Richard Percival
Sentencing cases: Dr Louise Cowen
Articles for submission for Archbold Review should be emailed to sweetandmaxwell.archboldreview@thomsonreuters.com
The views expressed are those of the authors and not of the editors or publishers.
Editorial inquiries: Victoria Smythe, House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019.
Archbold Review is published in 2019 by Thomson Reuters, trading as Sweet & Maxwell.
Thomson Reuters is registered in England & Wales, company number 1679046.
Registered Office and address for service: 5 Canada Square, Canary Wharf, London E14 5AQ.

For further information on our products and services, visit
www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

30821973