

## Guideline Judgments Case Compendium – Update 3: April 2007

SUBJECT	CASE NAME AND REFERENCE
<b>(A) Generic sentencing principles</b>	
Approach to sentencing	<u><a href="#">R v Martin [2006] EWCA Crim 1035</a></u>
Dangerousness <ul style="list-style-type: none"> <li>▪ Imprisonment for public protection</li> <li>▪ Extended sentences</li> </ul>	<u><a href="#">R v Reynolds and others [2007] EWCA Crim 538</a></u>  <u><a href="#">R v Johnson and others [2006] EWCA Crim 2486</a></u>  <u><a href="#">R v O'Brien and others [2006] EWCA Crim 1741</a></u>  <u><a href="#">R v O'Halloran [2006] EWCA Crim 3148</a></u>  <u><a href="#">R v Brown and Butterworth [2006] EWCA Crim 1996</a></u>  <u><a href="#">R v Lay [2006] EWCA Crim 2924</a></u>  <u><a href="#">R v C and others [2007] EWCA Crim 680</a></u>
Deferred sentences	<u><a href="#">Attorney-General's Reference No. 10 of 2006 [2006] EWCA Crim 3335</a></u>
Prosecution and defence duty to assist at sentencing	<u><a href="#">R v Cain and others [2006] EWCA Crim 3233</a></u>
Sentence length <ul style="list-style-type: none"> <li>▪ Custodial sentences</li> <li>▪ Licence period</li> <li>▪ Minimum sentences</li> <li>▪ Time spent in custody on remand</li> </ul>	<u><a href="#">R v Seed and Stark [2007] EWCA Crim 254</a></u>  <u><a href="#">R (on the application of Stellato) v the Secretary of State for the Home Department [2007] UKHL 5</a></u>  <u><a href="#">Attorney-General's Reference No. 6 of 2006 [2006] EWCA Crim 1043</a></u>  <u><a href="#">R v Gordon and others [2007] EWCA Crim 165</a></u>
Sentences/ancillary orders <ul style="list-style-type: none"> <li>▪ Anti-Social Behaviour Orders</li> <li>▪ Sexual offences prevention orders</li> <li>▪ Confiscation orders</li> </ul>	<u><a href="#">R v Lamb [2005] EWCA Crim 3000</a></u>  <u><a href="#">R v H, Stevens and Lovegrove [2006] EWCA Crim 255</a></u>  <u><a href="#">R v Richards [2006] EWCA Crim 2519</a></u>  <u><a href="#">R v Sharma [2006] EWCA Crim 16</a></u>

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SUBJECT	CASE NAME AND REFERENCE
<ul style="list-style-type: none"> <li>▪ Restraining orders</li> </ul>	<u><a href="#">R v Debnath [2005] EWCA Crim 3472</a></u>
Suspended sentence orders	<u><a href="#">R v Lees-Wolfenden [2006] EWCA Crim 3068</a></u>
Young offenders <ul style="list-style-type: none"> <li>▪ Treatment of time spent in custody on remand</li> </ul>	<u><a href="#">R v Eagles [2006] EWCA Crim 2368</a></u>
<b>(B) Homicide and related offences</b>	
Murder	<u><a href="#">R v Jones and others [2005] EWCA Crim 3115</a></u>
Manslaughter <ul style="list-style-type: none"> <li>▪ ‘Single punch manslaughter’</li> </ul>	<u><a href="#">R v Furby [2005] EWCA Crim 3147</a></u>
<b>(C) Non-fatal offences against the person</b>	
Wounding/causing grievous bodily harm with intent <ul style="list-style-type: none"> <li>▪ Young offenders</li> </ul>	<u><a href="#">Attorney-General’s Reference No. 10 of 2006 [2006] EWCA Crim 3335</a></u>
<b>(D) Driving offences resulting in death</b>	
<ul style="list-style-type: none"> <li>▪ Motor manslaughter</li> <li>▪ Causing death by dangerous driving and careless driving when under the influence of drink or drugs</li> </ul>	<u><a href="#">Attorney-General’s Reference No. 111 of 2006 (Hussain) [2006] EWCA Crim 3269</a></u>  <u><a href="#">R v Richardson and others [2006] EWCA Crim 3186</a></u>
<b>(G) Public order offences</b>	
Affray	<u><a href="#">R v Fox and Hicks [2005] EWCA Crim 1122</a></u>
<b>(K) Miscellaneous offences</b>	
Health and safety offences	<u><a href="#">R v Balfour Beatty Rail Infrastructure Services Ltd [2006] EWCA Crim 1586</a></u>

## **(A) GENERIC SENTENCING PRINCIPLES**

### **Approach to sentencing**

#### **R v Martin [2006] EWCA Crim 1035**

- The sentencing decision does not represent a mathematical exercise, nor does it result from an arithmetical calculation.
- It is not the case that each element relevant to the sentencing decision has or should have ascribed to it some notional length of sentence so that, depending on whether the individual ingredient constitutes aggravating or mitigating material, the actual sentence should increase or reduce in accordance with that figure. The reality is that a sentencer must balance all the circumstances of the case in order to reach an appropriate sentence.
- Although consistency of approach is to be encouraged, guidelines (whether provided by the Court of Appeal or the Sentencing Guidelines Council) remain guidelines. Section 174 of the Criminal Justice Act 2003, which imposes a duty on the court to give reasons for and explain the effect of its sentence, recognises a significant difference between sentences which are within or outside the normal range indicated by guidelines. The use of the word ‘range’ should be emphasised.

### **Dangerousness**

*Legislation: ss.224-229, Criminal Justice Act 2003*

#### **R v Reynolds and others [2007] EWCA Crim 538**

The Court reiterated the appropriate approach to the dangerous offender provisions and considered how any mistakes made in their application may be rectified.

#### **Approach to dangerous offender provisions:**

- (a) The first question is whether or not the offence is a ‘specified’ offence, and the second is whether it is a ‘serious’ offence.
- (b) If it is a ‘specified’ offence, whether ‘serious’ or not, the court must determine whether the offender meets the criteria of dangerousness. In doing so, the sentencing judge will be guided by the decisions in R v Lang and others [2005] EWCA Crim 2864 (Compendium update 2) and R v Johnson and others [2006] EWCA Crim 2486 (below).

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- (c) If the criteria of dangerousness are met and the offender is aged 18 or over:
- (i) where the offence is a 'serious' offence, the offender must be sentenced to an indeterminate sentence under section 225 of the Criminal Justice Act 2003 ('the 2003 Act');
  - (ii) otherwise, the offender must be sentenced to an extended sentence under section 227.
- (d) If the criteria of dangerousness are met and the offender is aged under 18:
- (i) if the offence is a 'serious' offence and is one in respect of which the offender would be liable to a sentence of detention for life under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 ('the 2000 Act'), and the court considers that the offence justifies detention for life, the offender must be sentenced to detention for life;
  - (ii) if the court considers in such a case that detention for life is not justified and, pursuant to section 226(3) of the 2003 Act, it considers that an extended sentence under section 228 would be inadequate to protect the public, it must impose detention for public protection;
  - (iii) in any other case, the offender must be sentenced to an extended sentence under section 228 of the 2003 Act.
- (e) By virtue of sections 227 and 228 of the 2003 Act, the court must impose an extended sentence where the criteria of dangerousness are met, even if the offender has been convicted at the same time of an offence carrying an indeterminate sentence and has been sentenced accordingly.

### Approach to rectifying mistakes made in the application of dangerous offender provisions:

The Court reiterated that both prosecution and defence counsel must be prepared to assist the sentencing judge with the application of the relevant statutory provisions and to draw the judge's attention to any mistakes made in passing sentence so that they can be resolved promptly (see R v Cain and others [2006] EWCA Crim 3233 (below)).

Where this does not occur, the following applies:

- Provided the mistake is identified quickly enough, the court can exercise its power under section 155 of the 2000 Act to vary the sentence within 28 days.

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- It would be a proper exercise of the power under section 155 to increase a sentence if, for example, the court had failed to appreciate that a 'specified' offence was a 'serious' offence. Equally, the power could be exercised where there was a failure to recognise that the offence was 'specified', as a result of which an ordinary determinate sentence or other disposal was imposed.
- Where the mistake has been identified within 28 days but the court is unable to conclude the matter within that period, the court is entitled under section 155 of the 2000 Act to rescind the original order and adjourn sentencing to a later date (see R v Annesley (1975) 62 Cr App R 113). To the extent that R v Stillwell and Jewell (1992) 94 Cr App R 65 suggests a different approach, it should not be followed in cases involving the dangerous offender provisions.
- Where the court has not acted under section 155 and a mistake has been made which operates to the disadvantage of the offender (for example, where the court has imposed an indeterminate sentence for a 'specified' but not 'serious' offence), it can be rectified on appeal.
- Greater difficulties arise where the mistake is to the benefit of the offender (for example, where the court failed to appreciate that an indeterminate sentence should have been imposed instead of an extended sentence).
- Such mistakes could be rectified in the context of an Attorney-General's reference, although the Attorney-General may not always consider it appropriate to refer the sentence to the Court of Appeal.
- Where the mistake emerges in the context of an appeal brought by the offender, the Court of Appeal is constrained by section 11(3) of the Criminal Appeal Act 1968, which provides that an appellant may not be more severely dealt with on appeal than in the court below. The effect is that the Court of Appeal is precluded from interfering with the sentence notwithstanding that the dangerousness provisions mandate a different, and more severe, sentence.
- While this means that the original sentence is 'unlawful', in the sense that the court has failed to apply the mandatory sentence, it continues to be effective unless and until varied or quashed. An extended sentence, for example, passed when there should have been an indeterminate sentence will remain a valid and effective sentence.

## **Imprisonment for public protection**

### **R v Johnson and others [2006] EWCA Crim 2486**

The Court considered several issues relating to the assessment of dangerous offenders in order to explain and amplify the guidance given in R v Lang and others [2005] EWCA Crim 2864 (Compendium update 2):

- The sentence of imprisonment for public protection does not represent punishment for past offending; it is directed to the future protection of the public.
- The absence of previous convictions does not preclude a finding of dangerousness.
- The presence of previous convictions for specified offences does not compel a finding of dangerousness; there is an assumption in section 229(3) that it does so, which may be rebutted. The effect of Lang is that the question of whether it is unreasonable to make the assumption is left to the sentencer's judgement.
- Previous convictions for offences that are not specified may be taken into account when assessing dangerousness. For example, a pattern of minor previous offences of gradually escalating seriousness may be significant.
- It does not automatically follow from the absence of actual harm caused by the offender to date that the risk that the offender will cause serious harm in the future is negligible.
- Characteristics such as the inadequacy, suggestibility or vulnerability of the offender may mitigate the offender's culpability. However, they may also serve to produce or reinforce the conclusion that the offender is dangerous.
- It is desirable that the prosecution is able to describe the facts of any previous specified offences of which the offender has been convicted, but failure to comply with this good practice does not normally preclude the imposition of sentence. Counsel for the defendant may be able to explain the circumstances of the previous offences on the basis of instructions. In addition, the sentence imposed for an earlier specified offence may enable the sentencer to draw inferences about its seriousness or otherwise.
- A court should not rely on a disputed fact in reaching a finding of dangerousness unless the dispute can fairly be resolved adversely to the defendant.

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- The sentencing remarks should explain the reasoning which has led the sentencer to the conclusion reached, although it is not obligatory to set out all the details of previous specified offences.

The Court emphasised that it will not normally interfere with the conclusions of a sentencer who has identified the relevant principles and applied his or her mind to the relevant facts:

- In cases to which section 229(3) applies, where the sentencer has applied the statutory assumption, the appellant should demonstrate that it was unreasonable not to disapply it.
- Where the Attorney-General has referred a case because the sentencer has decided to disapply the assumption, the Reference will not succeed unless it is shown that the decision was one which the sentencer could not properly have reached.

### **R v O'Brien and others [2006] EWCA Crim 1741**

The Court considered whether a sentence of imprisonment for public protection could be ordered to run consecutively to another sentence of imprisonment for public protection:

- While not unlawful, it is undesirable to impose consecutive indeterminate sentences or an indeterminate sentence consecutive to another period of imprisonment. Common sense suggests that a sentence of life imprisonment or of imprisonment for public protection starts immediately on its imposition. In addition, making indeterminate sentences consecutive to other periods in custody can compound difficulties in determining when a prisoner must be released or is eligible for parole.
- Where a court imposes an indeterminate sentence and wants the period before which the offender will become eligible for parole to be consecutive to the balance of an existing sentence or to follow the period of return to prison under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000, the court should increase the notional determinate term to reflect that balance or period. See R v Haywood [2000] 2 Cr App R (S) 418.
- Where a court imposes concurrent indeterminate sentences for two or more offences with concurrent minimum terms and, absent those indeterminate sentences, would have passed consecutive determinate sentences, the totality of the offending should be reflected by either:
  - a. imposing the same notional term for all offences; or
  - b. taking the most serious offence and imposing a notional term that reflects the totality of the offending.

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### **R v O'Halloran [2006] EWCA Crim 3148**

- Where a court has before it a specified, but not serious, offence of some gravity at the same time as a serious offence which would attract a sentence of imprisonment for public protection, it should:
  - a) impose a sentence of imprisonment for public protection for the serious offence; and
  - b) impose a concurrent extended sentence for the specified non-serious offence (see R v Lang and others [2005] EWCA Crim 2864 para 20 (Compendium update 2)).
- The court is entitled to take the circumstances of the specified non-serious offence into account when fixing the notional determinate term for the sentence of imprisonment for public protection.

### **Extended sentences**

Replace existing text under heading with:

*The provisions of the Powers of Criminal Courts (Sentencing) Act 2000 relating to extended sentences apply only to offences committed between 30 September 1998 and 4 April 2005. For offences committed after 4 April 2005, the dangerousness provisions of the Criminal Justice Act 2003 apply.*

### **R v Brown and Butterworth [2006] EWCA Crim 1996**

- A court should generally avoid imposing consecutive extended sentences, or a determinate sentence consecutive to an extended sentence, as difficulties may arise in terms of calculating the release date and the start of the period on licence.
- The above problems would not appear to arise where an extended sentence is imposed consecutive to a determinate sentence. In addition, concurrent extended sentences, or an extended sentence which is concurrent with a determinate sentence, may not create particular difficulties.
- However, it is sensible to avoid imposing an extended sentence concurrently with a determinate sentence which is longer than the custodial element of the extended sentence, as this may result in the extended licence period being subsumed in the longer determinate sentence.

The Court emphasised that its judgment was not intended to dilute the guidance issued in R v Lang and others [2005] EWCA Crim 2864 (Compendium update 2).



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### **R v Lay [2006] EWCA Crim 2924**

*Legislation: s.85, Powers of Criminal Courts (Sentencing) Act 2000*

The Court held that the principles established in R v Brown and Butterworth [2006] EWCA Crim 1996 (above) apply also to extended sentences imposed under section 85:

- (a) An extended sentence should not be made consecutive to another extended sentence;
- (b) Concurrent extended sentences are possible, although they will usually be unnecessary;
- (c) An extended sentence should not be followed by a consecutive determinate sentence;
- (d) It may be proper to impose a determinate sentence followed by a consecutive extended sentence, provided that due regard is had to totality;
- (e) If passing an extended sentence consecutive to a determinate sentence, it should be clear on the court record that the extended sentence is to be served second.

The Court indicated that these principles could apply to sentences imposed under section 86 of the Powers of Criminal Courts (Sentencing) Act 2000 (relating to sexual offences committed before 20 September 1998).

### **R v C and others [2007] EWCA Crim 680**

The Court gave further consideration to the practical problems arising from the imposition of consecutive extended sentences under the Criminal Justice Act 2003 ('the 2003 Act') and its predecessor regime under the Crime and Disorder Act 1998 ('the 1998 Act') and the Powers of Criminal Courts (Sentencing) Act 2000 ('the 2000 Act'). It emphasised that, in general, consecutive sentences should be avoided where they include extended sentences and/or imprisonment for public protection. Wherever possible, concurrent sentences should be imposed with the period in custody adjusted to reflect the overall criminality of the offender.

#### **Position under the 1998 and 2000 Acts**

- The Court confirmed the guidance in R v Nelson [2002] 1 Cr App R (S) 134 (Compendium p.11) and R v Pepper and others [2005] EWCA Crim 1181 (Compendium update 1) that a court should not, as a matter of good practice, and save in exceptional circumstances, impose consecutive extended sentences or consecutive sentences of any other nature with an extended sentence. There is, however, nothing unlawful in doing so and, in some cases, it may be necessary.

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- Where consecutive sentences are imposed under the 1998 and 2000 Acts, the practice is as follows:
  - (i) the custodial term of the extended sentence and the entirety of the term of the ordinary determinate sentence are aggregated into a single term;
  - (ii) if that aggregate single term is four years or more, the offender is eligible to apply for release on licence after serving one half of that single term and will be released on licence at the two thirds point in any event;
  - (iii) if the aggregate single term is less than four years, release is automatic after one half of the single term;
  - (iv) the offender remains on ordinary licence until the three quarters point;
  - (v) the extension period then takes effect.

### Position under the 2003 Act

- Under section 247(2) of the 2003 Act, a prisoner serving an extended sentence must be released if the prisoner has served one half of the custodial period and the Parole Board has directed his or her release. Therefore, the period which the prisoner will spend in custody depends on whether and when the Parole Board directs his or her release.
- Where an extended sentence is ordered to be served consecutively to a determinate sentence, the logical approach would be to release the prisoner after he or she has served one half of the determinate term and such part of the custodial term of the extended sentence as required by section 247(2). The prisoner would then be on licence until the end of the custodial term (if released early) plus one half of the determinate sentence plus the extension period.
- However, section 264(2) provides that, where consecutive sentences are imposed, the Secretary of State is not required to release the prisoner until he or she has served the aggregate of the custodial periods. Where an extended sentence has been imposed consecutive to a determinate sentence, this appears to exempt the Secretary of State from releasing the prisoner until completion of the whole custodial term (that is, one half of the determinate sentence plus the custodial term of the extended sentence). In practice, however, it is understood that the Secretary of State will give effect to section 247(2).
- Where consecutive extended sentences are imposed, the logical approach is to aggregate the two custodial terms and permit early release, on the direction of the Parole Board, after one half of the aggregate term has

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been served. The prisoner will be on licence until the end of the aggregate custodial terms and extended terms.

- More difficulties arise if a determinate sentence is expressed to be consecutive to an extended sentence as, strictly speaking, the commencement of the determinate sentence would have to await the decision of the Parole Board to direct the prisoner's release under section 247. The logical and proper solution appears to be to treat the custodial sentence in the same way regardless of which sentence is expressed to be consecutive to the other; that is, to treat the final part of the period in custody as the custodial term of the extended sentence.
- The practical difficulties that arise from the imposition of consecutive extended sentences underlines why they should be approached with great caution, although there may be some cases in which they are appropriate. After reviewing the relevant authorities, the Court summarised the position as follows:
  - (i) there is nothing unlawful about the imposition of concurrent or consecutive extended sentences under the 2003 Act or the earlier regime. This also applies to concurrent or consecutive sentences of life imprisonment or imprisonment for public protection under Chapter 5 of the 2003 Act: see R v O'Brien and others [2006] EWCA Crim 1741 (above). The Court of Appeal will not interfere where extended or indeterminate sentences were justified, unless the practical result is manifestly excessive or gives rise to real problems of administration;
  - (ii) nonetheless, judges should try to avoid consecutive sentences. In appropriate cases, the custodial term or minimum period within concurrent sentences should be adjusted to reflect the overall criminality where that is possible within other sentencing constraints;
  - (iii) if consecutive sentences are considered appropriate or necessary, and if one or more of those sentences is a determinate sentence, the determinate sentence(s) should be imposed first and the extended sentence(s) expressed to be consecutive;
  - (iv) in shaping the overall sentence, judges should remember that there is no obligation for the sentence to be expressed in historical date order. There is nothing wrong with stating that the sentence for the first offence in time should be served consecutively to a sentence imposed for a later offence.

## **Deferred sentences**

### **Attorney-General's Reference No. 10 of 2006 [2006] EWCA Crim 3335**

The Court referred to the guidance regarding deferred sentences in para 1.2.7 of the Sentencing Guidelines Council guideline '*New Sentences: Criminal Justice Act 2003*':

- While issued in respect of adult offenders, the guideline is relevant also to young offenders.
- Any deferral of sentence involves the message that compliance with whatever is required of the offender during the period in question will lead to a lesser category of sentence. Deferral is appropriate only if such a sentence is a proper and realistic possibility on the facts of the case.

## **Life sentences**

### **Automatic life sentences**

Replace existing text under heading with:

*Please note that the following cases were decided under section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. In respect of offences committed on or after 4 April 2005, provisions in Chapter 5 of Part 12 of the Criminal Justice Act 2003 now apply.*

### **Offences taken into consideration (TICS)**

*Please note that in February 2007 the Sentencing Advisory Panel published a consultation paper on the impact that offences taken into consideration should have on sentence.*

## **Prosecution and defence duty to assist at sentencing**

### **R v Cain and others [2006] EWCA Crim 3233**

- Advocates for both the prosecution and defence have a duty to assist the judge at sentencing.
- The prosecution advocate should always be ready to draw attention to any statutory provisions that govern the court's sentencing powers. It is the prosecution advocate's duty to ensure that the judge does not,

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through inadvertence, impose a sentence that is outside his or her powers.

- The advocate for the prosecution should also be in a position to draw the judge's attention to any relevant sentencing guidelines or guideline decisions of the Court of Appeal.

See also Attorney-General's Reference No. 52 of 2003 [2003] EWCA Crim 3731, para 8 (Compendium p.6) and R v Pepper and others [2005] EWCA Crim 1181, para 6 (Compendium update 1).

### **Sentence length**

#### **Custodial sentences**

##### **R v Seed and Stark [2007] EWCA Crim 254**

The Court reminded sentencers of the appropriate approach to sentencing, particularly in times of prison overcrowding:

- Section 152(2) of the Criminal Justice Act 2003 provides that the court must not pass a custodial sentence unless the offence was so serious that neither a fine alone nor a community sentence can be justified. If this threshold has not been passed, no custodial sentence can be imposed. If the threshold has been passed, it does not follow that a custodial sentence must be imposed; the effect of a guilty plea or of personal mitigation may make it appropriate for the sentencer to impose a non-custodial sentence.
- Section 153 of the Criminal Justice Act 2003 provides that, where a custodial sentence is imposed, it must be for the shortest term that is commensurate with the seriousness of the offence. When considering the length of a custodial sentence, sentencers should bear in mind that the prison regime is likely to be more punitive as a result of prison overcrowding.
- Unless imprisonment is necessary for the protection of the public, a sentencer should always give consideration to whether the aims of rehabilitation, and thus the reduction of crime, cannot better be achieved by a fine or a community sentence and whether punishment cannot adequately be achieved by such a sentence.
- While there may previously have been a reluctance to impose fines because of issues with their enforcement, enforcement is now rigorous and effective and, where the offender has the means, a heavy fine can often be an adequate and appropriate punishment. Where that is the case, the Criminal Justice Act 2003 requires a fine to be imposed rather than a community sentence.

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- Particular care should be exercised before imposing a custodial sentence on a first offender as association with seasoned criminals may make re-offending more likely rather than deter it, especially where the offender is young.

### Extended sentences

Replace existing text under heading with:

*The following cases relate to extended sentences imposed under section 85 of the Powers of Criminal Courts (Sentencing) Act 2000. In respect of offences committed on or after 4 April 2005, the dangerous offender provisions in Chapter 5 of Part 12 of the Criminal Justice Act 2003 now apply.*

### Licence period

*Legislation: s.37(1) Criminal Justice Act 1991, s.254, s.256, Schedule 2, para 19, para.23 Criminal Justice Act 2003, Criminal Justice Act (Commencement No.8 and Transitional and Savings Provisions) Order 2005.*

### **R (on the application of Stellato) v the Secretary of State for the Home Department [2007] UKHL 5**

- In respect of any prisoner whose offences were committed before 30 September 1998 and who is recalled to prison after 4 April 2005, section 37(1) of the Criminal Justice Act 1991 continues to govern the duration of the prisoner's licence following any re-release. The result is that any licence expires at the three-quarter stage.

### Minimum Sentences

*Legislation: s.110, s.111 Powers of Criminal Courts (Sentencing) Act 2000*

### **Attorney-General's Reference No. 6 of 2006 [2006] EWCA Crim 1043**

Paragraph 2.1.9 of the Sentencing Guidelines Council guideline 'New Sentences: Criminal Justice Act 2003' provides that, where a court imposes a custodial sentence of 12 months or more based on guidelines which pre-date the Criminal Justice Act 2003, the term should be reduced 'by in the region of 15%' in order 'to achieve the best match between a sentence under the new framework and its equivalent under the old framework'. The Court confirmed that that provision does not have the effect of reducing the minimum sentences prescribed by sections 110 and 111 of the Powers of Criminal Courts (Sentencing) Act 2000.

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### Time spent in custody on remand

*Please note that the Sentencing Guidelines Council guideline 'New Sentences: Criminal Justice Act 2003' published on 16 December 2004 contains guidance about time spent on remand at pages 12 and 32.*

*Legislation: s.67 Criminal Justice Act 1967, s.155 Powers of Criminal Courts (Sentencing) Act 2000, s.240 Criminal Justice Act 2003*

### **R v Gordon and others [2007] EWCA Crim 165**

- Section 67 of the Criminal Justice Act 1967 ('the 1967 Act') continues to apply to sentences of imprisonment imposed in respect of offences committed before 4 April 2005. The result is that time spent in custody on remand is automatically deducted from the sentence; no order by the court is required.
- Offences committed on or after 4 April 2005 are governed by section 240 of the Criminal Justice Act 2003 ('the 2003 Act'). Section 240(3) requires the court to direct that the number of days for which the offender was remanded in custody in connection with an offence or a related offence shall count as part of the sentence. Without a specific direction, no deduction can be made.
- Section 240(3) does not apply if the case is governed by rules made by the Secretary of State or if the court considers that it would be 'just' not to give credit for some or all of the time spent on remand.
- The court must give reasons whenever:
  - (a) it decides not to issue a direction under section 240(3); or
  - (b) it decides that the sentence should be reduced by a period shorter than that for which the offender was remanded in custody.

### **'Mixed' cases**

The Court addressed the situation where an offender has spent time in custody on remand in respect of offences committed both before 4 April 2005 and on or after 4 April 2005:

Where consecutive sentences are imposed:

- the entire remand period will automatically be credited under the 1967 Act in respect of the pre-4<sup>th</sup> April offence;
- section 240(3) of the 2003 Act does not apply in respect of the post-4<sup>th</sup> April offence: see the Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005.

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Where concurrent sentences are imposed:

- a reduction for time spent in custody on remand in respect of the pre-4<sup>th</sup> April offence will automatically be made in accordance with the 1967 Act;
- the court is still required to address section 240 of the 2003 Act in relation to the post-4<sup>th</sup> April offence; however, the court may decide that it is 'just' not to make a direction under that section in order to prevent the offender receiving 'double credit'.

### Offenders who have been recalled to prison after release on licence

Where an offender has spent time in custody on remand in connection with a fresh offence while, at the same time, the offender was serving a sentence of imprisonment after having been recalled:

- in cases to which the 1967 Act applies, the time spent on remand will not be deducted from the sentence imposed for the fresh offence.
- in cases governed by the 2003 Act, section 240(3) does not apply. The result is that the time spent on remand cannot be counted as part of the sentence for the fresh offence: see the Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005.

### Consecutive sentences for released prisoners

- Section 84 of the Powers of Criminal Courts (Sentencing) Act 2000 ('the 2000 Act') provides that a sentence cannot be ordered to begin on the expiry of another sentence from which the offender has been released. However, the section does not prevent a court from ordering an offender's return to prison under section 116 of that Act and imposing a consecutive sentence for the new offence.
- These arrangements continue to apply where the original offence was committed before 4 April 2005.
- Where the original offence was committed on or after 4 April 2005, the restrictions in section 84 are reproduced in section 265 of the 2003 Act.
- When dealing with an offence committed while the full term of a previous sentence is incomplete, the 2003 Act does not empower a court to order that an offender be returned to prison or that the 'new' sentence should run consecutively to the full term of the original sentence or any period of recall ordered by the Secretary of State. Accordingly, when considering any direction in relation to time spent on remand under section 240(3) of the 2003 Act, it may be 'just' to deduct from the number of days included in the order those periods when the offender was still subject to the original sentence.



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### Discretionary life sentences

- Section 82A of the 2000 Act provides that, when fixing the appropriate tariff for a discretionary life sentence, the court should take into account the effect of any direction it would have given under section 240 of the 2003 Act if it had sentenced the offender to a term of imprisonment.

### Errors and omissions

Section 155 of the 2000 Act enables the Crown Court to vary or rescind a sentence imposed or other order made, provided that the variation is made within 28 days. An equivalent power is available in a magistrates' court under section 142 of the Magistrates' Courts Act 1980; however, this ceases to be available after the Crown Court has determined any appeal against conviction, sentence or other order, or the High Court has determined a case stated appeal.

Following the decision in R v Norman and others [2006] EWCA Crim 1792, the Court confirmed that the time limit under section 155 could not be extended. However, the Court identified the following alternative processes which should be used to address errors or omissions in orders relating to time spent in custody on remand:

- Where the court considers that time on remand should be treated as time served but is uncertain about the precise number of days that the offender spent on remand, the court may direct that the appropriate period will be deducted after the calculation has been made and may adjourn that part of the sentencing hearing for that purpose.
- The adjournment should be for a limited period only and, save in exceptional circumstances, the matter should be concluded within 28 days. However, even if delayed beyond that period, it would be permissible for the court to deal with what is no more than the final implementation of its order; this does not constitute a variation or rescission of sentence.
- The final order should be listed and pronounced in open court.
- Any mis-statement of the number of days' credit to which an offender is entitled would almost invariably be the product of administrative error. There appears to be no reason why a judge cannot make it clear in the direction that the offender should receive credit for the full period of time spent in custody on remand (or any particular part of that period); that on the basis of the information before the court the relevant period is X days; but that if the period is proved to be based on an administrative error, the court would order an amendment of the record. Approaching the issue in this way, the number of days to be credited may properly be regarded as a temporary rather than a final

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order, and is therefore open to correction if and when any error emerges.

- Any corrected order should be listed and pronounced in open court.

### **Sentences/ancillary orders**

#### **Anti-Social Behaviour Orders**

##### **R v Lamb [2005] EWCA Crim 3000**

The court considered how to deal with an offender who repeatedly breaches an anti-social behaviour order (ASBO) but without committing an offence, or harassing or causing distress to any member of the public:

- Where breaches do not involve harassment, alarm or distress, community penalties should be considered in order to help the offender learn to live within the terms of the ASBO.
- Where a community penalty is not available (for example, because the offender refuses to engage with relevant agencies to address his or her non-compliance with the order) custodial sentences which are necessary to maintain the authority of the court can be kept as short as possible.
- Such short sentences may not be appropriate if the breach of the ASBO itself involves harassment, alarm or distress to the public of the type that the legislation was designed to prevent.

##### **R v H, Stevens and Lovegrove [2006] EWCA Crim 255**

The Court considered the approach to sentencing for breach of an ASBO where the conduct that is in breach also constitutes an offence:

- Any sentence must be proportionate to the offence. If the conduct which constitutes the breach of the ASBO is also a distinct criminal offence, the maximum sentence for the offence is a feature to be borne in mind by the sentencing court in the interests of proportionality.
- However, a court is not limited to the maximum penalty for the distinct criminal offence. That would treat the breach as if it were a stand alone offence, which at the time it was committed did not also amount to a breach of the court order.
- To the extent that the decision in R v Morrison [2005] EWCA Crim 2237 (Compendium update 2) suggests a different approach, that authority has been undermined by subsequent decisions (see R v Braxton [2005] 1 Cr App R (S) 167, R v Tripp [2005] EWCA Crim 2253 and R v Lamb [2005] EWCA 3000 (above)).

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As a distinct point, the Court noted that an ASBO should not be imposed as a device to circumvent maximum penalties which are believed to be too modest. See R v Kirby [2005] EWCA Crim 1228 and R v Boness [2005] EWCA Crim 2395.

### **Sexual offences prevention orders**

*Legislation: ss.104-110, Sexual Offences Act 2003*

#### **R v Richards [2006] EWCA Crim 2519**

The Court considered whether a sentencer may make a sexual offences prevention order when an extended sentence under section 227 of the Criminal Justice Act 2003 is not imposed:

- The two statutory schemes were intended to be and are distinct. Sections 224-229 of the Criminal Justice Act 2003 identify circumstances in which it is obligatory for the court to impose a particular form of custodial sentence on an offender assessed to be 'dangerous'. Section 104 of the Sexual Offences Act 2003 is concerned with a non-custodial order, available to be imposed by a court as a matter of discretion where satisfied that it is 'necessary' to do so. The power to make the order is not dependent upon conviction or upon the imposition of a particular form of punishment or disposal.
- Accordingly, it is not a pre-condition to the making of a sexual offences prevention order that the court should be satisfied that the offender would also qualify for an extended sentence (or for that matter a sentence of life imprisonment or imprisonment for public protection).

See also R v Rampley [2006] EWCA Crim 2203, which established that a court is entitled to impose a sexual offences prevention order in a case where it has decided not to impose a sentence of imprisonment for public protection.

### **Confiscation orders**

*Legislation: s.71, Criminal Justice Act 1988*

#### **R v Sharma [2006] EWCA Crim 16**

- When calculating the benefits obtained by an offender from an offence, money received into an offender's bank account of which he or she is the sole signatory is to be treated as having been obtained by the offender for his or her own benefit.

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- The purpose of the legislation would not be assisted by collateral inquiries into whether the benefit or part of the benefit was transferred by the offender to another.
- Where one member of a criminal enterprise disposes of part of the benefit to another who knowingly receives it, the legitimate purpose of the legislation is satisfied by treating each offender as having obtained a benefit to the value of the money which has come into his or her possession.
- As long as the benefit obtained by an offender is correctly calculated, it cannot be disproportionate to make the offender accountable for what he or she obtained. The amount of the benefit is not affected by the amount which might also have been obtained by others to whom the offender transferred any part of the benefit. Nor is it affected by the amount which might be recovered pursuant to a confiscation order against another.

### Drug Treatment and Testing Orders (DTTOs)

Replace existing text under heading with:

*DTTOs have been replaced by drug rehabilitation requirements under Part 12 of the Criminal Justice Act 2003 with effect from 4 April 2005.*

### Restraining orders

*Please refer to the Sentencing Guidelines Council definitive guideline on 'Breach of a Protective Order' published on 7 December 2006.*

*Legislation: s.5, Protection from Harassment Act 1997*

### **R v Debnath [2005] EWCA Crim 3472**

The Court identified the following principles:

1. The purpose of a restraining order is to prohibit particular conduct with a view to protecting the victim or victims of the offence and preventing further offences under section 2 or 4 of the Act.
2. A restraining order must be drafted in clear and precise terms so there is no doubt as to what the defendant is prohibited from doing.
3. Orders should be framed in practical terms (for example, it may be preferable to frame a restriction order by reference to specific roads or a specific address). A radius restriction will not

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necessarily invalidate an order. If necessary a map should be prepared. See R v Robert Beck [2003] EWCA Crim 2198 para 9.

4. In considering the terms and extent of a restraining order the court should have regard to considerations of proportionality. See R v Robert Beck [2003] EWCA Crim 2198 para 13.
5. The power of the court to vary or discharge the order in question by a further order under section 5(4) is an important safeguard for defendants. The Court of Appeal (Criminal Division) is unlikely to interfere with the terms of a restraining order if an application for variation or discharge to the court which imposed the restraining order would have been appropriate.

### **Suspended sentence orders**

*Please note that the Sentencing Guidelines Council guideline ‘New Sentences: Criminal Justice Act 2003’ published on 16 December 2004 contains guidance about suspended sentence orders at pages 20 to 26.*

#### **R v Lees-Wolfenden [2006] EWCA Crim 3068**

The Court established that a suspended sentence order must include one or more of the requirements falling within section 190(1) of the Criminal Justice Act 2003. A suspended sentence order which does not impose any requirement on the offender is unlawful.

The Court also reminded sentencers that:

- the maximum term of imprisonment that may be suspended is 12 months; and
- the order must specify both the period for which the term of imprisonment is suspended (‘the operational period’) and the period during which the offender is required to comply with the requirement(s) imposed (‘the supervision period’). The two periods do not need to be the same.

### **Young offenders**

#### **Treatment of time spent in custody on remand**

*Please note that the Sentencing Guidelines Council guideline ‘New Sentences: Criminal Justice Act 2003’ published on 16 December 2004 contains guidance about time spent on remand in relation to adult offenders at pages 12 and 32.*

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*Legislation: s.101, Powers of Criminal Courts (Sentencing) Act 2000*

### **R v Eagles [2006] EWCA Crim 2368**

The Court considered how to take account of time spent on remand when imposing a detention and training order on a young offender:

- Section 101(8) of the Powers of Criminal Courts (Sentencing) Act 2000 provides that time spent in custody on remand shall be taken into account when determining the term of a detention and training order.
- For adult offenders, the sentence is determined first, then time on remand is deducted. It follows that time on remand is taken from the time to be served, not from the determinate sentence.
- To ensure that young offenders do not face a harsher regime than adults, when dealing with a young offender, a sentencer should double the time spent on remand and subtract this from the nominal term considered to be appropriate.
- If the result does not equate to one of the specified periods for detention and training orders set out in section 101(1) of the Powers of Criminal Courts (Sentencing) Act 2000, a sentencer does not always need to settle on the next lowest permissible period, but generally should adopt the nearest permissible period.

## **(B) HOMICIDE AND RELATED OFFENCES**

### **Murder**

*Legislation: s.269 and schedule 21, Criminal Justice Act 2003*

#### **R v Jones and others [2005] EWCA Crim 3115**

##### Determining the minimum term for a mandatory life sentence

- A sentencer must have regard to the guidance in schedule 21, but each case will depend on its particular facts. If the sentencer concludes that it is appropriate to follow a course that does not appear to reflect the guidance, the sentencer should explain the reason for this.
- The three starting points given in schedule 21 provide a very broad framework for the sentencing exercise. It will often be impossible to divorce the choice of starting point from consideration of aggravating and mitigating factors. Where aggravating factors have led a sentencer to adopt the higher of two potential starting points, or mitigating factors have led a sentencer to adopt the lower, the sentencer must be careful not to apply those factors a second time when adjusting the starting point to reflect the other material facts.
- The starting points give a sentencer guidance as to the range within which the appropriate sentence is likely to fall having regard to the more salient features of the offence. However, detailed consideration of the aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order. The starting points must not be used mechanistically; the sentence must reflect the seriousness of the particular offence.
- Protection of the public is not a relevant factor in fixing the minimum term.

##### Whole life order

- A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life. Often, the facts will leave a sentencer in no doubt that the offender must be kept in prison for the rest of his or her life. If a sentencer is in doubt, this may well be an indication that a finite minimum term is the appropriate disposal.
- If the case includes one or more of the factors set out in para 4(2) of the schedule, a whole life order is likely to be called for. However, a sentencer must consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty.

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### Guilty plea

- The Sentencing Guidelines Council guideline '*Reduction in Sentence for a Guilty Plea*' deals specifically with the application of the reduction to sentencing for murder. See also R v Last and others [2005] EWCA Crim 106 and R v Peters and others [2005] EWCA Crim 605.
- The Sentencing Guidelines Council guideline provides that, where a court determines that there should be a whole life minimum term, there will be no reduction for a guilty plea. However, the sentencer should consider the fact that an offender has pleaded guilty to murder when deciding whether it is appropriate to order a whole life term. This applies also to other matters of mitigation.

## Manslaughter

*For motor manslaughter, please refer to Attorney-General's Reference No. 111 of 2006 [2006] EWCA Crim 3269 in section (D) below.*

### **By reason of provocation**

Replace existing text under heading with:

*Please refer to the definitive guideline '*Manslaughter by Reason of Provocation*' published by the Sentencing Guidelines Council on 28 November 2005 and which applies to offenders sentenced on or after that date.*

The following case summaries can be removed as the principles are addressed in the Council guideline:

- R v Shaw (1984) 6 Cr App R (S) 108
- Attorney-General's Reference No. 32 of 1996 (Latham) [1997] 2 Cr App R (S) 10
- Attorney-General's Reference Nos. 72, 95 and 118 of 2003 (Suratan and others) [2003] 2 Cr App R (S) 42

### **'Single punch manslaughter'**

#### **R v Furby [2005] EWCA Crim 3147**

- Because of the harm caused, the offence of manslaughter will usually attract a custodial sentence.
- The length of the sentence must reflect the culpability of the offender. This can vary widely in the case of manslaughter from violent or reckless



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behaviour that foreseeably carries the risk of causing death, to a case where death results from an unlawful act as a consequence of a fortuity which the offender could not reasonably have foreseen. Death resulting from a single punch usually falls into this latter category.

- The circumstances in which the punch was delivered will have a significant effect on the length of the sentence but, where the consequences of the punch were not reasonably foreseeable, care must be taken to see that the effect is not disproportionate.

### *Guidelines:*

- The starting point for 'single punch manslaughter' is 12 months' imprisonment where there is a guilty plea and no aggravating circumstances. See R v Coleman (1992) 13 Cr App R (S) 508.
- Where there are aggravating circumstances, an appropriate sentence can rise as high as four years, depending on the particular facts. *Please note that in Attorney-General's Reference No. 78 of 2006 [2006] EWCA Crim 2793 the Court of Appeal clarified that this guideline applies after a plea of guilty.*
- Getting drunk and resorting to violent behaviour under the influence of drink will be a significant aggravating factor, particularly where the violence occurs in a public place. See Attorney-General's Reference No. 9 of 2004 [2005] EWCA Crim 812 and R v Dulu Miah [2005] EWCA Crim 1798.

## **(C) NON-FATAL OFFENCES AGAINST THE PERSON**

### **Assault**

*Please note that the Sentencing Guidelines Council is currently considering advice of the Sentencing Advisory Panel on assault and other offences against the person and is likely to issue a consultation guideline in 2007.*

### **Harassment**

Replace existing text under heading with:

*Please refer to the definitive guideline ‘Breach of a Protective Order’ published by the Sentencing Guidelines Council on 7 December 2006, which applies to offenders sentenced on or after 18 December 2006.*

The following case summaries can be removed as the principles are addressed in the Council guideline:

- R v Liddle and Hayes [2000] 1 Cr App R (S) 131
- R v Pace [2004] EWCA Crim 2018

### **Wounding/causing grievous bodily harm with intent**

*Legislation: s.18, Offences Against the Person Act 1861*

Replace existing text under heading with:

*Please note that the Sentencing Guidelines Council is currently considering advice of the Sentencing Advisory Panel on assault and other offences against the person and is likely to issue a consultation guideline in 2007.*

### **Young offenders**

#### **Attorney-General’s Reference No. 10 of 2006 [2006] EWCA Crim 3335**

The Court referred to Attorney-General’s References Nos. 59, 60 and 63 of 1998 [1999] 2 Cr App R (S) 128, which established that:

- A sentencer must bear in mind that the welfare of the young offender is never the only consideration to be taken into account. When an offender, however young, deliberately inflicts serious injury on another, there is a legitimate public expectation that the offender will be severely punished to bring home the gravity of the offence and to warn others of the risk of behaving in the same way.
- The use of a weapon, including a baseball bat or a piece of wood, is an aggravating factor.

## **(D) DRIVING OFFENCES RESULTING IN DEATH**

### **Motor manslaughter**

#### **Attorney-General's Reference No. 111 of 2006 (Hussain) [2006] EWCA Crim 3269**

- The guidance on causing death by dangerous driving may be of some relevance to this offence because the same aggravating and mitigating factors sometimes apply, but its value tends to be limited.
- Manslaughter when using a vehicle can vary considerably in its characteristics. Relevant factors include:
  - (a) Whether there was any animosity by the offender towards the deceased;
  - (b) Whether the gross negligence was prolonged or shortlived;
  - (c) Whether the offence took place in the context of another offence, such as seeking to steal the vehicle;
  - (d) The consequences of the offence, such as the number of deaths.
- There are a number of cases concerned with sentencing for motor manslaughter but none purport to be guideline cases. The facts vary significantly but, on a plea of guilty, the sentences at first instance suggest a bracket of between four and seven years, with most tending to be in the upper half of that range.

### **Causing death by dangerous driving and careless driving when under the influence of drink or drugs**

Replace existing text under heading with:

*Please note that in January 2007 the Sentencing Advisory Panel published a consultation paper regarding sentencing for these offences and the two new offences created in the Road Safety Act 2006 (causing death by careless or inconsiderate driving and causing death by driving: unlicensed, disqualified or uninsured driver).*

*Legislation: ss.1 and 3A, Road Traffic Act 1988*

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### R v Richardson and others [2006] EWCA Crim 3186

The Court reconsidered the guidelines in R v Cooksley and others [2004] 1 Cr App R (S) 1 (Compendium, p.30) in light of the fact that the maximum penalty for causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs was increased from 10 to 14 years imprisonment by section 285 of the Criminal Justice Act 2003:

- The primary object of the increase was to enable longer sentences to be imposed in cases of the most serious gravity. However, if the level of sentence in the most serious cases is significantly increased, appropriate proportionality means that there should be some corresponding increase in sentences immediately below this level, continuing down the scale to cases with no aggravating factors.
- The Criminal Justice Act 2003 requires the sentencer to impose a custodial sentence only if such a sentence is necessary and, if it is, for the sentence to be no longer than necessary to fulfil the statutory purposes of sentencing set out in section 142. Therefore, at the lowest levels of seriousness, there will continue to be some cases in which the broad guidance in Cooksley will remain appropriate. There may also be some exceptional situations where even shorter sentences or non-custodial sentences are appropriate, although these will arise only very rarely.

#### Causing death by dangerous driving:

- The starting points identified in Cooksley should be reassessed as follows:

<i>Circumstances</i>	<i>Guideline starting point</i>
1. No aggravating circumstances	12 months to two years' imprisonment
2. Intermediate culpability – momentary dangerous driving/error of judgement/short period of bad driving	Two to four and a half years' imprisonment
3. Higher culpability – standard of driving more highly dangerous (for example, presence of one or two of aggravating factors (a) to (i) identified in <u>Cooksley</u> – see below)	Four and a half to seven years' imprisonment
4. Most serious culpability – for example, presence of three or more of aggravating factors (a) to (i) identified in <u>Cooksley</u> – see below	Seven to 14 years' imprisonment

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### Causing death by careless driving when under the influence of drink or drugs:

- In culpability terms, causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs are equal.
- If an offender drives under the influence of drink or drugs and there is a consequent road traffic accident in which death results, a custodial sentence is inevitable irrespective of the offender's good character or remorse.
- If the level of impairment is only just in excess of the permitted limit and there are no other aggravating factors, it is likely that the offence will fall within the first category set out above.
- Where the level is about double the legal limit, the case will fall within the second (intermediate) category.
- At higher levels, it is almost inevitable that there will be some distinct elements of culpability in the driving itself equating to the aggravating features set out in Cooksley (see below). This will take the offence into the categories of higher culpability and then most serious culpability.
- There will not be many cases where the alcohol level reaches three times the permitted limit and the driving itself was no worse than careless driving. However, even if the driving was not dangerous, at these and higher alcohol levels the offence would normally fall within the two most serious categories of culpability.

### Aggravating and mitigating factors:

The Court set out the aggravating and mitigating factors identified in Cooksley:

#### Aggravating factors

##### *Highly culpable standard of driving at the time of the offence:*

(a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl'

(b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off'

(c) disregard of warnings from fellow passengers

(d) a prolonged, persistent and deliberate course of very bad driving

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(e) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking)

(f) driving while the driver's attention is avoidably distracted, for example by reading or by use of a mobile phone (especially if hand-held)

(g) driving when knowingly suffering from a medical condition that significantly impairs the offender's driving skills

(h) driving when knowingly deprived of adequate sleep or rest

(i) driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns

*Driving habitually below an acceptable standard:*

(j) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle

(k) previous convictions for motoring offences, particularly offences that involve bad driving or the consumption of excessive alcohol before driving [please note that section 143(2) of the Criminal Justice Act 2003 provides that a previous conviction must be treated as an aggravating factor if the court considers it reasonable to do so having regard to the relevance and recency of the previous conviction]

*Outcome of the offence:*

(l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable)

(m) serious injury to one or more victims, in addition to the death(s)

*Irresponsible behaviour at the time of the offence:*

(n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape

(o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension

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(p) offence committed while the offender was on bail [please note that this is now a statutory aggravating factor under section 143(3) of the Criminal Justice Act 2003]

### Mitigating factors

- (a) a good driving record
- (b) the absence of previous convictions
- (c) a timely plea of guilty [please note that this is now to be treated as separate from mitigation – see below]
- (d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend)
- (e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence)
- (f) the fact that the offender has also been very seriously injured as a result of the accident caused by the dangerous driving.

The Court observed that, since the decision in Cooksley, the Sentencing Guidelines Council has issued the guideline '*Reduction in Sentence for a Guilty Plea*', which establishes that a guilty plea should be treated as a matter separate from mitigation. A sentencer should, therefore, reach a preliminary conclusion as to the appropriate sentence before taking account of and applying the discount for any guilty plea.

The Court established that it is a specific mitigating factor, not expressly identified in Cooksley, that the defendant behaved responsibly and took positive action to assist at the scene of the accident.

Replace existing entry for R v Cooksley with the following:

### **R v Cooksley and others [2004] 1 Cr App R (S) 1**

The guidelines set out in Cooksley for causing death by dangerous driving and careless driving when under the influence of drink or drugs have been superseded by R v Richardson and others [2006] EWCA Crim 3186 (above). However, the Court in Cooksley also identified the appropriate length of disqualification for offenders convicted of these offences:

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### *Disqualification*

<i>Circumstances</i>	<i>Length of ban</i>
1. Where the offender had a good driving record before the offence and the offence was a momentary error of judgement	In the order of two years
2. Where the offence and offender's record show the offender tends to disregard the rules of the road or drive carelessly or inappropriately	Three to five years
3. Where the offence and offender's record show the offender represents a real and continuing danger to other road users	Five to 10 years



## **(E) SEXUAL OFFENCES**

Replace existing text under heading with:

*These offences are now included in the Sexual Offences Act 2003 and may be defined differently and/or have different maximum penalties. The following judgments are included because there will be a number of cases to which the previous legislation applies.*

*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

### **Incest**

Replace existing text under heading with:

*This offence is now included in the Sexual Offences Act 2003 and may be defined differently and/or have different maximum penalties. These cases are included because there will be a number of cases to which the previous legislation applies.*

*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

### **Indecent assault**

Replace existing text under heading with:

*This offence is now included in the Sexual Offences Act 2003 and may be defined differently and/or have different maximum penalties. These cases are included because there will be a number of cases to which the previous legislation applies.*

*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

### **Pornography**

Replace existing text under heading with:

*This offence is now included in the Sexual Offences Act 2003 and may be defined differently and/or have different maximum penalties. These cases are included because there will be a number of cases to which the previous legislation applies.*

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*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

### **Rape**

Replace existing text under heading with:

*This offence is now included in the Sexual Offences Act 2003 and may be defined differently and/or have different maximum penalties. These cases are included because there will be a number of cases to which the previous legislation applies.*

*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

### **Trafficking women for prostitution**

Replace existing text under heading with:

*This offence is now included in the Sexual Offences Act 2003 and may be defined differently and/or have different maximum penalties. These cases are included because there will be a number of cases to which the previous legislation applies.*

*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

### **Offences under the Sexual Offences Act 2003**

Replace existing text under heading with:

*In June 2006 the Sentencing Guidelines Council issued a consultation guideline on offences in the Sexual Offences Act 2003. A definitive guideline is likely to be published in 2007.*

## (G) PUBLIC ORDER OFFENCES

### Public order

#### Affray

The case summary of R v Keys and others (1986) 8 Cr App R (S) 444 can be removed as it related to the common law offence of affray which was abolished in the Public Order Act 1986.

#### **R v Fox and Hicks [2005] EWCA Crim 1122**

The Court confirmed that the following principle established in R v Keys and others (1986) 8 Cr App R (S) 444 remains relevant to sentencing for affray under the Public Order Act 1986:

- Acts of individual participants on the edges of an affray should not be viewed in isolation. Even if a person participated simply by encouraging others, he or she thereby hoped to promote the totality of the affray and must take some share of the blame for the overall picture. The court is not, therefore, confined to consideration of the individual role of the offender and is entitled to take account of the larger picture to which the offender is contributing.

## (H) THEFT ACT OFFENCES/FRAUD

### Fraud

#### Benefit fraud

*Please note that the Fraud Act 2006, which came into force on 15 January 2007, created a new offence of fraud. The Sentencing Advisory Panel intends to publish a consultation paper on sentencing for various types of fraud, including benefit fraud, during 2007.*

#### Company management

*Please note that the Financial Services Act 1986 was repealed by the Financial Services and Markets Act 2000, which came into force on 1 December 2001.*

#### Mortgage fraud

*Please note that the Fraud Act 2006, which came into force on 15 January 2007, created a new offence of fraud. The Sentencing Advisory Panel intends to publish a consultation paper on sentencing for various types of fraud, including mortgage fraud, during 2007.*

#### Obtaining money transfer by deception

*Please note that the Fraud Act 2006, which came into force on 15 January 2007, abolished the offence of obtaining money transfer by deception and created a new offence of fraud. The Sentencing Advisory Panel intends to publish a consultation paper on sentencing for various types of fraud during 2007.*

### Robbery

Replace existing text under heading with:

*Please refer to the definitive guideline 'Robbery' published by the Sentencing Guidelines Council on 25 July 2006, which applies to offenders sentenced on or after 1 August 2006. The guideline provides starting points and sentencing ranges for three types of robbery: street robbery or 'mugging', robberies of small businesses and less sophisticated commercial robberies. It also summarises Court of Appeal guidance regarding violent personal robberies in the home and professionally planned commercial robberies.*

The following case summaries can be removed as the principles are addressed in the Council guideline:

- R v Turner (1975) 61 Cr App R (S) 67
- R v Daly (1981) 3 Cr App R (S) 340

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- R v Gould and others (1983) 5 Cr App R (S) 72
- Attorney-General's Reference Nos. 32 and 33 of 1995 (Pegg and Martin) [1996] 2 Cr App R (S) 346
- Attorney-General's Reference No. 2 of 1989 (Major) (1989) 11 Cr App R (S) 481
- Attorney-General's Reference No. 7 of 1992 (Khan) (1993) 14 Cr App R (S) 122
- R v O'Brien (1984) 6 Cr App R (S) 274
- R v Edwards and Larter *The Times* 3 February 1987
- Attorney-General's Reference Nos. 4 and 7 of 2002 (Lobban and Sawyers) [2002] 2 Cr App R (S) 77
- R v Allen [2005] EWCA Crim 667

### **Theft**

#### **Airport luggage (theft of)**

*Please note that in November 2006 the Sentencing Advisory Panel published a consultation paper on sentencing for a number of forms of theft and dishonesty, including theft in breach of trust.*

#### **Breach of trust – 'White collar' dishonesty**

*Please note that in November 2006 the Sentencing Advisory Panel published a consultation paper on sentencing for a number of forms of theft and dishonesty, including theft in breach of trust.*

#### **Shoplifting**

*Please note that in August 2006 the Sentencing Advisory Panel published a consultation paper on sentencing for theft from a shop.*

## **(I) OFFENCES AGAINST PUBLIC JUSTICE**

### **Breach of licence**

Replace existing text under heading with:

*Please note that section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 was repealed by Part 7 of Schedule 37 to the Criminal Justice Act 2003 in respect of offences committed on or after 4 April 2005. However, under the relevant transitional provisions section 116 continues to apply in cases where the term of imprisonment:*

- *was imposed in respect of offences committed before 4 April 2005; or*
- *was for a term of less than 12 months.*

### **Breach of a non-molestation order**

Replace existing text under heading with:

*Courts will need to have regard to the relevant provisions of the Domestic Violence, Crime and Victims Act 2004 when they are implemented and to the definitive guideline ‘Breach of a Protective Order’ published by the Sentencing Guidelines Council on 7 December 2006, which applies to offenders sentenced on or after 18 December 2006.*

## (K) MISCELLANEOUS OFFENCES

### Health and safety offences

*Legislation: s.3, Health and Safety at Work Act 1974*

#### **R v Balfour Beatty Rail Infrastructure Services Ltd [2006] EWCA Crim 1586**

The Court endorsed the following principles from R v Howe and Son (Engineers) Ltd [1999] 2 Cr App R (S) 37:

1. Failures to fulfil general duties such as those imposed by section 3 of the 1974 Act are particularly serious, as such sections are the foundations for protecting health and safety of the public.
2. Historically, fines for such offences, particularly those imposed in magistrates' courts, have been too low.
3. It is not possible to say that a fine should bear any specific relationship to the turnover or net profit of the offender. Each case must be dealt with according to its own circumstances.
4. It may be helpful to look at how far short the offender fell of the appropriate standard.
5. Generally, where death occurs in consequence of the breach, that is an aggravating feature. The Court added that, by analogy with cases of causing death by dangerous driving, multiple deaths must be regarded as more serious than single deaths although they do not stand in an arithmetical relationship with them.
6. A breach with a view to profit seriously aggravates the offence.
7. The degree of the risk and the extent of the danger may also be relevant, specifically whether it is an isolated failure or one continued over a period.
8. The offender's resources and the effect of a fine on its business are important. Any fine should reflect the means of the offender and the court should consider the whole sum it is minded to order against the offender (including costs).
9. Mitigating factors will include:
  - i. a prompt admission of responsibility and a timely plea of guilty [please note that the Sentencing Guidelines Council guideline '*Reduction in Sentence for a Guilty Plea*'

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- establishes that a guilty plea is a separate issue from aggravation and mitigation generally];
- ii. steps taken to remedy deficiencies drawn to the offender's attention; and
  - iii. a good safety record.
10. Above all, the objective of the fine imposed should be to achieve a safe environment for the public and to bring that message home, not only to those who manage a corporate offender, but also to those who own it as shareholders.
11. This objective means that consistency of fines between one case and another and proportionality between the fine and the gravity of the offence may be difficult to achieve. Consistency may not, therefore, be a primary aim of sentencing in this area of law. See R v Jarvis [2005] EWCA Crim 1409 para 7.
12. The court can take a more serious view of the breaches where there is a 'significant public element', particularly where members of the public have to trust a company to carry out work relating to their safety. The court can also take into account the fact that it was a matter of good fortune that the risks, and their consequences, did not turn out worse than they did. See R v Jarvis [2005] EWCA Crim 1409 para 11.
13. Where a defendant is a public body, it is not immune from criminal penalties because it has no shareholder or well-paid directors. However, if a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function it has been set up to fulfil, that is not something to be disregarded. See R v Milford Haven Port Authority [2000] 2 Cr App R (S) 423. *Please note that this approach was endorsed by the Court of Appeal in R v Southampton University Hospital NHS Trust [2006] EWCA 2971.*

The Court also provided the following guidance regarding the purposes of sentencing:

- The fine must reflect both the degree of fault and the consequences of the breach so as to raise appropriate concern on the part of shareholders at what has occurred. Such an approach will satisfy the requirement that the sentence should act as a deterrent. It will also satisfy the requirement that a company should be punished for culpable failure to pay due regard to safety and for the consequences of that failure.
- A deterrent sentence is neither appropriate nor possible where a breach is the result of negligence or inadvertence on the part of an individual which reflects no fault on the part of management, the systems that they have put in place, or the training that they have provided.



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- Where the consequences of an individual's shortcomings have been serious, the fine should reflect this but should be smaller than a fine for a breach of duty that consists of a systemic failure.