



## Position Paper

### Misdirection

### Introduction

1. In solemn criminal procedure<sup>1</sup>, it is the responsibility of the presiding judge, after the legal representatives have given their closing speeches, to charge the jury<sup>2</sup>. The charge to the jury forms a vital part of the “framework” that makes the jury’s verdict comprehensible<sup>3</sup>. In the course of the charge, the judge provides an explanation of the matters of law that the jury will be required to apply in reaching their decision, linking these, where appropriate, to the facts in issue. He may also summarise some or all of the evidence.
2. A ground of appeal, usually described as “misdirection”, may arise from the judge’s charge in a number of different ways. It is a misdirection if the judge states the law incorrectly or applies it wrongly to the facts. It is also a misdirection if the judge provides a misleading or unbalanced summary of the evidence available at trial. A misdirection will, however, only lead to a miscarriage of justice if it is deemed to be “material” to the case.
3. Misdirection is a common ground of review for the Commission<sup>4</sup>. It is, proportionately, an even more frequent ground of referral. In 16% of the Commission’s referrals<sup>5</sup> on conviction points misdirection was the main ground of review, placing the ground second only to fresh evidence in terms of total volume of conviction referrals. Some of these cases have had a significant impact upon the law

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<sup>1</sup> Trial by jury with a presiding judge or sheriff

<sup>2</sup> In summary procedure, the sheriff or justices of the peace act(s) as finder(s) of fact, and thus there is no need for a charge.

<sup>3</sup> *Judge v United Kingdom* 2011 SCCR 241; *Beggs v HMA* 2010 SCCR 681

<sup>4</sup> Misdirection was the main ground of review in 5% of the Commission’s aggregate caseload from 1 April 1999-31 March 2015.

<sup>5</sup> To April 2015

in this area. *Liehne v HMA*<sup>6</sup>, for example, established that, in cases involving complex forensic evidence, it may be incumbent upon the trial judge to focus the attention of the jury upon the contentious issues.

## The Commission's Position

### Misdirection on the Law

4. The directions appropriate in any particular case will vary depending on the areas of law engaged. It would not be possible to cover all of the possibilities. The *Jury Manual*<sup>7</sup>, published by the Judicial Institute, catalogues standard directions relating to the areas of law that arise most frequently.

5. In *Sim v HMA*<sup>8</sup>, the court observed that the directions “must be looked at in the context of the oral tradition in which they are given as part of the trial process.” It continued:

*“The words should not be scrutinised in isolation or as if they were part of a conveyancing document or a provision in a penal statute (Beck v HM Advocate [[2013] HCJAC 51...]) Minor deviances from standard formulae will not normally be regarded as productive of miscarriages of justice, if the directions on a particular topic are, when the charge is read as a whole, clear and correct”*

6. It is important to consider any direction within the context of the charge as a whole<sup>9</sup>. Whilst an isolated passage may appear to be misleading, this may not be so when considered in conjunction with the remaining directions. The charge is not to be evaluated as an “academic treatise” on the law<sup>10</sup>. The extent of the directions required in relation to any particular legal issue will depend on the circumstances of the case at hand.

7. It is worth noting that the directions required in any particular case are not constrained by the manner in which the parties presented it in their closing speeches<sup>11</sup>. In *Ferguson v HMA*<sup>12</sup>, a case in which defence counsel had invited the

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<sup>6</sup> 2011 SCCR 419

<sup>7</sup> [http://www.scotland-judiciary.org.uk/Upload/Documents/mrcJURY\\_MANUAL\\_JAN2011nosignature.pdf](http://www.scotland-judiciary.org.uk/Upload/Documents/mrcJURY_MANUAL_JAN2011nosignature.pdf)

<sup>8</sup> [2016] HCJAC 48

<sup>9</sup> *Withers v HMA* 1947 JC 109

<sup>10</sup> *Grenfell v HMA* [2013] HCJAC 125

<sup>11</sup> Although, in relation to the ability of the Crown as “master of the instance” to restrict the charges under consideration, see *Buchanan v Hamilton* 1990 SLT 244

<sup>12</sup> 2009 SCL 250

jury to acquit his client or convict him of murder, the court held, following the approach in *R v Coutts*<sup>13</sup>, that it was incumbent upon the trial judge nonetheless to direct the jury in relation to any “obvious” alternative verdict, in that case culpable homicide. In *Coutts*, Lord Bingham of Cornhill explained that this should be taken to mean: “alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial.” Whether or not an alternative verdict is available will depend upon the facts of the case.

### Misdirection on the Evidence

8. Generally speaking, a trial judge is obliged to refer in the charge to the evidence only insofar as it is necessary to do so in order to explain to the jury how to apply his directions in law. Canvassing the evidence is primarily the responsibility of the Crown and the accused<sup>14</sup>. The judge may, nonetheless, choose to summarise some or all of the remaining evidence. This is more likely to be appropriate in long and complex cases<sup>15</sup>. Following *Liehne v HMA*, there are some cases in which the nature of the evidence requires the judge to focus the issues at hand<sup>16</sup>, but these are not common; the court generally affords a wide discretion to the trial judge in this regard.
9. If a judge does decide that it is appropriate to go into the evidence, whether in full or in part, then, in offering the jury a summary of evidence, he must do so accurately and in a balanced manner<sup>17</sup>. An applicant who seeks to found on imbalance must demonstrate that, viewing the charge as a whole, “its tenor was unbalanced in the sense of demonstrably favouring the Crown upon a contentious issue of fact raised at trial.”<sup>18</sup> If a witness’s position has vacillated, it would not be sufficient to refer merely to what was said in examination-in-chief. The trial judge must be careful not to trespass on the province of the jury by expressing or implying his own view on the credibility or reliability of the evidence<sup>19</sup>. Where the judge has presented a misleading or unbalanced summary of the evidence, this will not be readily rescued by general directions relating to the differing functions of judge and jury or an

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<sup>13</sup> [2007] 1 Cr App R 6

<sup>14</sup> *Sim v HMA*

<sup>15</sup> *Shepherd v HMA* 1997 SLT 525 at page 528

<sup>16</sup> Although cf *Younas v HMA* [2014] HCJAC 114 & *Geddes v HMA* 2015 SCL 342

<sup>17</sup> *Shepherd v HMA*

<sup>18</sup> *Snowden v HMA* [2014] HCJAC 100

<sup>19</sup> *Simpson v HMA* 1952 JC 1; *O'Donnell v HMA* [2014] HCJAC 43

instruction to disregard any impression that the jury may have formed in relation to his own views on the evidence<sup>20</sup>.

## Materiality

10. It is well established that an error by the trial judge does not necessarily constitute a miscarriage of justice. The High Court will consider the materiality of the misdirection upon which an appeal is based. It will consider the misdirection in the context of the trial and the directions given as a whole, before deciding whether or not it may have affected the jury's understanding of the case to the extent that the appellant did not receive a fair trial.
11. Until recently, there was little in the way of guidance as to the test to be applied in determining whether a misdirection is material. In *Fraser v HMA*<sup>21</sup>, Lord Hope noted that there appeared to be some dissonance between two (then) recent High Court judgements, *Coubrough's Executrix v HMA*<sup>22</sup> and *Black v HMA*<sup>23</sup>. In the former case, the court expressed the view that the test in *McInnes v HMA*<sup>24</sup> ought to be used in misdirection cases, whilst in the latter, the court doubted the relevance of the test to a misdirection point. Noting the disagreement, the court in *McGrory v HMA*<sup>25</sup>, a misdirection case that post-dated *Fraser*, took the view that it lacked the authority to determine the issue conclusively, but, in the face of a Crown concession, was content to proceed on the assumption that the *McInnes* test was appropriate. More recently, in *Brodie v HMA*<sup>26</sup>, the court rejected the contention put forward by counsel for the appellant to the effect that *McInnes* ought to be adopted as a general standard for the assessment of miscarriage of justice, but appeared to apply a functional equivalent<sup>27</sup> to a ground relating to a misdirection on dock identification. The approach that the court took in *Brodie* leads the Commission to conclude that a *McInnes*-type approach is correct in this category of cases<sup>28</sup>.

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<sup>20</sup> *O'Donnell v HMA*

<sup>21</sup> 2011 SCCR 396

<sup>22</sup> 2010 SCCR 473

<sup>23</sup> 2011 SCCR 87

<sup>24</sup> 2010 SCCR 286

<sup>25</sup> 2013 SCCR 113

<sup>26</sup> 2013 SCCR 23

<sup>27</sup> At paragraph 32: "There was no realistic possibility that the jury would have returned a different verdict had such a warning been given."

<sup>28</sup> Cf Renton & Brown, *Criminal Procedure*, 6<sup>th</sup> Ed at paragraph 29-30.2 and *Duffy v HMA* 2015 SCL 544 at paragraph 24

12. Where a misdirection has been established, the question to which the Commission will apply its mind is thus whether there is a real possibility that, had there been no misdirection, the jury might have delivered a different verdict.

### **Specific Considerations**

13. In cases in which it is contended that there has been a misdirection, it will invariably be necessary to have recourse to the charge to the jury. If the case has been the subject of appeal proceedings, the charge should be among the papers obtained from Justiciary Office during the stage 1 process. If it has not, it should be possible to have the charge transcribed. It may also be helpful to have access to the Crown and defence speeches. These are unlikely to have been transcribed. Where it is interested in a particular passage from the speeches, the Commission will consider whether it is appropriate to listen to the audio recording at Justiciary Office rather than requesting a transcription.

14. Where it is suggested that the trial judge has misdirected the jury in relation to a matter of law, it may be beneficial to consult the *Jury Manual*. Whilst not intended to be prescriptive with regard to the form of words that trial judges should use<sup>29</sup>, a significant deviation may be indicative of misdirection.

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<sup>29</sup> *Deeney v HMA* 2014 SCL 858 at paragraph 19

