212, C.A.). There is also a strong presumption against Parliament intending a statute to operate to impair an existing substantive right (*ibid.*, noting Bennion, *Statutory Interpretation* (3rd edn., 1997), pp. 235–242).

A final point concerns litigation privilege. Toulson J. was not directly concerned with that second species of legal professional privilege, although he discussed it briefly (pp. 693G–694C). Could the Rule Committee lawfully introduce a rule requiring a party to disclose even unused witness material or expert reports (*cf.* the ominous comments of Scott V.-C. in *Secretary of State for Trade & Industry* v. *Baker* [1998] Ch. 356, 363–364, 366–370, C.A.)? This is hardly an instance of a fundamental right. But is it decisive that the communication is confidential? The point might prove a nice one.

N.H. Andrews

PROCEDURAL ANOMALIES

For centuries, English criminal procedure regarded the "surprise witness" as a legitimate weapon, for the prosecution as well as the defence. In a case in 1823 Park J. complained that the defendant had seen the depositions in advance of trial. "The prosecutor or his solicitor might have access to them, but not the party accused. For what would be the consequence if the latter had access to them? Why, that he would know everything which was to be produced in evidence against him—an advantage which it was never intended should be extended towards him ..." (J.F. Stephen, *History of the Criminal Law of England* (1883), vol. I, p. 228).

During the nineteenth century this attitude changed, to the extent that the defendant acquired the right to advance notice of the evidence the prosecution proposed to call against him in cases that were to be tried on indictment. However, this change did not apply to summary trial in the magistrates' courts, where the prosecutor could still spring evidential surprises on him.

This mattered little in the days when summary trial was reserved for truly trivial cases, but as the jurisdiction of the magistrates' court was gradually extended, so it began to matter more. During the 1970s and 1980s, there was public pressure to extend "advance disclosure" to summary trial. To this the Government reluctantly gave way, in 1977 promoting legislation that eventually led to the Magistrates' Courts (Advance Information) Rules 1985, which are still in force. These give the magistrates' court defendant some

rights, but ones markedly inferior to those he has in trials on indictment. On summary trial, the defendant has a limited right to be informed about the prosecution case where he is accused of an "either-way offence", and if it is a purely summary offence, no right to advance disclosure whatsoever.

Initially the debate about disclosure centred on the duty of the prosecution to inform the defence of the evidence that it proposed to use at trial. In the 1980s, it began to centre around a slightly different matter: the duty (if any) of the prosecution to tell the defence about the material it had gathered in the course of the enquiry, and which it did not intend to use because it suggested that the defendant was innocent. In the case of *Judith Ward* [1993] 1 W.L.R. 619, the Court of Appeal ruled that the prosecution must in principle tell the defence about such "unused material", and give them access to it. This new judge-made rule was codified (and also restricted in certain ways) by the Criminal Procedure and Investigations Act 1996.

The new duty on prosecutors to share "unused material" applies across the board: not only to proceedings on indictment, but also to all shapes and forms of summary trial, including the summary trial of purely summary offences. And this, in combination with the grudging Magistrates' Courts (Advance Information) Rules already mentioned, gives rise to an extraordinary paradox. In summary trials of purely summary offences, the Criminal Procedure and Investigations Act 1996 now requires the prosecutor to share with the defence the evidence that he does not intend to use, but the Magistrates' Courts (Advance Information) Rules still allow him to keep from the defence the evidence he does!

This remarkable anomaly was publicly exposed in *R.* v. *Stratford JJ., ex p. Imbert* [1992] 2 Criminal Appeal Reports 276. The defendant, following an incident in a public lavatory, was prosecuted for offences of threatening behaviour and assault on the police—both of which are summary only. The Crown Prosecution Service, relying on the Magistrates' Courts (Advance Information) Rules, refused to give the defence access to the statements of the prosecution witnesses. In response to this, the defence asked the magistrates to stay the prosecution as an abuse of process, and when the justices refused, sought judicial review of their refusal. Before the Divisional Court, the defence argued that the prosecutor was now obliged to tell the defence the evidence he intends to call in every type of case. This must be so, he said, for two reasons. The first was that the prosecutor's right to refuse to disclose the evidence he intends to call had been in some way overridden by his new duty to disclose "unused material". The second was that his

refusal contravened the defendant's right to a "fair trial", as guaranteed by Article 6 of the European Convention on Human Rights.

The Divisional Court rejected both arguments. The first failed because, as the court observed, giving advance notice of the evidence you intend to use is one thing, and sharing the evidence you do not intend to use is another; thus later legislation on the second does not repeal or qualify earlier legislation on the first. The other argument failed because the commodity that Article 6 of the Convention protects is not advance disclosure, but "fair trial". A trial is not a fair one if the defendant is denied the chance to meet the case against him; but even if the prosecution hides the evidence until the day of trial, the court can still ensure the defendant has a fair trial by ordering an adjournment to give him a proper opportunity to meet the case. As Buxton L.J. said, "The case might of course have to be assessed again once the trial had been completed, and its whole conduct fell to be reviewed. But that is a very different matter from saying that the Convention forbids that stage ever being reached."

Although a defeat for this particular defendant, this decision is in a limited sense a victory for defendants generally. Whilst rejecting the defendant's case that he had a right to see the statements, the Divisional Court said that it would be good practice for the CPS to disclose them voluntarily on request—and it hoped that in future it would do so.

If the CPS heeds this sensible advice, the anomaly this case exposes will no longer matter. However, the face of English criminal procedure will still be disfigured by it. And this sort of muddle will continue to be made, I believe, as long as English criminal procedure remains in its present chaotic state of non-codification. If all the major statutory rules on criminal procedure could be just brought together in one single statutory text, as was done in Scotland in 1975, legislative blunders of this sort might be noticed before they are committed.

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