counter-productive: any subsequent prosecution, at least by the CPS, would have no reasonable prospect of success because the court hearing it would regard it as an abuse of process (relying on the decision of the House of Lords in *Jones* v. *Whalley* [2006] UKHL 41, [2007] 1 A.C. 63, noted at [2007] C.L.J. 11). The Divisional Court strongly disagreed, quashing the decision not to prosecute. The Court stressed the "very considerable responsibility" placed on the CPS: by a decision to offer a conditional caution to an offender, the court is effectively bypassed:

> In this case, decisions were taken without regard to the Code for Crown Prosecutors, the Director's guidance on Conditional Cautioning and the Secretary of State's Code of Practice. It seems to me astonishing, as it would no doubt to many members of the public, that the CPS could seriously contemplate not prosecuting someone who, it was alleged, deliberately went to a person's house at night, attacked him inside that house with some ferocity (including kicking him) in the presence of his (obviously very frightened) partner (Goldring L.J., at [57]).

The Court strongly disagreed that any subsequent prosecution would be an abuse of process, Sweeney J. going so far as to say that "it is troubling, to say the least" that the DPP and his senior lawyers did not appear to see that a prosecution in this case would be the reverse of an abuse (at [59]). He stated that the affront to justice of the decision not to prosecute would be put right by a prosecution. This decision illustrates the flood of arguments based on abuse of process which has reached trial and appellate courts. It will not stop them.

Transparency is one key to good decision-making. Yet the pressure to save money has encouraged the Government to bypass the criminal courts: this Government has presided over the closure of 150 courts since 1997 (see House of Commons Written Answers for 5 February 2009, Hansard col. 1401W). On 13 October 2009 it announced plans to close 21 more. Instead, we have largely invisible alternative "disposals" by a wide variety of criminal justice agencies. Very little research has been undertaken into the use and enforcement of these disposals. In particular, qualitative research into decision-making operational practices is crucial. And, if the Government truly wants to develop greater confidence in the criminal justice system, why don't they encourage open and local justice in magistrates courts?

NICOLA PADFIELD

NEGLIGENCE AND DEFENDANTS WITH SPECIAL SKILLS

DISCUSSIONS of the objective standard of care in the criminal law tend to focus on its treatment of incompetent defendants. Relatively little

has been said about its application to defendants who are especially capable. This focus is understandable. For one thing, the incompetent are much more likely to fall short of this standard than the gifted. Another reason for this focus is that it is a greater philosophical challenge to justify holding the incompetent to the objective standard than those who have the capacity to meet it. Nevertheless, it is worth considering how the standard applies to especially capable defendants since it raises some interesting issues concerning the definition of negligence. These issues surfaced in the decision of the Court of Appeal in *R.* v. *Bannister* [2009] EWCA Crim 1571. The appellant in this case was an experienced road traffic police officer who had been convicted of dangerous driving contrary to section 2 of the Road Traffic Act 1991, a negligence-based offence. The dangerous driving consisted in speeding at 120 m.p.h. at night time and in torrential rain (the appellant was not, apparently, responding to an emergency call). The driving culminated in the appellant losing control of his vehicle and crashing it into a copse of trees. Before the Court of Appeal, the appellant submitted that the jury, in deciding whether he had been negligent, should have been instructed to take account of the fact that he possessed exceptional driving skills (he had completed an advanced driving course). Thomas L.J., speaking for the Court of Appeal, rejected this submission. He did so on the basis that to take account of the appellant's skill would mean "that the standard being applied [would be] that of the driver with special skills and not that of the competent and careful driver" and that to apply such a standard would be to depart from the objective test for dangerous driving laid down by Parliament (at paras. [16]–[18]).

One difficulty with the appellant's submission is that it did not make it clear how he wanted his exceptional driving ability to be taken into account. One possibility is that he wanted the reasonable person to be clothed with his special driving skill. The foregoing dictum from Thomas L.J.'s opinion suggests that this is how his Lordship interpreted the appellant's argument. However, it is highly unlikely that this is what the appellant had in mind. Such an argument would have been counterproductive since, if accepted, it would have resulted in the appellant being held to a more exacting standard of care than would otherwise have been the case. Why would the appellant want to be held to a higher standard than that of the ordinary driver? Another possibility is that the appellant maintained that his special driving skill should have been considered in calculating the risk of injury that his driving presented. If this is what the appellant meant, he would have conceded that the reasonable driver would not have driven as quickly as he did but contended that, because of his skill, he could drive at the speed concerned without generating a risk of injury greater than that

which the reasonable driver would have tolerated. It seems much more likely that this is the position that the appellant took when he submitted that his driving skill should be taken into account.

If, as has been suggested, Bannister intended for his special skill to be put in issue in the second-mentioned sense, the decision is problematic since it did not address his contention. How, then, should the Court have dealt with it? This depends on how negligence is defined. If negligence entails creating a larger risk of injury than the reasonable person would have created, the Court should have allowed the appeal. The jury should have been instructed to consider the appellant's special skill since it was plainly relevant to whether the risk of injury that he created exceeded that which the reasonable driver would have countenanced. If, however, negligence consists in acting differently from how the reasonable person would have acted (the classic definition of negligence offered by Alderson B. in *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Ex 781, 784; 156 E.R. 1047, 1049), the fact that the appellant was a skilled driver was irrelevant. The only thing that mattered was that the appellant drove faster than the reasonable driver would have driven. This is not the place to discuss the merits of these definitions of negligence. The important point to note is that the case of the especially skilled defendant brings into sharp relief the difference between these formulae. This is one reason why theorists need to study in greater detail how special skills enjoyed by the defendant should be taken into account in respect of negligence-based offences.

JAMES GOUDKAMP

MESOTHELIOMA AND RISK AIRED IN THE COURT OF APPEAL

IN *Fairchild* v. *Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32 the claimant had been exposed to asbestos fibres by successive negligent employers and later developed mesothelioma; because of the limitations of science, it was not possible to identify which employer was the source of the fatal fibre, but it must have been one of them. In these exceptional circumstances, the House of Lords relaxed the "but for" test of causation and allowed the claimant to recover damages from any employer who had materially increased the risk of mesothelioma. *Fairchild* left the precise boundaries of this exception unclear, but they were clarified in *Barker* v. *Corus UK Ltd.* [2006] 2 A.C. 572, where the House of Lords decided two related issues: first, that the *Fairchild* exception was not confined to its precise facts, but applied to a claimant who also had a period of asbestos exposure while he was