Drug-assisted rape

1.305 The problem of drug-assisted rape has been recognised for some time.[423] Certain drugs have the capacity to lead complainants to consent to acts which they would normally find repugnant.[424] They may also cause sexual arousal and a sense of enjoyment. They can be mixed with other drugs or alcohol to avoid detection.

1.306 Section 75(2)(f) applies where *any* person has administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act. This represents the one circumstance where the 2003 Act goes further than recommended by the Sexual Offences Review, albeit the Review did include in its original list of circumstances the situation where a complainant is too affected by alcohol or drugs to give free agreement.[425]

1.307 The substance must, having regard to when it was administered or taken, have been capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act. The substance need not be an illegal substance. This wide definition includes laced drinks.

1.308 The substance must have been administered etc. without the complainant's consent. Voluntary consumption of the substance will not suffice. However, for the complainant to have consented to the administration etc., they would have to have freely agreed to its administration etc., knowing its nature and effect. Deception of the complainant as to the nature or effect of the substance would vitiate consent.

1.309 If the substance was administered etc. but no sexual activity actually took place and none was attempted, the defendant may still be charged with the preparatory offence of administering a substance with intent.[426]

Conclusive Presumptions as to Consent

1.310 In contrast to the rebuttable presumptions of s.75 of the 2003 Act, which the defendant may challenge if there is sufficient evidence, s.76 of the Act creates conclusive presumptions. It provides:

[423] P. Sturman, *Drug Assisted Sexual Assault: A study for the Home Office* (Chardon: Metropolitan Police, 2000). For further discussion see Temkin, *Rape and the Legal Process*, 2nd edn, (2002) p.103. See also E. Finch and V.E. Munro, *Intoxicated Consent and the Boundaries of Drug Assisted Rape* [2003] Crim. L.R. 773 and *Intoxicated Consent and the Boundaries of Drug Assisted Rape Revisited* [2004] Crim. L.R. 789.

[424] Rohypnol or GHB (Gamma hydroxyl butyrate acid).

[425] In their article *The Sexual Offences Act 2003: (1) Rape, Sexual Assaults, and Problems of Consent* [2004] Crim. L.R. 328 at p.337, Professors Jennifer Temkin and Andrew Ashworth make a powerful case that this circumstance should raise an irrebuttable presumption.

[426] See Ch.14, below.

"(1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
(a) that the complainant did not consent to the relevant act, and
(b) that the defendant did not believe that the complainant consented to the relevant act.
(2) The circumstances are that—
(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant."

1.311 Section 76 essentially replicates the common law, although both limbs of s.76(2) in some respects go further. Where the prosecution are able to prove that the defendant did a relevant act (in the case of rape, intentional penile penetration of the complainant's vagina, anus or mouth), and that either of the circumstances set out in s.76(2) existed, it is conclusively presumed that the complainant did not consent to the relevant act and that the defendant did not believe that the complainant consented to the relevant act. The jury should be directed to convict the defendant if they find either of these matters proved. The judge should give the jury clear directions as to the meaning of the word "purpose" and identify the relevant evidence going to that issue. Since this section creates conclusive presumptions, it is arguable that its contents should not have been treated as matters of evidence but should have been included in the definition of the offence. The circumstances that give rise to the conclusive presumptions are not necessarily the worst type of rape.

1.312 The deception or impersonation must be shown to have operated upon the mind of the complainant so as to induce consent. Lies as to the nature or purpose of the act or as to identity are not sufficient in themselves to trigger the presumptions. The presumption relating to impersonation does not arise if the complainant was not in fact induced to consent by the impersonation, and consented irrespective of it.

Deception as to the nature or purpose of the relevant act

1.313 As the conclusive presumptions in s.76 of the 2003 Act provide an alternative route for a jury to convict a defendant, they require careful scrutiny. The presumption in s.76(2)(a) is relevant only in the comparatively rare case where the defendant has deliberately deceived the complainant about the nature or purpose of the relevant sexual act. The ambit of the provision is limited to the "act" to which the deception relates, and to deceptions as to the "nature or purpose" of the act as opposed to its quality. Beyond this very limited type of case, and assuming that none of the evidential presumptions in s.75 applies, the issue of consent in rape must be addressed by reference to the definition of consent in s.74 and the provision as to reasonable belief in consent in s.1(2).

1.314 Section 76(2)(a) applies where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act. In *Jheeta*[427] the presumption was held not to have arisen where the defendant deceived the complainant by creating a bizarre fantasy which led her into having sexual intercourse with him more often than she would otherwise have done. The appellant pleaded guilty to two counts of procuring the complainant to have sexual intercourse with him by false pretences, contrary to s.3(1) of the Sexual Offences Act 1956, four counts of rape, contrary to s.1(1) of the Sexual Offences Act 2003, and one count of blackmail. The complainant and appellant had met while students and started a sexual relationship. To prevent the complainant from breaking off the relationship the appellant sent her threatening text messages. The complainant had no idea who was sending the messages, and shared her worries about them with the appellant. He tried to reassure her that he and his friends would protect her. When the complainant wanted to involve the police, he said he would lodge a complaint on her behalf. Over a period of four years, the appellant sent her numerous text messages appearing to be sent by different police officers. The police officers were fictitious. The messages were designed to encourage her to maintain the relationship with the appellant and to sleep with him.

1.315 The appellant was arrested and, when interviewed, eventually admitted that he had been responsible for the creation of the entire fictitious scheme. There had been occasions when sexual intercourse had taken place while the complainant was not truly consenting. Following advice from his counsel as to the effect of s.76, the appellant pleaded guilty to four counts of rape. In his basis of plea, he acknowledged that he had persuaded the complainant to have sexual intercourse with him more frequently than she would otherwise have done and that the persuasion had taken the form of pressures imposed on her by the complicated scheme he had fabricated.

1.316 On appeal against conviction, the appellant argued that the deception did not amount to a deception as to the nature or purpose of the act, and accordingly the appellant had been wrongly advised as to the law by his then counsel, the ambit of his behaviour was not caught by s.76 and the conclusive presumption did not arise. The Court of Appeal agreed, holding that the complainant had been deceived not as to the nature or purpose of the sexual intercourse, but as to the situation in which she had found herself. No conclusive presumption arises merely because a complainant is deceived in some way or other by disingenuous blandishments or common-or-garden lies told by the defendant. Lies of that type may well be deceptive and persuasive, but they will rarely go to the nature or purpose of intercourse. However, the Court dismissed the appeal on the basis that, in the light of the appellant's admissions, the complainant had not exercised a free choice or consent for the purposes of s.74 of the 2003 Act. There was no doubt that, on some

[427] [2007] EWCA Crim 1699.

occasions at least, the complainant had not consented and that the appellant was perfectly aware of that. This appears to be an acknowledgement by the Court of Appeal that some deceptions, when considered in the context of all the circumstances prevailing at the time, may lead to a complainant not exercising a free choice under s.74, even though those deceptions fall short of those engaging the s.76 presumptions. For further discussion see paras 1.205ff above.

1.317 It is of interest that the appellant's earlier deceptions in *Jheeta* were charged under the old law as procuring sexual intercourse by false pretences, contrary to s.3(1) of the Sexual Offences Act 1956. The 2003 Act does not contain this offence, which was accordingly abolished as from May 1, 2004. The decision in *Jheeta* reveals a gap in the law[428] in that it is not at present properly equipped to deal with the procuring of sexual intercourse by fraud, which falls short of the limited categories of fraud that vitiate consent. However, the wider definition of consent in s.74, with its emphasis on freedom of choice, may be sufficient to catch cases where there is evidence that a complainant's choice was very far from informed.

Deception as to the nature of the act within the meaning of s.76

1.318 Section 76(2)(a) of the 2003 Act is relevant only in those comparatively rare cases where the defendant deliberately deceived the complainant about the nature or purpose of one or other form of sexual intercourse. The ambit of s.76 is limited to the "act" to which the deception relates and to deceptions as to the "nature or purpose" of the act, as opposed to the act's quality. With regard to the nature of the act, the 2003 Act follows the common law, which established that if the victim was induced to consent on the basis of a fraudulent misrepresentation as to the nature of the act, there was no consent. In *Flattery*,[429] the defendant ran an open stall at Halifax market from which he professed to give medical and surgical advice for money. The victim, a girl of 19, consulted him with respect to an illness from which she was suffering. He advised that a surgical operation should be performed and, under the pretence of performing it, had sexual intercourse with her. She submitted to what was done in the belief that the defendant was merely treating her medically. It was adjudged that in the circumstances the girl had only consented to a surgical operation, and the conviction for rape was

[428] See the observations of Professor John Spencer in *Three new cases on consent*, *Cambridge Law Journal* [2007] 490.

[429] (1877) 1 QBD 410. See also *Case* (1850) 1 Den. 580, where a 14-year-old girl believed that she was submitting to medical treatment and made no resistance when her medical practitioner had sexual intercourse with her. Wilde CJ said (at 582): "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgement and will".

upheld. *Flattery* was followed in *Williams*[430] where the appellant, who was a choirmaster in a Presbyterian church, was engaged by the parents of a 16-year-old girl to give her lessons in singing and voice production. The appellant had sexual intercourse with her under the pretence that her breathing was not quite right, and that he had to perform an operation to make an air passage to enable her to produce her voice properly. The girl submitted to what was done under the belief fraudulently induced by the appellant that she was being medically and surgically treated, and not with the intention that he should have sexual intercourse with her. In contrast, a fraudulent misrepresentation that a person has been found to be free from HIV and/or other sexually transmitted diseases does not nullify consent, because there is no deception as to the nature of the act.[431]

1.319 Beyond this limited type of case, and assuming that none of the evidential presumptions in s.75 apply, the issue of consent must be addressed by reference to the definition of consent in s.74 and the provision as to reasonable belief in consent in s.1(2).

Sexual intercourse induced by a fraudulent promise

1.320 It follows from the preceding paragraph that at common law, where a complainant consented to sexual intercourse knowing full well what the nature of the act was, but deceived by a promise never intended to be fulfilled, the complainant's consent was not vitiated by the deception. This is illustrated by *Linekar*,[432] where the defendant had approached a prostitute outside a cinema and they had agreed a price; they eventually had sexual intercourse with him promising to pay afterwards. He failed to pay. He was convicted of rape and appealed. It was held, allowing the appeal, that an essential ingredient of rape was proof that the woman did not consent to the act of sexual intercourse with the man who penetrated her; that the only types of fraud which could vitiate consent in a case of rape were frauds as to the nature of the act itself or as to the identity of the agent; that it was the absence of consent to sexual intercourse, rather than fraud, which constituted the offence of rape; and that accordingly, the reality of the complainant's consent in the present case was not destroyed by the defendant's pretence that he would pay her. In *Jheeta*,[433] the Court of Appeal confirmed that the facts of *Linekar* would not fall within the ambit of s.76(2)(a) and that the

[430] [1923] 1 K.B. 340, overruling *O'Shea* (1898) 19 Cox C.C. 76, in which Ridley J appeared to say that *Flattery* was no longer law. The decision in *Williams* was criticised by Professor Glanville Williams on the ground that the girl was deceived only as to the effects of the defendant's act rather than as to its essential nature: *Textbook of Criminal Law*, 2nd edn, (1983) pp.561–562. See also *Clarence* (1888) 22 QBD 13 at 44, per Stephen J: "Consent in such cases does not exist at all, because the act consented to is not the act done".

[431] For this reason, the Law Commission invited views as to whether this should be a further exception to the general rule: Law. Com. Consultation Paper No.139, paras 6.19 and 6.80. See also *R. v B* [2006] EWCA Crim 2945.

[432] [1995] 2 Cr. App. R. 49.

[433] [2007] EWCA Crim 1699 at [27] per Sir Igor Judge P.

position reached by the common law has not been changed by the 2003 Act. Similarly, consent induced by a promise to marry the complainant, or to give the complainant a lift home afterwards, an expensive holiday or a part in a film, is still consent to the relevant act albeit the person making the promise never intended to keep it. Accordingly, s.76 would not apply. Such conduct could have amounted to an offence under s.3(1) of the Sexual Offences Act 1956 if it involved sexual intercourse procured by false pretences or false representation. However, as noted above, that offence was repealed and not replaced by the 2003 Act.

Deception as to the purpose of the act not the quality of the act

1.321 By including in s.76(2)(a) deception as to the "purpose" of the act, Parliament arguably extended the pre-existing common law. The extension was proposed by the Sexual Offences Review, citing as an example a false representation that the purpose of the act is a medical examination.[434] A deception of this sort is unlikely to feature in a rape case, but it could arise in cases of assault by penetration or sexual assault, where a complainant is induced by deception as to the purpose of the act to undergo an intimate medical examination. The inclusion in s.76(2)(a) of deception as to purpose has the virtue that it will eliminate the need to determine whether the complainant was deceived as to the nature of the act or its purpose. In particular, it renders academic any question as to whether the difficult case of *Tabassum*[435] was correctly decided as, on any view, the Court of Appeal in *Tabassum* applied a test different from the present law. The appellant in that case deceived women by pretending in one case that he was a fully qualified breast cancer specialist, and in other cases that he was doing a survey on breast cancer. The representations led the women to allow him to examine their breasts. In fact, although he had no medical qualifications, it was held by the Court of Appeal that the victims had consented to the nature of the defendant's acts, but not to their quality, since they believed he was medically qualified or had trained at the cancer hospital and that the touching was for a medical purpose; and that accordingly, there was no true consent. The late Professor Sir John Smith was highly critical of the decision, stating that the distinction drawn between "nature" and "quality" was new and highly suspect.[436] Arguably, this concern is dispelled by the Sexual Offences Act 2003, which, by adding the words "or purpose" to "nature", enables a jury to decide whether there was no consent due to deception as to the purpose of the relevant act. However, the Court of Appeal in *Jheeta*, when reviewing the pre-2003 Act authorities, pointed out that s.76(2)(a) does not address the

[434] *Setting the Boundaries*, 2000, para.2.10.9.

[435] [2000] Crim. L.R. 686.

[436] [2000] Crim. L.R. 686 at p.687. Arguably *Tabassum* is inconsistent with *Richardson* [1998] 2 Cr. App. R. 200 where a struck-off dentist who carried out work on patients without disclosing her status was held not to have committed an assault.

"quality" of the act but confines itself to its "purpose". The Court preferred *Green*[437] to *Tabassum* as an example where s.76(2)(a) would operate. In that case, a qualified doctor carried out bogus medical examinations of young men in the course of which they were wired up to monitors while they were masturbated. As the purported object was to assess their potential for impotence, there was a clear deception as to the "purpose" of the physical act.

1.322 The decision in *Jheeta* suggested that the Court of Appeal was adopting a restrictive interpretation of "the purpose of the act". The Court stated that since the s.76 presumptions are conclusive of guilt, they require the most stringent scrutiny. However, a considerably broader approach was taken by the Court of Appeal in *Devonald*,[438] in a reserved judgement, where it upheld the trial judge's decision that s.76(2)(a) applied where the appellant had persuaded the complainant, a 16-year-old boy, to masturbate in front of a webcam. The appellant believed that the boy had treated his daughter badly so he decided to teach him a lesson. He corresponded with the boy over the internet pretending to be a young woman and persuaded him to masturbate in front of a webcam. The appellant was convicted under s.4 of the 2003 Act of causing a person to engage in sexual activity without consent, having changed his plea following a ruling by the judge. The Court of Appeal, here, gave s.76(2)(a) a very wide interpretation as the complainant undoubtedly masturbated for a sexual purpose, albeit he was doing it for a young woman. It held that it would have been open to the jury to conclude that the complainant had been deceived as to the purpose of the masturbation. The Court regarded the case as analogous to *Green*, although in *Green* the complainants were induced to masturbate for non-sexual purposes. It said that the concept of "purpose" encompasses rather more than the specific purpose of sexual gratification by the defendant in the act of masturbation. *Devonald* has been the subject of significant academic criticism. Professor Ormerod argued that it is out of step with *Jheeta*.[439] If correctly decided, it would mean that lies about a defendant's state of mind could trigger the conclusive presumption, whereas they should simply be part of the evidence to be considered when the jury evaluate absence of consent. Jo Miles has echoed this criticism in observing that the implication of *Devonald* is that where a defendant intentionally induces the complainant's participation in sexual activity on the basis of some ostensible purpose other than his genuine purpose, the s.76 presumption would be triggered.[440]

[437] [2002] EWCA Crim 1501, identified by David Ormerod QC and Karl Laird in *Smith and Hogan's Criminal Law*, 14th edn (Oxford: OUP, 2015), p.840, as a relatively easy case in that the true purpose was not medical but sexual gratification.

[438] [2008] EWCA Crim 527.

[439] *Smith and Hogan's Criminal Law*, 14th edn (Oxford: OUP, 2015), p.842, where David Ormerod QC and Karl Laird argue that there are dangers in taking a wider reading of "purpose", as many bigamists and adulterers would thereby become rapists on the basis of a conclusive presumption.

[440] Jo Miles, *Sexual offences: consent, capacity and children*, *Archbold News*, Issue 10, December 5, 2008.

Subsequently, in *R. v B*[441] the Court of Appeal confirmed the restrictive 1.323
interpretation of the "purpose" of the act adopted in *Jheeta*.[442] The facts are instructive. The appellant was convicted on seven counts of causing the complainant, his girlfriend, to engage in sexual activity without consent, contrary to s.4(1) of the 2003 Act. He established a fake Facebook account and under a pseudonym ("G") established an online relationship with the complainant. She had no idea that G was in reality the appellant. Using the pseudonym he persuaded her to share sexual photos with him, and then blackmailed her into performing more sexual acts. She confided in the appellant as to what had happened. He told her he had dealt with the matter by killing G. The appellant then established another fake online account purporting to be a friend of G. Through that account he contacted the complainant online and blackmailed her into providing yet more sexually explicit photographs of herself. At trial, the appellant admitted setting up the accounts and persuading the complainant to engage in the sexual activity, but claimed that he believed she was consenting. The Crown sought to rely upon the conclusive presumption in s.76 on the basis that the appellant had intentionally deceived the complainant as to the purpose of the relevant acts (it was not contended that she was deceived as to the *nature* of the acts). The trial judge agreed that a s.76 issue arose for the jury to consider. He decided he would leave to the jury the issue of whether the complainant had been deceived as to the purpose of the acts and that he would direct them that, if they found deceit proved, the conclusive presumption applied. The complainant was not asked at trial what she understood the purpose or the motive of the person at the end of the webcam to be. The Court of Appeal quashed the convictions and ordered a re-trial. Hallett LJ stated:[443]

> "Reliance upon section 76 in this case, on these facts and this evidence, was misplaced. The prosecution needed to look no further than the provisions of section 74. It provides that 'a person consents if he agrees by choice and has the freedom and capacity to make that choice'. If the complainant only complied because she was being blackmailed, the prosecution might argue forcefully she did not agree by choice."

In *R. v B*, there was no deception as to the "nature" of the acts: the 1.324
complainant knew that they were sexual acts of vaginal and anal penetration. There was, undoubtedly, a deception as to the identity of the person who was intentionally causing her to engage in sexual activity. Could there have been a deception as to identity within the meaning of s.76? The obstacle to that argument is that the conclusive presumption in s.76 has to be restrictively interpreted as it effectively widens the definition of rape. Parliament has provided that a fraud as to identity will trigger the application of s.76 only where a defendant impersonates someone "known personally to the complainant". The identities used in this case were not the true identities of

[441] [2013] EWCA Crim 823.

[442] [2007] EWCA Crim 1699.

[443] At [24].

anyone known personally to the complainant. Arguably, there was in *R. v B* a deception as to motivation, in that it is likely that the girlfriend thought she was being intentionally caused to engage in the sexual acts for someone's sexual gratification, whereas the true motivation was to test her fidelity or to humiliate her. Clearly, the deception as to identity was inextricably linked to the appellant's motivation or purpose. However, on these facts, the Court of Appeal suggested that if the complainant had assumed that the motive of the other person was sexual gratification, she would not have been misled as to the purpose. The Court of Appeal distinguished *Devonald*,[444] and preferred *Jheeta* to the extent that there is a conflict between the two decisions.

1.325 The recent case of *Matt*[445] provides a clear cut example of a deception as to purpose. The complainant answered an advertisement placed by the applicant on a respectable website to appear in a pilot programme for a television series. The applicant was not a film maker but a plumber. He deceived the complainant into believing she was undergoing a casting process and induced her to carry out sexual acts with him, short of sexual intercourse, in a London hotel room. The Court of Appeal, in refusing an application for leave to appeal, had no difficulty in finding that there was a deception as to purpose falling within s.76(2)(a) in that the applicant's ostensible purpose was not sexual pleasure but simulated sexual pleasure for commercial purposes.

1.326 Two Commonwealth cases are instructive in this context. In the Canadian case of *Harms*[446] the appellant had posed as a doctor and obtained consent to sexual intercourse by falsely representing it as a necessary medical treatment for a condition for which he had given a false diagnosis. The Court upheld the conviction. Such conduct would clearly be rape under the 2003 Act as there was deception as to the purpose of the Act. In contrast, in the Australian case of *Papadimitropoulos*[447] the defendant went through a bogus ceremony of marriage with the complainant, inducing her thereby to have sexual intercourse with him. The High Court refused to find that the deception invalidated the woman's consent. This would be a clear example of the old offence under s.3 of the 1956 Act. Equally s.76(2)(a) of the 2003 Act might apply on these facts as arguably there was a deception as to the purpose of the act, the consummation of the marriage.

1.327 Section 76(2)(a) seems to assume that an act can have only one purpose. For instance, a doctor with a gynaecological sexual obsession might tell the complainant truthfully that an intimate medical examination is necessary. That doctor would not have deceived the complainant as to one of his purposes, but he would have failed to reveal that his secondary purpose was to obtain sexual gratification from the examination. If the evidence were to

[444] [2008] EWCA Crim 527. For further criticism of *Devonald*, see para.1.322, above.
[445] [2015] EWCA Crim 162.
[446] [1944] 2 D.L.R. 61.
[447] (1957) 98 C.L.R. 249. "Once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape."

establish that sexual gratification was an additional purpose, and the complainant was deceived as to this and would not have consented had it been known, it is at least arguable that the presumption would operate, albeit the need for the medical examination was genuine. In the Canadian case of *Bolduc and Bird*,[448] a doctor deliberately allowed a voyeuristic friend, falsely representing himself to be a medical student, to be present at a vaginal examination. The woman's consent to the examination was held to be valid. Arguably, if the same set of facts arose in this jurisdiction, under the 2003 Act there would have been a deception as to the ulterior sexual purpose of the act even if the examination was necessary, so that the conclusive presumption would be engaged. The position would be different if the defendant had multiple purposes, but the complainant actually understood one of the purposes to be sexual gratification.[449]

Impersonation

Section 76(2)(b) appears to extend the common law by widening the categories of impersonation sufficient to vitiate consent beyond the complainant's husband or regular sexual partner to "a person known to the complainant". 1.328

Before the Act, the law had developed to a stage where, in cases of impersonation, the offence of rape would be committed whether the person impersonated was the complainant's husband or any other welcome sexual partner. Section 1(2) of the Sexual Offences Act 1956 provided that it was rape for a man to have sexual intercourse with a woman by a fraud which induced her to suppose he was her husband.[450] On the face of it, this provision was limited to impersonation of the complainant's husband. The position at common law with respect to people with whom the complainant had had a relationship falling short of marriage was for a long time unclear. However, in *Elbekkay*[451] it was decided that s.1(2) of the 1956 Act was not limited to husbands, as the section was derived from s.4 of the Criminal Law Amendment Act 1885, which was declaratory of the common law and was in itself designed to resolve the conflict between two conflicting judicial 1.329

[448] (1967) 63 D.L.R. (2nd) 82.
[449] See Jo Miles, *Sexual offences: consent, capacity and children*, *Archbold News*, Issue 10, December 5, 2008, where it is argued, on the basis of the outcome in *Jheeta*, that a complainant's ignorance of one of the defendant's multiple purposes, will not vitiate consent, at least where one purpose actually was, and was actually understood by the complainant to be, sexual gratification.
[450] A line of cases starting with *Jackson* (1822) Russ. & Ry. 487 and culminating in *Barrow* (1868) 11 Cox C.C. 191 (where the Court for Crown Cases Reserved held that the woman's consent to sexual intercourse was a defence even though she was deceived into thinking that the defendant was her husband) resulted in the passing of s.4 of the Criminal Law Amendment Act 1885 (later re-enacted as s.1(2) of the Sexual Offences Act 1956) which extended rape to cover this situation and so put an end to the vexed question of consent in this area.
[451] [1995] Crim. L.R. 163.

decisions.[452] It was limited to husbands solely because there was no need to include the unmarried, as the problem had just not arisen. The declaration was repeated in s.1(2) of the Sexual Offences Act 1956. The Court of Appeal held that it was very unlikely that in 1956 Parliament was deliberately and consciously deciding that it was rape to impersonate a husband but not, for example, a man who had been living with a woman for many years. The vital question was whether there was an absence of consent. The Court wholly agreed with the trial judge that to find that it is rape to impersonate a husband, but not if the person impersonated was the partner of the woman, would be extraordinary. In respect of the nineteenth century authorities, the Court adopted the words of Lord Keith in *R. v R*[453] that "the common law is . . . capable of changing in the light of changing social, economic and cultural developments". The decision in *Elbekkay* was welcome; any other interpretation would have been an anachronism.

1.330 What was s.1(2) of the 1956 Act was reproduced in s.1(3) of that Act when the definition of rape was amended by s.142(3) of the Criminal Justice and Public Order Act 1994. Section 1(3) provides that:

> "A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband."

The Criminal Law Revision Committee had recommended in 1984 that consent obtained by impersonating *another man* (not just a husband) should be included amongst the cases where consent obtained by fraud amounts to rape.[454] This recommendation was adopted in Clause 89(2)(b)(ii) of the draft Criminal Code Bill.[455] Nevertheless, Parliament did not take the opportunity when amending the definition of rape in 1994 to extend the impersonation rule to all cases. That was unfortunate because, although it was likely that the courts would follow *Elbekkay*, it was at the very least arguable that the 1994 Act had implicitly overruled that decision by excluding from the new s.1(3) of the 1956 Act any reference to other welcome partners.[456]

"A person known to the complainant"

1.331 The 2003 Act uses the term "a person known to the complainant". This puts beyond doubt the position of sexual partners, both heterosexual and homosexual. Indeed, the term appears significantly to extend the pre-existing law. It could embrace a wide spectrum of people, from those the complainant has never met but has heard of to those with whom the complainant has had

[452] *Barrow* (1868) 11 Cox C.C. 191 and *Dee* (1884) 15 Cox C.C. 579.

[453] [1992] 1 A.C. 599 at 616C.

[454] Criminal Law Revision Committee, Fifteenth Report on *Sexual Offences* (1984), Cmnd.9213, para.2.102.

[455] Law Com.No.177 (1989).

[456] See Professor Sir John Smith's commentary on *Elbekkay* [1995] Crim. L.R. 163, at p.164. See also Nicola Padfield, *A Tiger by the Tail: Sexual Offences in the CJPOA 1994*, *Archbold News*, Issue 2, March 1, 1995 ("Such is the price for hasty Parliamentary reform.")

some degree of intimacy. It is unclear what degree of prior knowledge and/or intimacy is required. It is certainly not necessary for the person impersonated to be someone who has previously engaged in sexual activity with the complainant.[457] Nor would it appear necessary from the wording of the statute for the person impersonated to be someone the complainant has met,[458] although this would mean that an undisclosed last-minute stand-in on a date set up over the internet would be at risk of a conclusive presumption that the complainant did not consent to any subsequent sexual activity. It remains to be seen whether the courts will be tempted to apply *Elbekkay* so as to restrict persons known to the complainant to regular partners. However, a natural reading of the new provision suggests they will not so restrict it.

Section 76 does not address the problem of where there is a deception as 1.332
to the defendant's professional qualifications or authority to do the act. The Law Commission recommended that this situation should be included within deception as to identity.[459] However, there is no specific provision in the Act to cover it. Whilst deception as to the "nature or purpose" of the act may cover bogus medical examinations, it does not necessarily follow that a deception solely as to qualifications or other attributes is a deception as to "nature or purpose". Nor is it necessarily a deception as to identity. This appears from the decision in *Richardson*,[460] where the defendant had continued to practise as a dentist despite being suspended. Patients claimed that they would not have allowed her to treat them if they had known of her suspension. She pleaded guilty to assault after the trial judge ruled that her deception had vitiated the patients' consent. The judge rejected the defence submission that the patients had consented to treatment despite their ignorance of the circumstances. The Court of Appeal quashed the conviction. The Court felt that the prosecution submission that the concept of identity encompassed a person's qualifications and other attributes would be straining and distorting the definition of identity even though it was clear that patients would not have consented had they known the dentist was suspended.

[457] cf. H.O. Circular 21/2004, *Guidance as to Part 1 of the Sexual Offences Act 2003*, para.337 (giving as an example a man impersonating his twin brother in order to engage in sexual activity with a woman whom he knows would be willing to engage in sexual activity with his brother).

[458] In this context, it is worth noting that family courts have been prepared to find no consent to marriage where the parties had only corresponded by letter before the wedding day: see the New Zealand case *C v C* [1942] NZLR 356, 358–9. The authors are grateful to Jo Miles for bringing the point to their attention.

[459] *Consent in Sex Offences* (2000), para.5.25. The Commission concluded "that it should be open to a jury to decide that, for the purposes of a particular act, the 'identity' of the actor included the possession of a professional qualification or other authority to do the act in question, and that if the defendant had no such authority then he or she did it without consent."

[460] [1998] 2 Cr. App. R. 200.

of real children, and to create an offence of "making" an indecent photograph (etc.) of a child alongside the offences of "taking" and "permitting to be taken". In 2001, the maximum penalties for the offences were substantially increased. The Sexual Offences Act 2003 further significantly extended the scope of the offences by amending the definition of "child" to cover those aged 16 and 17, subject to an exception where the parties are married or cohabiting at the material time. This extension was designed to implement the UK's international obligations to protect children up to the age of 18 from exploitation through pornography.[5] In 2008, the definition of "photograph" was further extended to cover tracings and other derivates from photographs.[6] The most recent legislative intervention is the creation in s.62 of the Coroners and Justice Act 2009 of an offence of possession of prohibited images of children. This offence[7] is targeted at non-photographic images, such as computer generated images, "cartoons" and drawings, and it specifically excludes indecent photographs or pseudo-photographs of children, as well as tracings or derivatives of photographs and pseudo-photographs, all of which are regulated by the 1978 and 1988 Acts. The offence is therefore best regarded as an aspect of the law of obscenity and as such falls outside the scope of this book.

8.02 This chapter considers separately the offences in the 1978 Act of taking etc. an indecent photograph or pseudo-photograph of a child and the offence in the 1988 Act of possession of such a photograph or pseudo-photograph.

Taking (Etc.) an Indecent Photograph or Pseudo-Photograph of a Child

Definition

8.03 Section 1(1) of the Protection of Children Act 1978[8] provides:

> "Subject to sections 1A and 1B,[9] it is an offence for a person—
> (a) to take, or permit to be taken or to make, an indecent photograph or pseudo-photograph of a child; or
> (b) to distribute or show such indecent photographs or pseudo-photographs; or

[5] See especially *Council Framework Decision 2004/68/JHA* and the *UN Convention on the Rights of the Child*, art.34. The Framework Decision has since been replaced: see *Directive 2011/93/EU of the European Parliament and of the Council of 13December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, as to which see para.10.09, below.

[6] See para.8.53, below.

[7] Which came into force on April 6, 2010.

[8] As amended by the Criminal Justice and Public Order Act 1994 s.84(1), (2), with effect from February 3, 1995 and by the Sexual Offences Act 2003 s.139 and Sch.6, para.24, with effect from May 1, 2004.

[9] For which see paras 8.75 and following, and 8.82 and following, below.

> (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
> (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs or intends to do so."

Mode of Trial and Punishment

8.04 The offences in s.1(1) of the 1978 Act are triable either way.[10] On conviction on indictment the maximum punishment is 10 years' imprisonment or a fine, or both.[11] On summary conviction, the maximum is six months' imprisonment or a fine, or both.[12] As from a day to be appointed the maximum sentence of imprisonment on summary conviction will increase to 12 months.[13] The increase will have no application to offences committed before it takes effect.[14] Until recently, the maximum fine on summary conviction was a fine not exceeding the prescribed sum (i.e. £5,000). The effect of s.85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that, from March 12, 2015, a fine of any amount may be imposed. Fines will, however, continue to be set according to the seriousness of the offence and the means of the offender. An offence under s.1(1) cannot be dealt with by way of a simple caution.[15]

8.05 As regards listing, the Criminal Practice Directions 2015 ("CPD") are not explicit as to whether indecent image offences[16] are to be treated as "sexual offences" within Class 2B (which must be heard before a judge authorised to hear such cases) or as offences within Class 3.[17] Where a case involves indecent image allegations and also allegations of one or more offences that clearly do fall within Class 2B, i.e. offences of physical sexual abuse, the case in its entirety will necessarily be listed before an authorised judge. What if the indecent image allegations stand alone? If a child victim of the offences is to

[10] 1978 Act s.6(1).

[11] 1978 Act s.6(2), as amended by the Criminal Justice and Court Services Act 2000 s.41(1), which was brought into force on January 11, 2001, by SI 2000/3302. The amendment raised the maximum sentence of imprisonment from three to 10 years. There is no transitional provision in the 2000 Act or SI 2002/3302, but the combined effect of s.3 of the Human Rights Act 1998 and art.7 of the European Convention on Human Rights is to require that the increased penalty applies only to offences committed on or after the commencement date.

[12] 1978 Act, s.6(3); Magistrates' Courts Act 1980 s.32 and Sch.1.

[13] Criminal Justice Act 2003 s.282(2), (3).

[14] Criminal Justice Act 2003 s.282(4).

[15] Criminal Justice and Courts Act 2015 s.17(3), and the Criminal Justice and Courts Act 2015 (Simple Cautions) (Specification of Either-Way Offences) Order 2015 (SI 2015/790).

[16] Including offences of soliciting, inciting, encouraging or assisting, attempting or conspiring to commit such an offence or assisting an offender having committed such an offence.

[17] See *Consolidated Criminal Practice Directions*, Part XIII Listing B: CLASSIFICATION, available at *https://www.judiciary.gov.uk/publications/criminal-practice-directions-2015/* [Accessed April 30, 2016].

give evidence, the better view is that the case should be treated as falling within Class 2B on the basis that the intention of the CPD is that any case in which a victim of sexual abuse is to give evidence of that abuse should be tried by an authorised judge. If indecent image allegations stand alone and the child victim is *not* to give evidence, the case may technically be regarded as falling within Class 3. However, the authors suggest it is better practice to treat such cases as within Class 2B, in the light of their potential sensitivity and the issues that are likely to arise. Accordingly, such cases should be listed wherever possible before an authorised judge, who will be familiar with the considerations that arise where a child has been sexually abused and with the sentencing options available on conviction. It is understood that the practice in certain List Offices, including the Old Bailey, is to treat such cases as falling within Class 2B. In certain circumstances cases in Class 2B must be referred to the Resident Judge, and by the Resident Judge to a Presiding Judge, including where the case is unusually grave or complex or a novel and important point of law is to be raised; where the defendant is a police officer, a member of the legal profession or a high profile figure; or where for any reason the case is likely to attract exceptional media attention.

8.06 A person convicted under s.1(1), cautioned, found not guilty by reason of insanity or found to be under a disability and to have done the act charged, is automatically subject to the notification requirements in the Sexual Offences Act 2003 if the images showed persons under 16 and the either the offender was 18 or over at the time of the offence or the offender is sentenced to at least 12 months' imprisonment.[18]

8.07 An offence under s.1(1), whenever committed, is a specified offence for the purposes of s.226A of the Criminal Justice Act 2003 (extended sentence for certain violent or sexual offences).[19] The offence is also listed in Part 1 of Sch.15B to the Criminal Justice Act 2003 for the purposes of s.224A of that Act (life sentence for a second listed offence).[20]

8.08 Where a justice of the peace is satisfied by information on oath laid by or on behalf of the DPP or by a constable, that there is reasonable ground for suspecting that, in any premises, there is an indecent photograph or pseudo-photograph of a child, the justice may issue a warrant authorising a constable to enter (if need be by force) and search the premises and to seize and remove any articles which he believes (with reasonable cause) to be or include such photographs or pseudo-photographs.[21] There is also provision for a magistrates' court to order the forfeiture of such items.[22]

[18] s.80 and Sch.3, discussed in Ch.35, below.
[19] Inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.124, brought into force on December 3, 2012, by SI 2012/2906.
[20] Inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.122, brought into force on December 3, 2012, by SI 2012/2906.
[21] 1978 Act s.4.
[22] 1978 Act s.5 and Sch.

Restriction on prosecution

Section 1(3) of the 1978 Act provides that proceedings for an offence under the Act may not be instituted except by or with the consent of the DPP. For this purpose, consent given by a Crown Prosecutor is to be treated as having been given by the DPP.[23] It was held in *Jackson*[24] that the consent requirement is met if the Crown Prosecutor reaches a conscious decision to consent to the institution of proceedings after examining all the circumstances, and that the consent need not be in writing provided the Crown Prosecutor has the need for it in mind when settling the indictment. The decision in *R. v DM*[25] goes even further. There, a Crown Prosecutor considered the case before charge and decided that the evidential and public interest tests for prosecution were met, but on the relevant form he wrote "not relevant" against the issue of the DPP's consent. This error was corrected some months later when another Crown Prosecutor gave consent before the PCMH, which was the first hearing of substance in the case. On appeal against conviction, the appellant argued that these timings demonstrated that no proper consideration had been given to whether it was appropriate to prosecute him, and that the later consent was no more than a rubber stamp. The Court of Appeal rejected the appeal on the basis that the first Crown Prosecutor had undertaken a proper scrutiny before deciding to prosecute and, whilst as a matter of good practice he should have given consent when deciding to charge, his failure to do so was rectified when consent was later given by the second Crown Prosecutor before the appellant was asked to answer the charge. The case differs somewhat from *Jackson*, where the Crown Prosecutor did not give consent in writing but had the need for it in mind when settling the indictment. Here, the first Crown Prosecutor appears to have wholly overlooked the need for consent when deciding to charge, but the later consent was held to be effective. This may be regarded as somewhat generous to the prosecution, since s.1(3) provides that proceedings for an offence under the 1978 Act "shall not be instituted" except by or with the DPP's consent. The Court was clearly of the view that proceedings against the appellant were instituted when he was charged, at which time there was no consent; and although consent was purportedly given before the first hearing of substance, there is no provision in the Act that permits consent to be given retrospectively. 8.09

What is the effect of a failure to obtain consent before proceedings are instituted? It was long thought settled by the decision in *Angel*,[26] that in those circumstances, the proceedings would be a nullity. But this position came 8.10

[23] Prosecution of Offences Act 1985 s.1(7).
[24] [1997] Crim. L.R. 293.
[25] [2011] EWCA Crim 2752.
[26] [1968] 1 W.L.R. 669 (decided under the Sexual Offences Act 1967 s.8); and see *Secretary of State for Defence v Warn* [1970] A.C. 394; *Pearce* [1981] Crim. L.R. 639.

under question following the decisions in *Sekhon*[27] and *Soneji*.[28] Those decisions rejected the traditional approach of classifying procedural requirements such as the one in s.1(3) of the 1978 Act as mandatory or directory, and treating non-compliance with a mandatory requirement as rendering the proceedings a nullity. Instead, they established that the court should ask what Parliament intended to be the result of non-compliance. The Court of Appeal in the later case of *Ashton*[29] regarded this development as marking a sea-change in the law relating to procedural failure. It held that in future a court required to determine the consequences of such a failure should focus on two things: first, the intention of Parliament (did it intend that a procedural failure should render the proceedings invalid?), and secondly, the interests of justice, in particular whether the procedural failure caused any prejudice to any of the parties such as to make it unjust to proceed further. Applying that approach, the Court in *Ashton* held that the absence in relation one of the appellants in that case of a signed bill of indictment did not invalidate the proceedings against him.

8.11 *Ashton* was applied in relation to s.1(3) by HH Judge Brown sitting at Lewes Crown Court in *R. v D.*[30] The defendant was charged with 20 offences of possession of indecent images of children, contrary to s.160(1) of the Criminal Justice Act 1988, in relation to images downloaded from the internet. Consent to prosecute was not obtained. The defendant was committed for trial and at the PCMH, an indictment was preferred charging him with 16 counts of "making" indecent images under s.1(1)(a) of the 1978 Act. The judge gave leave for the indictment to be signed out of time and the defendant gave notice of his intention to apply to quash it on the ground that proceedings had been instituted without the consent of the DPP. Prior to the hearing of the application, the purported consent of the DPP was given by a senior Crown Prosecutor.[31] The defendant argued that this consent was given too late and could not retrospectively authorise the institution of the proceedings. He relied on the decisions in *Angel* and *Pearce*,[32] which he contended had not been overruled by *Ashton* and were binding on the Crown Court. The learned judge rejected the application, holding that *Angel* and *Pearce* were distinguishable since in those cases there had at no point been a consent to the charges on which the defendants had been convicted. On the facts before him he went on to apply *Ashton*, holding that the failure to give prior consent under s.1(3) was a procedural failure that did not take away the

[27] [2002] EWCA Crim 2954.
[28] [2005] UKHL 49.
[29] [2006] EWCA Crim 794.
[30] [2007] Crim. L.R. 240.
[31] The case is therefore distinguishable from *R. v DM*, discussed in para.8.09, above, in which consent given *at* the PCMH was held to be effective. In *R. v D*, the consent was given only *after* the holding of the PCMH at which the judge gave leave for the indictment to be served out of time, and as such there was no scope even for the generous approach to s.1(3) taken by the Court in *R. v DM*.
[32] fn.26, above.

court's jurisdiction. Accordingly, he was required to consider the interests of justice generally and, in particular, whether if the case proceeded there was a real possibility of prejudice to either the prosecution or the defence. Although the maximum penalty for the "making" offences in the indictment was greater than for the "possession" offences with which the defendant had initially been charged, the "factual matrix" of the two sets of offences was the same, and the defendant was not taken by surprise by any change in the nature of the evidence against him. It was essential from the point of view of both the defendant and the public that the appropriate charges were brought and, if contested, decided on the evidence presented by both sides. The learned judge accordingly concluded that the interests of justice required that the Crown be allowed to proceed on the charges under the 1978 Act.

This reasoning is, with respect, convincing and the result consistent with 8.12
Ashton. However, in the subsequent case of *Clarke and McDaid*,[33] the House of Lords put the genie at least partly back in the bottle by downplaying the significance of *Sekhon* and *Soneji* and indicating disapproval of the reading given to them in *Ashton*. That case concerned the absence from a voluntary bill of indictment of the signature of "the proper officer of the court" as required by s.2(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933. In the leading speech, Lord Bingham acknowledged that technicality is always distasteful when it appears to contradict the merits of a case, but said that the duty of the courts is to apply the law, which is sometimes technical, and that if the State exercises its coercive power to put a citizen on trial for serious crime, a certain degree of formality is not out of place. In relation to voluntary bills, it was inescapable that Parliament intended that a bill should not become an indictment unless and until it was duly signed by the proper officer, and that there could be no valid trial on indictment unless this was done. The decisions in *Sekhon* and *Soneji* were valuable and salutary, but they did not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect.

Where does that leave the position as regards s.1(3)? The provision was not 8.13
referred to in *Clarke and McDaid*, though in the course of his speech Lord Brown of Eaton-under-Heywood mentioned the decision in *Angel* in apparently approving terms. We suggest, however, that the better view, in the light of *Clarke and McDaid*, is that a failure to comply with s.1(3) will be fatal to a prosecution and that *R. v D*, though persuasive and apparently consistent with case law as it stood at the time, was wrongly decided. This view derives some support from the recent decision of the Court of Appeal in *R. v CW and MM*,[34] which concerned s.4 of the Criminal Law Act 1977, a "consent" provision relating to offences of conspiracy that is in similar terms to s.1(3). In that case, the Court stated without prior analysis that proceedings for conspiracy instituted prior to consent being granted "would be a nullity",

[33] [2008] UKHL 8, followed in *Leeks* [2009] EWCA Crim 1612.
[34] [2015] EWCA Crim 906.

and went on to deprecate "the erosive effects of a cavalier attitude to statutory requirement".[35] The decision, which cited none of the authorities discussed above, suggests a return to simpler times in the Court of Appeal.

Form of Charge or Indictment

8.14 For the drafting of the indictment or information in proceedings under the 1978 Act, see *Thompson*,[36] discussed in para.8.124, below. The decision which relates to the offence of possession of an indecent image contrary to s.160(1) of the Criminal Justice Act 1988, but is equally applicable to charges under the 1978 Act.

Sentencing

8.15 For the Sentencing Council guideline relating to the sentencing of sexual offences committed by offenders aged 18 and over, see Ch.33. In consulting on its draft guideline,[37] the Sentencing Council said that due to advances in technology, this area of offending, i.e. the making, etc. of indecent images of children, has changed since the offences were created and even since the Sentencing Guidelines Council ("SGC") issued the previous guideline in 2007. The ease with which images, including moving images, can be distributed and downloaded has increased the ability of offenders to share or trade in them; and advances in electronic storage capacity have also meant that offenders can retain a much larger volume of images than previously. These developments have shaped the way such offences are committed. Judicial understanding of the way in which offenders behave has also developed.

8.16 The guideline for offences relating to indecent images of children applies both to offences under s.1(1) of the 1978 Act and offences of possession under s.160(1) of the Criminal Justice Act 1988. It takes a different approach to the guidelines for other sexual offences, since the harm and culpability model used for those offences is not readily applicable here, often because there is no identified victim before the court because the victim in the image has not been identified or located. However, harm and culpability remain the focus of the guideline, albeit expressed in a different way. In relation to harm, the Council recognized that victims of these offences are harmed in several ways. First, there is the nature and level of harm caused by the abuse depicted in the indecent images. The victim is then subjected to further harm due to the images being recorded and viewed. There is yet further harm due to the

[35] At 14–15, 40, per Rafferty LJ.
[36] [2004] EWCA Crim 669.
[37] *Sexual Offences Guideline: Consultation* (December 6, 2012). The consultation document is available on the Sentencing Council's website.

fact that viewing creates a market and demand for such images and so leads to further abuse. In this connection the Council cited with approval the following passage in *Beaney*[38]:

> "The serious psychological injury which they [the children in the picture] would be at risk of being subjected to arises not merely from what they are being forced to do but also from their knowledge that what they are being forced to do would be viewed by others. It is not difficult to imagine the humiliation and lack of self-worth they are likely to feel. It is not simply the fact that without a market for these images the trade would not flourish. If people . . . continue to download and view images of this kind . . . the offences which they commit can properly be said to contribute to the psychological harm which the children in those images would suffer by virtue of the children's awareness that there were people . . . watching them forced to pose and behave in this way."

Sentencing guideline

Step One—Harm and culpability

The guideline requires the sentencing court to go through a series of steps in order to determine the appropriate sentence. Step one involves determining the offence category by reference to the degree of harm caused and then the culpability level for the offence. The court's first task is to determine the offence category, which in other guidelines is done by reference to the degree of harm caused. However, in this context the Sentencing Council chose to determine the offence category by identifying the role of the offender (broadly reflecting culpability) and then by considering the severity of the image (broadly representing harm). 8.17

Role of the offender

The Council identified three categories of role: possession, distribution and production/taking. 8.18

- *Possession*: An offender falls within this category if they possess images but there is no evidence of distributing, possession with a view to distributing, or involvement in the production of the image. For this purpose, the Sentencing Council considered that "making" an image by simple downloading should be treated for sentencing purposes as possession rather than as "production/taking", discussed below. This resolves an anomaly that existed under the previous SGC guideline, which drew a distinction between the deliberate saving of an image and the mere viewing of it, and treated mere viewing without storage as a mitigating factor. This failed to reflect the fact that indecent photographs which the user browses on the internet but does not deliberately save are nonetheless saved in the internet browser

[38] [2004] EWCA Crim 449, at 9, per Keith J.

cache as an automated function of the browser software. Where such images are recovered, the offender will commonly be charged with "making" the image contrary to s.1(1)(a) of the 1978 Act rather than "possession" of it contrary to s.160(1) of the 1988 Act. This is because the file data that is saved along with the offending image by the browser software will provide evidence of when the image was created, i.e. made. Ironically, given the disparity in maximum sentences between the making and possession offences, under the SGC guideline an offender would stand to receive a stiffer sentence for making an image recovered in this way from his browser than if he possessed the same image in a stored format. The Sentencing Council guideline resolves this issue by providing that both cases should be sentenced as possession.

- *Distribution*: This category includes both actual distribution and possession of images with a view to distributing them, showing them or sharing them with others (see s.1(1)(c) of the 1978 Act).
- *Production/taking*: This category includes involvement in the actual taking or making of an image at source, i.e. involvement in its production, and is the highest category for sentencing purposes.

Severity of the image

8.19 The SGC guideline identified five levels of prohibited image based on the levels originally set out in the judgment in *Oliver, Hartrey and Baldwin* (with 1 being the lowest level and 5 the highest)[39]:

Level 1	Images depicting erotic posing with no sexual activity;
Level 2	Non-penetrative sexual activity between children, or solo masturbation by a child;
Level 3	Non-penetrative sexual activity between adults and children;
Level 4	Penetrative sexual activity involving a child or children or both children and adults; and
Level 5	Sadism or penetration of, or by, an animal.

8.20 In consulting on the draft guideline, the Sentencing Council acknowledged that classification of images can be difficult and resource intensive for the police and prosecuting authorities, and that the images before the court may give only a partial indication of the abuse suffered by the victim and of the offender's behaviour. However, the court can only sentence on the basis of what is before it, and the Council believed that the severity of the sexual offence depicted in an image can be at least an initial guide to the harm that will have been suffered by the victim. It did, however, seek in the published guideline to simplify the levels of image by reducing them to three (category A being the highest level and category C the lowest):

[39] [2003] 1 Cr. App. R. 28.

Category A: *"Images involving penetrative sexual activity" and "images involving sexual activity with an animal or sadism"*. The Council thought that any image showing a child involved in penetrative sexual activity should be placed in the highest category. In line with the guidelines for the other child sex offences, it considered that "penetration" for this purpose should mean penetration of the vagina or anus (using body or object) and penile penetration of the mouth, in either case by, or of, the victim. It drew no distinction between penetrative activity involving an adult and a child and penetrative activity between children. Category A also includes images involving sexual activity with an animal or sadism. In the SGC guideline, "penetrative activity and sadism" and "penetration of, or by, an animal" were expressed as different levels of image (4 and 5 respectively), but they attracted the same sentence starting points and ranges, which the Council thought right, and it therefore placed both of them in category A. The Council also changed the wording "penetration of, or by, an animal" to "sexual activity with an animal" to ensure that it covers images involving non-penetrative activity such as a photograph showing an animal licking a child's sexual organs, which on a strict interpretation of the SGC guideline fell outside not only level 5 but also any level other than, conceivably, level 1.

Category B: *"Images involving non-penetrative sexual activity"*. This category combines the SGC's levels 2 and 3. The SGC guideline made a distinction between non-penetrative sexual activity between children (or involving a child on their own) and non-penetrative sexual activity between an adult and a child. However, the Sentencing Council considered that even if no adults appear in an image, this does not mean that an adult was not involved in making the image or otherwise exploiting the victim in order to generate it. In addition, the continuing victimisation of the child that flows from the image being recorded and viewed will be as great even if there is no adult in the picture. Taking into account the law enforcement resources needed to classify images, the Council believed that a distinction between images involving just children and those involving adults and children is not required for sentencing purposes, as both create similar levels of harm and culpability. Accordingly, all non-penetrative sexual activity is dealt with in Category B, and has the same starting points and category ranges.

Category C: *"Other indecent images not falling within categories A or B"*. In its consultation draft, the Council defined this category as "images of erotic posing". The term "erotic posing" was used in the SGC guideline, but the Council nonetheless thought it capable of misleading as there may be cases where an image that is not posed or "erotic" is still indecent, e.g. a picture of a naked child not engaged in sexual activity but with a focus on the child's genitals. The majority of respondents to the consultation agreed, the general view being that the term "erotic posing" was outdated and also inappropriate in that it indicated that

responsibility for the nature of the posing lay with the victim rather than the offender. The Council accordingly dropped the term in the published guideline in favour of a neutral formulation referring to "other indecent images".

Responses to the consultation showed almost universal support for the Council's simplifying approach. The new levels are labelled A, B and C, rather than numbered, because the general scheme of the guideline is that offences in category 1 attract the highest starting points and ranges, whereas under the SGC grading system based on *Oliver*, category 1 images attracted the lowest starting point and range. That being so, the Council thought it would be confusing to retain numerical classification in relation to offences involving indecent images and that instead such offences should be categorised using the labels A, B and C.

Mixed levels of images

8.21 Most offenders have collections containing images at a mix of levels, which can cause difficulties for sentencers. The guideline resolves this by providing:

> "In most cases the intrinsic character of the most serious of the offending images will initially determine the appropriate category. If, however, the most serious images are unrepresentative of the offender's conduct a lower category may be appropriate. A lower category will not, however, be appropriate if the offender has produced or taken (for example photographed) images of a higher category."

8.22 An important difference from the SGC guideline is that the quantity of material is no longer used to determine the offence category. The SGC guideline determined sentence starting points and ranges for different levels of images by reference to whether there were a "small number" or a "large number" of images. These terms were not defined and this caused difficulties for sentencers in assessing what "small" or "large" meant in this context. The Council formed the view that the best indicator of the offender's culpability is what he has done with the images, rather than their number. For example, an offender who has produced even a small number of images should attract a higher starting point than one who is in possession of the same number. However, as a large volume of images may provide an additional indicator of increased culpability in some cases, it is included in the guideline as an aggravating feature, allowing the court to move up from the starting point as and when appropriate.

The offences categories

8.23 In light of these points, the offence categories for offences under s.1(1) of the 1978 Act and s.160(1) of the Criminal Justice Act 1988 are as follows:

	Possession	*Distribution**	*Production***
Category A	Possession of images involving penetrative sexual activity Possession of images involving sexual activity with an animal or sadism	Sharing images involving penetrative sexual activity Sharing images involving sexual activity with an animal or sadism	Creating images involving penetrative sexual activity Creating images involving sexual activity with an animal or sadism
Category B	Possession of images involving non-penetrative sexual activity	Sharing of images involving non-penetrative sexual activity	Creating images involving non-penetrative sexual activity
Category C	Possession of other indecent images not falling within categories A or B	Sharing of other indecent images not falling within categories A or B	Creating other indecent images not falling within categories A or B

* Distribution includes possession with a view to distributing or sharing images.
** Production includes the taking or making of any image at source, for instance the original image.

Making an image by simple downloading should be treated as possession for the purposes of sentencing.
In most cases the intrinsic character of the most serious of the offending images will initially determine the appropriate category. If, however, the most serious images are unrepresentative of the offender's conduct a lower category may be appropriate. A lower category will not, however, be appropriate if the offender has produced or taken (i.e. photographed) images of a higher category.

Step Two—Starting point and category range

Once the court has determined the offence category and culpability level, at step two it should use the corresponding starting point specified in the guideline in order to reach a sentence within the category range. The starting point applies to all offenders irrespective of plea or previous convictions. Once the starting point has been determined, step two allows further adjustment for aggravating or mitigating features, set out below. A case of particular gravity, reflected by multiple features of culpability or harm, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features. Where there is a sufficient prospect of 8.24

stressed the need for caution. Overall, he had exercised his discretion in a proper manner and his ruling could not be criticised.

(10) When a judge considers the "interests of justice" test under s.116(4), although he or she is not obliged to consider all the factors set out in s.114(2)(a)–(i), those factors may be a convenient check list for the judge to consider.

(11) Once the judge has concluded that the specific secondary gateways set out in s.116(4) have been satisfied, the court must consider the vital linked questions of (a) the apparent reliability of the evidence sought to be adduced as hearsay and (b) the practicality of the jury testing and assessing its reliability. In this regard, s.124 (which permits a wide range of material going to the credibility of the witness to be adduced as evidence) is vital.

(12) In many cases, a judge will not be able to make a decision as to whether to admit an item of hearsay evidence unless he has considered not only the importance of the evidence and its apparent strengths and weaknesses, but also what material is available to help test and assess it, in particular what evidence could be admitted as to the credibility of the witness and the hearsay evidence under s.124. The judge is entitled to expect that "very full" enquiries as to witness credibility will have been made if it is the prosecution that wishes to put in the hearsay evidence, and if it is the defence, they too must undertake proper checks.

19.50 *Ali (Yasir)*[53] is a recent case in which the Court of Appeal took the view that the trial judge had been wholly correct to permit a complainant's statement to be read in a rape case pursuant to s.116(2)(e) because it had been established that she was in fear, most particularly of having to confront the events of a night at a hotel. Her account was that that night was the worst in her life, and she had wanted to be able to forget about what had occurred. There was evidence before the jury from a social worker that at the time of the trial, she was emotionally traumatised by what had occurred, and was unable to answer questions about it. There was an accurate record of the ABE interview. Pursuant to s.124, the appellant had had a wide-ranging opportunity to challenge the contents of her statement on the basis of other evidence in the case, including the witness's first account. The judge had been right to conclude that this evidence had considerable probative value against the appellant, and would assist the jury in their evaluation of other evidence in the case. There was no reason for the judge to conclude, applying s.125, that her statement was so unconvincing that the conviction of the appellant would be unsafe, bearing in mind it was of critical importance against him. Her statement was a credible account by someone who had been intimidated and had not given proper consent. The contradictions between her earlier and later accounts were explicable, as with many witnesses in situations of

[53] [2015] EWCA Crim 1279.

this kind, on the basis that initially she was reluctant to disclose what had occurred.

Statement of witness admitted where s.116 criteria fulfilled

19.51 Under s.116 of the CJA 2003 (cases where a witness is unavailable), first hand hearsay evidence, whether oral or documentary, is admissible without leave provided certain criteria are met (witness dead, ill, absent abroad, lost, or in fear). However, in all cases under s.116 it is necessary to establish that the relevant person was competent[54] at the time of making the relevant statement. Section 123(1) of the 2003 Act provides:

> "Nothing in section 116, 119 or 120 makes a statement admissible as evidence if it was made by a person who did not have the required capability at the time when he made the statement."

Section 123 bases the test of a person's capability on (a) understanding questions put to him about matters stated, and (b) giving answers to such questions which can be understood. A *voir dire* may be held and expert evidence called if necessary. The inclusion of the requirement of competence appears, somewhat surprisingly, to have narrowed the law at a time when Parliament was adopting a far more inclusive approach to the admissibility of evidence. Under the pre-2003 Act provisions, the Court of Appeal in *Ali Sed*[55] held that the video interview of an Alzheimer's sufferer (who was a complainant in case of attempted rape) was rightly admitted under s.23 of the Criminal Justice Act 1988, even though the complainant was not available to give evidence. *Ali Sed* followed *R. v D*,[56] where it was held in an attempted rape case that the video interview of another Alzheimer's victim was rightly admitted under s.23, and, in particular, there was no requirement for admission under s.23 that the witness be competent.

19.52 When deciding whether to admit a statement in evidence where the defendant has not had an opportunity to examine the witness, there is only one governing criterion: is the admission of the evidence compatible with a fair trial? In *Konrad Cole and Rocky Keet*,[57] Lord Phillips LCJ, as he then was, stated[58]:

> "There are many reasons why it may be impossible to call a witness. Where the defendant is himself responsible for that fact, he is in no position to complain that he has been denied a fair trial if a statement from that witness has been admitted. Where the witness is dead, or cannot be called for some other reason, the question of whether the admission of a statement from that witness will

[54] The age of a child witness is not determinative of its competence or its ability to give truthful and accurate evidence: *Barker* [2010] EWCA Crim 4. Ability to remember is not the same as competence: *DPP v R.* [2007] EWHC 1842 (Admin).

[55] [2004] Crim. L.R. 1036. For the present position, see *DPP v R.* [2007] EWHC 1842 (Admin).

[56] [2002] 2 Cr. App. R. 601. In both *Ali Sed* and *R. v D* there was supporting evidence.

[57] [2007] EWCA Crim 1924.

[58] At [21].

impair the fairness of the trial will depend on the facts of the particular case. Factors that will be likely to be of concern to the court are identified in s.114(2) of the Act."

He went on to point out that the s.114(2) list of factors relevant to the interests of justice does not state expressly which way each individual factor is intended to cut. The Court considered that the inference is that the more important and the more reliable the statement appears to be, the stronger the case for its admission. When the factors in s.114(2) are considered in respect of several statements, the correct approach is not to consider each statement on its own, but to consider each in context. Each statement may be part of a wider picture that is coherent and compelling. The Court also endorsed the trial judge's remarks that s.116 and its predecessors provide an important weapon in the prosecution armoury in respect of offences alleged to have been aimed at the elderly and vulnerable.

Statement admitted in the interests of justice under s.114(1)(d) of the Criminal Justice Act 2003

19.53 Section 114(1)(d) is not a route to be invoked only when none of the other hearsay gateways apply. Section 114(2) contains a list of matters that it is mandatory for the court to take into account when deciding whether to admit hearsay evidence under s.114(1). Although the judge must take these factors into account, he need not express a conclusion on each factor. The courts have been known to give the provision a relatively wide interpretation. In *R. v SJ*,[59] at a trial for assault by penetration of a child under 13 (the defendant's step-daughter aged 30 months), it was held that the trial judge had been right to allow a mother to report statements made by the child about what had happened to her shortly after the time of the allegation. The Court of Appeal commented that s.114 was a safety-valve to deal with this kind of case.

19.54 However, it is necessary to approach s.114(1)(d) with caution, particularly where a party is seeking to adduce hearsay evidence from a witness who is not being called, but whose absence is not within the reasons listed in s.116.

Earlier disclosures by very young children unconfirmed in evidence

19.55 What is the situation where the witness is called but has no recollection of making an earlier disclosure or of the events described in it? This is not an uncommon feature of cases where there are allegations of long-term abuse. A complainant may have little or no recollection of a contemporaneous report to a police officer or a social worker. Earlier disclosures may be relevant to rebut allegations of fabrication (see paras 19.88 and following, below). It may

[59] [2009] EWCA Crim 1869.

also be in the interests of justice for the jury to hear a contemporaneous account by a witness given during the grooming process.

19.56 *MH v R.*[60] provides some assistance as to how to approach earlier disclosures unconfirmed by a complainant in evidence. In that case, it was held that unconfirmed disclosures made by a small child were admissible in the interests of justice under s.114(1)(d). The respondent's counsel sought to counter the suggestion that admitting such evidence would infringe the prohibition against "self-corroboration". He submitted that there was a material difference between an adult, or an older child, making repeated allegations of sexual misconduct (with the risk that mere repetition may provide spurious self-support) and a child aged three who did not possess the sophistication required to manipulate such opportunities to his own advantage, consciously or sub-consciously. The child's repeated and unsolicited references, in an unchallenging domestic context, to the appellant's conduct towards him provided cogent evidence of the child's truthfulness and reliability. It was in the interests of justice for such evidence to be considered by the jury both for its capacity to demonstrate the truth of the witness's evidence and, on account of its inherent reliability, because it was evidence of the appellant's conduct. The Court of Appeal, whilst acknowledging that the trial judge had not been asked to exercise his discretion under s.114(1)(d) and so had not addressed these issues, concluded that there would have been no prospect of successfully resisting the prosecution's wish to adduce the evidence. The circumstances were overwhelmingly in favour of the admission of the hearsay evidence in the interests of justice, whether or not it was capable of admission under s.120(2) to rebut a suggestion of fabrication.

19.57 To similar effect is *Strotten*,[61] where the appellant (then aged 23) was arrested in connection with an allegation of sexually touching a boy, RG (then aged three years). It was alleged that he had sexually assaulted RG when alone with him and told him not to tell anyone as it was their "big secret" and that he (RG) would get into trouble if he did so. RG exhibited behaviour consistent with having been sexualised by an adult while at nursery school. RG, born in May 2009, was interviewed in accordance with ABE guidelines on April 5, 2013, when he was aged three, and in June and July 2013 when he was aged four. In the interviews, RG stated that the appellant had never done anything to his (RG's) penis. When put to him that he had told his mother that the appellant had touched his penis, he replied, "No, that didn't happen".

[60] [2012] EWCA Crim 2725. See also *R. v SJ* [2009] EWCA Crim 1869, considered in para.19.53, above, where the victim of sexual assault was a child aged 30 months who was not competent to give an ABE interview. There was a strong circumstantial case against the appellant. The child's responses to questions asked by her mother and on one occasion by a social worker were held to have been properly admitted under s.114(1)(d). The Court in *MH v R.* derived from *R. v SJ* the proposition that, whilst care must be exercised, there may be circumstances in which the interests of justice demand the admission of hearsay evidence, even if it is of critical importance to the main issue in case.

[61] [2015] EWCA Crim 1101.

19.58 RG's mother gave evidence that the appellant would run errands for her and look after RG when he was a toddler which would include helping her to change RG's nappy and playing together in the communal gardens. She went on to say that RG, when two-and-a-half years' old, told her and her partner that the appellant had been "playing with RG's willy". There was a further occasion when RG told her that the appellant had been "playing with his willy". RG has also told her that the appellant liked to put RG's penis into his mouth and suck it. RG's mother also stated that after RG had been interviewed by the police, he had told her that he had not been forthcoming in his ABE interview as he was frightened, and would feel bad if others got into trouble. The appellant gave evidence that he had not touched RG's penis.

19.59 The sole ground of appeal concerned the admission by the trial judge of the hearsay evidence of RG's mother and partner as to the complaints which RG made, but which he did not repeat in ABE interview. It was argued that RG, who was available to give evidence at the trial, had failed to substantiate the allegations and that, as a result, the application to admit the hearsay evidence could not be brought within s.114(1)(d) of the Criminal Justice Act 2003.

19.60 The respondent referred the Court to other potentially supporting evidence. The remarks by RG spanned 18 months and were consistent. They were supported by observations that RG had made to his mother and her partner, and by evidence of sexualised incidents at the nursery. The respondents also relied upon a similar fact allegation made by another boy entirely unconnected with RG. The Court of Appeal was satisfied that these circumstances were sufficient to permit the judge to admit the evidence. The Court added that an argument could have been advanced that RG's reported remarks were admissible as part of the *res gestae*. Sir Brian Leveson stated[62]:

> "In that regard, the possibility of concoction or distortion in relation to that allegation alone is capable of being discounted, not only because the appellant was there accepting that he was touching the boy RG, albeit not, as he asserted it, sexually, and by the immediacy of the circumstances."

19.61 Nevertheless, earlier Court of Appeal decisions suggest a move to limit the scope of s.114, particularly where no s.116 conditions are satisfied and the witness is unwilling to attend. For instance, in *R. v Z*[63] the Court of Appeal

[62] At [26].

[63] [2009] EWCA Crim 20; [2009] 1 Cr. App. R. 34. See also *O'Hare* [2006] EWCA Crim 2512, where the Court of Appeal pointed out that s.114(1)(d) should not be applied so as to render s.116 nugatory; *Khan* [2009] EWCA Crim 86, where the Court of Appeal upheld the decision of the trial judge to refuse an application to adduce the evidence of a prostitute under s.114(1)(d) in a case where the witness was available to be called as a witness; and *Warnick* [2013] EWCA Crim 2320, where the Court of Appeal stated that the judge was wrong to admit evidence under s.114(1)(d), when he had concluded that one of the conditions for admitting evidence under s.116 was not satisfied. In *R. v ED* [2010] Crim. L.R. 862, the Court of Appeal suggested that s.114(1)(d) is subordinate to the other exceptions.

quashed convictions of historical offences of indecent assault and rape where the trial judge had given the Crown leave under the hearsay provisions to adduce bad character evidence relating to two complainants in respect of alleged rapes and sexual abuse. One of the complainants was the appellant's former wife. She was dead and so the test under s.116(2)(a) was satisfied. However, the judge had failed to direct the jury that they had to be sure of the allegation before they could take it into account. The position in respect of the other complainant is more significant in that it sheds light on the proper approach where a hearsay application is made in respect of a complainant who is unwilling to give evidence for no apparent good reason. She was unwilling to give evidence and had explained why to the Crown. The Court held that her reluctance or apparent but untested unwillingness to testify did not justify the admission of her hearsay evidence. This was a case in which the conditions on the admission of hearsay in s.116, none of which applied to her, were being circumvented. The Court added that s.114(1)(d) should be cautiously applied[64] since otherwise the conditions laid down by Parliament in s.116 would be avoided, although s.114(1)(d) should not be so narrowly applied that it had no effect, and there would be cases where hearsay evidence might be admitted under s.114(1)(d) in which it could not be admitted under s.116. In *Riat*,[65] Hughes LJ observed that the power to admit evidence under section 114(1)(d) in the interests of justice should not be used so as to circumvent the conditions laid down in s.116.

Statement admitted under the preserved common law rule of *res gestae*: s.118(1) of the Criminal Justice Act 2003

19.62 The *res gestae* rule is specifically preserved by s.118(1), the relevant part of which reads:

> "(1) The following rules are preserved.
>
> . . .
>
> *Res gestae*
>
> (4) Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if—
>
> (a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded,
>
> (b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or
>
> (c) the statement relates to a physical sensation or a mental state (such as intention or emotion)."[66]

19.63 The *res gestae* rule might apply where a complainant manages to communicate with the emergency services during the course of or immediately after a sexual attack. Where s.118(1) applies, the prosecution do not

[64] The importance of a cautious approach in these circumstances was stressed in *R. v C* [2010] Crim. L.R. 858.

[65] [2013] 1 Cr. App. R. 2 at [20].

[66] There is no need to serve a notice to introduce hearsay evidence that is admitted through s.118(1), (4).

have to apply to introduce the evidence under s.114(1)(d). The guiding authority is *Andrews*[67] where Lord Ackner strongly cautioned against attempting to use the *res gestae* principle as a device to avoid calling the maker of the statement if he or she is available. It is now clear that there are exceptions. In *Barnaby v DPP*[68] the Divisional Court held in an assault case that the admission of the evidence of emergency 999 telephone calls, together with conversations with the police officers that occurred shortly after an attack by a boyfriend, fell well within the *res gestae* principle even though the maker of the statement, the alleged victim, was available but was not called to give evidence. Immediately after the incident the victim had expressed fears as to the likely consequences if the appellant discovered that she had co-operated with the police, and particularly that she had provided information against him. Fulford LJ stated[69]:

> "Although the court has a cardinal responsibility to ensure the defendant receives a fair trial, careful decisions need to be taken in situations of this kind if there is a real risk that a victim of domestic abuse may suffer harm following her co-operation with the prosecution authorities. Here, the prosecution authority was aware from the outset that Ms X was frightened that providing a witness statement might provoke a violent reaction from the appellant. This was not a situation in which the prosecution was seeking to resort to unfair tactics in order to avoid introducing evidence that was potentially inconsistent with the case against the defendant, or it simply anticipated that there was a risk the witness might give an untruthful account. The Crown's stance was a seemingly sensible recognition of the potentially dangerous position in which Ms X had been placed. Given these facts, it was appropriate to admit this *res gestae* evidence notwithstanding, in a strict sense, Ms X was available as a witness if the court had issued a witness summons."

Inconsistent Statements: Section 119 of the Criminal Justice Act 2003

Inconsistent statements now evidence of the truth

19.64 Section 119(1) of the Criminal Justice Act 2003 makes a person's previous inconsistent statement, once admitted, "evidence of any matter stated of which oral evidence by him would be admissible". The effect is that a previous inconsistent statement related to the subject matter of the indictment is capable of being evidence of the truth of any matter stated if the witness admits making the statement or is proved to have made it. It follows that this provision has potentially a significant impact in respect of the evidence of complainants of a sexual offence.[70] If it is not established that the witness made the inconsistent statement, s.119 does not apply. If the witness

[67] [1987] A.C. 281.
[68] [2015] EWHC 232 (Admin) at [32]ff per Fulford LJ.
[69] At [34].
[70] For a strong example of s.119 in operation, see *Joyce and Joyce* [2005] EWCA Crim 1785, where two eye-witnesses in respect of a firearms offence became hostile at trial.

adopts his earlier statement or could reasonably be understood to be endorsing it, then s.119 does not apply.[71]

Hostile witnesses

19.65 If the witness is hostile and the statement is proved to be inconsistent, then s.119 applies. There is no bar to calling a witness, expecting them to resile from what they said before, and then applying to make them hostile.[72] It follows that a previous consistent statement of a hostile witness, who admits making the statement, is admissible to prove the facts stated in it.[73] However, there may be very compelling reasons why it would be wholly inappropriate to call a complainant in a sex case when it is known that she retracts her original statement and does not want to give evidence.[74] For instance, where there is a continuing close relationship between the complainant and defendant, the situation may call for particular sensitivity. However, this very much depends upon the facts of a particular case, and the public interest in continuing to prosecute. Where a complainant's hostility is the result, for example, of fear or parental coercion, there may be strong arguments for calling the complainant, and, if necessary, applying to make them hostile.

19.66 The principle that an inconsistent statement by a witness becomes evidence of the truth of its contents is not, of course, confined to hostile witnesses. However, the witness needs to give some oral evidence and to admit making the previous inconsistent statement. A good example is *Leach*,[75] where the Court of Appeal upheld a conviction of sexual assault where the first complaint of a 14-year-old to her mother was that the appellant had kissed her. In subsequent interviews, she alleged that he had touched her beneath her underwear. This inconsistent statement became evidence of the truth of her complaint as well as material which, if the jury thought the inconsistency was significant, could be used to cast doubt upon the truth of what she said. Arguably, judges should be astute to remind juries of any important inconsistencies in a complainant's previous statement, as the jury would be entitled to act upon a previous inconsistent statement as evidence of the truth.[76] It is likely that prosecutors will seek to rely more on the previous statements of complainants who have retracted their statements, particularly

[71] *R. v M* [2011] EWCA Crim 1458.
[72] *Osborne* [2010] EWCA Crim 1981.
[73] *Joyce and Joyce* [2005] EWCA Crim 1785; *Bennett* [2008] EWCA Crim 248; *Osborne* [2010] EWCA Crim 1981.
[74] See e.g. *R. v C* [2007] EWCA Crim 3463 where, in a domestic violence case, the Court of Appeal recommended relying on other available evidence rather than calling the complainant and making her hostile, thereby only exacerbating the wretched situation in which she found herself.
[75] [2005] EWCA Crim 58.
[76] *R. v Keith D* [2005] EWCA Crim 3043 (obiter).

where there is other evidence in the case supporting the previous statement.[77]

Complainant's Evidence

Reluctant complainants

19.67 It happens not infrequently in sex cases that a complainant refuses to give evidence or to continue to give evidence. When such a situation arises, it will usually be necessary for the judge to tell the witness that, as a witness in a court of law, he or she is under an obligation to answer questions and does not have a choice in the matter. The situation requires a blend of sensitivity and fairness which may involve giving the witness time to reflect. If the witness maintains their refusal, the judge may point out that, in the event of a continued refusal, the witness would be in contempt of court and there is a power to punish the witness. Whether or not there is evidence to suggest that the refusal is attributable to fear, a court may grant legal representation to such a witness, who has come to court as a result of a summons or warrant but is steadfastly refusing to give evidence. The court-appointed lawyer will not be able to discuss the witness's evidence with them, but will be able to explain the implications of failing to give evidence, which may amount to a contempt of court. We are firmly of the view that the court-appointed lawyer should have appropriate experience of sex cases in order that they are in a position to give proper advice in these highly sensitive cases. In sensitive situations, it may be better for the judge to leave it to the court-appointed lawyer to explain the repercussions of continued refusal.

No rule that there cannot be a conviction for rape without oral evidence from the complainant

19.68 Generally speaking, a complainant in a sex case, if available, will be expected to testify if their evidence is in dispute. There are, however, exceptional circumstances in which a complainant's statement might be properly admissible under the hearsay provisions. These will include cases in which the complainant has subsequently become seriously ill. Whilst the circumstances are limited in which a complainant's disputed evidence can be put before a jury under the hearsay provisions, there is no principle preventing such

[77] In *Crown Prosecution Service v CE* [2006] EWCA Crim 1410, the Court of Appeal upheld the trial judge's ruling not to admit a complainant's video evidence in a rape case even though two of the criteria under s.116 of the Criminal Justice Act 2003 were satisfied. The hearsay evidence was the sole or decisive evidence against the accused. The complainant was "potentially a completely flawed witness" and the defendant would be deprived of the opportunity of cross-examining her on a large numbers of issues relating to consent. Cf. two cases under s.23 of the Criminal Justice Act 1988, where the Court of Appeal held that the complainant's video was properly admitted: *Ali Sed* [2004] Crim. L.R.1036; *R. v D* [2002] 2 Cr. App. R. 601.

evidence being admitted if the appropriate criteria are satisfied. As Sir Igor Judge LJ, as he then was, observed in *Coates*[78]:

> "A conviction for rape may, of course, be returned without the oral testimony of the complainant. As examples, after giving a detailed statement of the incident, the complainant may suffer a justified fear of serious repercussions if she were to give evidence, or she may suffer an accident with head injury[79] and loss of memory. The written statement would almost certainly be admitted. Again, the complainant may have been unconscious at the time of intercourse, or so inebriated as to have no memory of the precise circumstances, but others may have witnessed it. In other words a positive case may be mounted by the prosecution without the complainant giving oral evidence."

Where complainant disavows an earlier account

19.69 If the witness admits making the previous statement but does not repeat it at trial, or denies its contents, and the statement is proved to be "inconsistent" with his present testimony,[80] then, as seen above, the statement is potentially admissible under s.119 of the CJA 2003 (previous inconsistent statements).[81] It may also be admissible in the interest of justice under s.114(1)(d) of the Act. See paras 19.53 and following, above.

19.70 However, the effect of a disavowal in evidence by a complainant of an earlier account will depend upon the case. Where there is evidence that a vulnerable witness or a child has retracted an earlier allegation as a result of fear or coercion, the earlier allegation may still carry significant evidential weight. That was not the position in *Coates*[82] where the complainant had completely rejected her first account and there was no suggestion of any such pressure. This led to the conviction being quashed by the Court of Appeal as the tribunal had taken an impermissible route to conviction. The complainant had given evidence in which she rejected her own first account of and statement about the incident in which she alleged rape. Unusually, and because this was a Court-Martial, the factual basis on which the conviction was returned is known. The Board convicted the appellant on the basis of the first of the complainant's four statements, notwithstanding their rejection of her oral evidence. During the trial, defence counsel had put the first statement to the complainant during the course of her evidence. This was to establish significant inconsistencies with her evidence that her fourth statement was the true account so as to demonstrate her general unreliability. The

[78] [2007] EWCA Crim 1471; [2007] Crim. L.R. 887.

[79] Presumably this would include a complainant who made an ABE interview whilst competent, but subsequently was not fit to give evidence because of a degenerative condition such as dementia: see *Ali Sed* [2004] Crim. L.R. 1036; *R. v D* [2002] 2 Cr. App. R. 601.

[80] *Chinn* [2012] EWCA Crim 501, where s.119 was held not to apply where there was no suggestion that the witness was making an inconsistent statement. However, a claim to have no recollection may lead to a clear inference of inconsistency: see *Bennett* [2008] EWCA Crim 248.

[81] *R. v B* [2008] EWCA Crim 365.

[82] See *Coates* [2007] EWCA Crim 1471; [2007] Crim. L.R. 887.

fourth statement was made after later consultations and therapy with a doctor of clinical psychology, who was an accredited consultant in Eye Movement Desensitisation and Reprocessing. The Court of Appeal accepted that, on a strict application of the language of s.119(1), the statutory conditions governing admissibility of an inconsistent statement were fulfilled. However, the complainant, in her evidence, did not support any version of events which she had given before she saw the clinical psychologist. Defence counsel had introduced the first statement as a direct consequence of the prosecution proceeding on the fourth statement. The Court held that in those circumstances, notwithstanding the provisions of s.119, the issue of exclusion under s.78 of the Police and Criminal Evidence Act 1984 should have been addressed and, as a matter of discretion and overall fairness, the first statement should not have been treated as admissible evidence sufficient to form the basis of a conviction for a rape disavowed by the complainant herself.

Complainant's testimony at previous trial admitted at re-trial

19.71 On a re-trial, the transcript of the witness's testimony may be admissible under s.114(1)(d) or s.116 of the CJA 2003 where the defence have had a full opportunity to cross-examine and test the evidence at the previous trial. This may apply whether the testimony is the evidence of the complainant in respect of the allegation or of witnesses adduced under s.101(1)(d) of the bad character provisions.[83] Here, the argument in favour of admission is at its most compelling as the defence will already have had an opportunity to challenge and test the evidence. Often there will be an ABE interview, which, if admitted, will assist the jury in assessing the witness's demeanour, albeit not during cross-examination. In *Sadiq*[84] the Court of Appeal approved the admission of a complainant's testimony from a first trial at a re-trial under s.114(1)(d) in "some very exceptional circumstances". The complainant had been the victim of a shooting which had left him paralysed and unable to speak. At the first trial he had given important identification evidence by pointing to letters on an alphabet board. He then refused to give evidence at the re-trial. The Court of Appeal approved this course, but went out of its way to make clear that it was not normally in the interests of justice that an important witness's evidence should be given under the hearsay provisions when the witness simply refuses to testify and will not provide a good reason for the refusal. The judge, however, had been entitled to take into account a very relevant factor, namely that the jury would gain little assistance from the witness's demeanour at the re-trial.

[83] See Professor David Ormerod's discussion as to hearsay possibilities if there had been a re-trial in *O'Dowd* [2009] Crim. L.R. 827; but see *R. v Z* [2009] EWCA Crim 20; [2009] 1 Cr. App. R. 34.

[84] [2009] EWCA Crim 712.

Consistent Statements—Evidence of Earlier Complaints by the Complainant

Section 120 of the CJA 2003 specifies six gateways under which previous consistent statements can become admissible as evidence of the truth. The following paragraphs focus on two of those gateways: earlier complaints (in the past commonly described as evidence of recent complaint) (s.120(4)–(7)) and evidence to rebut suggestion of fabrication (s.120(2)). The scope provided by the Act for previous consistent statements to be admitted and used as evidence of the truth represents a major shift from the common law position. 19.72

History of evidence of earlier complaints

In the Middle Ages, suspicion of the veracity of any claim of rape led to the imposition of a requirement on the woman to prove that, while the offence was still recent, she raised "hue and cry" in the neighbouring towns and showed her injuries and clothing.[85] By the eighteenth century, this requirement had evolved into a strong presumption against the victim of an alleged rape if she made no complaint within a reasonable time of the offence.[86] This presumption itself withered away, but a complaint made within a reasonable time by the victim of an alleged rape remained admissible, contrary to the general rule against the admission of previous consistent statements. Indeed, recent complaints were recognised to be of such potential evidential significance that the rules relating to them were extended to all sexual offences. 19.73

At common law, the prosecution in a trial for a sexual offence could, as part of its case, call evidence that the victim had made a voluntary complaint at the first reasonable opportunity after the commission of the offence.[87] The complaint was not admissible as evidence as to the truth of the facts complained of[88] but as evidence of the consistency of the victim's conduct with her story in the witness box, and as tending to negative her consent.[89] 19.74

[85] Bracton, *De Corona* lib. iii. fol. 147; 1 Hale 633.

[86] 1 Hawk. c.41.

[87] *Lillyman* [1896] 2 Q.B. 167; *Osborne* [1905] 1 K.B. 551; *Camelleri* [1922] 2 K.B. 122; *Lovell* (1923) 17 Cr. App. R. 163; *Coulthread* (1934) 24 Cr. App. R. 44; *Evans* (1924) 18 Cr. App. R. 123; *Wannell* (1923) 17 Cr.App.R. 53; *Valentine* [1996] 2 Cr. App. R. 213. The rule was initially applied in respect of sexual offences against females; its application to offences against males was settled in *Camelleri*.

[88] Though a complaint may be admitted for this purpose if it was made in the presence of the defendant in circumstances where his response amounted to an admission or formed part of the res gestae: see Sir Rupert Cross and Colin Tapper, *Cross & Tapper on Evidence*, 9th edn (London: LexisNexis, 1999), pp.547 and following and 558 and following.

[89] *Lillyman*, above fn.87, at 170 per Hawkins J; *Osborne*, above fn.87; *Wallwork* (1958) 42 Cr. App. R. 153; *Redpath* (1962) 46 Cr. App. R. 319.

with effect from April 8, 2013, by s.135 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The new scheme comprises youth cautions (ss.66ZA of the Crime and Disorder Act 1998 ("1998 Act")) and youth conditional cautions (s.66A). Youth cautions and youth conditional cautions are not court orders. However, familiarity with these pre-court disposal schemes are important in the youth court: not only are they relevant to considerations of bail and sentence, but representations can sometimes be made to adjourn proceedings if a case is one which may suitable for an alternative disposal.[22] CPS decisions on case disposal are judicially reviewable.[23]

Youth cautions

31.22 By s.66ZA(1)(a)–(c) of the 1998 Act, a youth caution can be administered if there is sufficient evidence to charge, the offence is admitted, and the constable does not consider that the offender should be prosecuted or given a youth conditional caution. The police are to consider the seriousness of the offence, as determined by reference to the ACPO Gravity Factor Matrix.[24] The Matrix assigns sexual offences (and other offences) a score of 1, 2, 3 or 4. An offence that attracts a gravity score of 2 or 3 will usually result in a youth being given a youth caution. If the offending behaviour cannot be satisfactorily addressed by a youth caution, the police will consider a youth conditional caution.

31.23 Guidance on such disposals can be found in *Youth Cautions—Guidance for Police and Youth Offending Teams*, issued by the Ministry of Justice and the Youth Justice Board in April 2013.[25] By virtue of ss.80(1)(d) and 113(1) of the 1998 Act, youth cautions trigger notification requirements in relation to the same set of offences that trigger notification where a person is convicted at court. The *Guidance* stresses that the police are responsible for explaining to the youth and appropriate adult that a caution will trigger the notification requirements.[26] The notification requirement is two years.

Youth conditional cautions

31.24 By s.66A–E of the 1998 Act a youth conditional caution can be administered if there is sufficient evidence to charge, the offence is admitted, the effect of the caution is explained to the young person (breach may result in

[22] *F. v CPS* (2004) 168 J.P. 93.

[23] See, e.g. *S. v DPP* [2006] EWHC 2231 (Admin) where the court scrutinised the CPS's decision to prosecute a 15-year-old for an offence under ss.9 and 13 of the 2003 Act in light of the CPS guidance *Legal Guidance: Youth Offenders* and *Legal Guidance: Sexual Offences*.

[24] Available at *http://cps.gov.uk/legal/assets/uploads/files/Gravity%20Matrix%20May09.pdf* [Accessed April 30, 2016].

[25] Available at *http://www.justice.gov.uk/downloads/oocd/youth-cautions-guidance-police-yots-oocd.pdf* [Accessed April 30, 2016].

[26] Para.11.10.

prosecution) and the young person signs a document admitting the offence and consenting to the conditions attached to the caution.[27] There is a duty to consult the victim or victims before a youth conditional caution is administered.[28] The decision to administer such a caution has the effect of suspending any criminal proceedings while the young person is given an opportunity to comply with the agreed conditions. Under s.66E(2), if the young person fails without reasonable excuse to comply with conditions, they may be prosecuted for the original offence.

31.25 Guidance on the use of youth conditional cautions is to be found in *The Director's Guidance on Youth Conditional Cautions*[29] and the *Code of Practice for Youth Conditional Cautions*[30] (both revised April 2013). The *Director's Guidance* states that conditional cautions can be used for all offences classified (in the case of adults) as summary only or triable either way. Cases which are triable only on indictment in the case of adults must be referred to a prosecutor before a youth conditional caution is given.

First Appearance

31.26 The youth court is normally the court of first appearance for a youth charged with an offence. However, where the youth is charged with an adult, or with aiding and abetting an adult, or with an offence arising out of the same facts as give rise to a charge against an adult, the court of first appearance will be an adult magistrates' court.

Mode of Trial

31.27 The procedure for determining mode of trial is modified in respect of youths. There is a presumption that youth cases will be heard in the youth court. A youth court can deal with all forms of offences, whether summary, triable either way or indictable only.[31] The youth has no right to elect Crown Court trial. The only circumstances in which a youth will be tried in the Crown Court is if the magistrates send the case there. So far as sexual offences are concerned, they may do so only if:

- The offence is a "grave crime", i.e. one to which s.91 of the Powers of Criminal Courts (Sentencing) Act 2000 ("PCCSA") applies;
- The offender would be sentenced under the "dangerousness provisions" of the Criminal Justice Act 2003 ("CJA 2003"); or
- The offender is charged jointly with an adult.

[27] s.66B(3).

[28] s.66BA.

[29] *http://www.cps.gov.uk/publications/directors_guidance/youth_conditional_cautions.html* [Accessed April 30, 2016].

[30] *http://www.justice.gov.uk/downloads/oocd/code-practice-youth-conditional-cautions-oocd.pdf* [Accessed April 30, 2016].

[31] Except homicide and certain firearms offences.

If none of these circumstances apply, there will be no mode of trial hearing for a sexual offence in the youth court. For the procedure when sexual offences do fall into the above categories, see below.

31.28 The *Code for Crown Prosecutors* states as follows as regards the mode of trial of youths[32]:

> "Prosecutors must bear in mind that youths should be tried in the youth court wherever possible. It is the court which is best designed to meet their specific needs. A trial of a youth in the Crown Court should be reserved for the most serious cases or where the interests of justice require a youth to be jointly tried with an adult."

Bail

31.29 In the first instance bail will generally fall to be determined by the youth court. The Bail Act 1976, including the presumption in favour of bail in s.4 of the Act, applies to youths as it does to adults.[33] Equally, the limitations on bail set out in s.25 of the Criminal Justice and Public Order Act 1994 apply to youths as they do to adults. Thus, if a youth has been charged with or convicted of certain offences and has a previous conviction for any such offence, there must be exceptional circumstances before they are granted bail.[34] In the case of an adult this limitation applies where the adult has been sentenced to a period of imprisonment for the previous offence. In the case of youths, it applies where they have been sentenced for that offence to "long-term detention" under s.91 of the PCCSA 2000.[35]

31.30 Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss.91–102, a court that refuses bail for a child under 18 has two options:

- Remand to local authority accommodation, with or without conditions (ss.92–97). The conditions may include electronic monitoring, where certain requirements are met and the child has been charged with a sexual offence (ss.93(2) and 94).
- Remand to youth detention accommodation (s.102). If the child is charged with a sexual offence, the court can only remand to youth detention if the child has reached the age of 12, and such detention is the only adequate way to protect the public from death or serious personal injury or to prevent the commission of imprisonable offences by the child (s.98).

Trial in the Youth Court

31.31 This section deals with the following matters relating to trial in the youth court:

[32] Above, fn.9, at para.8.3.
[33] Except that a youth may be refused bail for his "own welfare" rather than his "own protection", as is the case with adults: Bail Act 1976 Sch.1, Pt 1, para.3.
[34] Criminal Justice and Public Order Act 1994 s.25, as amended by the Sexual Offences Act 2003 s.139 and Sch.6.
[35] Criminal Justice and Public Order Act 1994 s.25(3).

- Constitution and operation of a youth court.
- Attendance of parent/guardians.
- Press and publicity.
- Disclosure.
- The course of a trial.
- Competence and compellability.
- Oaths.
- Special measures.
- Questioning of young people.

Constitution and Operation of a Youth Court

31.32 Magistrates must be authorised to sit in youth courts. Section 45 of the Children and Young Persons Act 1933 governs the authorisation process. It aims to ensure that only suitably trained magistrates sit in youth court, given the specific needs and issues of this age group.

31.33 The composition of the youth court is governed by the Youth Courts (Constitution of Committees and Rights to Preside) Rules 2007.[36] Rule 10(1) requires a youth court to consist of either a district judge sitting alone, or not more than three justices, including at least one man and one woman (unless either is unavailable and the members present decide that the hearing will be delayed unreasonably if they do not proceed). Under r.11(1), a youth court (unless it consists of a district judge sitting alone) must be chaired by a district judge or by a youth justice who is on the list of approved youth court chairman. In *R. v Birmingham Justices, Ex p. F (A Juvenile)*,[37] it was held that the court should consider representations before proceeding with a single-sex Bench.

31.34 Where a youth court retains jurisdiction for a rape trial, the trial may well be heard by a circuit judge authorised to try serious sexual cases. This is in accordance with the *Protocol: Sexual Offences in the Youth Court* (set out in full at para.31.86, below). Section 66 of the Courts Act 2003 enables a circuit judge to sit as a district judge. In exceptional cases, for example if a circuit judge is not available, a district judge may hear the case.

31.35 The public are excluded from the youth court. Under s.47(2) of the Children and Young Persons Act 1933, the only persons entitled to be present in a youth court are:

- Members and officers of the court.
- Parties to the case before the court and their legal representatives.
- Witnesses and other persons directly concerned in that case.
- Bona fide representatives of news gathering or reporting organisations.

[36] SI 2007/1611.
[37] [2000] Crim. L.R. 588.

- Such other persons as the court may specially authorise to be present.

These restrictions are set out in similar terms in the Criminal Procedure Rules 2015 r.24.2(c). By contrast, there are no such restrictions if a youth appears in an adult magistrates' court or in the Crown Court.

Attendance of Parents/Guardians

31.36 Under s.34A(1) of the Children and Young Persons Act 1933, where a youth under the age of 16 is brought before a court, whether as a defendant or a witness, the court must require a parent or guardian of the child to attend during all stages of the proceedings, unless and to the extent that the court is satisfied that it would be unreasonable to require this, having regard to the circumstances of the case.[38] If the youth is aged 16 or over, the court *may* require a parent or guardian to attend, subject to the same exception. The court has a discretion, in the exercise of which it needs to balance the swift disposal of the case with the seriousness of the offence.[39]

Press and Publicity

31.37 We deal under this heading with:

- Automatic reporting restrictions which take effect in the youth court.
- Removal of reporting restrictions.
- Anonymity for the complainant in sexual offences cases.

Automatic reporting restrictions

31.38 Accredited media representatives are allowed to observe and report on youth court proceedings. However, the media are restricted in the details they may report. Section 49 of the Children and Young Persons Act 1933 applies to the youth court only and provides as follows:[40]

> **"49.—Restrictions on reports of proceedings in which children or young persons are concerned**
>
> (1) No matter relating to any child or young person concerned in proceedings to which this section applies shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as someone concerned in the proceedings.

[38] By virtue of s.34A(2), these provisions apply to local authorities where the child or young person is in their care or in accommodation provided by them.

[39] See the *Youth Court Bench Book* (January 2013), available from the Judicial College website. See also Appendix A—Magistrates Association Protocol, which sets out factors influencing procedures in youth court trials.

[40] The section is printed here as amended, most recently by the Youth Justice and Criminal Evidence Act 1999 s.48 and Sch.2.

> (2) The proceedings to which this section applies are—
> (a) proceedings in a youth court;
> (b) proceedings on appeal from a youth court (including proceedings by way of case stated);
> (c) proceedings in a magistrates' court under Schedule 2 to the Criminal Justice and Immigration Act 2008 (proceedings for breach, revocation or amendment of youth rehabilitation orders);
> (d) proceedings on appeal from a magistrates' court arising out of any proceedings mentioned in paragraph (c) (including proceedings by way of case stated).
> (3) In this section 'publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings.
> (3A) The matters relating to a person in relation to which the restrictions imposed by subsection (1) above apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—
> (a) his name,
> (b) his address,
> (c) the identity of any school or other educational establishment attended by him,
> (d) the identity of any place of work, and
> (e) any still or moving picture of him.
> (4) For the purposes of this section a child or young person is 'concerned' in any proceedings if he is—
> (a) a person against or in respect of whom the proceedings are taken, or
> (b) a person called, or proposed to be called, to give evidence in the proceedings."

Section 49(3), which was substituted with effect from April 13, 2015, by the Youth Justice and Criminal Evidence Act 1999, has the effect of extending the definition of "publication" beyond the print media and sound and television broadcasts, and is capable of covering content published online.

The effect of s.49, for sexual offences as for any other offence, is that nothing may be published that is likely to lead to the identification of any child or young person under the age of 18 who is concerned in youth court proceedings, including their name, address or school and any picture of them. These restrictions apply whether the child or young person is a defendant or a witness. If they turn 18 during the course of proceedings, the restrictions cease to have effect.[41] But if the child or young person is a victim or a witness, then s.45A of the Youth Justice and Criminal Evidence Act 1999 gives the court a discretion to impose lifetime reporting restrictions: see further paras 29.108 and following, above.

31.39 If a youth appears in an adult magistrates' court or the Crown Court, reporting restrictions are governed by s.45 of the Youth Justice and Criminal Evidence Act 1999, for which see paras 29.58 and following, above.

[41] *T v DPP* [2003] EWHC 2408 (Admin), considered more recently in *R. (on the application of JC) v Central Criminal Court* [2014] EWHC 1041 (Admin).

Removal of reporting restrictions

31.40 The s.49 restrictions are not absolute. The circumstances in which the court can remove them are set out in s.49(4A) and (5):

- Where the child or young person has been convicted of an offence and the court is satisfied that it is in the public interest to dispense with the reporting restriction (s.49(4A));
- Where it is appropriate to do so for the purpose of avoiding injustice to the child or young person subject to the application (s.49(5)(a)); or
- Where a defendant has been charged with or convicted of a violent or sexual offence, or an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more, if the defendant is unlawfully at large and it is necessary to identify him in the press for the purpose of apprehending him (s.49(5)–(7)).

The sexual offences to which s.49(5)–(7) refers are those listed in Pt 2 of Sch.15 to the Criminal Justice Act 2003. Accordingly, this exception may apply to the majority of sexual offences.

31.41 Little guidance is available as to when it will be "in the public interest" to remove restrictions under s.49(4A), following conviction in the youth court. What is clear is that this power should be exercised rarely and with the greatest caution. In *McKerry v Teesdale and Wear Valley Justices*,[42] the fact that the defendant constituted a "serious danger to the public" was held to justify the decision to dispense with restrictions. Lord Bingham stated[43]:

> "The power to dispense with anonymity, as permitted in certain circumstances by section 49(4A), must be exercised with very great care, caution and circumspection. It would be wholly wrong for any court to dispense with a juvenile's prima facie right to anonymity as an additional punishment. It is also very difficult to see any place for 'naming and shaming'. The court must be satisfied that the statutory criterion that it is in the public interest to dispense with the reporting restriction is satisfied. This will very rarely be the case, and justices making an order under section 49(4A) must be clear in their minds why it is in the public interest to dispense with the restrictions."

Anonymity of complainants in sexual offence cases

31.42 The anonymity of complainants of sexual offences is governed by s.1 of the Sexual Offences (Amendment) Act 1992 (for rape and other sexual offences), discussed in Ch.29. The list of sexual offences to which the anonymity provisions apply are set out in s.2(1) of the 1992 Act, as amended by the Sexual Offences Act 2003. All offences under Pt 1 of the Sexual Offences Act 2003 are included, with the exception of those in s.64 (sex with an adult relative), s.65 (sex with an adult relative: consent to penetration), s.69

[42] [2001] E.M.L.R 5; [2000] Crim. L.R. 594.
[43] At [17].

(intercourse with an animal), and s.71 (sexual activity in a public lavatory).[44] The right to anonymity is not absolute as there are circumstances in which a court can lift the restrictions, for example to induce a witness to come forward. These circumstances are set out in s.3 of the 1992 Act.

Disclosure

Disclosure is governed by Pt 15 of the Criminal Procedure Rules 2015.[45] As far as prosecution evidence for summary trial in the youth court is concerned, the relevant guidance is to be found in the *Attorney General's Guidelines on Disclosure*,[46] published in December 2013. Paragraphs 44 to 47 deal with disclosure where a trial is to take place. In short, initial disclosure obligations arise after a not guilty plea has been entered (para.44), and once set down for trial, prosecutors should ensure the investigator is requested to supply any outstanding disclosure schedules as a matter of urgency. Prosecutors should serve initial disclosure in sufficient time to ensure the trial date is effective (para.46). 31.43

As in the Crown Court, disclosure of unused material in the youth court is governed by the Criminal Procedure and Investigations Act 1996 ("CPIA"). The prosecution's obligations arise after a not guilty plea has been entered.[47] The material must, of course, satisfy the appropriate statutory test for disclosure. 31.44

Disclosure of a defence statement under s.6 of the CPIA is voluntary in the youth court.[48] However, in the absence of a defence statement, the defendant cannot make an application for specific disclosure under s.8 of the CPIA, nor can the youth court make any order for disclosure of unused prosecution material. If there is to be a defence statement, it must comply with s.6A of the CPIA, and standard directions require that it be served within 14 days of date upon which the prosecution has complied with (or purported to comply with) initial disclosure. 31.45

The *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases*[49] was issued in December 2013. Paragraphs 30 to 37 deal with disclosure of unused material in the magistrates' and youth court. It notes that whilst the statutory disclosure test applies, given the nature of summary trials, it is important that summary trials are not delayed or over-complicated 31.46

[44] Sexual Offences Act 2003 s.139 and Sch.6, para.31.
[45] The Rules are available at *http://www.legislation.gov.uk/uksi/2015/1490/pdfs/uksi_20151490_en.pdf* [Accessed April 30, 2016].
[46] Available at *https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2013* [Accessed April 30, 2016].
[47] Except when, pursuant to the common law rules of disclosure, the prosecution ought to disclose unused material in advance of CPIA disclosure, e.g. for a bail application.
[48] CPIA s.6(2).
[49] Available at *https://www.judiciary.gov.uk/publications/protocol-unused-material-criminal-cases/* [Accessed April 30, 2016].

by misconceived applications for, or inappropriate disclosure of, prosecution material.[50]

The Course of a Trial[51]

31.47 The youth court procedure is the same as that of the adult magistrates' court. The trial procedure is governed by Pt 24 of the Criminal Procedure Rules 2015. That Part applies to all magistrates' courts. It does, however, contain some modifications in respect of youths. In particular, "finding of guilt" is to be used in place of "conviction", and "an order made on a finding of guilt" is to be used in place of "sentence" (r.24.2), and the general rule that a court may proceed in the absence of a defendant does not apply to those under 18 (r.24.12(3)(b)).

31.48 The youth court is intended to be designed in such a way as to ensure that the court proceedings are accessible to this age group. The court layout and procedure will be less formal: for example, first names will be used, the defendant will not normally be in the dock and witnesses will be seated whilst giving evidence.[52] Further guidance is to be found in *R. (TP) v West London Youth Court*,[53] which involved a 15-year-old defendant with an IQ of an eight-year-old. He applied to stay proceedings as an abuse of process on the basis that his intellectual capacity was such that he could not effectively participate in the proceedings in accordance with art.6 ECHR. This application was dismissed, owing to the fact that the youth court was designed to facilitate participation. Baker LJ noted the following steps that should be taken to that end[54]:

> "i) keeping the claimant's level of cognitive functioning in mind;
> ii) using concise and simple language;
> iii) having regular breaks;
> iv) taking additional time to explain court proceedings;
> v) being proactive in ensuring the claimant has access to support;
> vi) explaining and ensuring the claimant understands the ingredients of the charge;

[50] para.30.

[51] See the CPS Guidance *Safeguarding Children as Victims and Witnesses*, Annex 2, for a trial checklist when dealing with children or other vulnerable victims of rape. The checklist can be applied to other sexual offences. See also the Equal Treatment Bench Book 2013, Ch.5, which sets out how to adapt criminal proceedings to accommodate children. The Guidance is available at *https://www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/* [Accessed April 30, 2016].

[52] See the *Youth Court Bench Book* (January 2013), para.12. The *Bench Book* available on the Judicial College website. See also the Magistrates' Association Protocol, Appendix A, which sets out factors influencing procedures in youth court trials.

[53] [2005] EWHC 2583 (Admin). Note that if a youth appears as a defendant in the Crown Court, the court must be adapted in accordance with the Criminal Practice Direction, General matters 3D: Vulnerable People in the Courts. This follows the decision in *SC v UK* (2005) 40 E.H.R.R. 226, which found a breach of art.6 on the basis that the young defendant could not participate effectively at trial.

[54] At [26].

> vii) explaining the possible outcomes and sentences;
> viii) ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised".

31.49 The court has a duty to ensure that the defendant receives a fair trial, which includes the ability to participate effectively at trial.[55] For the use of special measures, and the inherent power of the court to take such steps as are necessary to ensure that the defendant receives a fair trial and to assist the defendant to give his best evidence, see Ch.27. The steps to be taken include "being pro-active in ensuring that the claimant had access to support".[56] This applies not simply to the trial itself, but also, where appropriate, in case preparation and the run up to the trial.[57]

31.50 Under s.33A of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA"), the court may, on application and if certain conditions are met, direct that the accused give evidence by live link. In the case of those under 18, those conditions are that the accused's:

> "(a) ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning, and
> (b) use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise)."[58]

31.51 Section 33BA of the YJCEA, when commenced, will enable the court to direct that the examination of the accused be conducted through an intermediary. As with the live link provisions, this power will be available where the accused's ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning.[59]

Competence and Compellability

31.52 By virtue of s.53 of the YJCEA, all persons (whatever their age) are competent to give evidence in criminal proceedings. However, a person is not competent to give evidence if it appears to the court that he is not a person who is able to understand questions put to him as a witness, or give answers to them which can be understood.[60] The question of competence is determined by the court. In doing so, it will take into account any special measures directions. Where the witness is a child or vulnerable adult, the court should watch any video-recorded interview before determining the

[55] Criminal Procedure Rules 2015, overriding objective, r.1.1(2)(b) and r.3.10(3)(b).

[56] *R. (on the application of P) v West London Youth Court* [2006] 1 W.L.R. 1219, at [26].

[57] *R. (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) at [17] (where the court examined steps to be taken to ensure participation of the defendant, in particular the use of intermediaries).

[58] See further paras 27.26 and following, above.

[59] See further paras 27.36 and following, above.

[60] YJCEA 1999 s.53(3).

issue.[61] Expert evidence may well be necessary to inform the decision, and material from medical or school records may also assist.

31.53 Any issue of competence should be raised before the witness is sworn or begins to give evidence. This will usually be at the start of the trial or on earlier notice, but may be dealt with during the course of the trial if it becomes clear only then that competence is an issue. Cases involving very young witnesses should be fast-tracked to avoid any effect on their competence.[62]

31.54 As a general rule, all competent witnesses are compellable. There are no exceptions on the basis of the age of the witness.

Oaths

31.55 A witness aged 14 or over, who appreciates the solemnity of the occasion and the particular responsibility to tell the truth which is involved in taking an oath, must give sworn evidence. A person under the age of 18 uses the words "I promise" in place of "I swear" when taking the oath or affirming.[63] A witness under the age of 14 (or otherwise incapable of giving sworn evidence) is not permitted to give sworn evidence. The court should be satisfied that such a witness is otherwise competent, and knows the difference between truth and lies.

Special Measures

31.56 Special measures are available for vulnerable and intimidated witnesses (other than defendants) to ensure that they are able to give their best evidence at court. The relevant statutory provisions are to be found in ss.16–32 of the YJCEA. Under ss.16 and 17, the following groups of witness are eligible for special measures:

- those under 18 at the time of the hearing (s.16(1)(a));
- vulnerable witnesses (other than those under 18) (s.16(1)(b));
- intimidated witnesses (s.17(1));
- complainants of sexual offences (s.17(4)).

31.57 For detailed discussion of these provisions, see Ch.27. The provisions, and the types of special measures that are most relevant to the youth court and sexual offences, are summarised below. Some options are available to the court to facilitate best evidence for defendants. These do not technically fall under the "special measures" provisions, but arise from the inherent power of the court to protect the rights of the defendant and ensure effective participation.

[61] YJCEA 1999 s.54(3); and *MacPherson* [2005] EWCA Crim 3605.
[62] *Powell (Michael John)* [2006] 1 Cr. App. R. 31.
[63] YJCEA 1999 ss.55(2) and 56(2).

Persons eligible for special measures

31.58 The persons eligible for special measures can be divided into four groups:

- Those under 18. Under s.16(1)(a), those under 18 at the time of the special measures hearing are automatically eligible for special measures.[64]
- Other vulnerable witnesses. Under s.16(1)(b), vulnerable witnesses (those with a mental disorder or other significant impairment of intelligence and social functioning, or those with a physical disability), whatever their age, are eligible if by virtue of that disorder etc. the quality of their evidence is likely to be diminished.[65]
- Intimidated witnesses. Under s.17(1), a person will be eligible for special measures if the court is satisfied that the quality of evidence given by them is likely to be diminished by reason of fear or distress on their part in connection with testifying in the proceedings. The court must take into account various factors including the views, age, cultural background etc. of the witness.[66]
- Complainants of sexual offences. Under s.17(4), a witness who is a complainant of a sexual offence will automatically be deemed eligible for special measures, unless they do not wish to be so eligible.[67]

Types of special measures

31.59 Once the eligibility criteria have been met, the court must consider whether any special measures will be likely to improve the quality of the evidence, and if so, which measure(s). The types of special measure available are set out in ss.23–30 of the Act. Measures relevant to the youth court are:

- screens (s.23);
- evidence via live link (s.24);
- video recorded evidence-in-chief (s.27);
- examination of a witness through an intermediary (s.29); and
- devices to aid communication (s.30).

31.60 Section 28 of the YJCEA, which provides for pre-recorded cross-examination where a special measures direction provides for video-recorded examination-in-chief under s.27 of the Act, is not in force as of the date of writing (October 2015).

31.61 The "primary rule", namely that the court must give a special measures direction in relation to an eligible witness, applies to child witnesses involved

[64] Eligibility used to apply to those under 17 but was extended to those under 18 by an amendment of s.16(1)(a) made by the Coroners and Justice Act 2009 s.98, with effect from June 27, 2011.
[65] YJCEA s.16(1)(b), (2).
[66] See YJCEA, s.17(2), for a full non-exhaustive list of factors the court must consider.
[67] YJCEA s.17(4).