

CRIMINAL LAW FOR PERSONAL INJURY PRACTITIONERS

This paper contains a brief summary of the principal procedural and evidential provisions which now apply to criminal proceedings in the Crown Court.

The main sources referred to in this paper are;

Crime and Disorder Act 1998	(‘CDA’)
Criminal Justice Act 2003	(‘CJA’)
Criminal Procedure Rules 2005, S.I.2005 No.384.	(‘CPR’)
Criminal Procedure and Investigations Act 1996	(‘CPIA’)
Criminal Justice and Public Order Act 1994	(‘CJPOA’)
Prosecution of Offences Act 1985	(‘POA’)

Trial; Preliminaries

Jurisdiction

Cases now come to the Crown Court as follows

- ‘either way offences’ committed from Magistrates’ Court
- Indictable only offences ‘sent’ (s.51 Crime and Disorder Act 1998, as amended by CJA Sch 3)

The latter type are mostly sent for a preliminary hearing at which directions are given for the service of the witness statements, indictment, and initial disclosure, and a date set for a plea and case management hearing (‘PCMH’). As they are sent up without consideration of the evidence, an application to dismiss can be made. This will be heard by the Judge who will decide whether there is a ‘case to answer’. The application must be made in writing, and the prosecution are able to serve further evidence in response.

At the PCMH, arraignment will take place, a date set for trial, and directions will be given pursuant to the court’s trial management powers. These are to be found in the **Criminal Procedure Rules (‘CPR’)**. See also Consolidated Criminal Practice Directions and Protocols (Amendments Nos 9-11, re jury service, forms, case management, heavy fraud and other complex cases; handed down in CACD 22.3.2005)

CPR

These commence with the statement of the Overriding Objective “that criminal cases be dealt with justly” which includes -

- (a) acquitting the innocent and convicting the guilty;
- (b) dealing with the prosecution and the defence fairly
- (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights
- (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
- (e) dealing with the case efficiently and expeditiously
- (f) ensuring that appropriate information is available to the court when bail and sentence are considered;
- (g) dealing with the case in ways that take into account
 - (i) the gravity of the offence alleged,
 - (ii) the complexity of what is in issue,
 - (iii) the severity of the consequences for the defendant and
 - (iv) the needs of other cases.

Disclosure

This is governed (for investigations commenced after 4th April 2005) by the CPIA ss. 1-21, as amended by the CJA, and creates a staged approach; initial prosecution disclosure, defence disclosure within 14 days, continual review thereafter by the prosecution

Defence disclosure takes the form of a Defence Case Statement (s.6 CPIA, as amended by CJA s.36)

This is a written statement by the accused, setting out the nature of his defence, including any particular defences on which he relies, indicating matters of fact on which he takes issue with the prosecution, indicating any points of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority relied upon for that purpose.

This must be served within 14 days from initial disclosure (ss.5 & 12 CPIA, Regs. S.1 1997, No.684) Failure to serve a DCS (or late service) may result in an adverse inference being drawn against the defendant (s.11 CPIA), and any inconsistencies can be cross examined on, as with any previous inconsistent statement.

There are further provisions for an application to be made by defence for further disclosure where there is other material they argue falls to be disclosed (s.8 CPIA).

What must the prosecution disclose ?

“Material not previously disclosed to the accused which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused” (CPIA s.3).

In relation to ‘sensitive material’, this can be made the subject of a claim by the prosecution to ‘public interest immunity’ (CPR, rr 25.1 & 25.2). There are different types of application, dependent upon the degree of sensitivity of the material; the nature of the material must be specified on notice (rr.25.2 & 3), unless notice would disclose that which it is contended should not be disclosed, or indeed the giving of notice at all would have such effect. The Crown must first have considered that the material is relevant to an issue in the case before placing it before the Judge for a ruling. If it is, the Judge must then perform a balancing exercise to decide whether the interests of a fair trial require disclosure. If he rules it is not, he must keep the decision under review throughout the trial. If he rules in favour of disclosure, the prosecution will have to decide whether to proceed.

Authorities

R v Davis, Johnson & Rowe 97 Cr.App.R 110.

R v H [2004] 2 A.C.134, HL..

There are also two Codes of Practice made under Part II of the CPIA (S.I.1997 No.1033, and S.I. 2005 No.985); also see Attorney General’s Guidelines.(Archbold Suppt A-242). These include (Para.47) the principles governing disclosure from third parties such as social services departments and health authorities. A person affected by disclosure of such material e.g. a complainant in a sexual case, must be given the opportunity to make representations before disclosure occurs; R v Staffordshire jj.

Bail

(Bail Act 1976)

Presumption in favour of bail remains, save for certain offences specified in s.25 (homicide or rape after previous conviction for such offence; exceptional circumstances required). Appeal against a refusal is now to the Crown Court only; the Prosecution can now also appeal against a grant, subject to strict time limits.

Custody Time Limits

(Prosecution of Offences Act 1985)

Trial must commence (jury must be sworn) within specified time limits (currently 112 days from committal, or 182 days from sending less time in custody of magistrates' court) Regulations 1987 No 299 as amended, Reg 5(3),(6B)

Time can be extended for particular reasons; illness or absence of accused, a necessary witness judge or magistrate, postponement caused by ordering of separate trials of defendants or offences, or other "good and sufficient cause", provided the prosecution have acted with all due diligence and expedition.

s.22(3) POA

TRIAL

Trial in absence of defendant

The court has a discretion to conduct or continue a trial in the absence of a defendant who has voluntarily absented himself.

R v Hayward & others [2001] Q.B. 862 (C.A.; checklist of factors to consider)

R v. Jones (Anthony) [2003] 1 A.C.1 (H.L).

Jury composition.

Juries Act 1974, as amended by CJA s.321 and Sch 33

The most significant recent development is the removal from the list of ineligibility of those concerned with the administration of justice. See also R v Khan & others, Times, 7th April 2008

Challenge now only available for cause;

s.12

Trial without a jury

The CJA also provides for a trial without a jury to take place in certain cases of serious fraud, or where there has been jury tampering (CJA s.43). There is also a provision for trial without a jury of sample counts (Domestic Violence, Crime and Victims Act 2004, ss 17-20)

EVIDENCE

Special measures

Evidence can now be given by vulnerable witnesses by means of video recorded evidence in chief, live CCTV link for cross examination, using screens if necessary and in some areas via an intermediary; see Youth Justice and Criminal Evidence Act 1999. This is routinely done in sexual cases involving young persons.

The most significant recent developments concern hearsay and bad character.

Hearsay

The rules imposed by common law and some statutory provisions (business documents, absent witnesses, witnesses in fear) have been replaced, and are to some extent codified by, CJA Ch.2 ss.114-136. In particular, the 'interests of justice' provision (s.114(d)) relaxes the formerly restrictive rules, provided certain factors have been considered.

S. 114 Admissibility of hearsay evidence

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—

- (a) any provision of this Chapter or any other statutory provision makes it admissible,
- (b) any rule of law preserved by section 118 makes it admissible,
- (c) all parties to the proceedings agree to it being admissible, or
- (d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

Also see **s.116** ('Cases where a witness is unavailable')

(2) The conditions are—

- (a) that the relevant person is dead;
- (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
- (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
- (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
- (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

S. 117 Business and other documents

S. 118 preserves certain common law categories (public information, reputation as to character, reputation or family tradition, *res gestae*, confessions, admissions by agents, common enterprise, expert evidence)

Bad character

CJA ss.98-113

This is the area in which there has been the greatest 'sea change' in the rules of evidence, allowing evidence of bad character of a defendant to be placed before a jury (s.101 CJA) much more than previously. Also, leave must be sought to introduce the bad character of a non-defendant (s.100 CJA)

S. 101 Defendant's bad character

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

- (a) all parties to the proceedings agree to the evidence being admissible,
- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
- (c) it is important explanatory evidence,
- (d) it is relevant to an important matter in issue between the defendant and the prosecution,
- (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
- (f) it is evidence to correct a false impression given by the defendant, or
- (g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

‘propensity’

s. 103 “Matter in issue between the defendant and the prosecution”

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant’s case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant’s propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2)—

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under section 101(1)(d).

Authorities.

R v Hanson [2005] 2 Cr.App.R. 21
R v Renda & oths [2006] 1 Cr.App.R 24
R V Bovell & Dowds [2005] 2 Cr.App.R. 19
R v Highton & others

The right to remain silent

Criminal Justice and Public Order Act 1994 ('CJPOA')

Adverse inference can be drawn from failure by a defendant

- to mention when questioned something later relied upon in court (s.34 CJPOA)
- to give evidence (s.35 CJPOA)
- to account for objects, substances, or marks, when arrested.

SENTENCING

Pursuant to s.170(9) CJA, The Sentencing Guidelines Council now issues definitive guidelines in many areas of sentencing matters and policy , and also in relation to many specific types of offences (Sexual Offences, Robbery, Domestic Violence, Manslaughter, Assault and other offences against the person, Assaults on Children and Child Cruelty are amongst those issued to date). The Court must “have regard to a relevant guideline”; s.172 CJA..

Indications of sentence

Since the decision of the Court of Appeal in **R v Goodyear [2005] EWCA Crim 888**, a formalised procedure has been established for seeking an indication from the Judge prior to trial as to the maximum sentence that a defendant can expect to receive should s/he plead guilty as that stage. The Judge retains a complete discretion as to whether or not to do so. Another Judge will be bound by the indication at any future hearing.

Credit for plea

A Guideline has been issued in relation to the amount of credit to which a defendant is entitled, according to the stage of proceedings at which a plea is tendered. This varies from 30%, down to 10%

Dangerous offenders

SS. 224-236 CJA

CJA has brought about radical changes and has introduced indeterminate sentences, in many respects indistinguishable from life sentences, in cases where a defendant is found to be 'dangerous'.

'Dangerous'

is defined (s.226.) as posing " a significant risk to members of public of serious harm ...by commission ... of further specified offences'

'Serious harm'

means "death or serious personal injury whether physical or psychological" s.224(3)"

There is also an assumption of dangerousness if D has committed a previous specified (s.229 CJA), which applies unless "...court considers it would be unreasonable to conclude that there is such a risk...." (ss 3)

These sentences take the form, firstly, of "imprisonment for public protection" ('IPP'). This applies to a defendant who has committed any of the 'specified' violent or sexual offences listed in Schedule 15 CJA and which carries 10 years' imprisonment or more as the maximum sentence ('serious specified offences'), and who is found to be dangerous. S/he is then sentenced to IPP, and the court specifies a term which he would have imposed had there been a determinate sentence, halves it, subtracts time spent on remand, and the result of this is the period which must elapse before s/he can apply to the Parole Board for release. However, that release will not take place until the Parole Board is satisfied that s/he is no longer dangerous. This means that release can be delayed for many years, and when it takes place the defendant will remain on licence for life (subject to certain provision allowing for application to terminate the licence after 10 years).

For specified violent or sexual offences carrying a maximum sentence of less than 10 years, a defendant found to be dangerous is liable to an 'extended sentence', namely a determinate term plus a further extension period (of up to 10 years for a violent offence, 8 years for a sexual offence, the total period being no longer than the maximum for the offence). S/he too will not be released until considered by the Parole board no longer to be dangerous, and can be detained until then, but only until the end of the full term imposed.

Other sentences

One of the positive reforms is in relation to suspended sentences.

- Available for under 21s
- No need for "exceptional circumstances"
- Court must attach at least one condition

Community orders

CJA ss 177, 199-213

A list of 12 requirements which may be attached is (s.177);

- Unpaid work
- Activity requirement
- Programme requirement
- Prohibited activity requirement
- Curfew requirement
- Exclusion requirement
- Residence requirement
- Mental health treatment
- Drug rehabilitation
- Alcohol treatment requirement
- Supervision requirement
- Attendance centre requirement (under 25s)

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