

that this was indeed expert evidence. The jury were not, however, bound to accept it.

It is noteworthy that the technique used by the expert in *Stockwell* was superimposition. Three of the four experts in Winchester would therefore have considered the evidence unsafe. In *Clarke (supra)*, the Court held that facial mapping evidence is prima facie admissible as "a species of real evidence" per Steyn LJ at 429.

This is difficult to understand. Clearly, video footage from a CCTV camera is 'real evidence'. Arguably, computer-generated enhancement of that video footage is also 'real evidence'. However, can the opinion of the expert as to the degree of similarity between the defendant and the person caught on camera also be deemed 'real evidence'?

In *Hookway* [1999] Crim L.R. 750, the Court of Appeal upheld a conviction based solely upon facial mapping evidence. It was not until *Gray* [2003] EWCA Crim 1001, 27/3/2003 in 2003 that the Court began to acknowledge the potential for danger. In the late 1990s, the CPS acknowledged the unreliability of a certain facial mapping expert. This expert had given evidence at first instance in *Gray*. The prosecution sought to uphold the conviction on the basis of other evidence. In quashing the conviction, the Court of Appeal acknowledged that the absence of any database meant that any conclusion drawn by a facial mapping expert would be subjective. Accordingly there is no means of determining objectively whether such an opinion is justified.

Consequently, unless and until a national database or agreed formula or some other such objective measure is established, this court doubts whether such opinions should ever be expressed by facial imaging or mapping witnesses. The evidence of such witnesses, including opinion evidence, is of course both admissible and frequently of value to demonstrate to a jury with, if necessary, enhancement techniques afforded by specialist equipment, particular facial characteristics or combinations of such char-

acteristics so as to permit the jury to reach its own conclusion... but on the state of the evidence in this case, and if this court's understanding of the current position is correct in other cases too, such evidence should stop there. (at para 16)

It is not immediately obvious how this guidance should be applied in practice. The Court treated the suspect evidence as admissible, albeit plainly unreliable. The assumption implicit in the judgment seems to have been that a jury would be able properly to assess its weight provided the expert did not himself voice an opinion. But the expert should be permitted to highlight all the facial and other features he considers important in reaching his own undisclosed opinion (!) In short, a jury is to be allowed to be led by the hand to the wrong destination, provided they take the final step themselves.

Conclusion

Few lawyers, and few jurors, are equipped properly to weigh scientific evidence, no matter how carefully explained. The pressure to reduce the cost of criminal trials to the public purse makes it all the more unlikely that jurors and judges in the future will have displayed before them the number of experts as appeared in Winchester, the better to assess the reliability of all or any. The responsibility, therefore, of the courts to ensure that expert evidence is reliable is not one that in our view can safely be ignored. It is no longer an adequate response, if ever it was, that judges can have confidence in the 'common sense' of the jury to get it right.

The unhappy state of facial mapping is reflective of, and in part caused by, this 'hands off' approach. Whether facial mapping will follow phrenology into the forgotten abyss of discarded science, or emerge as a fusion of agreed scientific methodology and technology is not clear to us. The omens are not encouraging.

Corporate Manslaughter Bill: a new dawn?

By Gerry Forlin of 2-3 Gray's Inn Square

At the end of March 2005, the long awaited draft Corporate Manslaughter Bill was finally published (Cn 6497). It had been heralded in the Queen's Speech of November 2004, although many had hoped that it would be launched earlier than March. Alongside the draft Bill is a consultation document (replies by 17th June 2005).

The draft Bill sets out proposals for a new, specific offence of corporate manslaughter. An organisation would be prosecuted for this if a gross failing by its senior managers to take reasonable care for the safety of their workers or members of the public caused a person's death. The new offence will apply as now to all companies and other types of incorporated body (including many in the public sector, such as local authorities). Government departments, and other Crown bodies may also be liable to prosecution.

The Government suggests it has sought to strike the "right balance" between a more effective offence and legislation

that would unnecessarily impose a burden on business by focussing on what is currently wrong with the law: the need to find a very senior individual personally guilty of gross negligence manslaughter before the company itself can be convicted. At the heart of the new offence, therefore, is a means of attributing to an organisation failures in the way its activities are organised or managed at a senior level.

The Government points out that the result of the identification principles has been that larger companies with complex management structures have proved difficult to prosecute for manslaughter under the current law. Since 1992 there have been 34 prosecutions for work-related manslaughter, but only six, small, organisations have been convicted. This has created public concern that the law is not delivering justice, a feeling that has been underlined by the lack of success of corporate manslaughter prosecutions following a number of public disasters, such as the Herald of Free

Enterprise ferry disaster in 1987 and the Southall rail disaster in 1997.

In an approach which will surely aggravate both some of the business community and various unions, the consultation states that an offence of corporate manslaughter is not an appropriate way of holding the government or public bodies to account for matters of public policy or uniquely public functions. They propose an offence that applies where an organisation owes a duty of care:

- as employer or occupier of land,
- when supplying goods or services or when engaged in other commercial activities (e.g., in mining or fishing).

Core public functions, such as Government services in a civil emergency or functions relating to the custody of prisoners, are exempt from prosecution. There is no change to the current situation of ministerial immunity. Yet France, for instance, has no such concept and Ministers can be individually prosecuted, such as Mr Fabius for his alleged neglect in his handling of French blood banks in the aftermath of the HIV pandemic. The personal liability of individuals undertaking such functions will remain. However, organisational failings in these areas, we are told, are more appropriately matters for wider forms of public and democratic accountability. This approach is bound to trigger criticism from, amongst others, victim groups, especially in non-Government run prisons where the work has been tendered out to private companies. It will provoke a lively debate in both the House of Lords and amongst certain backbenchers.

The document states that the heart of the new offence lies in the requirement for a management failure on the part of its senior managers. It focuses on responsibility for the working practices of the organisation and considers questions about how, at a senior management level, activities were organised and managed. In particular this allows senior management conduct to be considered collectively, as well as individually. It considers wider questions about law, at a senior management level, how activities were organised and managed. Criminality bites at the level of the organisation's senior managers, those who play a role in making management decisions about, or actually managing, the activities of an organisation as a whole or a substantial part of it. It is intended to cover, for example, management at regional level within a national organisation such as a company with a national network of retail outlets, factories or operational sites. It is targeting those responsible for the overall management of each division. This proposal is surely bound to ignite much comment from those who will say that this test is too limited and will allow companies to escape liability if a more junior manager is involved.

The document stresses that the offence is to be reserved for cases of gross negligence i.e., a gross failure that causes death which is conduct that falls far below what can be reasonably expected in the circumstances. This definition will cause much judicial interest if and when this Bill becomes law. It will allow judges and juries to take into account breaches of health and safety legislation and associated approved Codes of Practice, to see if a gross breach has occurred.

The new Bill covers companies incorporated under company law as well as bodies primarily in the public sector,

what are incorporated under statute, or Royal Charter. These include local authorities, NHS trusts and many non-departmental public bodies. Somewhat draconically, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior managers caused death.

There will be no general Crown immunity. A schedule sets out which Crown bodies are specifically affected. There are however clear hints that the list is not exhaustive: "further work is required to develop this list, particularly to consider the position of executive agencies and other bodies that come under the ambit of Departments". Training is exempted from the Bill in relation to armed forces, but the offence would otherwise apply to the Armed Forces.

Organisations such as friendly societies and informal groups are not currently included, though individual members remain open to individual prosecution for manslaughter and other offences: "Although we will keep this position under review, we look forward to receiving comments on this, particularly in respect of practical issues identified." In my view, the alternative would almost certainly dampen down general enthusiasm for people to do voluntary work.

Interestingly, the Government does not consider that, in principle, police forces should be outside the scope of the offence and they intend that legislation should in due course extend to them. They are currently considering how best to achieve this, given their "particular legal status". This will cause a degree of angst to the police generally and it would not be of enormous surprise if various submissions are made from the police on one side, but also from others who would argue that what is good for the goose is also good for the gander!

The Government does not intend to pursue new sanctions for individuals or to provide secondary liability. They will remain liable to prosecution for individual offences. Disqualification proceedings under existing legislation will also be possible. Thus, in the near future, a growing number of individuals will stand in the dock alongside their employers and contractors, charged with individual and corporate manslaughter respectively. This will delight certain "pressure groups", unions and MPs, but also trigger far more "cut throat" defences which notoriously assist the prosecution.

The fine will be unlimited and where the circumstances of the case merit, a fine can be set at a very high fine. In addition to a fine, the courts will be able to impose remedial orders on offending organisations, akin to those available for health and safety offences. This will enable the courts to require that specific remedial action be taken to address, within a specified time, the failures that led to death. What is not mentioned is the huge impact on a company's reputation and their ability to tender for further work. Insurers will also look carefully at future insurance premiums, at whether they are prepared to ensure certain organisations in the future.

The new offence will apply to England and Wales. All companies, including foreign registered companies, will be subject to prosecution. The new offence, would not, how-

ever, have extra-territorial jurisdiction. Yet any suspicious death of a British National can trigger an inquest in the England and Wales (and a fatal accident investigation in Scotland). This in turn can lead to a police and H&S investigation being opened from which criminal charges can flow. Further, the Criminal Justice Act 2003 allows for retrials in England and Wales even if there has been an acquittal elsewhere. This will cover both individuals and companies. In my view, it is only a question of time before British incorporated companies who allegedly unlawfully kill non-British Nationals outside the UK will face trial inside the UK. This

will have an enormous impact on whether certain companies would in the future wish to incorporate and operate in the UK at all!

The police will investigate and the CPS prosecute the new offence, using the HSE and other agencies as advisers, as currently occurs under the joint protocol. Interestingly, the Government has heeded concerns and the draft Bill specifically requires the consent of the DPP before private proceedings can be instituted. What actual difference this makes in practice awaits to be seen. Scotland and Northern Ireland are actively considering reforming the law.

Feature

OASys

John Bourton¹

Introduction

OASys—short for the Offender Assessment System—was developed jointly by the National Probation Service (NPS) and the Prison Service. OASys assessments are completed and used by both Services. Development of OASys began in 1999 after an analysis of existing assessment systems demonstrated that none fully met the needs of the Prison Service and NPS. OASys was initially rolled out in the NPS as a paper-based system but probation staff now use an IT version known as e-OASys.

OASys assesses likelihood of reconviction, risk of harm, and offending related needs (or “criminogenic factors”) such as poor educational and employment skills, substance misuse, relationship problems and problems with thinking and attitude. The OASys assessment enables a sentence plan to be prepared. Completed at Pre-Sentence Report stage in many cases, OASys informs the NPS’ sentencing advice to the courts. Used in the ongoing management of sentenced offenders, both in custody and in the community, it helps practitioners make sound and defensible decisions about managing risk and tackling need. OASys enables better targeting to programmes and other interventions than was hitherto possible, increasing their chances of having a beneficial impact.

Earlier this year the National Probation Directorate in the Home Office promulgated a new court report framework for the NPS which introduced greater standardisation in the provision of PSRs across England and Wales. OASys has an important role to play in underpinning the new framework and in supporting the successful implementation of the 2003 Criminal Justice Act.

After an initial assessment, often conducted at PSR stage, OASys is revisited and reviewed throughout an offender’s sentence. Later this year the Home Office expects to see improvements in NPS and Prison Service IT that will enable the exchange of OASys assessments between all probation offices and prison establishments. Quick, effective transfer of information will enable practitioners in the two Services to build on each other’s work.

Which offenders are assessed using OASys?

The following are assessed:

- Offenders subject to court ordered Standard Delivery PSRs.
- Offenders on community orders.
- Offenders on licence from prison.
- Hostel residents who are subject to an order, licence or on bail.
- Young offenders serving one month or more in custody and adults serving 1 year or more in custody.

What does OASys do?

OASys examines:

- Offending history and current offence
- Social and economic factors—accommodation, education/employability, financial management, relationships, lifestyle/associates, drug misuse, alcohol misuse
- Personal factors—emotional, thinking and behaviour, attitudes
- Links to risk of harm
- Supervision and sentence planning

In greater detail:

The **Offending Information** section examines current and previous offences; research clearly indicates that criminal history is the best predictor of future conviction. Current offence(s) are further detailed in the **Analysis of Offences** section which helps to identify risk of serious harm, risks to the individual and other risks.

¹ Those who wish to know more about OASys are welcome to contact John Bourton, OASys Implementation manager at the National Offender Management Service (email: john.bourton@homeoffice.gsi.gov.uk)