Paper C: Case Law Review

This paper provides a summary of the development of the Court of Appeal's approach to the exclusion of evidence obtained in the absence of an appropriate adult (AA).

In an early review of case law, Hodgson (1997) noted a lack of clarity in court decision and identified a shift towards a less robust interpretation by the Court of Appeal during the 1990s.

In *R v Dutton* [1988] [1] the Court of Appeal held that the trial judge had erred in allowing confession evidence to be put to the jury which had been gained from a 'mildly mentally handicapped suspect' (with an IQ of 60) in the absence of an AA. In cases such as *Morse and others* [1990] [2], *Cox* [1991][3], and *Kenny* [1993][4] the Appeal Court continued the approach that what should be considered was the actual mental condition of the suspect (not what the police believed it to be) and whether evidence had been obtained in consequence of anything likely to make it unreliable (the lack of an appropriate adult) rather than taking a view on its actual reliability. This approach implied that the absence of an AA would exclude evidence even if it was *prima facie* reliable.

However, in the case of *Lewis* [1996], attempts to argue that the defendant should have had an AA due to his low IQ were dismissed not on the objective basis of his intelligence but due to opinion that the presence of a solicitor was sufficient to ensure his rights were safeguarded. Hodgson (1997) saw this as, "a move from roundly condemning breaches of PACE and the Codes and upholding procedures put in place by Parliament, to taking account of other factors which might in some way mitigate the effects of the breach and so permit the court to admit the evidence subsequently obtained".

This more permissive approach was apparent when, in *DPP. vs Cornish* [1997][5], the Court of Appeal held that confessions could still be admissible even where an AA should have been present due to a learning disability. It stated that a court should consider the nature of the interview, including who was present, and assess what effect the lack of an AA had made with regard to PACE s.76(2)(b)[6].

Similarly, in *R v. Law-Thompson* [1997][7] an appellant with 'autistic psychopathy' and Asperger syndrome, had given a confession during an interview without an AA. The Court of Appeal felt there was no basis for believing the confession was unreliable and did not find it should have been excluded under PACE s.78.

[1] R v. Dutton (unreported case no. 4627.G1/87 (http://apt.rcpsych.org/content/14/5/369)
[2] Morse and others [1991] Crim.L.R. 195; Everett [1988] Crim.L.R. 826.
[3] [1991] Crim.L.R. 276.
[4] [1994] Crim. L.R. 284; Times, July 27, 1993; Independent, August 16, 1993; CA (Crim Div); 16 July 1993
[5] The Times, 27 January
[6] Gudjonsson G. H. (2003) The Psychology of Interrogations and Confessions: A Handbook
[7] R v Law-Thompson (Howard James) [1997] Crim. L.R. 674)

Failure to inform appropriate adults of their role may lead to confessions being excluded, or to miscarriages of justice (see *R v. Palmer* in Legal Action, September 1991, p. 21). However, in *H and M v. DPP* ({1998} Crim L.R. 653), the Court of Appeal held that a failure by the police to inform 'W' that he was the appropriate adult, and to provide the information required under para. 11.16, was a technical breach. However, it produced no substantial unfairness to the appellants. Each interview was conducted in the presence of W. However, he was never told that he was the appropriate adult and was unaware of the term, but he was told that he was there to support the juveniles. The court felt this was sufficient information[8].

In *R. v. Aspinall* [1999][9], the Recorder had allowed interview evidence obtained without an AA from a man with a history of schizophrenia that was stabilized by medication. The Recorder's view was that this was acceptable because, though the police were aware of his diagnosis, the suspect was lucid at the time and did not exhibit any acute symptoms of schizophrenia or other mental health problems. However, the Court of Appeal overturned this decision, stating that the correct question to ask was not whether a condition meant an AA wasn't needed but whether the admission of the evidence would have such an adverse effect upon fairness that it should be excluded[10].

R v. Ali [1999] concerned a man with an IQ between 66 and 72. The trial judge excluded some interview evidence on the basis that he was 'mentally handicapped' and an AA could have intervened to establish that he understood the need to avoid boasting and exaggeration. Though he was still convicted, this was quashed by the Court of Appeal, which stated that although some of his evidence was sensible and reliable, his admissions and assertions were obviously exaggerated and likely to be unreliable (Ventress et al., 2008).[11]

In *R vs Gill* [2004] a man who was mentally vulnerable (due to low intelligence) had been convicted on the basis of a confession was made without an AA present. However, the Court of Appeal disallowed the appeal stating that the absence of an AA did not mean the confession was automatically excluded; each case must be taken on its own merits. In its deliberations, the Court said that the words 'anything said or done' in PACE s.76(2)(b) are wide enough to include interviewing a mentally vulnerable suspect without an AA. However, it went on to say that, while in some cases it may be material to consider whether a Code breach occurred, if the police are not aware of the person's relevant condition, it is the consequent loss of protection that should have been provided that is relevant. Citing *R. v Aspinall* the Court stated that the correct approach was to consider what had been lost as a result of the absence of an appropriate adult at the time of the confession. In this case, the Court

[8] Williams, J. (2000) The inappropriate adult. *Journal of Social Welfare and Family Law*. 22(1):43-57

[9] [1999] 2 Cr. App. R. 115; (1999) 49 B.M.L.R. 82; [1999] Crim. L.R. 741; (1999) 96(7) L.S.G. 35; Times, February 4, 1999; CA (Crim Div); 29 January 1999

10 Olubokan,J. (2008). The vulnerable adult in police custody: lessons learned from the case of R v Paul James Aspinall. *Medicine, Science and the Law*, Vol. 48. No. 3

[11] Michael A. Ventress , Keith J. B. Rix , John H. Kent. Keeping PACE: fitness to be interviewed by the police http://apt.rcpsych.org/content/14/5/369

decided the judge had been entitled, and correct, to conclude that the presence of an appropriate adult would not have affected the man's evidence.

In *R vs Wilding* [2010][12], the Court of Appeal overturned the trial judge's decision to include confession evidence from a vulnerable adult who had not had an AA and quashed his conviction. It accepted that the trial court had been entitled to take its own experience into account in undertaking an enquiry as to the reliability of the evidence. However, citing *R vs Gill*, it 'cautiously and with respect' concluded the trial judge should have considered the whether an AA would have made any difference, and whether their absence rendered the admission unreliable, rather than having regard to how well the interview was conducted (as had happened in *DPP vs Cornish*). The Court of Appeal concluded on the basis of expert evidence that Wilding was within the definition of mentally vulnerable in Code C and that an AA might have secured legal advice, which might in turn have led to him making no admission.

In *R. v Brown* [2011][13] the Court of Appeal refused an appeal based on the fact that, post-conviction, a clinical psychiatrist had later determined that Mr Brown, who had not had an AA, had an extremely low IQ of 58 (only 0.3% of people have an IQ that low). In explaining its decision, the Court made the following points.

a) Mr Brown refused assistance for people with learning difficulties or disabilities when asked by police whether he need it.
b) Analysis of the interview transcripts concluded that Mr Brown had no apparent difficulty in concentrating, apparently had no major problems with understanding the questions, and gave reasonably clear and comprehensible answers
c) The type of support and advice offered by an AA would have been unlikely to make any impact on the interview because an expert[14] assessed Mr Brown as a confident, assertive and strong-willed man and that his language comprehension was better than suggested by his IQ.
d) Citing *R v Law-Thompson* [1997], the absence of an AA where a solicitor was present was unlikely in itself to justify the exclusion of an interview.
e) The jury had had a good opportunity to come to its own assessment of how bright Mr Brown was.

A number of drink-driving cases such as *R. (on the application of DPP) v BE* [2002], *R. (on the application of DPP) v Preston* [2003] and *Stanesby v DPP* [2012] have allowed evidence obtained not in the presence of an AA. In such cases the Court of Appeal has been consistent in disallowing appeals based on the absence of an AA for breath or blood based alcohol tests because they are time critical. This is the case even though it has been accepted that rights and procedures may not have been understood.

[12] R. v W Court of Appeal (Criminal Division) 05 November 2010 - [2010] EWCA Crim 2799 http://www.bailii.org/ew/cases/EWCA/Crim/2010/2799.html
[13] [2011] EWCA Crim 1606 - http://www.bailii.org/ew/cases/EWCA/Crim/2011/1606.html
[14] Professor Gisli Gudjonsson