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Albion Chambers CRIME TEAM NEWSLETTER

Stranded

My experiences in - and of trying to obtain leave to be in - the Court of Appeal (COA) have been much tougher during the last few years than previously. In fact, after a good run of appellate work my appearances, until recently, came to an abrupt end in about 2009. This more or less coincided with practice directions tightening up on the use of authorities which aren't on the Court's approved list and of the decisions in cases such as *R v Erskine*; *R v Williams* [2009] 2 Cr App R which deprecate the use of unreported authorities in all but the most exceptional of cases. I'm not suggesting that the two are directly connected but it does seem that the chances of taking the case of a disgruntled client to appeal are much slimmer now than they were, say, six years ago. The primary reason for that is because there has been a change in the approach taken by the COA in applications for leave; hum-drum "kitchen sink" cases just don't get leave unless the Defendant is clearly on the wrong end of an Attorney General's reference or there has been some glaring error of principle akin to a Wednesbury-type decision in public law.

Let me draw on two examples from my own practice from earlier this year. In *R v Smith* the Defendant was the boyfriend of a previously single mum. He would get drunk and shoot at photographs of people he disliked in the garden with an air rifle. On the day of the offence he rowed with his girlfriend and used her photograph as a target. Her seven year-old son kept wandering over for a look and ignored warnings to stay away; the Defendant 'clicked' the trigger with the barrel pointed skywards to scare the boy and then when the boy ran to his mother, shot twice near to her rather than at her. At trial he was acquitted of the offence of possession of a firearm with intent to endanger life but convicted of the lesser offence of possession of a firearm with intent to cause fear. He was also convicted of sending some vicious text messages to her in the days that followed which were charged as harassment. He was sentenced to three years imprisonment in respect of the firearms offence which, given the volcanic nature of the relationship was light, but not exceptionally so.

Despite that, an Attorney General's Reference followed, not because the Crown requested one unprompted, but because the victim complained about the sentence.

At the hearing the Court found that the whole list of questions set out in Avis should be answered adversely to the Defendant, including the question relating to the type of weapon involved, despite it being an ordinary air rifle which anyone except those barred by virtue of age or conviction could lawfully own.

I made the mistake of suggesting that an "explosive" relationship was highly relevant to the sentence which drew gales of criticism for poor rhetorical form (I didn't have the nerve to remind Moses LJ that it was an air weapon). In a similar vein, my suggestion that an experienced Judge with a real feel for the case was perhaps better placed to determine the length of sentence was swatted away with real irritation. The result was that the sentence was doubled.

Roughed up I may have been but at least I didn't have to tell the client, who had waived his right to be present, so I only had the second-worst job on the day.

The second case *R v Dennis*, again involved domestic violence and received a fair bit of publicity during the trial because the victim gave evidence (and press interviews) in which she said that her life had been saved by her bra wire as the knife which was said to have been plunged towards her chest got stuck on it, miraculously preventing her death. In fact the Defendant was a trained chef (i.e. skilled in the use of knives) and the knife was used to slash his own neck and wrists, severing arteries, as he knelt on her in a pretty determined bid to make her watch him end his own life. Her injuries were caused when he pushed the blade towards her chest and she grabbed the blade, cutting tendons in her hand which could not be fully repaired to their pre-offence condition. He was convicted of S.18 at trial having failed to give evidence and received a nine year sentence of imprisonment. He had been of effective good character and suffered, the psychiatrists on both sides agreed, from moderate to severe depression at the relevant time.

I sought leave to appeal the sentence but leave was refused on the basis that the guidelines put this as an offence which involved greater harm as well as greater culpability and therefore the sentence was not manifestly excessive.

At the renewed oral application for leave I was told that the injuries to the hand, the fingers of which could still not be fully straightened but which the medics said may recover, were 'greater harm' and that the mental illness suffered by the Defendant was not going to prevent the court from placing this into the top category.

If *Smith* was a pounding on the ropes then this was more akin to a bout of professional wrestling circa 1975 on Saturday morning telly; the Court of Appeal being the professional while I was the obliging opponent gently thrown out of the ring, all the time with my mind on my fee (except I didn't get one because I didn't get leave). The killer blow came when after the case was called on I was informed that the Court had received a (further) impact statement (dated some days earlier but which had not been

served on me or my solicitor) in which the victim complained that she still couldn't straighten her fingers, would never be able to do so again and making all sorts of helpful recommendations about the appropriate sentence in her soon-to-be-ex-husband's case.

The statistics published by the Ministry of Justice and the Judicial and Court Statistics for 2006 (HMSO) reveal that the total number of criminal COA appeals in 1997 exceeded 9,000. Since those heady days there has been a steady trend downwards to fewer than 8,000 by 2000 and about 6,000 in 2006, all of which would suit my argument pretty well. However by 2010 that trend it appears had been bucked and the figure had risen back up to 7,250. That has to be seen against the amount of procedural and sentencing legislation and the fact that the numbers of AG's references and prosecutors appeals against terminating rulings have equally increased. So perhaps what may be more telling and as reflected by my tales of woe, is that of those 7,250 appeal hearings only 190 out of 1,500 appeals against conviction and 1,460 out of 5,500 appeals against sentence were allowed.

Jonathan Stanniland

Third party disclosure

How to make the most of it

On reading the Attorney General's guidelines of 2005 it is apparent that the onus is on the Prosecution to make the running in relation to obtaining material held by third parties. It is true that the Crown do have a duty to pursue reasonable lines of enquiry in this regard, but before you sit back and wait for the disclosure to roll in, consider carefully whether you could get more out of the process by further participation.

Defence Application

First identify who has the material you seek and to whom you should address any summons in order to achieve its production. Bear in mind that there can be multiple departments within entities such as local authorities and NHS trusts. As long as the material sought: a) exists, b) is described sufficiently for the third party to locate it, c) is likely to be admissible in evidence, and d) is relevant to the issues in the case the application is justified. In disclosure terms, it is not fishing if you can describe the fish you want, why you want them, and how they can be used. Given the many routes to admissibility of hearsay evidence, the spectre of a wasted costs order is not as large as it was prior to the Criminal Justice Act 2003 (CJA), and the procedure itself is relatively straightforward. A form under Part 28 of the Criminal Procedure Rules can be found on the Ministry of Justice website, and Chapter 8 of Archbold sets out the relevant principles and procedures.

It may be that many defence practitioners are wary of seeking further disclosure out of concern about potentially damaging material which such a search might uncover. The disclosure test under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 is "likely to be material evidence". Whether this sets the bar any lower than the CPIA test relating to undermining the prosecution or assisting the defence cases is a moot point. Since it is a wider test there is a risk that material strengthening the Crown's case may emerge, but this would also be true if the Prosecution reviewed the material first. The procedural advantage for the defence of making the application first, is that, with no option of first handing over the material to a friendly prosecuting authority, if asserting issues of sensitivity, such as public interest immunity, confidentiality or Article 8 ECHR, the third party will nearly always choose to instruct independent counsel to review and flag the material. It will then go before the Judge for consideration, facilitating two fresh pairs of eyes on the subject. The Judge will not only inspect the material ready for disclosure, but also has a duty to keep the matter under continual review throughout the trial process. The Judge of course does not routinely receive unused material in the case, so he or she will become aware of background material that travels this route; something which in many cases is an advantage to the defence.

Prosecution Application

The Prosecution may seek third party material as a result of their own investigations, or agree that it is appropriate that they do so as a result of being alerted by the Defence. This is more often than not a smoother and quicker process than a defence application, perhaps because third parties are more willing to assist a prosecuting authority, and the systems in place to deal with such an application are already well trodden by the prosecution.

If the third party chooses to instruct independent counsel to review the material at the witness summons stage, matters will proceed via that counsel and the Judge, as outlined above. However, third parties are routinely given the option of handing over their material to the Prosecution, who will refer back to them if there is an issue of sensitivity which needs to be asserted. This can occur following a witness summons, or can happen at a much earlier stage in the investigation under agreed local protocols. If it is the Prosecution who review the material, the test for disclosure outlined in the CPIA will be applied. Therefore, only material which passes this test will be put before the Judge for a ruling which balances the interests of disclosure against those of sensitivity. The potential, therefore, is that the disclosure may be more limited as a consequence of the difference between the two legal tests. Additionally the Judge is less likely to gain knowledge of the body of third party material as a whole.

Detail

Regardless of who undertakes the review of third party material (Judge, counsel, CPS, police), the review, and accordingly any subsequent disclosure, will only be as good as the knowledge that the person undertaking the review has of the issues in the case. Some matters will be obvious simply by reason of the nature of the case. Others however, will not. If, for example, the Defendant could not have done the act alleged by reason of: not living at a certain address at a certain date, or owning a yellow mini not a blue van, or if there is another named individual of relevance those facts are not going to jump out as important unless the issues are clearly identified. An appropriate and obvious place to flag these up would be the defence statement. Alternatively, a note of the issues, names, and facts specifically aimed at the third party material in question (even if a little speculative) invariably assists in identifying relevant material.

The application for a witness summons

under Part 28 CRPR is a starting point only, even if generic issues are identified within it. Of course it may not always be appropriate for case materials to be forwarded to third party departments, but it is imperative that whoever undertakes the review has more than just the witness summons. An indictment and some sort of case summary should ideally always also be attached to it. Additionally, if served, a copy of the defence statement is desirable and always useful. Whether prosecuting or defending, it is important to ascertain who will be undertaking the review in order to ensure that they have sufficient information to allow them to carry out a meaningful review.

Timing

If the issues have not been crystallised for whatever reason, there is a danger that somebody will be looking at a huge body of material twice over. Nevertheless, if third party material is identified and reviewed early in the investigation, a huge amount of time and expense can be saved if it is realised that the case is fundamentally undermined as a consequence of that material. A late application can jeopardise a trial if the material leads to further enquiries or is too voluminous to assimilate.

Bear in mind that from the point of the issuing of a witness summons, the time taken to achieve disclosure can run into weeks or more, taking account of the following: access from archive, and collation by the third party, couriers need to be arranged for transportation of confidential material, counsel and Judge need to read the material, one following the other, disclosure ruling, once made, may need to be clarified, copying, editing and distribution and that the parties then need to read and take instructions on the material in preparation for trial.

It is often difficult to know whether an application will yield a few pages, or many boxes of material. It would therefore be worth making enquiries into at least the potential for disclosure and if so, the likely volume of that material at the earliest opportunity, even if the summons itself comes along slightly later. Heading towards a trial date in the Crown Court with third party disclosure still outstanding is a risk to all participants in the process.

Conclusions

Leaving a third party disclosure application to others can appear attractive. However, tackled in a timely fashion and in sufficient detail, there is every chance that both sides will be able to get more out of the process

Kirsty Real

Sentencing in historic sex cases

Many of us have grappled with the problems involved in the sentencing of Defendants convicted of historic sexual allegations. The historic offences are not catered for in the Sentencing Council guidance and the tables concerned with the myriad offences created by the 2003 Act. Try and find something on an Indecent Assault on a woman and you draw a complete blank. How for example do you attempt to reconcile an historic case involving Indecency with a child with the modern offence of causing a child below the age of 13 to engage in non penetrative sexual activity? The maximum sentence in respect of the former offence ranged from 2 to 10 years and included at times those aged 15 and 16 while its modern equivalent carries a maximum sentence of 14 years.

Further, if you abandon the guidelines and turn to the Current Sentencing Practice, any attempt to find a contemporary sentence which fits the historic allegation, is thwarted by the very different (and more lenient) sentencing regime than exists today. Understandably, such sentences do not sit comfortably with the Guidelines for the equivalent modern day offences.

However, assistance or at least some assistance is now at hand, courtesy of the Court of Appeal's judgment in *R v H (and others)* [2011] EWCA Crim 2753. In that case the Court considered the sentences imposed in a number of historic sex cases and took the opportunity to issue general guidance for those sentencing such cases. In doing so the Lord Chief Justice acknowledged that

'...specific guidance is required about the extent, if any, to which the court passing sentence should reflect the levels of sentence which would have been likely to have been imposed if the defendant had been convicted at a trial shortly after the offences were committed, and by contrast, the extent to which events during the long period between the commission of the crime and the sentencing decision may be relevant.'

The Court also confirmed that the guidance was not confined to sex cases, but to all cases of an historic nature, particularly as technological advances have made it possible for a variety of offences to be detected many years after they were committed.

The Guidelines make it clear that when sentencing such cases, the Judge cannot ignore the current statutory provisions in force. Those apply at the date of sentence irrespective of when the offence was committed and a Judge must have regard to the express purpose of sentencing, as set down in s.142 of the CJA 2003;

(a) the punishment of offenders, (b) the reduction of crime, (c) the reform and rehabilitation of offenders, (d) the protection of the public, and, (e) the making of reparation of offenders to persons affected by their offences.

When assessing the seriousness, the sentencing court must have regard to s143 and;

"...consider the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause or might foreseeably have caused.".

In the past the Judge was required to "have regard" to any guidelines issued by the Sentencing Guidelines Council. However, following the creation of the Sentencing Council of England and Wales s.125 Coroners and Justices Act 2009 a Judge is now required to follow any relevant guideline unless they are satisfied that to do so would be contrary to the interests of justice.

The Lord Chief then considered the many legislative changes and the problems these had created and examined the history of judicial decisions from *R v Willis* [1974] 60 Cr App R 146 to *R v Milberry and others* [2003] 1 WLR 546 through to the current day. He stated that older decisions were not entirely helpful as a consequence of a less formulaic approach and that the competing considerations were not comprehensive, or always relevant to current thinking. As a consequence he concluded that it is impossible to reconcile the previous guidance. With the exception of *Milberry* and the definitive sentencing guideline (used in the measured way suggested), the following principles are to be treated as guidance, and that reference to earlier decisions should be discouraged;

(a) Sentence will be imposed at the date of the sentence hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.

(b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, for example, theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.

(c) As always, the particular circumstances in which the offence was committed and its seriousness must be the main focus. Due allowance for the passage of time may be appropriate. The date may have a considerable bearing on the offender's culpability. If, for example, the offender was very young and immature at the time when the case was committed, that remains a continuing feature of the sentencing decision. Similarly if the allegations had come to light many years earlier, and when confronted with them, the defendant had admitted them, but for whatever reason, the complaint had not been drawn to the attention of, or investigated by, the police, or had been investigated and not then pursued to trial, these too would be relevant features.

(d) In some cases it may be safe to assume that the fact that, notwithstanding the passage of years, the victim has chosen spontaneously to report what happened to him or her in his or her childhood or younger years would be an indication of continuing inner turmoil. However the circumstances in which the facts come to light varies, and careful judgment of the harm done to the victim is always a critical feature of the sentencing decision. Simultaneously, equal care needs to be taken to assess the true extent of the defendant's criminality by reference to what he actually did and the circumstances in which he did it.

(e) The passing of the years may demonstrate aggravating features if, for example, the defendant has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.

(f) Early admissions and a guilty plea are of particular importance in historic cases. Just because they relate to facts which are long passed, the defendant will inevitably be tempted to lie his way out of the allegations. It is greatly to his credit if he makes early admissions. Even more powerful mitigation is available to the offender who out of a sense of guilt and remorse reports himself to the authorities. Considerations like these provide the victim with vindication, often a feature of great importance to them.

These principles can be found at paragraph 47 of the judgment and their application considered between paragraphs 48 and 129. In short, the guidelines are the starting point, albeit they are constrained by the statutory maximum that existed at the time.

Paul Cook

Thinking inside the box

Understanding and applying the sentencing guidelines in conspiracies to supply drugs

Always go too far because that's where you'll find the truth
Albert Camus

There is a misconception on behalf of some of the judiciary that the Sentencing Guidelines in respect of offenders convicted of drugs offences sentenced on or after the 27th of February 2012 do not apply to "conspiracies". The Guidelines are framed to assist identifiable quantities and that harm and culpability are more readily ascertained where an offender has a specific role in respect of supplying or intending to supply a known amount of class A drugs on a particular date. However, it is also clear that they are not exclusively restricted to substantive offences rather than extended to conspiracies.

That means that practitioners should guard against sentencing Judges exceeding their role by breaking out of what could understandably be perceived as the inflexible straitjacket imposed by the guidelines, when sentencing drugs conspiracies which involve vast amounts of prohibited drugs supplied in highly sophisticated commercial enterprises over a significant period of time. For the guidelines acknowledge that if vast quantities of drugs are involved the sentencer will have to go beyond the upper end of the categories. That is spelt out in clear terms in the pre-amble to both the categories of "Importation" and "Supply" in the new Guidelines which state that *"where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender."*

In *R v Healey and others* [2012] EWCA Crim 1005 (9 May 2012), Lord Justice Hughes noted that there should not be a slavish adherence to a relatively low sentence based on an indicative quantity of a few plants in category 3 or 4 if the Defendant creates a "purpose-built room in the loft or the cellar or the garage dedicating such a room to the exclusive purpose of cultivating cannabis having invested substantially in professional equipment" for providing watering and lighting. Such an offender is clearly committed to the commercial production of cannabis. In that regard Lord Justice Hughes observed that the Guidelines had not substantially altered the guidance provided by the previous case law, *R v Auton*. Furthermore, he noted that although "there is deliberately built into the guidelines....a good deal of flexibility, this flexibility does not extend to deliberately disregarding the guidelines" because "it would remove all point from the issuing of any guidelines at all".

The more recent authority of *Attorney General's Reference No. 15, 16 and 17 of 2012* concerned the review of sentences for involvement in large scale commercial operations involving class A drugs. The facts in relation to the respondents Wijtvilet and Lewis involved the seizure of 200 packages of brown powder containing heroin and six packages of cocaine with a total wholesale value of at least £1.5 million and a street value of well over £4 million. The drugs were concealed in the floor of a refrigerated trailer attached to an HGV tractor stopped at Dover. The weight of the powder containing diamorphine was 99.67 kg (containing the equivalent of 68.73kg of diamorphine at 100%). The weight of the powder containing cocaine was 5.95kg (containing 3.6kg of cocaine at 100%). The cocaine was

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approximately 60% pure. The heroin was approximately 70% pure. The respondents were convicted after trial. Wijtvilet "was an organiser of the importation, using his haulage business as cover". He recruited Mr Lewis to assist in the importation. Neither Defendant had any relevant previous convictions. The Court of Appeal quite rightly considered that Wijtvilet "fell fairly and squarely" within the "leading role" category although there appeared to have been some confusion as to whether he should be placed near to somebody in a "significant role", a position which was adopted in the Crown Court. This was plainly wrong and the Court of Appeal noted that the Crown Court Judge "appears to have been overly generous to [Wijtvilet]". Lewis was a courier who "must have had an awareness and understanding of the scale of the operation", rather than being a relatively ignorant "drugs mule". He played a less significant role than Wijtvilet "but it was still significant". Wijtvilet's sentence was increased from 13 years imprisonment to 20 years (with a concurrent sentence of 14 years for a less serious count) and Lewis's total sentence was increased from nine years imprisonment to 13 years imprisonment.

This Reference was brought by Her Majesty's Solicitor General in order to "dispel a few myths" about the impact of the new Guidelines on the level of sentences for drugs offences. What is clear from this authority is that substantial custodial sentences providing deterrence will still be imposed unless the Court is faced with a relatively small quantity of drugs or an offender whose culpability is limited. The Court stated "we can detect (sentencing of "drugs mules" apart) no dramatic shift in the level of sentencing for drugs offences in the new Definitive Guideline; certainly, not in relation to importation cases, which is the category upon which we have focused". It is therefore unsurprising that the Court gave Counsel for the respondent Wijtvilet (Brimelow QC) short shrift when he attempted to persuade the Court that the "emphasis in sentencing for drugs offences has shifted from deterrence and heavy reliance on the quantity of the drug, to focus on the role of the offender and the seizure of assets".

Repeatedly throughout the judgment the Court referred to harm and culpability as being the two principal factors which determine the starting point. Further, the starting point for determining the level of harm is determined by the quantity. Thus, as Hallett LJ confirmed *"the weight or quantity of the drug remains at the heart of the sentencing process".*

What is also clear from this authority is that the new terms now being used should be interpreted with a degree of realism. Thus instead of the foot soldier and the lieutenant we now have someone playing a "lesser role" or a "significant role". It is also abundantly clear that several people may play "leading roles" in vast conspiracies to supply large amounts of controlled drugs directing operations from various corners of the country or beyond. However, "the essential nature of a drugs hierarchy remains the same even if the terminology has changed" and practitioners should try and keep it simple: harm and culpability. The importance of ascertaining "culpability" by placing the Defendant in a particular role is an important part of the sentencing process allowing Judges flexibility to reserve heavy punitive deterrent sentences for organisers and relatively low sentences (arguably lower than ones which were previously imposed in conspiracies) for couriers with very limited understanding passing on a small one ounce package in exchange for drugs to fund his addiction. The organiser could properly face a sentence at or beyond the 16 year mark for playing a "leading role" in a massive drugs operation, even after a guilty plea while the one-off courier of a small amount may properly receive a sentence which places him in a "lesser role" for a quantity which is in category 3 if her/his awareness was limited to supply on a much smaller scale. That may equate to a sentence of 2 years or less after a guilty plea as the starting point is 3 years custody for a lesser role in Category 3.

Determining the quantity and the starting point.

The guidelines themselves encourage great flexibility while ensuring that the sentence concentrates on quantity. This is why those playing "leading" roles, heavily involved in drugs conspiracies which span a year or so should receive sentences well into double figures even upon a prompt guilty plea. This is because the quantity and the harm with which they are involved is well outside the "starting point" for the weight of the drug. The quantities of drug referred to in each category in the Sentencing Guidelines *are not* upper limits. They are described as *indicative quantities*.

There is likely to be consistency between the appropriate sentence imposed applying the Definitive Guideline, and any relatively recent authority which predates the 27th of February 2012. An example of this is *R v Kotecha and others* [2011] in which a total sentence of 18 years imprisonment for involvement in the intended supply of over 15kg of high purity cocaine and 68 kg of cannabis was reduced to 16 years imprisonment for the "ringleader" upon a plea of guilty. This applied a starting point of 20 years imprisonment before any discount for a guilty plea.

However, the starting point for a street dealer dealing an "indicative quantity" of 150g of class A drugs before any credit for a plea of guilty appears to have moved down from approximately six years after conviction on some previous authorities to four years. This is a welcome recognition of the true position of this type of Defendant, who is usually an easily detectable street-runner, unlikely to derive any great profit from his activity. It is also consistent with the fact that the minimum sentence of seven years imprisonment is appropriate for a third drug trafficking conviction which would make it a little unfair to start at six years for a first offence in these circumstances.

There has been a common sense move to start by considering the weight of the powder containing the drug rather than simply considering how much of the drug at 100% purity is obtained. Purity is however, still a consideration which may aggravate or mitigate the position. Therefore, with the weight of the powder as the starting point, the Defendant in possession of several kilograms is likely to be in a far worse position than an offender with very a small quantity of high purity cocaine and no cutting agents.

Although a Judge is not bound to accept submissions about which category and role applies to each offender, even if this had been agreed, care must be taken to provide a valid basis of plea which sufficiently limits the Defendant's appreciation of the seriousness of the situation or his role. This is likely to assist the Defendant and the Judge to distinguish any minor players if assertions in relation to the general conspiracy cannot be proven in respect of a particular conspirator. If there is insufficient evidence to prove involvement in a widespread conspiracy, the Defendant should receive the benefit of the doubt

As far as the quote from Albert Camus is concerned, I just like it. It doesn't really have any point – just like the phrase "Sentencing Guidelines don't apply to conspiracies."

Kannan Siva

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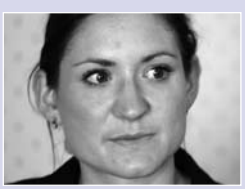

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