potentially prejudicial photographs in the future. Unless the trial judge specifically prohibits the jurors from reading about the case online, posting such images will constitute contempt of court.

CHRIS HUNT

CONTROLLING THE DISCRETION TO PROSECUTE

AN article of faith for English lawyers is that the Crown has a discretion to prosecute, rather than a duty to bring proceedings wherever there is evidence of a crime – as is the case with public prosecutors in some other legal systems. But the discretion to prosecute, like the duty to prosecute, has its own particular problems: namely, ensuring that the discretion is exercised intelligently and fairly. With that in mind, the law now imposes on the Director of Public Prosecutions the duty to publish his prosecution policy, and influenced by this, the courts now treat the decision to prosecute as susceptible of judicial review. Up to now, most of the case-law has involved prosecutorial inaction: coppers "copping out" and prosecutors unwilling to proceed. But, as *R. (E., S. and R.) v DPP* [2011] EWHC 1465 now clearly shows, it can sometimes be invoked against the opposite problem of excessive zeal.

When she was 12, E videoed herself performing indecent acts with her two little sisters, then aged four and two. Two years later, officers from the national Child Exploitation and Online Protection Centre discovered this on the internet. E's story was that she had been groomed and pressured to do this by an adult paedophile – an explanation that seemed plausible, given the presence on the internet of other indecent videos, this time of E alone, being "remotely abused".

Informed of this, the local authority called a case-conference with a "strategy group" composed of social workers, representatives of the NSPCC, the probation service, the child and adolescent mental health service, the children's school and the police. All participants believed that E was herself a victim and in need of help rather than of punishment, except for one. This was the police, who thought she should be prosecuted. They sent the papers to the Crown Prosecution Service, which endorsed their view. In consequence, E found herself facing a Crown Court trial.

At this point the children's mother, acting on their behalf, sought to have the decision of the CPS judicially reviewed. Her challenge succeeded, and the decision to prosecute was quashed on the ground that it conflicted with the prosecution policy of the CPS as officially proclaimed.

When read together, three documents – the Code for Crown Prosecutors (published under section 10 of the Prosecution of Offences

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Act 1985), the CPS's published policy for handling child abuse cases and the CPS's official policy on the safeguarding of children involved in criminal proceedings – stress the need for prosecutors to consider the welfare of children, and also to consider the views of the victim's family. In its report the strategy group had explained why it would be not only bad for E herself if she were prosecuted, but also devastating for her family (including the little sisters who were the victims of her offence). Yet when announcing its decision to prosecute, the CPS, though stating that the strategy group's report had been "considered", had failed to address any of the arguments contained in it.

In her legal challenge to the CPS decision the mother also deployed arguments based on the UK's international obligations: in particular, under the European Convention on Human Rights and under the United Nations Convention on the Rights of the Child. These arguments, by contrast, were rejected. This aspect of the case is interesting; but for reasons of space I shall leave it to others (e.g. Malkhani, [2011] Crim. L.R. 943) and deal here with just two different points.

The first relates to forum. The proceedings by which the decision to prosecute was challenged in this case were civil ones: an application for judicial review, made in the Administrative Court. Whilst readily admitting judicial review as a proper method for challenging prosecutorial inaction, the civil courts have hitherto discouraged its use to challenge allegedly improper decisions to proceed. The right place to challenge a decision to prosecute, they have said, is the criminal court that is dealing with the prosecution. A criminal court can stay a prosecution if it considers it to be an abuse of process; and so a defendant who claims to be the victim of an improper exercise of the discretion to prosecute should raise the matter by inviting the criminal court to exercise this power. This point was made, inter alia, by Lord Steyn in *ex parte. Kebiline* [2000] 2 A.C. 326, and his remarks were endorsed and applied by the Administrative Court in *R. (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin). But, said the Administrative Court, all these earlier cases involved applications for judicial review made by disgruntled criminal defendants. Different considerations apply in cases where, as here, the applicants include the victims of the offence – who, unlike the defendant, have no official standing before the criminal courts. In taking this position, the Administrative Court has added to the list of recent cases which, when viewed together, show a growing tendency to enhance the legal status of the victim – for long the "forgotten person" in the criminal justice system.

The second general point concerns the potential application of the law forbidding sexual acts with juveniles to defendants who are juveniles themselves. This part of the criminal law exists to protect children

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from sexual exploitation by predatory adults. In its present form, however, it applies equally to sexual acts – even the most trivial ones – when done by juveniles with other juveniles; and this is so even where, unlike in the present gruesome case, the persons are of the same age and willingly consent. Nine years ago, when what is now the Sexual Offences Act 2003 was before Parliament, the Government was invited to support the decriminalisation of sexual acts between consenting juveniles, and resisted. No such exemption was required, it said, because the CPS would publish guidelines to regulate its prosecution policy in such cases, and these would prevent needless or oppressive prosecutions being brought. Sceptics were dissatisfied with this response. What recourse would there be, they asked, if the guidelines are not applied? This new and welcome decision suggests at least a partial answer.

J.R. SPENCER

BEING THERE

SUPPOSE that Jim is walking to the shops. It is nine o'clock in the morning. Nearby is Kevin, driving home from an all-night bender and still thoroughly intoxicated. At two minutes past nine, Kevin mounts the pavement and collides with Jim, killing them both. Does Jim's walking cause Kevin's death? Surely not. But how do we distinguish this example from two recent causation decisions, *Williams* [2010] EWCA Crim 2552, [2011] 1 W.L.R. 588 and *MH* [2011] EWCA Crim 1508?

Both cases concerned the notorious offence of causing death by driving when unlicensed, disqualified, or uninsured; contrary to section 3ZB of the Road Traffic Act 1988. The Act makes it a crime, imprisonable for up to two years, if D "causes the death of another person by driving a motor vehicle on a road" when, at the time, D is committing any one of three predicate offences: driving without a licence, driving whilst disqualified, or driving while uninsured.

This is a highly problematic example of constructive liability. By committing one of the predicate offences, D becomes a strict-liability risk taker. Should anyone die while he is doing so, he commits a very serious crime. But the aggravating circumstance, the very feature that makes the crime so serious, is a matter of strict liability. Indeed, so are the predicate offences. That is neither right nor fair. *Williams* and *MH* confirm that D need not be at fault in any way for the death. Yet he is specifically punished for causing that death.

Not only is there no fault requirement, but traditional causation requirements are also attenuated by the statute. There is no criterion of causal salience, that the death be in some way related to the

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