

# Archbold NEWS

## Cases in brief

*Bail—breach of bail conditions—consideration of hearsay evidence—whether separate representations necessary following finding of breach*

**R. (THOMAS) v GREENWICH MAGISTRATES' COURT [2009] EWHC 1180 (Admin); May 11, 2009**

The Bail Act 2003 s.7(5) required a two stage approach – a decision about whether a bail condition had been breached, and a decision as to whether the defendant should be admitted to bail or remanded in custody (*R. (on the application of Paul Vickers) v West London Magistrates' Court* [2003] EWHC 1809 (Admin)). In regard to the first stage, it was well established that the bail jurisdiction was not equivalent to a criminal charge, the rules of evidence need not apply, and a court may rely on written hearsay evidence provided it was properly evaluated (*R. (DPP) v Havering Magistrates' Court*, December 15, 2000). *Havering Magistrates* had not been overtaken by the introduction of the regime for the admission on hearsay in criminal proceedings in Criminal Justice Act 2003; nor *Al-Khawaja and Taheery v United Kingdom* (Application Nos 26766/05 and 22228/06) (January 20, 2009), both of which applied to criminal proceedings (in domestic law and under European Convention on Human Rights, Art.6 respectively); nor *R. (on the application of Cleary) v Highbury Corner Magistrates' Court* [2006] EWHC 1869 (Admin), finding that the Civil Evidence Act 1995 applied to closure orders under Anti-Social Behaviour Act 2003, as the 1995 Act pre-dated *Havering Magistrates*. In relation to the second stage, T argued that the district judge had erred in failing to invite separate representations. Although the district judge had quickly moved from the finding of breach to revoking bail and remanding T in custody, the procedure was a relatively summary one with which the district judge would have been very familiar, and there was nothing to suggest that he did not go through the necessary mental process.

*Evidence—relationship between Road Traffic Offenders Act 1988 s.16 and Criminal Justice Act 2003 s.116; procedure—magistrates' courts—re-consideration of pre-trial rulings; procedure—approach of Administrative Court where appeal by case stated successful*

**BRETT v DPP [2009] EWHC 440 (Admin); March 16, 2009**

(1) Where a defendant served notice requiring the appearance of the analyst under Road Traffic Offenders Act 1988 s.16(4) such that a certificate as to the proportion of alcohol in a sample of breath, blood or urine cannot be admitted under s. 16(1), the prosecution may use another available route to admit the same material as hearsay, particularly Criminal Justice Act 2003 s.116 (*Crown Prosecution Service v Sedgmoor Justices* [2007] EWHC 1803 (Admin); *DPP v Stephens* [2006] EWHC 1860 (Admin) was not, properly understood, authority to the contrary).

(2) Where magistrates ruled the evidence of an analyst living abroad admissible under s.116 at a pre-trial hearing, then the trial became ineffective and the case came before a deputy district judge some months later, he had been wrong to rule that he was bound by the original pre-trial ruling. Although Magistrates' Courts Act 1980 s.8A provided that a pre-trial ruling was binding, it ceased to be so where there had been a material change of circumstances (s.8B(5)), such that after hearing evidence and the parties the court concluded that it was in the interests of justice to discharge

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or vary the earlier ruling (s.8B(3)). Not only had the deputy district judge failed to consider whether a substantial delay in proceedings affected the reasonableness of securing the attendance of the witness (s.116(2)(c)), by s.116(4), leave could only be given if the court considered that the statement ought to be admitted in the interests of justice having regard to “(d) to any other relevant circumstances”. The exercise of discretion was therefore entirely dependent on the precise circumstances obtaining at the time of the trial. (3) The conviction must be quashed – the deputy district judge should have considered the s.116 question afresh, and the Court could not say now what evidence would have been before him and could not speculate as to the outcome. Where an appellant was successful on case stated, the default position in almost every case should be to remit any prosecution that remained viable for re-trial before a differently constituted bench. If the purpose of appealing by way of case stated was to improve the prospect of the case not being tried at all (which counsel suggested was the effect of her experience), the sooner that those advising defendants were disabused of the merit of such an approach the better. Once those advising defendants had understood this approach, it would be incumbent upon them to ensure that their clients were aware of that risk. If the result were to be greater use of the appeal to the Crown Court, that would be a desirable outcome (the Court was nonetheless “just persuaded” not to remit given the defendant’s personal circumstances).

*Drunk and disorderly—elements—mens rea*  
**CARROLL v DPP [2009] EWHC 554 (Admin);**  
**March 4, 2009**

Being drunk and disorderly contrary to Criminal Justice Act 1967 s.91(1) was one of the most basic offences in the criminal calendar. It required proof of three elements: (1) the defendant was drunk; (2) he was in a public place; and (3) he was guilty of disorderly behaviour. As to (1), the word “drunk” should be given its ordinary and natural meaning (*Neale v E (a minor)* (1983) 80 Cr.App.R. 20). Whether a defendant was drunk was a simple question of fact. On familiar principles it was the voluntary consumption of alcohol which was the requisite *mens rea*, such as it was, of this most basic offence. If voluntary consumption resulted in the defendant becoming drunk then the first element of the offence was proved. As to the third element, there was no requirement for *mens rea* at all. What was required was proof that objectively viewed the defendant was guilty of disorderly behaviour. Specific drunken intent and recklessness – the basis of the argument at the magistrates and the case stated – were nothing to the point. The words “disorderly behaviour” were again to be given their ordinary and natural meaning. In the end, therefore, it was a simple question of fact in each case whether the defendant was guilty of disorderly behaviour.

*Evidence—admission of guilty plea by co-accused—whether admissible—whether wrong admission affected safety of conviction*

**GIRMA [2009] EWCA Crim 912; May 15, 2009**  
The appellants (Y, E and M) were convicted of assisting an offender (O, one of the failed July 27, 2005 bombers) contrary to Criminal Law Act 1967 s.4(1); and Y with failing to disclose information contrary to Terrorism Act 2000

s.38B(1)(a) and (2). The appellants broadly accepted they had assisted O, but contested that they knew or believed he was a terrorist or had an intention to impede his arrest or prosecution. The guilty plea to the assisting charge of a co-accused, K, was admitted under Police and Criminal Evidence Act 1984 s.74(1). The plea had been entered on a limited basis – K did not accept the allegations that involved, on the Crown’s case, Y and E, denied knowledge of O’s offence, but accepted belief, and asserted he came to the belief at a late stage. The basis of plea was “not wholly accepted” by the Crown, but they declined a trial of the facts and the judge sentenced on the limited basis. The judge, preferring the arguments of the Crown and M (and acquitted co-accused) declined to allow admission of the basis of the plea. The judge had been wrong to admit the plea. A jury could not infer from a guilty plea more than the co-accused admitted, and K only admitted a limited number of specified allegations. What view the prosecution took of such limited admissions was irrelevant, and there was no question of “satellite litigation”, a fear referred to by the judge. Section 74 only provided a mechanism for admission, not a basis for admissibility. The plea was inadmissible because irrelevant. First, the issue in the trial was not what the defendants did, but their states of mind. K’s plea was irrelevant to that issue (as the Crown accepted and the judge directed the jury). Second, given the limitation of the plea in relation to allegations against Y and E, about which the jury did not hear, it could not be relevant to them. The Court also considered that the matter had been dealt with prematurely. It was better that such decisions were taken once the issues were clarified by evidence (cf. *Smith* [2007] EWCA Crim 2105, [28]). However, the error did not render the convictions unsafe. There could be no doubt that the jury would have followed the judge’s written directions and considered their verdicts in a way which did not depend on K’s plea; there was compelling independent evidence of guilty; the jury showed themselves capable of distinguishing between defendants by acquitting two who lived with K; the judge did direct them that the plea was not relevant to the appellants’ states of mind; on the facts, O rather than (as M argued) M might have been the origin of K’s belief in relation to O’s offence; M used the plea as part of her defence; and, even if phrases in Crown counsel’s speeches and cross-examination may have invited the jury to make wrong inferences from the plea, that could not sensibly be seen as affecting the safety of convictions arising from a long trial.

*Murder—manslaughter—joint enterprise—rule as to whether that which contemplated “fundamentally different” from that which occurred—whether same in murder and manslaughter; jury—police juror*

**YEMOH [2009] EWCA Crim 930; May 22, 2009**  
(1) The victim died of a stab wound inflicted at some stage during an attack on him by a group comprising the appellants and possibly others. The judge had not been wrong to reject submissions (made at trial by all counsel) that manslaughter should not have been left to the jury (for those other than the stabber), the basis of the submission being that the unforeseen use of a knife would take the killing altogether outside the scope of the joint enterprise. The appellants’ argument was only a slight variation on that rejected in *Rahman* [2008] UKHL 45. If a defendant, knowing

that the stabber had a knife, intended the stabber to cause some injury to the deceased or realises that he might cause some injury, then the fact that the stabber stabbed the deceased intending to kill him is not “fundamentally different” from what the defendant had intended or foreseen. Counsel could point to no authority to the effect that the “fundamentally different” rule in manslaughter cases is different to the rule as it applies to murder cases.

(2) The judge came to know that a juror (the foreman) was a policeman near the beginning of the trial, but only told counsel after the jury had retired (on the day that a report of *Khan* [2008] 2 Cr.App.R. 13 appeared in *The Times*). The judge had not been wrong to refuse to discharge the juror. Applying *Khan* (cf. *Abdroikov* [2007] UKHL 37), there was no basis on which it could be said that the fair minded and informed observer, aware of the facts, could reach the conclusion that partiality of the juror to the witness may have caused the jury to accept the evidence of that witness or that this may have affected the outcome of the trial. It would have been better if the judge had asked more questions of the juror (he asked, through a court official, where the officer was based and if he knew about the case). But the court should accept his answer that he knew nothing about the case (a notorious gang stabbing which attracted media attention) in the sense that he had no professional knowledge of it. While it was true that there was important contested evidence given by a police witness, there was contrary evidence by another police witness. One appellant argued that the (contested) admission of his answer on charge (“fuck the police”) strengthened the case for the discharge of the juror. The position of the officer was no different from that of a black juror in a case which involved evidence of the abuse of black people – in such a case, a black juror should not be expected to be discharged for apparent bias. (The Court noted in passing that it could not understand how the judge, rejecting a submission under Police and Criminal Evidence Act 1984 s.78, could have thought that the remark could possibly have assisted the jury).

## SENTENCING CASES

### *Life imprisonment*

**R. v WILSON [2009] EWCA Crim 999; April 28, 2009**

A sentence of life imprisonment passed under the Criminal Justice Act 2003 s.225, with a whole life order under the Powers of Criminal Courts (Sentencing) Act s.82A(4), on a man with previous convictions in Australia for rape, causing grievous bodily harm and murder of elderly females, who admitted attempted rape, wounding with intent and causing a person to engage in sexual activity without her consent, against a lady aged 71, varied to life imprisonment with a minimum term of ten years, derived from a notional determinate sentence of twenty years. A whole life order remained a sentence of last resort for cases of the most extreme gravity.

*Causing death by dangerous driving—offender driving at speed into rear of stationary vehicle—offender using mobile telephone shortly before accident, but not at time of accident—adequacy of sentence*

*Search warrant—warrant authorising search and seizure of all computers of “discredited” professional expert witness—whether lawful*

**R. (BATES AND BATES) v CHIEF CONSTABLE OF AVON AND SOMERSET POLICE AND BRISTOL MAGISTRATES’ COURT [2009] EWCA 942 (Admin); May 8, 2009**

B, a forensic computer expert, had been discredited to the extent of conviction relating to lies about his qualifications, and consequently counsel in a criminal case involving indecent images of children resisted the lay client’s desire to instruct him. B gained access to the images in a police facility as, apparently, the “assistant” of another expert instructed by the defence in the case. Once his identity became clear, officers launched an investigation on those facts into a conspiracy to possess indecent images of children by B and the instructed expert. They sought and obtained a search warrant (Police and Criminal Evidence Act 1984 s.8) which included a power to search and seize all of his computers. The warrant had been unlawfully obtained. The officer who applied for it, and consequently the justices who relied on information from her, could not have been satisfied that all of the computers at B’s property did not contain material subject to legal professional privilege or special procedure material. She knew that B had acted as an expert for both sides in many cases, including as recently as 2005. Given that knowledge, they could not have properly addressed the question of whether privileged material would be covered. Had they done so, it would have been inevitable that they would come to the conclusion that the computers might contain such material. There was a means by which the police could have examined the computers for material relevant to their investigation, namely by exercising the power of seizure contained in ss.50–52 of the Criminal Justice and Police Act 2001, but they did not do so.

**ATTORNEY GENERAL’S REFERENCE NO.17 OF 2009 (PHILLIPA CURTIS) [2009] EWCA Crim 1003; April 30, 2009**

21 months’ imprisonment imposed on a young woman for causing death by dangerous driving, where the offender drove into a car which had broken down on a double carriageway at night, shortly after using her mobile phone to send and receive voice and text messages, not varied. Observations on the dangers of using mobile phones while driving. The consequence of a deliberate disregard of the law introduced to improve safety on the roads meant that a custodial sentence was inevitable. The only question was its length, which was fact specific. It depended on the detailed circumstances of the incident and all other matters whether mitigating or aggravating. A significant was whether the phoning or texting happened at the moment of, or in the immediate few seconds before, impact, or whether earlier phoning or texting might have played some part in the driver’s lack of proper attention to the road ahead.

*Imprisonment for public protection***R. v PEDLEY AND OTHERS [2009] EWCA Crim 840; May 14, 2009**

The imposition of a sentence of imprisonment for public protection under s.225 of the Criminal Justice Act 2003, as it existed before its amendment by the Criminal Justice and Immigration Act 2008, was compatible both Art.3 and Art.5(1) of the European Convention on Human Rights. It was wholly unhelpful to attempt to redefine "significant risk" in terms of numerical probability, whether as "more probable than not" or by any other percentage of likelihood. No attempt should be made by sentencers to attach an arithmetical value to the qualitative assessment which the statute required of them. This would be inconsistent with the degree of flexibility inherent in the word "significant".

*Appeal against sentence***R. v HUGHES [2009] EWCA Crim 841; May 14, 2009**

The Court of Appeal has power to entertain an appeal against sentence by a man whose sentence had already been reviewed by the court on a reference by the Attorney General under the Criminal Justice Act 1988 s.36. It did not follow that the court would in fact entertain such an appeal. Any application for leave to appeal against sentence required leave and often an extension of time. The right of appeal given by s.9 of the 1968 Act was subject to s.18 which required an application to be lodged within 28 days. An extension of time was by no means a formality and would be granted only where there was good reason to give it. It would be a highly significant factor that it was open to the defendant to mount any argument that he wished on the hearing of the reference.

*Automatic deportation***R. v HAKIMZADEH [2009] EWCA Crim 959; April 28, 2009**

Sentences totalling 12 months for 14 counts of theft substituted for concurrent terms of two years, but imposed in the form of sentences of nine months and three months' consecutive, to avoid subjecting the appellant, a foreign national, to automatic deportation under the UK Borders Act 2007 s.32.

*Confiscation order***R. v CLARKE [2009] EWCA Crim 1074; June 12, 2009**

The Crown Court has no power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence. The Powers of Criminal Courts (Sentencing) Act 2000 s.12(7), which permits a court which grants a discharge to make an order for costs, a compensation order, a deprivation order or a restitution orders does not include a reference to confiscation orders.

**R. v ISLAM [2009] UKHL 30; June 10, 2009**

Where a defendant is convicted of an offence involving the possession of drugs, the value of the drugs in an unlawful market may be taken into account in assessing the value of the defendant's benefit for the purposes of the Proceeds of Crime Act 2002 s.6, but not for the purposes of determining the "available amount" under s.7. *Ajibade* [2006] 2 Cr.App.R.(S.) 70 and *Hussain* [2006] EWCA Crim 621 overruled.

## Case in detail

### Restraint orders and the rights of those defrauded

By David Hislop of Doughty Street Chambers, London

The ill gotten gains of those who commit frauds are often not only the subject of claim by the Government through proceedings brought under the provisions of the Proceeds of Crime Act (POCA) 2002 but also by the victims of the fraud. Frequently before the third party victims can seek to establish their claims the Director of the Serious Fraud Office has obtained in the Crown Court a restraining order preventing any dealings whatsoever<sup>1</sup> with identified property of the accused or at least someone who is being investigated for a crime.<sup>2</sup>

The fact that the authorities have laid claim by a restraint order does not however prevent the third party victim from also seeking to "ring fence" or "lay claim" to those funds misappropriated from him. The third party victim's remedy in the face of a restraining order is to apply to the Crown Court to vary the terms of the restraining order in order

that the value of his interest may be recognised and in due course met.

The success or otherwise of an application to vary a restraint order by a third party victim will very much depend on whether the victim can establish that he has an interest in the restrained property in terms of s.69(3) of the Act. Section 69(2) and (3) provide:

(2) The powers –

- (a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;
- (b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;
- (c) must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant;
- (d) may be exercised in respect of a debt owed by the Crown.

<sup>1</sup> Usually subject to rather limited conditions such as subsistence and the like: see POCA s.41(3).

<sup>2</sup> POCA s.41 provides the court with the power to grant a restraining order subject to the preconditions set out in s.40.

- (3) Subsection (2) has effect subject to the following rules –
- (a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;
  - (b) in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift;
  - (c) in a case where a confiscation order has not been made against the defendant, property must not be sold if the court so orders under subsection (4).

Section 69(3)(a) allows variation or discharge with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him. Section 84 is also material:

**Property: general provisions**

- (1) Property is all property wherever situated and includes –
- (a) money;
  - (b) all forms of real or personal property;
  - (c) things in action and other intangible or incorporeal property.
- (2) The following rules apply in relation to property –
- (a) property is held by a person if he holds an interest in it;
  - ...
  - (f) references to an interest, in relation to land in England and Wales or Northern Ireland, are to any legal estate or equitable interest or power;
  - ...
  - (h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).

In *Hughes v Customs Excise Commissioners* [2003] 1 W.L.R. 177, a case under the Criminal Justice Act 1988, Simon Brown L.J. said that the courts should "... be astute, wherever possible, to protect the rights and interests of third parties". The case of *The Director of Serious Fraud Office v Lexi Holdings Plc (In Administration) and M* [2009] 1 Cr.App.R. 23 provides valuable guidance and a reminder of the principles of following and tracing where it is alleged that an equitable charge may attach to assets in existence which derive from misappropriated trust funds and the position of unsecured third party creditors where no such trust arises or if it does, there is no nexus between the misappropriated funds and the identifiable assets left in existence and restraint orders under POCA.

In *Lexi*, the court found that the third party was able to demonstrate a nexus between the misappropriated funds and the funds held in bank accounts the subject of the Director's restraint order giving rise to an equitable charge and dismissed an appeal against an order varying the original restraint order. The facts were as follows: criminal investigations against M were on going. The allegations made against him were that he had received £625,000 in the form of bribes from SL, a director of Lexi Holdings Plc (now in administration) in respect to over inflated valuations provided by M in order that SL could raise loans from the Cheshire Building Society. The Director obtained a restraint order under the Act that prohibited M from removing, disposing of, dealing with or diminishing the value of any of his assets, including significant sums specifically identified.

Lexi had commenced proceedings in the Chancery Division against M and others. It was pleaded that SL had dishonestly and in breach of the fiduciary duties owed by him to Lexi Holdings authorised or permitted the payment by

*Lexi* to M of the £625,000.00, the money being deposited in some part into relevant bank accounts. It was pleaded that M knew that the payments were made in breach of trust and that he thus held them or their products on constructive trust for Lexi Holdings and or was liable to account for them. During the course of the Chancery proceedings various court orders were made against M relating to the funds received by him from Lexi. These orders were effectively ignored and in March 2007 an "unless order" against M was made. This order was not complied with and *Lexi* filed for Judgment. M was ordered to "pay the Claimant [*Lexi*] the sum of £625,250.00 plus compound interest at the rate of 4% over six monthly LIBOR in the sum of £62,432.83". *Lexi* then sought to execute judgment by seeking an interim charging order over a house and third party debt orders against M's bank accounts.

In the Central Criminal Court, an application to vary the restraint order was made so as to permit M to comply with the default judgment. The Director of the SFO opposed the variation sought arguing that, whilst having pleaded in the alternative in their pleadings in the Chancery Division for a declaration that monies held on trust for the company and an order that it be paid, judgment in fact had been entered in "in personam" terms and thus *Lexi* no longer had a proprietary right in the monies the subject of the restraint order and accordingly s.69(3) had no application. H.H.J. Hone Q.C. rejected this submission finding that the Act protected an equitable interest held by *Lexi* under a constructive or resulting trust and then found that M was a constructive trustee. He went on to find that the Court had power to sanction payment of third party unsecured creditors from restrained monies or assets in circumstances where there had yet to be made a confiscation order under the Act. Accordingly the restraint order was varied. The Director appealed the order.

The Court of Appeal dismissed the appeal, upholding the variation made but for different reasons. The Court accepted that the nature of the Chancery judgment was an in personam judgment and that no proprietary remedy was sought or obtained. It was also clear, said the Court, that in the "immediate aftermath" *Lexi* proceeded on the footing that it was an unsecured creditor. The Court accepted that in applying in the Chancery proceedings for judgment in a money sum *Lexi* had elected to become a judgment creditor and had abandoned in those proceedings its proprietary claims in its pleaded case. There had not been a judgment, or even a finding, in the Chancery proceedings that *Lexi* had an entitlement to an equitable proprietary remedy. But the Court did not agree that *Lexi* had abandoned such a claim for all purposes.

It is the case that where misappropriated trust assets are thereafter applied in the acquisition of other property the beneficiary is entitled at his option either (a) to assert, via a constructive trust, beneficial ownership of the proceeds (or a commensurate part of them) or (b) to make a personal claim against the defaulting trustee, if need be enforcing an equitable charge or lien over the proceeds in question to secure restoration by the defaulting trustee of the misappropriated assets. These are true alternatives. In the first kind of claim, the beneficiary is in effect saying: "Those proceeds (or part of them) belong to me". In the second, alternative, kind of claim the beneficiary is in effect saying "The trustee is \*309 obliged to account personally to me for his misappropriation and those proceeds stand charged

as security for his personal obligation to me". The position is very fully and helpfully explained by Lord Millett in his speech in *Foskett v McKeown* [2001] 1 A.C. 102, especially at 130–132. At 130A, Lord Millett said this:

The simplest case is where a trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit. In such a case the beneficiary is entitled *at his option* either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund. He will normally exercise the option in the way most advantageous to himself ...

Lord Millett went on to summarise at 131G, the basic rule where mixing has occurred as this:

Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset the beneficiary is entitled *at his option* either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money.

Moreover, as Lord Millett explains (see p.130C–D) both remedies are proprietary and depend on successfully tracing the misappropriated trust property into the proceeds: cf. also *El Ajou v Dollar Land Holdings plc* [1993] 3 All E.R. 717 (a decision of the same judge, at first instance). That process of its nature involves identifying a continuing equitable interest at all stages leading up to the identification of the asset or assets over which the proprietary remedy is ultimately asserted (para 36).

The evidence was clear that the misappropriated funds had been deposited not only in the relevant banks, but also became mixed with other monies. The Court of Appeal held that in such circumstances, a claim to an equitable charge over such accounts would be entirely orthodox. The Court of Appeal cited Lord Millet in *Foskett v McKeown* [2001] 1 A.C. 102 and said at para.39 that an in personam claim against a defaulting trustee may be supplemented in addition by a claim to enforce an equitable charge or lien over proceeds in which the misappropriated assets have been mixed.

The Court of Appeal further held that in entering judgment in the form that it did, *Lexi* had elected to pursue its equitable claim against M "in personam", but that this is not of itself inconsistent with a claim to an equitable charge, it is a cumulative remedy in aid of an equitable in personam claim not an alternative remedy: *Foskett v McKeown* (supra), and *Lexi* cannot have been taken to have conclusively and for all purposes abandoned any further claim it might have to an equitable charge. Accordingly the claim to an equitable charge provided the foundation for the power to vary pursuant to POCA s.69(3).

It was submitted on behalf of *Lexi* that where a trustee mixes

trust funds with his own assets in such a way as to make it impossible for the beneficiary to identify which of the trustee's assets are affected by an equitable charge the court will impose the charge over all the assets of the wrong doing trustee. The Court of Appeal understandably disagreed, for the equitable charge to attach it must attach to assets in existence which derive from the misappropriated trust funds. There must be a nexus. Were it otherwise the principles of following and tracing would become otiose.

The Court concluded that the natural meaning of s.69(2)(c) gained support from the statutory framework in which it is found. The intention of the legislature was clear; restraint orders should be made and subsequently maintained without regard to debts owed to third party unsecured creditors. Given the finding of the Court in respect to the existence of a valid claim for an equitable charge the latter finding did not affect the rights of the third party victim in this case. It is interesting to note that had *Flexi* not had its position safeguarded by the claim of an equitable charge, on the facts of this case, upon the conviction of M the court had power under s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 to make a compensation order in its favour, being someone who has suffered loss resulting from the offence. Such a compensation order takes priority over a confiscation order see s.13(5) and (6) of the Act.

## Conclusions

- (1) Those defrauded are not necessarily precluded from pursuing their misappropriated funds where the DPP or the Director of the Serious Fraud Office have obtained a restraining order over property that can be traced back to the misappropriated funds.
- (2) The recipient of misappropriated funds will hold them on trust for the victim where the recipient at the time of the receipt of the funds had knowledge of the dishonesty or fraud.
- (3) Where misappropriated trust assets are thereafter applied in the acquisition of other property or are placed in a bank account the beneficiary (the victim) is entitled to assert his claim to those funds and seek a variation of the restraint order in respect to such property. The victim would be saying to the court in effect: those proceeds (or part thereof) belong to me or the trustee is obliged to account personally to me for his misappropriation and those proceeds stand charged as security for his personal obligation to me. The security being an equitable right or lien. In either instance this would be an interest in terms of s.69(3) of the Act and would justify the court ordering a variation of the original restraining order.
- (4) If the victim was unable to trace his misappropriated funds to the assets the subject of the restraint order he would stand as an unsecured creditor. An unsecured creditor does not hold an interest in restrained property in terms of s.69(3) and the court would not vary the restraint order in order that such debt be met or satisfied. In this situation the victim would have to await the conviction of the fraudster and then seek a compensation order against him. A compensation order would have priority to any confiscation order the court might make in respect to the restrained property.<sup>3</sup>

<sup>3</sup> s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 and s.13(5) and (6) of POCA.

## Comment

On May 12, the Sentencing Advisory Panel published a consultation paper on sentencing for burglary in a dwelling. The Panel's previous advice on sentencing for "domestic burglary" in 2002 predated the creation of the Sentencing Guidelines Council and led to the Court of Appeal's guideline judgment in *McInerney and Keating* [2003] 2 Cr.App.R.(S) 39. The Panel's proposals here closely follow the approach taken by

the Lord Chief Justice in *Saw* [2009] EWCA 1. The paper is in five sections. The first describes the nature of the offence and the current pattern of offending (focusing on prevalence, etc). There are some interesting facts which need exploring further: what were the outcomes for the 11 per cent of adult burglars who in 2007 were "merely" cautioned? What do we know about the decision to cau-

tion: especially now with the increasingly used “conditional caution”? The second section considers recent sentencing practice and existing guidance, the third examines the seriousness of the offence and the fourth contains the Panel’s proposals for sentence starting points and ranges for adult offenders. The consultation is disappointing for what it does not contain. Surely it should review what is known about what works to reduce re-offending by burglars, what is known about criminal careers and desistance from crime? Surely the Sentencing Advisory Panel should advise on the relative effectiveness of different sentences?

Of course, the Lord Chief Justice was right in *Saw* to point out that sentences should reflect the anguish suffered by the victims of domestic break-ins. Much more should be done to recognise the trauma of victims. But very short, expensive and ineffective custodial sentences will do less in this way than speedily paid compensation and other reparation. The public are less punitive than policy makers often believe: we need more research like that which the SAP commissioned back in 2002 on public attitudes to sentencing burglars.

The consultation suggests that in the most serious cases, such as where vulnerable victims have been targeted,

or where serious harm was caused to the victim, the starting point for sentencing a first time adult offender should be two years custody, falling within a range of 12 months to four years. A person sentenced to 12 months or 15 months custody will probably serve only 3 months inside, considering Home Detention Curfew. Is this what the public really wants? Rather than a “tough” two-year community order, with effective supervision from a well supported probation officer? Once again the “custody threshold” is a barrier to effective punishment in the community.

The Consultation also considers young offenders (since 27 per cent of offenders sentenced for burglary of a dwelling in 2007 were aged under 18). Here we have a proposed reliance on even shorter custodial sentences. Only in cases where a burglar has caused minimal loss or damage and the harm caused to the victim is shown to be low does the Panel recommend a “starting point” for sentencing which falls “below” a custodial sentence. What justifies the belief that very short custodial sentences are somehow more appropriate for serious crimes than community penalties with “teeth”?

The closing date for responses is August 5, 2009.

## Feature

### Deaths, drug and duties

by Jonathan Rogers, Lecturer, University College London

The law of manslaughter when D supplies V with an illegal drug, with fatal consequences, has taken a new twist. Less than two years ago, the House of Lords ruled that D is not guilty of unlawful act manslaughter in cases where V injected himself with the drug and was a “fully-informed and responsible adult”: *R. v Kennedy (2)* [2008] 1 A.C. 269. In such a case there would be no “unlawful act”. The only possible offence was said to be “causing the administration of poison” (s.23 of the Offences Against the Person Act 1861, hereafter “OAPA”) – but D would not be guilty of that because the self-injection by V of the drug would constitute a *novus actus interveniens*, so D would not have “caused” its administration. But the Court of Appeal, in *R. v Evans* [2009] EWCA Crim 650 has now ruled that the supplier may instead be guilty of gross negligence manslaughter if he realises that V has become seriously ill but does nothing (or at any rate, far too little) to try to save him.

I shall suggest that this decision is fundamentally inconsistent with the reasoning in *Kennedy (2)*. However, since cases of this nature seem prone to recur, I shall discuss some other possibilities of establishing gross negligence manslaughter, which may have been open on the facts of *Evans*. I conclude by raising some options for clarifying and amending the law.

#### Facts and decision in *Evans*

Evans was indicted jointly with her mother for gross negligence manslaughter. They were both alleged to have failed

to call an ambulance when Evans’ younger half-sister (Carly) fell seriously ill in their presence after injecting herself with heroin at the family home. Carly was a heroin addict and it was Evans, who was also an addict, who had supplied the drug on this occasion. It seems that neither Evans nor Carly’s mother wanted to call an ambulance when Carly first became ill because Carly had just been released on licence from a detention and training order. They feared that they and possibly Carly would get into trouble if her drug abuse were discovered. But despite efforts by the defendants to monitor her condition at home, Carly was found dead in her bed the following morning.

The prosecution put their case squarely as one of omission. Carly’s mother had grossly neglected her maternal duty to seek urgent medical assistance for her daughter. Evans, it was argued, owed a duty to “counteract the dangerous situation” which her act of supply of heroin had “created”, following the broad principle declared by the House of Lords in *R. v Miller* [1983] 2 A.C. 161. The judge summed up the case accordingly, directing the jury in particular that it could only find that Evans owed a duty of care if it were sure that she had supplied the drug (which had been in dispute at the trial). Both defendants were convicted. Evans appealed on the basis that she did not owe a duty of care to do anything to save Carly.

The Court of Appeal, comprising of a bench of five headed by the Lord Chief Justice, ruled on two important points. First, that whether or not a duty of care arises is a pure question of law. Secondly, and of greater import, that Evans

did owe a duty in law to “counteract the situation” which she had “created”; and so the appeal was dismissed.

### **Inconsistency with *Kennedy (2)***

The problem with the second point of decision in *Evans* is that the recognition of a duty of care by virtue of supplying the drug is inconsistent with *Kennedy (2)*. If Evans did not cause Carly to administer the drug to herself (it being assumed in this case that Carly was a competent adult who broke the chain of causation by injecting herself with it), then how did Evans cause Carly’s subsequent illness (which presumably was the “dangerous situation” which Evans had “created”) and then failed to “counteract” by calling the ambulance? If Carly’s voluntary act of self-injection breaks the chain of causation in the first analysis then it must do so in the second analysis. In other words, Evans did not owe a duty of care on the basis of having created a dangerous situation because only Carly had created the danger in question.

The only way to evade this conclusion is to say that the notion “creating a dangerous situation” is somehow different from, and broader than, the standard principles of causation. The Court in *Evans* speaks elliptically of a duty arising when “a person has created or contributed to the creation of a state of affairs which he knows or ought reasonably to know, has become life threatening” (at [36]). But it is normal to speak of “causing” results and “contributing to” results interchangeably; as we all know, one may be held to “cause” a result simply by having “contributed” to it. The spirit of the *Kennedy (2)* decision is still that the voluntary consumption of the drug by a fully informed adult deprives the prior supply of it of any “contributory” value.

In fact, the Court in *Evans* seemed momentarily to recognise this inconsistency. At [26], it referred to *R. v Khan and Khan* [1998] EWCA Crim 971 where the question of drug dealers owing a duty to their client had been left open, but it added that this might now be doubted “in the light of *Kennedy (2)*”. However the Court then sidetracked itself with discussions of other gross negligence cases. Later, at [36] it returned to the case at hand and simply declared that the duty arose in this case on the basis of Evans’ contributory actions, having apparently quite forgotten about the inconsistency with *Kennedy (2)*.

### **Policy implications of *Kennedy (2)* and *Evans***

Some might seek to defend the decision in *Evans* from the standpoint of policy rather than logical consistency. The argument would be that suppliers to drug users should feel free to summon an ambulance as soon as possible when a user of drugs becomes ill, without having to worry about being detected as a supplier. Thus, so the argument goes, *Kennedy (2)* is rightly decided because the drug supplier who becomes aware of a client’s predicament could then summon help without worrying about his involvement leading to conviction for unlawful act manslaughter. Further, if that is not enough, *Evans* provides for punishment for gross negligence manslaughter if he does then fail to call the ambulance and the client dies.

But this argument has various holes. Professional drug suppliers would surely never call an ambulance to the scene of one of their client’s overdoses, regardless of *Kennedy (2)*. They have after all committed a very serious offence simply by having supplied the drug: the fact that they are not also

guilty under s.23 OAPA and (in the event of death) unlawful act manslaughter hardly offers much incentive to alert the authorities. The most likely difference that *Evans* would make to them is that they now have every incentive not even to associate with their clients after supplying the drug, for the duty of care in *Evans* seems only to arise when they “know or ought reasonably to know” that the recipient has become seriously ill.

So the burden of the duty of care in *Evans* will fall more typically upon those close friends or family members who supply the drug and then stay with the victim. If they were quite sure in their own minds that the victim should recover with basic care, and that he or she might suffer penal consequences if the drug taking were discovered, then the decision whether to call the ambulance is surely something of a dilemma. The law itself sends an equivocal message to those friend and family who wonder what to do for the best; for if the victim were to survive, then there would be no possible criminal liability attaching to the decision not to call the ambulance. There is no general offence of reckless endangerment by which such an omission could be punished. Taken by itself, one may still find policy reasons for punishing family members who supply drugs to relatives, even out of compassion, and who then “guess wrongly” what they should do afterwards. But one cannot certainly defend the inconsistency between *Evans* and *Kennedy (2)* on the basis of policy. The culpability of family members who supply a drug and stay with the victim is pale by comparison with that of the professional drug dealer, who cares nothing for the miserable consequences of his trade and who profits from the addiction of his clients. No one wishes a friend to become a drug addict and to become responsible for his welfare; but several people desire the money to be made for professional drug dealing. Any policy based reasoning which accepts that the dealer, who knowingly supplies potentially lethal drugs for profit, should not be guilty of any form of manslaughter when a client dies – but which tolerates the punishment of any one else who was involved with the victim – is seriously flawed.

### **The different categories of duties to act**

It is possible that the Court in *Evans* had not forgotten *Kennedy (2)* but placed too much emphasis on their Lordships’ words that “nothing in this opinion should be understood as applying to manslaughter caused by gross negligence” (at [6]). Their Lordships in *Kennedy (2)* did not explain what they meant by this teasing statement. But there is no reason to think that they would accept (as the Court necessarily did in *Evans*) that the mere supply of a controlled drug might “contribute to the illness” suffered by a self-injecting recipient, even though the same act of supply does not amount to the “administration” of the drug. It is more likely that their Lordships in *Kennedy* meant that it may still be possible for suppliers of drugs to be guilty of manslaughter when their clients die from a self-injected overdose, but if so, that this guilt would be in gross negligence manslaughter rather than unlawful act of manslaughter. They would, surely, have meant to say that something more than the initial supply of drugs by itself would be needed to establish the necessary duty of care. Probably they did not do so because it did not seem necessary: *Kennedy (2)* was about unlawful act manslaughter only, since the defendant in that case appears to have left the scene before his friend showed any signs of illness.

The three most likely categories of duties to take care of a comatose victim of drug abuse are family relationships (as applied to Carly's mother on the facts of *Evans*), explicitly undertaken duties, and social relationships. The latter two categories were also bubbling beneath the surface on the facts in *Evans*. It is possible that either of them could have been found to apply, had the prosecution presented its case accordingly, in which case the conviction would have been relatively unobjectionable. However, each of them is fraught with various legal difficulties too. It should be noted that these categories may apply even if D had not supplied the fatal drug, though doubtless the public interest in prosecuting will be thought to be more clearly present where that does appear to have been the case.

#### *Explicitly undertaken duties*

It is established that D may undertake a duty to care for another, even if a close relationship is otherwise lacking, e.g. by taking money on the understanding that such care would be offered (*R. v Instan* [1893] 1 Q.B. 450) or by making previous efforts to provide care, as in *R. v Stone and Dobinson* [1977] Q.B. 354. One might have thought that this category could apply to Evans, since she had admitted to the police that Carly "would have expected her and her mother to look after her needs during that night".

But the prosecution did not base their case upon this, perhaps because, notwithstanding Carly's expectations, they were unable to prove anything said or done by Evans which would have amounted to an undertaking to that effect. The court in *Evans* also seems to wish to restrict this category. Commenting on *R. v Sinclair, Johnson and Smith* [1998] EWCA Crim 2590 (a case where a comatose drug victim was allowed to die by his associates), it seems to approve of the decision that Johnson, who only made a "desultory attempt to be of assistance", did not undertake a duty to the victim (at [28]). More to the point, it seems to suggest, *obiter*, that there would only be a clear case of a duty arising through an undertaking where the defendant "had led the victim, or others, to become dependent on him to act" (at [36]).

This is intuitively appealing. In particular it may apply to the supplier who assures the anxious recipient that he will stay around to make sure that nothing terrible happens. But one might ponder the notion of "dependence". Would the necessary "dependence" be made out if the victim herself were known to prefer to take the risk of dying at home than being taken to hospital?

#### *Social Relationships*

Another way to establish a duty of care is to say that D associated with V in such a way as to give the latter a reasonable expectation that he might take care of him or her in an emergency, such as in the event of a drug overdose which occurs in the presence of D. Here, it seems that liability may accrue even in the absence of an explicit undertaking to take care. In *Sinclair*, D was said, *obiter*, to owe a duty to the comatose victim, who had been his close friend and "like a brother" to him for 13 years.

It seems likely that this is a separate category of duty of care, albeit one that can easily overlap with familial responsibility and explicit undertakings. It might have been the most plausible basis for a duty of care in *Evans*, since D had herself acknowledged Carly's likely expectations arising from the closeness of their relationship. Indeed the Court

in *Evans* cited the decision in *Sinclair* with approval, even saying that "it accords with the present case" (at [28]). But as noted the prosecution had not based its case upon Evans' statement, and it is not surprising that the Court did not seek to uphold the conviction on that basis.

But the unspoken assumption of responsibility through close friendship raises the spectre of many borderline cases. One may wonder whether the unspoken assumption of preparedness to care should be mutual, if indeed close friendship supplies the basis for the duty. It seems likely too that the courts would prefer that whether a friendship between two drug addicts had become particularly "close" should be left as a question of fact, which the jury might be better equipped to decide than a judge. But as noted already, the Court in *Evans* held that the existence of a duty of care is a question of law. It would be interesting to see the Judicial Studies Board issue guidelines for judges on ascertaining the closeness of relationships between habitual drug users!

One might think that Art.7 ECHR could be used as a safeguard against liability being imposed in situations where the finding of a duty of care could not have been foreseen. But the common law relating to duties of care is so potentially wide that a court will always be tempted to hold that any development which it endorses would also have been "foreseeable" to a competent practitioner.

#### **Possible reforms**

So, even if we agree that the actions of Evans were sufficiently thoughtless and self-serving as to deserve punishment, it is not easy to pinpoint a legal route to the conclusion that she owed her victim a duty of care which will be of universal utility in similar cases. Can the law be improved, so that it may become more predictable and coherent?

The most natural reform would be to abolish the general rule of no liability for omissions and to enact "good Samaritan" legislation. Such a reform would go beyond the particular problem of looking after drug addicts and would thus undermine our traditional attachment to the act/omission distinction. The idea would be to provide for liability for anyone who fails to aid someone whose life is in evident danger, and the crime would be committed even if the person in danger fortuitously survived without the assistance of the accused. But D would be able to defend himself (as he could now) by successfully arguing that he did not breach his duty, i.e. that on the facts he could not reasonably have been expected to act in the way that it is alleged that he should have done.

Many academic writers would support such an offence. But if it were thought to be too revolutionary, then we might consider particular reforms relating to liability for deaths arising from the misuse of drugs, in the same way that we have provided a special regime of liability for failing to prevent the deaths of children from violence in the family home (s.5 of the Domestic Violence, Crimes and Victims Act 2004). Such reforms could, for example, be added to the Misuse of Drugs Act, should it ever be comprehensively revised. One advantage of this would be to make some distinctions, and to provide some guidance, which the common law seems unlikely to provide in this area. We might make a few tentative suggestions arising from our analysis here.

First, the legislature might limit the decision in *Kennedy* (2) so that those who supply drugs "for gain or in expecta-

tion of gain” (i.e. professional dealers) are declared to be guilty of the offence under OAPA s.23 when the drug is consumed, even when a “fully informed adult” injects himself with the drug. In that case there would be no impediment to a conviction for unlawful act manslaughter, should the recipient die. If principles of causation are about imputing moral blame, it seems quite defensible to say that the drug dealer (but not the casual friend) is guilty of the offence under OAPA s.23 when V takes the illegal drug. The supplier who expects to profit from the risk of contributing to the illness and death of a drug addict positions himself morally much closer to that outcome than does the friend (as in the case of *Kennedy* himself) or family member who seeks no profit from doing so.

Every now and again, we do accept that the standing of the defendant and the victim may have some bearing on whether the victim’s act breaks the chain of causation. In tort, we know that a prison officer is liable for negligently failing to prevent the suicide of an inmate, even if the latter was mentally competent: *Commissioner of Police for the Metropolis v Reeves* [2000] 1 A.C. 360. The position of responsibility of the prison authority, combined with the understood misery arising from imprisonment and the wish to make the duty owed by the prison authorities to be actionable are (put together) thought to be significant enough to make a difference to the usual application of the *novus actus* rule. Can we not say, by analogy, that the commercial supplier of an illegal drug has such a hold on the life of an addict, who presumably feels somewhat trapped into accepting the risks of dying through an overdose, that there should be an exception to the *novus actus* rule here too? Nor would this be an unprecedented approach to criminal law, since the Court of Appeal recently showed itself to be receptive to the idea that a man who beats his wife repeatedly might bear some causal responsibility for her suicide: *R v D* [2006] EWCA Crim 1139. This too seems to be best explained by the position of powerlessness of the sufferer of domestic violence in relation to her abuser.

Second, we might revise the decision in *R. v Cato* [1976] 1 All E.R. 260 that anyone who injects a (consenting) drug addict with the controlled drug is guilty under OAPA s.23, and thus of unlawful act manslaughter if V dies. The difference here (from *Kennedy (2)*) is that since D himself administers the drug, V does nothing to break the chain of causation under OAPA s.23. But whether each of two drug addicts should consensually inject the other, or whether they should each inject themselves in the company and

with the encouragement of the other, says very little about their moral culpability, and in such a case the consent of the recipient ought to bar liability.

Finally, moving to the scenario when V is known to have become ill, legislation might provide greater clarity relating to the applicable categories of duties of care. We might over-rule the decision in *Evans* and provide for gross negligence manslaughter in cases of abandoned victims of drug abuse only where D explicitly undertakes to V that he will take care of him should his life seem to be endangered, or where their relationship is so close that such an expectation from V might naturally be inferred. In the case of the latter, the legislation should supplement the principle with a non-exhaustive set of examples of relationships, or characteristics of those relationships, which should be held to fall within that category. This would assist the judge in deciding when the duty of care arises and would reduce the extent to which any such decision might violate Art.7 of the ECHR.

### Conclusion

I have criticized the Court of Appeal in *Evans* for contradicting the reasoning in *Kennedy (2)* by accepting that a drug supplier can “cause” an illness (or, as the Court would seem to put it, “create a situation of illness”) suffered by the addict who self-injects herself with heroin. But there is also a certain amount of obscurity inherent in the alternative notions of “undertaking” a duty of care, and of assuming it through close friendship.

I have suggested that, if we make special reforms relating to criminal liability for deaths by drug abuse, we should look at the culpability of the commercial supplier (who should be guilty of unlawful act manslaughter when his supply of drug causes death) as well as seek to clarify the situations in which a duty to take care of a comatose victim might arise. A combination of the reforms outlined above would mean that the only occasion on which the supplier of a controlled drug could *not* be liable in law for the death of the (free and fully informed) recipient would be the case of a defendant who (a) does not supply for gain, and (b) neither undertakes responsibility for the recipient should he consume the drug, nor has such a close relationship with him or her that one would expect him to act if he were to become aware of the recipient’s illness. This, it is submitted, would allocate responsibility for the death more fairly between the respective parties.

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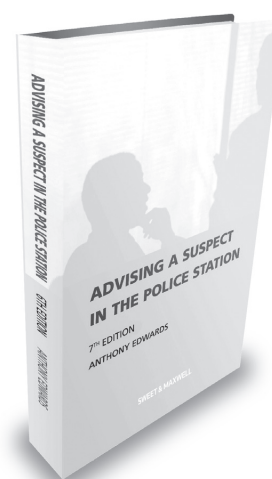
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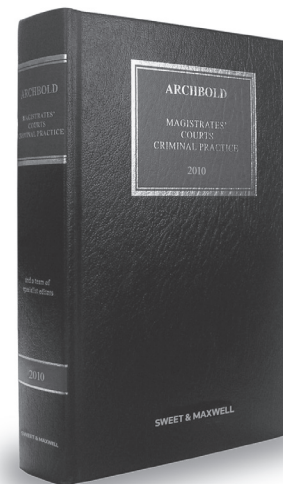
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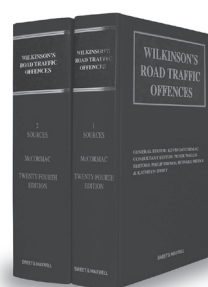
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