

Practice — related civil and criminal actions — abuse of process

January 8, 1997

Queen's Bench Divisional Court

Regina v Leominster Magistrates Court and Another, Ex parte Aston Manor Brewery Co

Before Lord Justice McCowan and Mr Justice Collins

[Judgment December 19]

When a party was the defendant in related civil and criminal proceedings, it was an abuse of process for those criminal proceedings to continue if the civil plaintiff was in effective control of the criminal proceedings, putting the prosecution in a position where they were unable to exercise independently their duty as prosecutor.

The Queen's Bench Divisional Court so held in a reserved judgment when allowing an application for judicial review by Aston Manor Brewery Co of the refusal on November 1, 1995, by Leominster Justices to stay proceedings concerning charges brought under regulation 13(4) of the Natural Mineral Waters Regulations (SI 1985 No 71) and section 15(1)(b) of the Food Safety Act 1990 brought by Hereford and Worcester County Council, on the ground of abuse of process.

The applicant was a company selling bottled spring water which became subject to civil proceedings brought by another company, who alleged that the applicant represented its water to be connected to water sold by the plaintiff. Later, related criminal proceedings were brought by the council on the plaintiff's complaint.

Counsel instructed by the council to prosecute, was already representing the plaintiff in the civil proceedings, and in that capacity had possession of documents which were also relevant to the criminal proceedings. When the criminal matter came to trial, prosecuting counsel would not allow the applicant to see these documents on the ground that they were covered by the plaintiff's privilege.

Having heard argument on those issues, the justices adjourned the case sine die, and refused to hear applications from the applicant for disclosure of the documents and for proceedings to be stayed on the ground of abuse of process.

Mr Ian Croxford, QC and Mr Thomas Lowe for the applicants; Mr Timothy Straker, QC and Mr Peter Miller for the council; the justices did not appear and were not represented.

LORD JUSTICE McCOWAN said that neither prosecuting counsel nor the council had acted improperly, because both had obtained the permission of the plaintiff, through its solicitors, before counsel was instructed. Whether they had acted wisely was another matter, however.

It should have been appreciated that there would be a conflict of interest if counsel was put in a position where he had a duty as a prosecutor to disclose to the applicant material which the plaintiff would prefer he did not disclose.

When that risk materialised, the plaintiff was in effective control of the question of disclosure and the council were unable to exercise independently their duty as prosecutors.

The integrity of the proceedings had been compromised by that and it was no longer possible for the applicant to have a fair trial.

The application would be allowed and proceedings permanently stayed.

Mr Justice Collins agreed.

Solicitors: Dibb Lupton & Broomhead, Birmingham; Mr R. A. Yates, Worcester.

Children — custody — rights under Conventions

January 8, 1997

Court of Appeal

In re S (a Minor) (Abduction: European Convention)

Before Lord Justice Butler-Sloss, Lord Justice Evans and Sir Iain Glidewell

[Judgment December 18]

"Rights of custody" for the purpose of the European Convention on the Recognition and Enforcement of Decisions Concerning the Custody of Children 1980 embraced similar requirements to those required in rights of custody under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Cmnd 8281); so that a parent who had an interim care and control order made in his favour had an order for custody within the scope of both Conventions.

The Court of Appeal so held in allowing an appeal by a father against a decision of Mr L. Swift, QC, sitting as a deputy High Court judge, that neither Convention applied to the case of the appellant's son who had been removed from the jurisdiction.

The court declared that the child had been wrongfully retained out of the jurisdiction by his grandmother and aunt contrary to article 3 of the Hague Convention and had been unlawfully removed from the jurisdiction contrary to article 12 of the European Convention.

Miss Judith Parker, QC and Miss Maureen Mullaly for the father; Miss Patricia Scotland, QC and Lord Phillimore for the grandmother and aunt.

LORD JUSTICE BUTLER-SLOSS said that the order for interim care and control gave the father rights of custody, albeit that they were on an interim basis and he shared them with the High Court. He had the right to take the child anywhere within England and Wales and to prevent any other person from removing the child from him without an order of the court.

The child was habitually resident in England at the time of his removal to Ireland and remained so thereafter. The father obtained rights of custody and on being served with the order requiring the return of the child to England the retention by the aunt was wrongful within the meaning of article 3 of the Hague Convention.

There were few decisions in English law on the interpretation of the European Convention. The removal of a child across international frontiers by a person without a legal right to care for him appeared to be unique in the English courts applying the international Conventions.

Looking at the travaux préparatoires of each Convention but particularly the report on the European Convention it was clear that the situation created by the present facts had not been contemplated by the authors.

COURT OF APPEAL

21 December 2001

A HEALTH AUTHORITY

v

X AND OTHERS

[2001] EWCA Civ 2014

Before Lord Justice THORPE

Lord Justice LAWS

Mr Justice HARRISON

Confidentiality — Public law proceedings — Disclosure of documents to third parties — Power of Court.

On the conclusion of public law proceedings under the Children Act the local authority reported to its area health authority that facts had emerged which it considered relevant to the discharge of its duties. The health authority applied to the Court for permission for the local authority to disclose specified case papers, including the general practitioner records, of two named individuals to it. *Munby J* [2001] Lloyd's Rep Med 349 held that the authority was entitled to disclosure of the papers, including the judgment in the proceedings, and an order requiring the Respondent to produce within seven days the medical records of the two named patients, whose consent to production had been refused or not obtained. In each instance *Munby J* had held that such disclosure should be subject to express conditions, including a requirement that the authority would not without the prior consent of the Court disclose any disclosed document to any person other than a specified disciplinary body, on the ground that the doctor's duty of confidentiality included a duty to assert the confidentiality in answer to any claim by a third party to disclosure and to put before the Court every proper argument against disclosure. The health authority appealed.

Held (THORPE and LAWS LJ, HARRISON J) dismissing the appeal:

1. There is a high public interest, analogous to the public interest in the due administration of criminal justice, in the proper administration of professional disciplinary proceedings, particularly in the field of medicine (*see para 19*).
2. The question to be decided was whether the public interest in effective disciplinary procedures for the investigation and eradication of medical malpractice outweighed the confidentiality of the records, and the balance came down in favour of disclosure, as it invariably does, save in exceptional circumstances (*see para 20*).

3. The Court had the power to attach conditions to an order directing the release of case papers in Children Act proceedings to a third party: striking the balance between competing public interests requires more sophisticated powers than a crude choice between directing or refusing release. *Re A (Disclosure of Medical Records to the GMC)* [1998] 2 FLR 641 approved (*see para 22*).

4. The only real issue in the appeal was whether the conflict in the private/public interest in the confidentiality of medical records and some other public interest should be decided by the health authority of a Judge of the Family Division. The importance of the resolution of the conflict requires the independence of the Judge (*see para 25*).

5. As he was not the Judge who heard the original public law proceedings, *Munby J* was entitled to elect for a cautious approach in the exercise of his discretion, and the Court of Appeal had to be cautious in interfering with the exercise of such a discretion (*see para 26*).

Per Curiam: The Court was not persuaded that *Munby J* had overstated the doctor's duty to his patient (*see para 25*).

The following cases were referred to in the judgment:

Re A (Disclosure of Medical Records to the GMC) [1998] 2 FLR 641;

Re C (A Minor) (Care Proceedings: Disclosure) [1997] Fam 76;

Re D (Minors) P (Wardship: Disclosure) [1994] 1 FLR 346;

Re L (A Minor) (Police Investigation: Privilege) [1997] AC 17;

MS v Sweden (1999) 28 EHRR 313;

Parry-Jones v The Law Society [1969] 1 Ch 1;

Z v Finland (1998) 25 EHRR 371;

Philip Havers QC and Angus McCullough (instructed by Messrs Le Brasseur J Tickle) for the Appellant health authority; David Panick QC and Angus Moon (instructed by Legal Services, Medical Protection Society) for the Respondent; Tim Ward (instructed by Legal Services, Association of Community Health Councils of England and Wales) as an interested party.

21 December 2001

JUDGMENT

Lord Justice THORPE:

1. There was a long and complex public law Children Act case tried by Hughes J in the Family Division which culminated in his judgment of 16 March 2000. When the case was over the local authority reported to its area health authority facts that had emerged in the case which it considered relevant to the discharge of the authority's duties. The local authority also applied to Hughes J for permission to release to the health authority a selection of the papers in the case. The Judge ruled that the application should be made by the health authority. Accordingly by an application of 30 January 2001 the health authority sought an order for the production of both specified case papers and the GP records of two named individuals who had been involved in the case. For reasons which are not clear to me the application was not listed in front of the trial Judge but in front of Munby J. He heard counsel for the health authority and counsel for the Respondent doctors. On 10 May he handed down his judgment and made his orders upon the application.

2. His learned and lucid judgment is now reported at [2001] Lloyd's Rep Med 349. His first conclusion was that the local authority were entitled to the disclosure of the selected case papers, including the judgment of Hughes J. His second conclusion was that the authority was entitled to an order requiring the Respondent to produce to the authority within seven days the medical records relating to the two named patients, whose consent to that production had been refused or had not been obtained. However his conclusion was that in each instance disclosure should be subject to express conditions set out in the second Schedule of his order and designed to ensure that as far as possible the health authority should maintain the confidentiality of the documents and not disclose them to any other person without prior permission of the Court. It is against the imposition of those conditions that the health authority appeals. In reality their challenge is directed to the third condition:

Save with the prior leave of this Court the authority shall not disclose any of the documents or communicate any information contained in them to any person other than

(a) to a medical discipline committee or the General Medical Council and

(b) in accordance with regulations 4 and 5 of the National Health Service (Service Committees and Tribunal) Regulations 1992, SI 1992 No 664, as amended.

3. The appeal is brought with leave of the Judge. With the leave of this Court the General Medical Council has lodged evidence in support of the Respondent's case. The Respondents have received further support from the Association of Community Health Councils for England and Wales. The Association also filed evidence and appeared at the hearing by counsel, Mr Ward, who adopted the submissions of Mr Pannick QC for the Respondents.

4. The case for the Appellant authority was skillfully argued by Mr Havers QC. The statutory framework for the application for the disclosure of the medical records in relation to the two patients who had not consented to production is fully and carefully set out in the judgment of Munby J. Accordingly Mr Havers was able to restrict himself to a reference to Regulation 36(6) of the National Health Service (General Medical Services) Regulations 1992 as amended. Regulation 36(6) provides:

A doctor shall send the records relating to a patient to the Health Authority —

(a) as soon as possible, at the request of the Health Authority; or

(b) where a person on his list dies, before the end of the period of 14 days beginning with the date on which he was informed by the Health Authority of the death, or (in any other case) before the end of the period of one month beginning with the date on which he learned of the death.

5. Mr Havers' first submission was that that statutory language was sufficiently clear and unqualified to override the ordinary duty of confidentiality owed by a GP to the patient. He submitted that that construction was supported by authority, namely the case of *Parry-Jones v The Law Society* [1969] 1 Ch 1 and the European case of *MS v Sweden* (1999) 28 EHRR 313, particularly paragraphs 41–44 of the judgment of the Court. Mr Havers accepted the production under Regulation 36(6) was subject to three preconditions set out in paragraph 71 of his judgment, namely:

(i) if the documents are bona fide and reasonably required for the purpose of the proper exercise by the Authority of one of its functions under Part II of the 1977 Act; and

(ii) if, where the documents are to be used otherwise than in the particular patients' best interests — eg for disciplinary or regulatory purposes — there is a compelling public interest in their disclosure which satisfies the usual Convention criteria of "necessity" and "proportionality"; and

(iii) if there are effective and adequate safeguards against abuse, including effective and adequate safeguards of the particular patient's confidentiality and anonymity.

6. Mr Havers submitted these preconditions are comparable to the built-in safeguards accepted by the Strasbourg Court in *MS v Sweden* in rejecting that Applicant's claim to a breach of her convention rights.

7. Mr Havers attacked Munby J's statement of the doctor's duty of confidentiality which appears thus at paragraph 9 of his judgment:

Now of course in the final analysis . . . Dr X's ultimate obligation is to comply with whatever order the Court may make. But prior to that point being reached his duty, like that of any other professional or other person who owes a duty of confidentiality to his patient or client, is to assert that confidentiality in answer to any claim by a third party for disclosure and to put before the Court every argument that can properly be put against disclosure. All the more so when, as in the present case, he knows, because he has asked that his patient or client is refusing to consent to disclosure.

8. Mr Havers' submission is that far from the doctor having any duty to require the Court's determination, his plain duty is to comply with a Regulation 36(6) request save in the unlikely event that he has reason to doubt compliance with any one of the three preconditions set by Munby J in paragraph 71 of his judgment.

9. Mr Havers submits that were we to uphold the doctor's duty as defined by Munby J there would be a number of undesirable consequences. First applications to the Court are expensive and impractical. Second they involve inevitable delay which could not be bridged in any case of urgency, still less in a case of emergency. Third the creation of an unnecessary superstructure on the production mechanism created by Regulation 36(6) would not only impede the health authority but any successive holder who would in turn be obliged to assert confidence and to make yet another application to the Court.

10. In summary Mr Havers submitted that the National Health Service depended upon free internal exchange of confidential information. He warned that the service would grind to a halt were Munby J's judgment extensively construed and applied.

11. Mr Havers' alternative submission was that the Judge was both wrong in principle and unjustified in imposing upon the health authority the conditions set out in Schedule II to the judgment. In support of that submission he advanced three reasons. The first was that there are already more than

sufficient safeguards for the patient. He listed and elaborated in turn:

(a) The duty of confidence as defined by our domestic law.

(b) Article 8 Convention rights as recognised in the case of *MS v Sweden* as well as the case of *Z v Finland* (1998) 25 EHRR 371.

(c) Additional protection given by the Data Protection Act 1998.

(d) The strong emphasis on confidentiality given in the Department of Health guidance. The Protection and Use of Patient Information — Guidance from the Department of Health HSG (96) 18/LASS L (95)5 as updated.

(e) The creation of the structure of Caldicott guardians created in response to recommendation 3 of the Caldicott report of December 1997.

12. Secondly, Mr Havers advanced the negative proposition that there was no evidence to suggest that the health authority was unaware of its obligations or that it was in breach of its obligations or arrangements.

13. Thirdly, he submitted that the consequences of imposing the conditions would be prejudicial to the health authority and disproportionate to the underlying objective of the regulation. In support of this third submission he submitted a bundle of papers to demonstrate a subsequent consequence of the imposition of the Schedule II conditions. In the continuing management of the aftermath of the proceedings before Hughes J there had been a launch review and his clients had been obliged to launch an application for permission to bring into the Part 8 review documents produced pursuant to Munby J's order. The additional bundle which he submitted contained an application served on Dr X for permission and a directions order made by Bracewell J. However when pressed Mr Havers conceded that this third ground was his last and he did not seek to make too much of it.

14. In responding to Mr Havers' submissions Mr Pannick essentially submitted that Munby J had been correct in principle because the need for patient protection required a decision of a High Court Judge to decide the balance between the private/public interest in confidentiality and any competing public interest. Such a decision had to be objective and could not be left to the health authority acting in good faith. Alternatively Mr Pannick submitted that the imposition of conditions by Munby J was a proper exercise of a judicial discretion without any error of principle and accordingly not a discretion with which this Court should interfere.

15. As to Mr Havers' first ground Mr Pannick emphasised the importance of the doctor's duty of confidentiality. As explained in *Z v Finland* it is not

just the private interest of the patient which is at stake but the wider interest of the public in the proper treatment of transmissible diseases which depends in part upon the individual's sense of security in seeking help and in revealing private matters. Mr Havers' construction would impose an impossible burden on the GP in assessing whether or not the preconditions are satisfied without the requisite expertise or information. It would in practice amount to an absolute duty to disclose which would in turn deprive the Court of any opportunity to strike a balance. He submitted that *Parry-Jones v The Law Society* has been overtaken by European jurisprudence and that the case of *Z v Finland* emphasises the importance attached to the role of the Court in weighing whether the state is in breach of Convention rights.

16. As to Mr Havers' spectres of costs and delay, whether in support of his first or second principal submissions, Mr Pannick foresaw that the majority of the applications would proceed by consent at little cost and urgent cases would be accommodated.

17. As to Mr Havers' second principal submission, the attack on the imposition of conditions, Mr Pannick submitted that the central issue remains who should exercise the balance when conflict of interests arises. If that exercise must be performed by the Judge then none of Mr Havers' three objections arose. But in any event the safeguards advanced were insufficient. The domestic law of confidence was not yet clear. Of the two European cases greater account should be taken of the approach of the Court in the case of *Z v Finland*. The Data Protection Act 1998 contained many exceptions, as the Department of Health guidance demonstrated. Finally Mr Pannick submitted that the arrival of Caldicott guardians was no substitute for judicial control. The concern was not that health authorities might act in bad faith or negligently but that a proper exercise of such a balance must be an independent exercise.

18. I have summarised the argument in this Court in some detail partly to demonstrate that it canvasses wide ranging issues that I do not consider to be directly raised in the present case. The strict confidentiality attaching to litigation material in children's cases has long been upheld both according to common law and statute. Of course that strict confidentiality is not absolute. There are many instances in which it must yield to a conflicting public interest. Most commonly the reported cases consider the release of case papers in Children Act proceedings for use in a criminal prosecution that requires investigation of the same facts and circumstances examined in the prior Children Act proceedings. There are a number of reported cases at first instance. In this Court two significant cases are

those cited by Munby J, namely *Re D (Minors) (Wardship: Disclosure)* [1994] 1 FLR 346 and *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76. There is also the case of *Re L (A Minor) (Police Investigation: Privilege)* reported in the House of Lords at [1997] AC 17. At that level the decision set the balance between the claim of the area police authority to a sight of an expert report to assist in their criminal investigation and the mother's claim to litigation privilege in respect of the report. However in this Court the judgment of the Master of the Rolls gives clear guidance as to how the balance should be set where either the prosecution or the defence seek the release of papers in Children Act proceedings for the proper conduct of a pending criminal case. Here we are not concerned with the administration of criminal justice but with possible disciplinary proceedings. Within the Appellant's evidence in the Court below was the explanation that:

The Authority may wish to investigate through a Discipline Committee or NHS Tribunal . . . ;

- (i) the possibility that there has been serious over-dispensing of medicines;
- (ii) the completeness of the records . . . ;
- (iii) whether there may have been an inappropriate delegation of responsibility in relation to the medical care of patients . . . ;
- (iv) the adequacy of the consent sought before performing medical procedures . . .

19. There is obviously a high public interest, analogous to the public interest in the due administration of criminal justice, in the proper administration of professional disciplinary hearings, particularly in the field of medicine. In the application of the authorities which he had cited Munby J properly ordered the release of the case material, namely the list A documents.

20. Although the list B documents are separately categorised because of the application of Regulation 36(6), the list B documents were inextricably connected in two respects: first because the patients in question had been directly or indirectly involved in the Children Act proceedings and second because, as Munby J recorded:

There is or may be a certain amount of overlap between the list A and the list B documents in as much as some of the general practitioner records were apparently before the Judge who heard the care proceedings.

In those circumstances in my opinion the objection to production fell to be decided in accordance with the principle that determined the application for the release of the list A documents, namely whether the public interest in effective disciplinary procedures for the investigation and eradication of medical malpractice outweighed the confidentiality of the

records. I do not regard the application for production much enhanced by the Regulation 36(6) duty. A balance still had to be struck between competing interests. The balance came down in favour of production as it invariably does, save in exceptional cases.

21. In relation to the attachment of conditions to the orders for release and production Munby J cited and followed a prior decision of Cazalet J in *Re A (Disclosure of Medical Records to the GMC)* [1998] 2 FLR 641. In that case Cazalet J heard an application by the General Medical Council for the disclosure of case papers pursuant to its statutory duty to investigate allegations of serious professional misconduct. To that extent there is common factual ground. However the majority of the judgment of Cazalet J deals with practice issues which are of no relevance to what we decide. But in the course of his judgment Cazalet J stated at 646C:

It must be emphasised that the protection of the child's anonymity in the course of any hearing before the GMC Conduct Committee will always be a matter of primary importance and necessary conditions, protection measures and assurances as to this will almost always be required from the GMC.

22. In my opinion Cazalet J was right to claim the power to attach conditions to an order directing the release of case papers in Children Act proceedings to a third party. Without that power the Court would be left with a crude choice between directing or refusing release. Striking a balance between competing public interests, often across the interface of distinct justice systems, requires much more sophisticated powers. In my opinion Munby J was correct in law to claim that power and equally correct to proceed to a discretionary exercise of that power having regard to the relevant facts and circumstances insofar as they were revealed to him.

23. I add that qualification since Munby J was not the Judge who had tried the Children Act proceedings. Accordingly he had no option but to deal with the application in abstract and without reference to the concrete context. Obviously the knowledge that Hughes J had gained from conducting the trial would have been of great advantage in determining the health authority's application. Therefore despite the administrative difficulties that may result I am of the strong opinion that where the trial has been conducted by a Judge of the Division, then a subsequent application by a third party for the release of case papers must be to that Judge rather than to another Judge of the Division, absent exceptional circumstances.

24. Accordingly in my judgment this appeal can and should be decided within those parameters. I would not want this judgment to be construed or

used as laying down any general propositions beyond the context of Children Act proceedings and their aftermath.

25. However I would add that I am not persuaded that Munby J overstated the doctors duty to his patient in paragraph 9 of his judgment. I accept the analysis that the only real issue in the present appeal is whether the conflict between the private/public interest in the confidentiality of medical records and some other public interest should be decided by the health authority or a Judge of the Division. I accept Mr Pannick's submission that the importance of the resolution of such a conflict requires the independence of a Judge. I conclude that the spectres developed by Mr Havers, cost and delay and administrative overload, are no more than speculations which good sense and management can contain. I do not accept that the safeguards defined by Mr Havers, not all of which were relied on below, are adequate to protect the private/public interest in confidentiality after the Judge's initial order for production to the health authority.

26. Accordingly, despite Mr Havers' cogent submissions I conclude that he has not demonstrated any error of law or principle that would justify our intervention nor has he demonstrated that the discretionary bounds set by Munby J were plainly wrong. In the circumstances of this application listed before a Judge other than the trial Judge the ambit of the judicial discretion is necessarily wide. The Judge elected for a cautious approach. In my opinion he was not only entitled but wise so to do. (After all the health authority are not precluded from further application should circumstances change or unexpected difficulties arise.) We must, of course, ourselves be cautious in interfering with such an exercise of discretion. I would dismiss this appeal.

Lord Justice LAWS:

27. I agree.

Mr Justice HARRISON:

28. I also agree.

Lord Justice THORPE:

1. For the reasons given in the judgment handed down this appeal is dismissed.

Mr MOON:

2. The Respondents having successfully resisted the appeal, I ask for the costs.

Lord Justice THORPE:

3. Any objections?

Mr HAVERS:

4. I would invite you to order that there be no order as to the costs of this appeal. The basis of that

is that in the Court below Munby J made such an order, save for a contribution of £1,000 to be paid by the Health Authority to the Respondents.

Lord Justice THORPE:

5. What was his reasoning for that?
Mr HAVERS:
6. I was not present at the time so I am not at all sure what the reasons were. I imagine his reason was along the lines that doctors, although, as it were, they had not resisted what was being sought, they came to Court so the Judge could decide whether the documents in list A and B was disclosed. The Health Authority there had no choice but to come to Court to assist the Court on disclosure.

7. My submissions on costs run into my application for leave to appeal. Perhaps I could run the two together. The basis of the submission on costs is that this appeal raises, or raised, a number of important questions, one in particular is that which is identified in the first two points on appeal which I hope you have in front of you.

Lord Justice THORPE:

8. We are grateful to you for having put it in writing.

Mr HAVERS:

9. That first question arises because, as we understand your Lordships' judgment — and I am turning up paragraph 25 of the judgment — what your Lordships there said as to paragraph 9 of Munby J's judgment, was not limited to the context referred to in paragraph 24. That is the context within which and the parameters within which your Lordships decided this appeal. On the contrary, what your Lordship said in paragraph 25 is to the duty of a GP goes much wider than that and does raise a real question of real importance in relation to the obligations, on the one hand of general practitioners whenever they are asked by a health authority to hand over the records of a patient (absent of course the consent of the patient), and, this being the other side of the coin, the expectations of health authorities and the consequences of health authorities whenever they seek such records absent the consent of the patient.

Lord Justice LAWS:

10. I would certainly respect the submission that the matter is an important one. It seems to me that clearly right but why should we not follow now the usual practice of letting their Lordships decide whether they want to take it or not? That is the question.

Lord Justice THORPE:

11. That is your difficulty.

Mr HAVERS:

12. Perhaps in these 2 October 2000 times —
Lord Justice LAWS:

13. I do not think there is any perception that refusal of leave by this Court means that you may not in some way ask their Lordships' House on the basis of it having a somewhat wider significance. I think that is the issue on leave.

Mr HAVERS:

14. Can I add that Munby J's decision has been raised in another context. Certainly I have had it cited against me in different circumstances as justifying the course taken by a general practitioner in circumstances where his records are sought as a look-back exercise.

Lord Justice LAWS:

15. Without rewriting my two-word judgment I would, with great respect, attach, if I may, a lot of importance to what my Lord says at paragraph 24.

Lord Justice THORPE:

16. We have really decided this on the basis that it is quite an ordinary sort of Family Division discretionary adjudication. We fought shy of getting involved in the wider presentation offered by the Bar.

Mr HAVERS:

17. May I be extremely bold and wonder out loud whether there was anything your Lordships might be able to say to limit the general statement of principle set out in paragraph 25 as to the obligation of the GP?

Lord Justice THORPE:

18. Is anybody reading this not going to think that that was a throw away line? I would have thought the second sentence, does it not, assists to limit the matter to its particular context.

Mr HAVERS:

19. The reference in the second sentence to "in the present appeal" is capable of that construction, but you will understand how others will seek to deploy this paragraph in a much wider context. If in truth the paragraph is only directed to the confines upon which your Lordships have decided this appeal, it would be extremely helpful to the health authorities across the country, and probably GPs as well, to know that that was the case.

Lord Justice LAWS:

20. My perception of the case is that we were looking at it through the parameters of the particular circumstances that arose here. Whether the logic is to be applied in other situations is not something that has been decided by this Court.

Mr HAVERS:

21. That is extremely helpful.

Lord Justice LAWS:

22. I hope I am not speaking out of turn, but that is how it seems to me. I do not think there is any doubt at all that in our discussions of the draft judgment that was the way it was presented and that was the basis on which my Lords agreed it.

Mr HAVERS:

23. I am grateful to your Lordships for clarifying the matter.

Lord Justice LAWS:

24. So what about the costs?

Mr HAVERS:

25. Although you decided the case within those relatively narrower parameters, the appeal in our submission did raise important questions in relation to the proper practice of GPs and health authorities which it was appropriate for this Court to consider. On that basis, given the importance of the issues raised, we would submit there should be no order as to costs.

Lord Justice THORPE:

26. We are against you on both points. We see no reason why the successful Respondent should not have costs of appeal and your application for permission we think should be addressed to their Lordships.

FAMILY DIVISION

24 January 2002

before Mr Justice MUNBY

A HEALTH AUTHORITY

v

X and Ors (No 2)

JUDGMENT

1. This is a short footnote to a judgment which I delivered on 10 May 2001 and which is reported as *A Health Authority v X (Discovery: Medical Conduct)* [2001] 2 FLR 673. An appeal against the order I made on that occasion was subsequently dismissed by the Court of Appeal. *A Health Authority v X and Ors* [2001] EWCA Civ 2014.

2. The scheme of the legislation as I described it in paragraphs 20–30 of my judgment has since been amended by section 25 of the Health and Social Care Act 2001. I do not propose to analyse the new scheme in any detail. Suffice it to say for present

purposes that (i) the National Health Service Tribunal has been abolished, (ii) certain disciplinary and regulatory powers are conferred on health authorities by the new sections 49F to 49L and 49O which have been inserted in the National Health Service Act 1977 and (iii) certain functions in this respect are conferred by the new section 49M of the 1977 Act on the Family Health Services Appeal Authority.

3. In these circumstances the provisions of paragraphs (3) and (5) of the Second Schedule to the order which I made on 10 May 2001, set out in paragraph 77 of my judgment, are no longer apt. They require to be amended to be brought into line with the new statutory scheme.

4. Accordingly on 22 January 2002 I made an order providing that the Second Schedule to my earlier order was to be amended to read as follows:

(1) The documents listed in Part A of the First Schedule to this order and the records relating to the patients listed in Part B of the said Schedule ("the documents") are and shall remain at all times confidential.

(2) Save with the prior leave of this Court

(a) no part of the documents shall be read into the public record or otherwise put in the public domain and

(b) nothing shall be published that might lead to the identification of any of the persons (other than the Doctors) referred to in the documents.

(3) Save with the prior leave of this Court the Authority shall not disclose any of the documents or communicate any information contained in them to any person other than

(a) (i) to a medical discipline committee or the General Medical Council and (ii) in accordance with regulations 4 and 5 of The National Health Service (Service Committees and Tribunal) Regulations 1992, SI 1992 No 664, as amended; or

(b) to any person or body of persons exercising the powers given to the Authority by sections 49F to 49L and 49O of the National Health Service Act 1977 and any regulations made thereunder; or

(c) (i) to the Family Health Services Appeal Authority and (ii) pursuant to the provisions of section 49M of the National Health Service Act 1977 and any regulations in relation to such appeals.

(4) Save with the prior leave of this Court no person to whom any of the documents or any information contained in them has been disclosed

or communicated in accordance with paragraph (3) above shall disclose or communicate the same to any other person.

(5) Save with the prior leave of this Court no information contained in the documents shall be disclosed at any public hearing or published in any public record of the proceedings of a medical discipline committee or any committee or sub-committee of the Authority or the Family Health Services Appeal Authority or the General Medical Council.

5. At the same time the Authority sought my leave to make certain further, but strictly limited, disclosure of the material in circumstances which were not covered by my earlier order. This was in fact the application referred to by Thorpe LJ in paragraph 13 of his judgment in the Court of Appeal. The application was not opposed by Dr X and his partners, was completely in accordance with the general spirit of my earlier order and seemed to me entirely appropriate.

6. Accordingly on 22 January 2002 I made a further order in these terms:

UPON HEARING Counsel for the ... ("the Authority")

AND UPON READING (1) the order made herein by Mr Justice Munby on 10 May 2001 (2) the order made herein by Mr Justice Munby on 22 January 2002 amending the order made on 10 May 2001 (3) statements of ... each dated 8 November 2001 and (4) letters dated 10 January 2002 from the solicitor for Dr X and his partners

AND THE JUDGE stating that it is an express condition of the disclosure of the document referred to in the Schedule to this order permitted by paragraph 1 of this order ("the document") that the Authority and any person to whom the Authority in accordance with the terms of this order hereafter discloses the document or any information contained in the document shall unless otherwise authorised or directed by order of this Court at all times comply with the provisions of the Second Schedule to the order made on 10 May 2001 (as amended by the said order made on 22 January 2002)

AND UPON the Authority by its counsel undertaking to serve copies of the said orders made on 10 May 2001 and 22 January 2002 at the same time upon any person to whom the document or any information contained in the document is disclosed or communicated in accordance with paragraph 1 of this order

IT IS ORDERED THAT:

1 There be leave to the Authority to disclose the document

(a) to the Area Child Protection Committee and the Serious Case Review Panel and

(b) if thought appropriate by either of those bodies also to the Department of Health and the Social Services Inspectorate.

2. The Authority and any of the persons referred to in paragraph 1 of this order is to be at liberty to apply with a view to the discharge or modification (i) of the provisions of this order and (ii) in the case of the Authority also of its undertaking

THE SCHEDULE

[Short description of the document]

7. Arising out of this last application I think I should add this observation. In his judgment in the Court of Appeal Thorpe LJ referred at paragraph [9] to the submission of Mr Philip Havers QC for the Authority that the procedures envisaged by my order would be productive of expense and delay and then at paragraph [16] to the riposte of Mr David Pannick QC on behalf of Dr X that the majority of applications would proceed by consent and at little cost and that urgent cases would be accommodated. The Lord Justice himself expressed the view at paragraph [25] that Mr Havers' spectacles of cost and delay were no more than speculations "which good sense and management can contain".

8. I say nothing about how in future such applications should be handled save to emphasise that the Family Division is well accustomed to dealing with urgent applications of many kinds at every hour of the day and the night. A Judge of the Division sits as urgent applications Judge every working day during term. A Judge of the Division is always available, 24 hours a day, every day of the year, to deal with really urgent applications out of hours. As Thorpe LJ emphasised in paragraph [23], absent exceptional circumstances applications of the kind which I was faced with in May 2001 should, where the trial has been conducted by a Judge of the Family Division, be made to that Judge and not to some other Judge. I respectfully agree. But if the matter really is too urgent to await the availability of the trial Judge then in the exceptional circumstances contemplated by Thorpe LJ application can be made to the urgent applications Judge or out of hours duty Judge.

9. The point I wish to make is slightly different. My original order of 10 May 2001 provided that the Authority should have liberty to apply at any time with a view to the discharge or modification of the regime established by the order. Such was the application which was made to me on 22 January 2002. The application, as I have said, was not opposed and the order sought was entirely appropriate. I see no reason why if a similar application has to be

made to me in future, whether by the Authority or by anyone else entitled to make an application in accordance with the liberty to apply contained in my order of 10 May 2001, the Applicant should necessarily be put to the trouble and expense of instructing solicitors and counsel to make a formal application in Court. If, as was the case with the application I have just heard, the application appears to be straightforward and unopposed then it can, as it seems to me, appropriately be made in the first instance by post or fax to the Judge and be dealt with as a paper application without the need for any attendance by the parties unless the Judge otherwise directs. It will of course be a matter for the Applicant to decide what papers should be lodged with the Judge but if the matter is to be dealt with as a paper application I would envisage that as a minimum the Judge will expect to receive (i) a draft of the precise order which the Court is being invited to make (for example, in the form set out in paragraph [6] above), (ii) a short witness statement explaining why the application is being made and (iii) letters showing that the application is not opposed.

10. I emphasise that I am not to be treated as laying down any general practice. Other Judges dealing with other cases may feel it appropriate to adopt different procedures. All I am doing is to suggest one way in which practical effect can be given to Thorpe LJ's exhortations and to indicate the way in which I propose to deal myself with any future applications which the Authority or anyone else may wish to make pursuant to the liberty to apply for that purpose in my order of 10 May 2001.

COMMENTARY

This case addressed the difficulties that can arise when a doctor is required to disclose medical

records of a patient to a regulatory body which wishes to investigate suspected disciplinary offences or non-compliance with professional standards. He faces the dilemma that not only does he owe a duty, often imposed by statutory regulation, to cooperate with the authority, but he also owes a duty of confidentiality to the patient. Where the patients concerned are children or others involved in proceedings under the Childrider Act a further consideration arises in relation to the duty not to disclose matters dealt with in private in such proceedings.

In this case the Court of Appeal has confirmed that unless there are exceptional circumstances, the balance between the duties will invariably be exercised in favour of disclosure to the regulatory authority. However, the Court also confirmed that the conditions can be imposed on such disclosure.

Of particular interest to practitioners will be the ruling [see paragraph 25 of the judgment] that the resolution of the conflict between the interests in confidentiality and other public interests should be determined by the Court, not the health authority. The implication is that disclosure in this type of case should not be sought on a voluntary basis, but that an application should always be made to the Court. The wording of the judgment suggests that this principle is of general application; if this is correct there would be considerable practical difficulties to health authorities and doctors alike. For that reason we report the discussion which followed judgment in which the Court was invited to clarify what was meant by this paragraph. Thorpe LJ, described it as a "throw away line" and Laws LJ said they had been looking at the particular circumstances of the case and that whether it applied to other situations had not been decided. The position appears to be that the extent to which there is an obligation to seek the Court's permission for disclosure otherwise than in the case of patients who are the subject of public law Children Act proceedings is still open.

REPORTED BY ROBERT FRANCIS QC

the circumstances where it can indeed be the case that the driver is not responsible for what would otherwise be dangerous driving or driving without due care and attention or, as in that case, not guilty of failing to give precedence to a pedestrian or a pedestrian crossing. The latent defect is a well-established defence to a charge of that nature. It is, however, a defence which has to be raised by evidence which shows the possible existence of the latent defect. If the defence in this way raise the matter as an issue before a tribunal, then the burden will be on the prosecution to negative the defence which has thus been raised. This situation is a very different one from that which we are considering here. It is not necessary to refer in any detail to the judgment of James J. in that case. On examination it is quite clear that nothing he says is inconsistent with a driver who makes a mistake of the sort which occurred here being guilty of the offence of dangerous driving.

The only matter that it is necessary to add is that in this case the learned judge was persuaded to deal with the question of law which was raised for his consideration at the end of the case for the prosecution. As became more and more clear in the course of argument, it is unwise for an issue of the sort that has been raised in this case to be determined without evidence being called, if the defence wishes to call such evidence on the defendant's behalf. The prosecution made a number of concessions. They took upon themselves the onus of establishing from the outset that this was a case where there was no latent defect in the vehicle. They took upon themselves to deal with the issue as to the design of the vehicle, and therefore the case was to that extent very unusual, as Mr Laprell submitted. However, in our judgment, it is unwise to avoid the ordinary procedures of a trial in a case of this sort. If there is a matter of this nature to be withdrawn from the jury, that decision is best made after all the evidence has been called.

There is no question in this case of a retrial. The only reason that the Attorney-General has sought the opinion of this Court is for clarification of the law. We hope that we have provided that clarification by making it clear that if a driver unintentionally presses the accelerator when he means to press the brake, that is no defence to a charge of dangerous driving. Unfortunately, it is all too easy to make a mistake of that nature. The mistake can, as it did in this case, have the most tragic consequences. As we understand the offence of dangerous driving, it is intended to cover occurrences where a driver has made a mistake of this nature. The matters relied upon by the defence in this case did not go to the question of guilt or lack of guilt; they went solely to the question of what would be the appropriate penalty. As to that it is not necessary for us to say anything.

H11

Opinion accordingly.

H12

Solicitors: Crown Prosecution Service, Newcastle upon Tyne; Baelcharne Jones, Blackburn.

C.B.

R. (EBRAHIM) V. FELTHAM MAGISTRATES' COURT MOUAT V. DIRECTOR OF PUBLIC PROSECUTIONS

QUEEN'S BENCH DIVISION (DIVISIONAL COURT) (Lord Justice Brooke and Mr Justice Morison):
January 12, 16, February 21, 2001¹

[2001] EWHC Admin 130; [2001] 2 Cr.App.R. 23

H1 EVIDENCE Videotape

Guidance where applications are made in the magistrates' court to stay proceedings for abuse of process on basis of destruction of videotape evidence.

H2

Where courts are dealing with an application to stay proceedings against a defendant for abuse of process on the grounds that videotape evidence has been obliterated, the court should structure its inquiries by considering, whether in the circumstances of the particular case, the nature and extent of the investigating authorities' and the prosecutor's duty, if any, to obtain and/or retain the videotape evidence in question. In doing so the court should have recourse, first, to the 1997 Code of Practice, published pursuant to sections 23 and 25 of the Criminal Procedure and Investigations Act 1996, relating to the nature and extent of the duty of the police and other investigating authorities to obtain and retain material which may be relevant to an investigation and, second, to the guidelines issued by the Attorney-General on November 29, 2000 concerning the disclosure of information in criminal proceedings. If, in all the circumstances, there is no duty to obtain and/or retain that videotape evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground. If, however, such evidence is not obtained and/or retained in breach of the obligations set out in the 1997 code and/or the Attorney-General's guidelines, then the court has to go on to consider whether it should take the exceptional course of staying the proceedings for an abuse of process. There will be an abuse of process if there is either an element of bad faith, or, at the very least, some serious fault on the part of the police or the prosecuting authorities and it is clear that the defendant cannot be fairly tried. The court, however, has to bear in mind the fact that a fair trial involves fairness to both the defendant

¹ Paragraph numbers in this judgment are as assigned by the Court.
[2001] 2 Cr.App.R., Part 4 © Sweet & Maxwell

and the prosecution, and that the trial process itself is equipped to deal with the bulk of complaints on which applications for a stay are founded. On a procedural note, where a defendant complains on an appeal against conviction in the magistrates' court, he should not apply for the proceedings to be stayed because if those proceedings are merely stayed his conviction will stand. He should therefore apply for an order allowing his appeal and quashing his conviction on the grounds that the original trial was unfair and the unfairness was of such a nature that it could not be remedied on appeal. Further, if a ruling on a stay application is made in a lower court, the court should give its reasons, however briefly, and it is the professional duty of the advocates for the parties to take a note of these. If the decision is to be challenged on judicial review, the Divisional Court will expect to see a note of the lower court's reasons before deciding whether to grant permission for the application to proceed. If any relevant oral evidence was given, it is hoped that an agreed note could be prepared summarising its effect.

(For abuse of process, evidential matters, see *Archbold* 2001, para. 4-63b.)

H4 Application for judicial review.

H5 The applicant, Mohammed Rafiq Ebrahim, on an application for judicial review, pursuant to the permission of Mitchell J. given on March 9, 2000, sought (1) an order to bring up and quash the decision of Mr Stephen Day, a metropolitan stipendiary magistrate sitting at Feltham Magistrates' Court on August 31, 1999, to refuse to stay for abuse of process the prosecution brought against him for common assault; and (2) an order of mandamus compelling the magistrate to stay the proceedings.

H7 Case stated by the Crown Court at Stafford.

H8 The appellant, Paul Mouat, appealed by way of case stated from the dismissal by the Crown Court at Stafford on August 11, 2000, of his appeal from a conviction for speeding by the Burton-on-Trent Magistrates' Court on June 15, 2000, which would not stay those proceedings for abuse of process on the grounds that the police officers in the case had destroyed a video recording of the relevant incident soon after it took place. The question for the opinion of the Court was "(1) Could a fair hearing take place given the fact that the police had destroyed the video recording of the incident? (2) Should the appellant's silence at the time of the incident be considered relevant to the police's duty to retain evidence?"

H9 At the hearing of the application for judicial review and the appeal by way of case stated on January 12 and 16, 2001, the following cases were cited or referred to in the skeleton arguments: *Connolly v. DPP* (1964) 48 Cr.App.R. 183, [1964] A.C. 1254, HL; *Jespers v. Belgium* (1981) 5 E.H.R.R. 305; *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42, HL; *Llbridge Justices, ex p. Sofrier* (1986) 85 Cr.App.R. 367, DC.

H10 The facts and grounds of appeal appear in the judgment of Brooke L.J.

Andrew Smiler for the applicant, Ebrahim.
John McGuinness for the Crown.
Imi Wise for the appellant, Mouat.
Stuart Clarkson for the Crown.

H11

Cur. adv. vult.

February 21. **BROOKE L.J.:**

1 This is the judgment of the Court.

Introductory

2 On January 12, 2001 we heard an application by Mohammed Rafiq Ebrahim for judicial review of a decision by District Judge Day, who was sitting as a stipendiary magistrate at Feltham Magistrates' Court on August 31, 1999, when he dismissed an application by Mr Ebrahim for a stay of proceedings against him for common assault on the grounds of abuse of process. We will call this case "the Feltham case".

3 On January 16, 2001 we heard an appeal by Paul Alexander Mouat by way of case stated from a decision of the Stafford Crown Court on August 11, 2000, when dismissing his appeal from his conviction for speeding by the Burton-on-Trent Magistrates' Court on June 15, 2000, to the effect that it was not willing to stay those proceedings for abuse of process on the grounds that the police officers in the case had destroyed a video recording of the relevant incident soon after it took place. We will call this case "the Stafford case".

4 In both these cases the original defendant's complaint related to the obliteration of video evidence. The facts of the Feltham case are confused, but what seems clear is that when the police officer attended the Tesco store where the alleged assault took place, he went and viewed what he thought was the only available video recording of the scene of the incident and satisfied himself that it showed nothing at all of any relevance. As a result he took no steps to seize or retain any of the videotape or film images used at the store on the day in question, and it all appears to have been reused or otherwise obliterated within about five weeks in the usual course of the store's business, long before any inquiries about the availability of video evidence were first made by the defence.

5 In the Stafford case, the Court accepted the evidence of two police officers that they had followed the appellant's car at a distance of 200 metres for three-tenths of a mile and that during this time they had recorded speeds of 90 miles per hour on their calibrated speedometer. They had a video in their car, and when they stopped the appellant and invited him into their car, they played the video back to him. It showed their speed registering at 90 miles per hour and his car in front of them. It also recorded the time as the cars went along. The police officers then served him with a fixed penalty notice and a notice requiring him to produce a document (not in his possession at the time) at a named police

station. He said "What am I going to do?" They permitted him to drive off, and so far as the Crown Court was aware, they then reused the videotape in the ordinary course of their duties. Although it appeared from the papers before us that no inquiry about videotape evidence appeared to have been made by the appellant or his advisers until the hearing of the appeal at Stafford Crown Court over 10 months after the incident, it was suggested at the hearing in this Court that the matter had been raised in correspondence in advance of that appeal. Because this had never been mentioned before, we did not ask to see the correspondence.

During the two hearings we were referred to a large number of unreported decisions of this Court and of the Court of Appeal in which similar complaints were made about the non-availability of video evidence which in fact showed, or which might have showed, an incident or incidents which were said to be material by one side or the other when the eventual trial took place. None of these unreported decisions established any new point of principle. This, no doubt, was the reason why none of them was reported. Notwithstanding this fact, counsel in the two cases have seized on various phrases in what were probably all *ex tempore* judgments as if they established some new point of principle, and a great deal of time was taken up on both occasions, both at the hearing and in pre-hearing reading, in looking at the facts of these unreported cases in an attempt to derive from them some new principle.

We therefore decided to reserve judgment in both cases and to prepare this single, reserved judgment in the expectation that in future courts may be spared the prolonged "trial by unreported judgment" to which we were subjected. One of the reasons why we took this course was that devices like CCTV are becoming more and more common, and the proceedings of courts are likely to become more and more disrupted each time the defence complains that what was or might have been relevant videotape evidence has been destroyed and is not available to the defence. There are also procedural matters of general importance to which we wish to refer.

The 1997 Code of Practice and the Attorney-General's new guidelines

Since 1997 the police and other investigating authorities have had the benefit of codified guidance relating to the nature and extent of their duty to obtain and retain "material which may be relevant to their investigation" (see below for the meaning of the phrase). In paragraph 2.1 of the Code of Practice published pursuant to sections 23 and 25 of the Criminal Procedure and Investigations Act 1996, which came into force on April 1, 1997 ("the 1997 code") it is said that:

"material may be relevant to the investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under

investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case."

9 That the extent of the duty of investigation should be proportionate to the seriousness of the matter being investigated is evident from paragraph 3.4 of the code:

"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances."

10 Paragraph 3.5 describes the extent of the investigative duty when it is believed that other persons may be in possession of material that may be relevant to the investigation:

"If the officer in charge of an investigation believes that other persons may be in possession of material that may be relevant to the investigation, and if this has not been obtained under paragraph 3.4 above, he should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain the material in case they receive a request for its disclosure... However, the officer in charge of an investigation is not required to make speculative enquiries of other persons: there must be some reason to believe that they may have relevant material."

11 Paragraph 5 of the code identifies the duty to retain material obtained in a criminal investigation which may be relevant to an investigation (5.1) and the length of time over which that duty will continue in effect (5.6-5.10). Paragraph 5.3 provides:

"If the officer in charge of an investigation becomes aware as a result of developments in the case that material previously examined but not retained (because it was not thought to be relevant) may now be relevant to the investigation, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required."

12 These provisions of the code preserve and amplify common law rules which were prescribed by the judges before the code came into force. We mention this fact because the investigations in some of the cases to which we were referred took place before April 1, 1997. In one of them, *Reid* March 10, 1997 (unreported), Owen J. said, in effect, that

- (i) There is a clear duty to preserve material which may be relevant;
- (ii) There must be a judgment of some kind by the investigating officer, who must decide whether material may be relevant;
- (iii) If he does not preserve material which may be relevant, he may in future be required to justify his decision;

(iv) If his breach of duty is sufficiently serious, then it may be held to be unfair to continue with the proceedings.

13 In both the present cases reference was also made to the Guidelines issued by the Attorney-General on November 29, 2000, in relation to Disclosure of Information in Criminal Proceedings, even though the police investigations, such as they were, in each case predated the publication of those guidelines. We were referred in particular to paragraphs 1, 6, 20, 21, 37 and 40(iv) of the guidelines. These paragraphs are concerned with the disclosure of material obtained and retained by investigators, and not to the process which leads to material being obtained and then retained, except for paragraph 6 which reads:

"In discharging their obligations under the statute, code, common law and any operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant."

14 In the Stafford case it is said that the investigators had obtained the relevant video evidence which they were obliged to retain pursuant to their duties under paragraph 5 of the 1997 code (see paragraph 11 above). In this context paragraph 1 of the new guidelines observes that fair disclosure to an accused is an inseparable part of a fair trial (as guaranteed under Article 6 of the European Convention on Human Rights), and paragraph 5 tells investigators that they must be fair and objective and that a failure to take action leading to proper disclosure may lead to a successful abuse of process argument.

15 In paragraph 20 of the new guidelines prosecutors are told that in deciding what material should be disclosed they should resolve any doubt they may have in favour of disclosure (subject to a proviso which is irrelevant in the present context). In the course of a discussion of the obligations of primary disclosure in paragraph 37, prosecutors are warned that they should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. One of the examples that is given (see paragraph 37(iii)) relates to any material which may cast doubt upon the reliability of a confession. During the discussion of secondary disclosure in paragraph 40, express reference is made in sub-paragraph (iv) to "video recordings made by investigators of crime scenes".

16 So much for the duty to pursue all reasonable lines of inquiry, and the duties to obtain, retain and disclose relevant material. When a complaint is made on an abuse application that relevant material is no longer available, the first stage of the court's inquiry will be to determine whether the prosecutors had been under any duty, pursuant to the 1997 code and the new guidelines, to obtain and/or retain the material of whose disappearance or destruction complaint is now made. If they were under no such duty, then it cannot be said that they are abusing the process of the court merely because the material is no longer available. If on the other

hand they were in breach of duty, then the court will have to go on to consider whether it should take the exceptional course of staying the proceedings for abuse of process on that ground.

The jurisdiction of a court to stay criminal proceedings for abuse of process

17 We think it may be helpful to restate the principles underlying this jurisdiction. The Crown is usually responsible for bringing prosecutions and, *prima facie*, it is the duty of a court to try persons who are charged before it with offences which it has power to try. Nonetheless the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of their process. This power is "of great constitutional importance and should be ... preserved"; per Lord Salmon in *DPP v. Humphrys* (1976) 63 Cr.App.R. 95, 122, [1977] A.C. 1 at p. 46C-F. It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See *Attorney-General's Reference* (No. 1 of 1990) (1992) 95 Cr.App.R. 296, 303, [1992] Q.B. 630, 643G.

18 The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried. We derive these two categories from the judgment of Neill L.J. in *Beckford* [1996] 1 Cr.App.R. 94 at p. 101. He observed that in some cases these categories may overlap. There may, of course, be other situations in which a court is entitled to protect its own process from abuse, for example where it considers that proceedings brought by a private prosecutor are vexatious (see *Behinash/Magistrates' Court, ex p. Watts* [1999] 2 Cr.App.R. 188), but we are not here attempting to carry out an exhaustive review of this jurisdiction.

19 We are not at present concerned with the second of these two categories (which we will call "Category 2" cases), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. In some of these cases it is this court, rather than any lower court, which possesses the requisite jurisdiction (see *ex p. Watts, per Buxton L.J.* at p. 195B-D).

20 In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutors' conduct it would be unfair to him if the court were to permit them to proceed at all. The court's inquiry is directed more to the prosecutors' behaviour than to the fairness of any eventual trial. Although

it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all.

21 Neill L.J. gave three examples of this type of case in his judgment in *Beckford* at pp. 101D–102A. In all such cases—and one hopes they will be very rare—the court has to make a value judgment about the character of the prosecutor's conduct. If it is satisfied that it would not be fair to allow the proceedings to continue, the court does not then concern itself with the possibility that any ensuing trial might still be a fair one, because it will have formed the prior view that it would not be fair to the defendant if it were to take place at all.

22 This, in our judgment, is the type of situation which Sir Roger Ormrod, sitting in this Court with Lord Lane C.J. in *Derby Crown Court, ex p. Brooks* (1985) 80 Cr.App.R. 164 had in mind when he said at pp. 168–169 that it may be an abuse of process if:

“the prosecution have manipulated or misused the process of the court so as to deprive a defendant of a protection provided by the law or to take unfair advantage of a technicality.”

23 In one of the unreported cases we were shown, it was said that there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities for this ground of challenge to succeed.

24 The first category of case (see paragraph 18 above: we will call these “Category 1 cases”) is founded on the recognition that all courts with criminal jurisdiction, including magistrates' courts, have possessed a power to refuse to try a case, or to refuse to commit a defendant for trial, on the grounds of abuse of process, but only where it is clear that otherwise the defendant could not be fairly tried. An unfair trial would be an abuse of the court's process and a breach of Article 6 of the European Convention of Human Rights. In these cases the focus of attention is on the question whether a fair trial of the defendant can be had.

25 Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:

- (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.
- (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

26 We have derived the first of these principles from the judgment of Sir Roger Ormrod in *Derby Crown Court, ex p. Brooks* at p. 168 and the second from the judgment of Lord Lane C.J. in *Attorney-General's Reference (No. 1 of*

1990) at pp. 303 and 644B–C. The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between. The power of a court to regulate the admissibility of evidence by the use of its powers under section 78 of the Police and Criminal Evidence Act 1984 (PACE) is one example of the inherent strength of the trial process itself to prevent unfairness. The court's attention can be drawn to any breaches by the police of the codes of practice under PACE, and the court can be invited to exclude evidence where such breaches have occurred.

27 It must be remembered that it is a commonplace in criminal trials for a defendant to rely on “holes” in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.

28 In relation to this type of case Lord Lane C.J. said in *Attorney-General's Reference (No. 1 of 1990)* at pp. 303 and 644A–B that no stay should be imposed:

“... unless the defence shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court.”

Cases in which these principles have been applied

29 We turn now to the facts of a number of cases in which courts have been concerned with applications to stay a prosecution for abuse of process when CCTV or video evidence has not been available at trial. We can summarise their effect, to which we have appended our comments, in this way:

- (i) Violent disorder broke out at a night club. The judge was satisfied that a video camera was trained on an area of the club where an incident occurred prior to the arrival of the police and where part of the incident of violent disorder took place. Police officers viewed the video but its existence was not revealed to the defence in spite of their specific requests for unused material, and by the time of the trial the videotape had disappeared. The judge ordered a stay.

This was a Category 1 case. It was not a case of the prosecution deliberately manipulating or misusing the process of the court, but the police had actually viewed the video and decided not to retain it because it did not

assist their case, without performing their duty of considering whether it assisted the defendant's case. The Court considered that the trial would not be fair (*Birmingham* [1992] Crim. L. R. 117).

(ii) Violence broke out at a chemist's shop. The jury heard evidence from three independent witnesses. A police officer told the court that he saw a video film which contained nothing of relevance, and that one of the cameras did not cover the particular area. He said that if the recording had been relevant it would have been seized. The trial judge refused a stay, and the Court of Appeal dismissed a challenge to this decision. It asked itself whether it was unfair that those video pictures had disappeared, and since the judge accepted the police officer's evidence he was entitled to find that there had been no unfairness.

This was neither a Category 1 case nor a Category 2 case. There was nothing unfair and nothing exceptional about it (*Reid*, March 10, 1997, (unreported)).

(iii) In a rape case, the complainant said that she had been raped close to a bridge over a railway line. The jury heard evidence from a number of independent witnesses. Video cameras were mounted on the bridge, but the detective constable in charge of the investigation was told by British Transport Police that the cameras were not switched on. In fact they were working, but the police did not ascertain this fact until a month later, by which time the film had been destroyed. The trial judge refused a stay, and the Court of Appeal dismissed a challenge to his decision. It directed itself that before there could be any successful allegation of an abuse of process based on the disappearance of evidence, there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities.

The Court considered that there was no bad faith and no serious fault on the part of the police and that it was possible to have a fair trial. It suggested, *obiter*, that a lackadaisical failure on the part of the police to make proper investigation might in certain circumstances be held, in effect, to give rise to a Category 2 case, but those circumstances did not exist in that case (*Swingler*, July 10, 1998, (unreported)).

(iv) The police were called to licensed club premises following an incident. They complained that during the course of their inquiries the defendant had used threatening words or behaviour and that he had also assaulted them in the execution of their duty. The incident in which the defendant was involved had taken place at the entrance of the premises and in the area just outside the door. A CCTV camera covered the foyer and three steps down

to the street, and gave a reasonably good image of people's faces. Police viewed the video but formed the opinion that it was of no use. They returned it to the club, and it was subsequently reused. The stipendiary magistrate stayed the proceedings for abuse of process on the grounds that since the camera covered the doorway and the surrounding area anything shown on it might well affect the assault charges. This Court refused to quash her decision, holding that it was well within the limits of her judgment to take the course she did, because it could not be shown that the videotape evidence would have had no effect on the trial at all. It said that the difference between this case and the *Birmingham* case, where it was established beyond doubt that the destroyed video evidence had shown the *locus in quo* of the alleged offences, was a difference of degree and not of substance.

This was a borderline Category 1 case. Most courts would have refused the stay. In *Stallard* (below) the Court of Appeal said that if it had to choose between the reasoning in *Clipping* and the reasoning in *Swingler*, it preferred the latter (*DPP v. Clipping*, January 11, 1999 (unreported)).

(v) A CCTV camera was operating in a street where a robbery took place, and it was so positioned that it was at the very least possible that something of the robbery might have been filmed. The jury received compelling evidence from two independent witnesses. A police officer looked at the film and formed the opinion that it showed nothing of value. He did not preserve the tape, which was then reused. The Court of Appeal upheld the judge, who had refused to stay the proceedings for breach of process. It said that in *Clipping* there was simply a refusal to hold that the magistrate had acted outside the generous ambit of her discretion. It was recognised that in cases where evidence had been tampered with, lost or destroyed it might well be that a defendant would be disadvantaged, but it did not necessarily follow that [a Category 1 or Category 2 case] was established. There would need to be something wholly exceptional about the circumstances of the case to justify a stay on the ground that evidence had been lost or destroyed.

In this context, the use of the word "wholly" adds nothing to the word "exceptional". A fair trial was possible, and this was not a Category 2 case (*Medunay* [2000] Crim. L. R. 415).

(vi) A purse was stolen in a shop. Video cameras were operating, which each showed a different picture and all the pictures appeared on one tape. A compilation tape was then made and retained, and the original tapes were destroyed in accordance with routine practice. It then turned out that the compilation tape began too late and ended too soon, and did not show the whole of

the story. The Court of Appeal upheld the judge's refusal to stay the proceedings for abuse of process. It held that there was nothing on the facts of the case to approach the kind of serious fault [in a Category 2 case] that would be required before the court could begin to consider whether the continuation of the proceedings were an abuse of its process. It had earlier dismissed the possibility of this being a [Category 1 case] by saying that it did not see how it could properly be said that the appellant could not have a fair trial without the video.

This case is a good example of the way in which these cases should be analysed. (*Stallard*, April 13, 2000 (unreported)).

(vii) A woman was arrested, following a road traffic accident, and charged with driving a motor vehicle whilst unfit through the consumption of drugs. Although a police officer at the scene, who did not attend court, had circled in his notebook the response "yes" to the question whether there was any video evidence, it was entirely speculative as to how any video evidence, assuming such existed, was or might have been relevant to any issue in the case. The defendant had persuaded the magistrates that in some unspecified manner she had been disadvantaged, and the proceedings were stayed for abuse of process. This Court held that in taking this course the justices had exceeded any reasonable exercise of their discretion.

A fair trial was clearly still possible, and there was no question of any misbehaviour at all (*DPP v. Garrety*, December 11, 2000 (unreported)).

Chipping is the only decision which it is difficult to reconcile with the principles we have stated. It must be remembered, however, that all that that case showed was the higher court being unwilling to interfere with the exercise of the decision of the lower court on the basis that it was clearly wrong. There is no hint in the judgment of Buxton L.J. with whom Collins J. agreed, that he thought that the magistrate was clearly right.

Before we turn to the facts of the present cases, there is one further point of general importance we need to mention. If a defendant is convicted and then appeals to the Crown Court, he will gain nothing by inviting the Crown Court to stay the proceedings for abuse of process. If the proceedings in the Crown Court are merely stayed, his conviction will stand. It appears to us, in these circumstances, that his appropriate course, if any unfairness cannot be corrected in a fresh hearing on appeal, will be to invite the Crown Court to allow his appeal and quash the conviction on the grounds that, even if he made no complaint at the time, the trial in the magistrates' court was not a fair one, and that any such unfairness is irremediable.

We turn now to the facts of the two cases with which we are concerned.

The Stafford Case

33 The case stated by Judge McEvoy Q.C. is in the following terms.

34 On October 5, 1999 Paul Mouat was driving his car out of Burton-upon-Trent when he was stopped by police officers. He was informed that he had been exceeding the speed limit and was given a fixed penalty ticket. The police officers took him into their vehicle and showed him a video recording of the incident.

35 He did not pay the fixed penalty, but asked for a magistrates' court trial. He wished to put forward a defence of duress. He would say that he was travelling in the outside lane of a dual carriageway, overtaking several vehicles, including large lorries. He was not exceeding the speed limit at that point. An unidentified vehicle then came up behind him at speed and proceeded to travel only a few inches from his bumper. He was extremely frightened and intimidated by this action. He felt that the vehicle was too close for him to be able to safely slow down. He could not pull to his left due to vehicles on his inside. He therefore increased his speed to avert the danger.

36 He was shocked to discover that the vehicle which had behaved in this way was a police car.

37 He was not represented when he appeared for trial at Burton-upon-Trent Magistrates' Court on June 15, 2000. A police officer, whilst giving evidence, conceded that the video recording of the incident had been destroyed. The issue of fairness of trial does not appear to have been raised.

38 He was convicted. The magistrates imposed a fine of £90 and endorsed his driving licence with three penalty points. He was ordered to pay £65 towards the cost of the prosecution.

39 He appealed against his conviction to Stafford Crown Court. That hearing took place on August 11, 2000. He was represented by counsel.

40 Counsel argued that proceedings should be stayed as Paul Mouat could not have a fair trial as the video evidence had been destroyed. The Court's attention was drawn to the cases of *Birmingham* [1992] Crim.L.R. 117 and *DPP v. Chipping* (January 11, 1999, unreported).

41 The Crown argued that Mr Mouat could receive a fair trial. Police officers would give evidence to the Court in respect of the incident. It is routine practice for video recordings of this nature to be wiped off unless the motorist has made some protest at the time of the incident.

42 The prosecution's position so far as the video evidence was concerned was that it was never originally intended to produce it in court in order to prove the speeding offence. Proof of the offence was to be achieved by evidence of following the offending vehicle at the constant distance for 3/10 of a mile and that the police speedometer was in proper working order. A video was to be used to illustrate to the motorist that an offence had been committed. The vascar capability had not been activated but the speed of the police vehicle was recorded on the video.

43 Both police officers said that the appellant when shown the video did not dispute the contents of it, i.e. that he was speeding at 90 m.p.h. and when given the fixed penalty ticket he is recorded as saying "What am I going to do?". Both officers said that if he had done or said anything to dispute the video evidence it would have been retained (it would not have been possible to use the fixed penalty procedure).

44 Mr Mouat's evidence was to the effect that he asked what would happen to the video and the police replied that they kept it should he try to contest the case. He asserted that he told the police that the only reason he went at 90 m.p.h. was that the police car was up his backside, or words to that effect. He did admit that the speed of 90 m.p.h. was registered on the video.

45 The Court found the appellant not to be a credible witness. The circumstances of watching a video of the driving and saying "What am I to do?" amounted implicitly to admitting to the offence and the police were entitled to regard it as so. Moreover under section 34 of the Criminal Justice and Public Order Act 1994 the Court was entitled to draw such inferences as appeared proper from the appellant's failure to mention the facts he relied upon at the hearing.

46 At the end of the hearing the Court delivered an *ex tempore* judgment which sets out the facts and reasons for dismissal of the appeal. It was found that in the circumstances the police were entitled to re-use the video and the appellant was not prejudiced or prejudiced to the extent that he could not have a fair trial. The Court exercised its discretion and refused to stay the case. A copy of the Court's judgment was attached to the case. In those circumstances the Court asked the following questions for the opinion of the High Court:

- (i) Could a fair hearing take place given the fact that the police had destroyed the video recording of the incident?
- (ii) Should Paul Mouat's silence at the time of the incident be considered relevant to the police's duty to retain evidence?

47 It appeared to us on the hearing of the appeal to this Court that something had gone wrong in this case. The videotape in the police car contained material which might be relevant to the police's investigation of the speeding offence, and they were not entitled to assume that Mr Mouat would simply pay the penalty required by the fixed penalty notice. Indeed, the law allowed him a 21-day "suspended enforcement period" in which he could decide whether he wanted to be tried at a court for the offence specified in the notice (see, generally, the statutory scheme set out in Part III of the Road Traffic Offenders Act 1988).

48 Mr Clarkson, however, told us in his skeleton argument that "financial considerations would mean that it would be impractical for there to be a new tape every time a speeding car is stopped and the driver disputes, or may in the future dispute, any fact contained therein. In fact it would mean that all such video tapes would have to be kept."

49 It appeared to us that this claim of impracticality revealed a willingness to ignore the clear requirements of the 1997 code. We could not understand why, at the very least, it was impractical for the police to keep the relevant tapes at least until the suspended enforcement period had expired (or until trial, if the motorist exercised his right to require a trial). We therefore asked counsel for the prosecution to make further inquiries about police practice before we delivered judgment. We are grateful to them and their solicitors for undertaking this task.

50 Mr Clarkson in due course told us, after inquiries had been made of seven police forces in England and Wales, that there were no national guidelines for the police which related to the retention of video recordings taken of suspect vehicles from video recording equipment in police vehicles. The policy of the Staffordshire force was expressed in the following terms (with occasional comments about the practice of other forces):

"The Staffordshire force has 14 video recording units although fewer would be on the road at any one time. That seems to be a reasonable average for police forces. The videos are three hours long, although other forces use shorter tapes. Some operators keep them running nearly all the time; others only turn it on if there is something interesting or illegal happening at the time. If no offences are revealed they are kept for 28 days and then wiped clean. If offences are revealed they are kept for 12 months following conviction; if there is an acquittal they are wiped shortly after the trial. If a fixed penalty notice is given they are kept for 12 months. That applies to all forces except Gwent which keep the tapes for seven years following conviction.

The Staffordshire force also keeps a back-up tape called a shift tape onto which all offences, or potential offences are transferred in any one shift. That is kept for 12 months."

Mr Mouat's solicitors had made inquiries whose results were rather less illuminating. A representative of the Home Office, when approached, knew nothing about any police guidelines. Two representatives of the Association of Chief Police Officers ("ACPO") were contacted. They both said that they believed ACPO had published guidelines, but neither of them was able to find them. A representative of the Nottinghamshire Police (policy unit and legal section) said that the Nottinghamshire Police followed ACPO guidelines, but they, too, were unable to produce a copy of them.

At the very least it appears that the Crown Court was misled, no doubt unwittingly, by the Crown when inquiries were made about police practice at the time of Mr Mouat's appeal. It was told (see paragraph 41 above) that it was routine practice for video recordings of this nature to be wiped off unless the motorist made some protest at the time of the incident. We now know that in Staffordshire, policy dictates that all these tapes are

kept for 28 days, and that if they reveal an offence they are retained for 12 months following a conviction (and for 12 months if a fixed penalty notice is given). Mr Mounat's appeal was heard well within both these periods. There should also have been the back up shift tape, which should also have been kept for 12 months.

53 Because we do not know why, despite the Staffordshire policy, the videotapes in the police car were re-used, or what happened to the shift tape, if any, which ought to have been preserved for 12 months, and because the Crown Court appears to have been misled, it appears to us that the decision of that Court cannot stand, and the case must be remitted for the appeal to be heard again by a differently composed Court. The answers to the questions posed by the court are:

- (i) In the light of the further evidence received in this Court we do not know if a fair hearing took place or could take place. This must be a matter for a new court to decide in the light of the principles we have set out in this judgment.
- (ii) No. He was entitled to consider during the suspended enforcement period whether he wished to contest his liability in court, and the police were under a duty under the Code of Practice to retain the video tapes until after that period expired, at the very least.

The Feltham case

54 These proceedings arose out of an incident at a Tesco superstore in Hayes Road, Southall on October 17, 1998, when it is alleged that Mr Ebrahim punched the complainant Mr Chopra, who was another customer in the store. The store was fitted with closed circuit television. The concern of Mr Ebrahim and his advisers was directed to the possibility that an earlier incident at the store, when Mr Ebrahim says that he was assaulted by a number of people, including Mr Chopra, when he first entered the store, was recorded on videotape. They complained that this videotape, if any, had been destroyed by Tesco during the course of the proceedings.

55 Form 86A, which is confirmed in evidence by the applicant's solicitor, shows that the application to the magistrate to stay the proceedings was based on the contention that a store security video, which was essential to the defence case and for which a witness summons had been obtained, had been destroyed, and that without this video the applicant could not have a fair trial.

56 The background facts were set out in Form 86A in the following terms: Mr Ebrahim is of good character, and he maintains that he was threatened and abused by a group of people when he entered the Tesco store to do some shopping. A little later one of these people became involved in an argument with him, and he believed that he was about to be struck. He therefore grabbed at this man in order to restrain him in self-defence. At the time of his arrest the arresting officer viewed only one of the numerous video cameras in the store and did not seize any of the tapes. Mr Ebrahim

was not interviewed himself, and it is said that he therefore had no proper opportunity at the time to explain about the events which occurred prior to the incident for which he was arrested.

57 It appears that a pre-trial review on February 11, 1999 was adjourned after defence counsel had requested the Crown Prosecution Service's help in obtaining a tape which showed the earlier incident when Mr Ebrahim entered the store, because it was thought at that time that this tape was held by the police. It then became evident that the Crown did not possess this tape, and on March 25 the defence applied successfully for a witness summons against Tesco for its production. This summons was duly served, but it did not elicit the production of the tape, and the Tesco manager did not appear at the trial on June 10 despite the summons. It appears that he had told the Crown in April that he would not be attending, presumably because he had nothing to produce, but this information was not passed on to the defence or to the court.

58 It was then stated in Form 86A that it had transpired, after further enquiries, that the videotape had been destroyed by Tesco on about May 19, 1999, some weeks after the service of the summons, and after the store manager had notified the Crown that he did not wish to attend court. The defence complained that no effort appeared to have been made to preserve the tape or to comply with the summons.

59 Evidence has been adduced by the Crown in response to this application to the effect that P.C. Webster, the officer in the case, gave evidence at the hearing on August 13, 1999 that before arresting Mr Ebrahim he had gone to the CCTV room at the store and had ascertained that the location of the alleged assault had not been recorded on film by any of the CCTV cameras. In those circumstances he had not seized any of the substantial quantity of videotapes which were being used at the time of the incident. In the statement which represents his evidence in the criminal proceedings he says that he went to view the video on monitor 7 of the area where the incident was alleged to have taken place, and that the monitor did not cover the scene.

60 We also received in evidence three affidavits by Tesco's customer service manager at this store, Mr Jeff Graham, by way of explanation of the siting of the CCTV cameras in this store. He is responsible for all security issues at the store, and he produced a big plan of the store which identified the location of the different security cameras. He said that they had not been moved since the store was opened.

They are all connected to a video recording room, where eight video recorders simultaneously record various parts of the store. The recording switches from one camera to another in a pre-programmed order. The sequence could be overridden manually if there was a need to concentrate on one particular camera and its vision.

The plan shows a 360 degree camera (Number 8) in the vicinity of the National Lottery counter which was the scene of the alleged assault and another one (Number 9) which could be directed towards the entrance of

the store. Some difficulty arose over numbering. The cameras (at least 37 in number) have one set of numbering, and the video recorders and their monitor screens have another. In his witness statement P.C. Webster said he went to view the video on monitor 7. In his first statement Mr Graham said that the video recorder No. 7 covered the camera No. 10, although it could be, and would be, switched to another camera if the need arose. In his second statement he said that "monitor No. 7 does not exist and did not exist at the time of the incident". In his third statement he said that the National Lottery counter was positioned in front of camera 8 and that it was viewable from Monitor No. 8 in the security room. He had earlier said that the image from the camera at the entrance to the store was continuously recorded on recorder No. 6.

63 During the course of the hearing we were given the original plan which was before the magistrate on August 27, 1999. The position of the cameras is indicated in manuscript on the plan, and it usefully illustrates the layout of the relevant part of the store in relation to the cameras.

64 We also received in evidence a statement by Mr Roger Coe, a senior Crown prosecutor, who had appeared for the prosecution in the lower court. He told us that he had first become involved at a hearing on June 10, 1999, at which P.C. Webster had been instructed to obtain a statement from Mr Leon Anthony relating to the status of the video. This statement, which was faxed to the court that day, is not mentioned in Form 86A or in the applicant's evidence. It reads:

"I am a security officer employed by Capital Security Services and working at Tesco, Hayes, Baisbridge. Our CCTV system runs on a system based with 247 video tapes. These tapes are used daily at the rate of seven tapes per day. This would give approx. five weeks of recording before all tapes would be taped over again. Also I would like to add that I destroyed over 300 video tapes so the store could start using new video tapes, therefore all recordings before May 19, 1999 are now destroyed."

65 Mr Coe tells us that this evidence formed the underlying basis for the argument before the magistrate on August 31, when the hearing lasted three hours. He told us that at that hearing

"P.C. Webster gave evidence that he had viewed the video, it contained no relevant evidence, and that he had viewed it following receipt of the allegation and having spoken to the witnesses. It was clear from his evidence that no cameras covered the location of the incident alleged at the time."

66 Mr Smiler, who appeared without a representative of his solicitors in attendance at the court below, did not take a note of P.C. Webster's oral evidence. We see no reason to disbelieve Mr Coe's account of what took place.

67 Because we do not have a full note of P.C. Webster's oral evidence, it is necessary to refer to his original witness statement in order to understand what he did by way of investigating the alleged offence when he was called out to the Tesco store at 11.30 p.m. that evening. His witness statement reads:

"On Friday, October 16, 1998 at about 23.30 hrs I was on duty in full uniform in a marked police vehicle in company with P.C. 156TX Hedley. Due to a call received on our personal radios, we attended Tesco Superstore, Baisbridge Industrial Estate, Hayes Road, Southall. On arrival we were met by Store Security who showed me just inside the store, where I met two Asian males. The first I now know to be Mr Rajinder Singh Chopra. The second I now know to be Mr Mohammed R. Ebrahim. In the presence and hearing of Mr Ebrahim, Mr Chopra said 'I was queuing at the Lottery counter to buy a ticket, when this man pushed into my wife for no reason. He did not apologise, so I said "Why did you push my wife?" He then turned and punched me in the face and started to shout and swear for no reason.' I said to Ebrahim 'You have heard what this gentleman has had to say, what do you have to say?' He replied 'I never punched him, I have witnesses, she stuck two fingers at me.'

I then left both men with my colleague PC 156TX and went to the CCTV room to view the video on monitor seven of the area where the incident was alleged to have taken place. The monitor did not cover the scene. I then returned and spoke with an independent witness, Mr Mark Lawrence, the duty manager of Tesco's. I said 'Can you tell me what you have seen?' He replied 'I was stood by the Lottery desk, when I saw this man pointing to Mr Ebrahim. He punched into that man's wife for no reason. When asked for an apology he punched him in the face. He was only sticking up for his wife.' I then noticed the inside bottom lip of Mr Chopra which appeared to be swollen. I advised him to contact his doctor.

At about 23.50 hrs, I said to Ebrahim 'I'm reporting you for the offence to be considered of prosecuting you for Common Assault' and cautioned him to which he became very irate and began to shout and swear."

68 It will be evident from this statement that while P.C. Webster received a version of events from both the participants before he went to see if there was any relevant video evidence, he did not make any further inquiries of Mr Ebrahim about the course of events that night. The outcome of such inquiries might have identified the importance of seeing if there was video evidence of the earlier incident at the entrance to the store. According to Mr Graham, any such evidence, if it existed, would have been available on recorder No. 6.

69 We were told that the magistrate gave no reasons for his ruling when he dismissed the application for a stay. District Judge Day (as he now is) has

very helpfully filed a short statement in response to this application. It reads:

"On August 31, 1999 at Feltham Magistrates' Court I tried an information against Mohammed Rafiq Ebrahim alleging common assault upon Rajinder Singh Chopra at Tesco Superstore, Hayes Road, Southall, Middlesex on October 17, 1998, contrary to section 39, Criminal Justice Act 1988. I was asked at the outset to stay the prosecution as an abuse of the process of the court on the ground that a video recording of an earlier incident in the store in which the accused claimed to have been abused and jostled by a group including Mr Chopra was not available. Because [Mr Ebrahim] had not been interviewed at any time, the nature of his defence (namely self-defence) and the consequent significance of the earlier encounter and any video record of it was not known until the pre-trial review on February 4, 1999.

It was not clear to me that any such earlier incident would definitely have been captured on video but what was clear was that no such recording was available despite the issue of a witness summons against the relevant staff member at the store. Indeed the staff member did not even attend court.

I was of the opinion that although the conduct of Tesco appeared cavalier, that did not alter the fundamental basis upon which I should decide the application. The only issue was whether the defendant would receive a fair trial.

- I based my decision on the following factors:
1. There was no certainty that the earlier incident had been recorded.
 2. Para. 3.4 of the Code of Practice (CPIA 1996) did not in these circumstances, months after the incident, impose a duty upon the police to search through all the recordings. That would go far beyond what was reasonable.
 3. My experience is that such recordings were unlikely still to be available after such a period.
 4. The decision to stay a prosecution is a matter of discretion for the court. The destruction of evidence may prevent a fair trial but does not automatically do so (*Beckford* [1996] 1 Cr.App.R. 94). The discretion should be used sparingly (*Meadway* [2000] Crim.L.R. 415).
 5. The defence to be raised by Mr Ebrahim was not dependent upon the existence or production of video evidence, although obviously if such evidence had existed it would have been of assistance, assuming it was as Mr Ebrahim claimed it to be. He was perfectly well able to give his account of that earlier incident in exactly the same way as if it has occurred in a place

where there was no suggestion of the existence of video cameras. The situation is more similar to that dealt with in the case of *Stallard* mentioned at p. 347 Justice of the Peace (13.05.2000) than the case of *Birmingham* [1992] Crim.L.R. 1171 referred to in the applicant's argument.

Accordingly, I declined to find that there was an abuse of the process of the court and adjourned the case to allow the matter to be dealt with by way of judicial review at the request of the defence."

70 It appears to us that the magistrate directed himself impeccably. He focused correctly on the extent of the police officer's investigative obligations pursuant to paragraph 3.4 of the Code of Practice, and on the guidance in that paragraph to the effect that the extent of the duty of investigation should be proportionate to the seriousness of the matter being investigated (see paragraph 9 above). P.C. Webster had no reason to believe that his investigations should encompass what had occurred elsewhere in the store an hour earlier, so that paragraph 3.5 of the code had no relevance (see paragraph 10 above). He made a reasonable investigation to see if there was any video evidence of the assault which was the subject of his investigation and he was satisfied that there was none. On the evidence available to us, we cannot disentangle the muddle in the witness statement over the non-existent Monitor No. 7: if the lawyers in court had made and retained a reliable note of the police officer's oral evidence on August 31, 1999 this would no doubt have removed any confusion about what he in fact saw. Any video recording of that earlier incident was therefore obliterated in the ordinary course of Tesco's business five weeks later.

71 This was not a Category 2 case because there was no evidence of any improper practice by the police. Nor was it a Category 1 case, because even if P.C. Webster should have asked some further questions of Mr Ebrahim before going off in search of relevant video evidence, the magistrate was satisfied, on reasonable grounds, that it was still possible to have a fair trial. No doubt at that trial Mr Ebrahim's representative will press P.C. Webster as to the reasons why he did not give him a better opportunity to give his full account of what happened that night before he went off to the video recording room, but cross-examination of this type is the very stuff of a criminal trial of this type. There is certainly no reason to stay the proceedings on this ground. We would therefore dismiss this application.

72 We would not wish to leave the Feltham case without expressing some concern about the way this judicial review application was presented. The "grounds of relief" on Form 86A give, in paragraphs 10-12, a very garbled version of what happened at the hearing on June 10. No mention is made of Mr Anthony's statement being faxed to the court that day, or of the fact that it showed that the contents of the relevant video tape (showing the entrance to the store) would have been obliterated within five weeks of the

date of the incident, and not, as stated in paragraph 12, some weeks after the service of the summons. Neither P.C. Webster's oral evidence on August 31, nor the content of the magistrate's ruling that day, are mentioned in Form 86A, and the misleading "facts" stated in that form are verified by a statement of a partner in the firm of solicitors acting for the applicant, who was never present at court, and who confirms, without identifying her source of information, but merely referring to "file records", that the facts stated in the statement of grounds were true to the best of her knowledge and belief.

73 If a proper statement of the facts of this case had been placed before Mitchell, we doubt very much if he would have granted leave. At the very least, he would have given the prosecutor an opportunity to state his version of the events before directing that there should be a substantive judicial review hearing.

Conclusion

74 We would suggest that in similar cases in future, a court should structure its inquiries in the following way:

- (1) In the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the videotape evidence in question? Recourse should be had in this context to the contents of the 1997 code and the Attorney-General's guidelines.
- (2) If, in all the circumstances, there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground.
- (3) If such evidence is not obtained and/or retained in breach of the obligations set out in the code and/or the guidelines, then the principles set out in paragraphs 25 and 28 of this judgment should generally be applied.
- (4) If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. The test in paragraph 23 of this judgment is a useful one.

75 We would add the following two matters by way of procedural guidance:

- (5) If a complaint of this type is raised on an appeal by a defendant from his conviction on the magistrates' court, he should not apply for the proceedings to be stayed. He should apply for an order allowing his appeal and quashing his conviction on the grounds that the original trial was unfair and the unfairness was of such a nature that it cannot now be remedied on appeal.
- (6) If a ruling on a stay application is made in a lower court, the court

should give its reasons, however briefly, and it is the professional duty of the advocates for the parties to take a note of these. If the decision is to be challenged on judicial review, this Court will expect to see a note of the lower court's reasons before deciding whether to grant permission for the application to proceed. If any relevant oral evidence was given, this Court will hope that an agreed note can be prepared, summarising its effect.

H12

Application in Ebrahim for judicial review refused. Legal aid taxation of applicant's costs.

Appeal in Mount allowed. Costs in appeal and court below to be paid out of central funds. Legal aid taxation of defendant's costs.

H13

Solicitors: Pemila & Nathan, Southall; Crown Prosecution Service; Bhatia Best, Nottingham; Crown Prosecution Service, Stafford.

E.E.