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Е. В. Попова

ИСПОЛЬЗОВАНИЕ КОНЦЕПТОВ (ОСНОВНЫХ ПОНЯТИЙ) ЮРИСЛИНГВИСТИКИ В СУДЕБНЫХ АКТАХ С ТОЧКИ ЗРЕНИЯ ИХ ДИСКУРСИВНЫХ ХАРАКТЕРИСТИК И СТРУКТУРЫ ТЕКСТА

МЕТОДИЧЕСКИЕ РЕКОМЕНДАЦИИ

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Попова, Е. В.

П58 Использование концептов (основных понятий) юрислингвистики в судебных актах с точки зрения их дискурсивных характеристик и структуры текста. [Электронное издание] : методические рекомендации / Е. В. Попова. – Уфа : УЮИ МВД России, 2018. – 62 с.

Методические рекомендации включают в себя теоретический и практический материал (упражнения), описывающий использование концептов (основных понятий) юрислингвистики в судебных актах с точки зрения их дискурсивных характеристик и структуры текста.

Данные методические рекомендации предназначены для профессорско-преподавательского состава и обучающихся в образовательных организациях системы МВД России.

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СОДЕРЖАНИЕ

ПРЕДИСЛОВИЕ

Целью настоящих методических рекомендаций является рассмотрение экстралингвистических средств, используемых при организации текстов судебных актов англо-говорящих стран. Абсолютно ведущую роль в кодировании такой информации играют вербальные средства, но велико значение и невербальных средств, способствующих созданию особой композиции данного вида текста.

Основной единицей коммуникации является текст. В процессе общения между юридическими и физическими лицами используется определенный языковой код, который представляет собой систему языковых знаков и правил их использования. Адресат в результате использования языкового кода создает конкретные тексты в письменной или устной форме. Реципиент должен его декодировать, учитывая элементы поведения, связанные с определенной традицией, различия в вербальном и невербальном поведении носителей различных языков, отличия в речевом этикете и картинах мира. Переработка текста состоит в сопоставлении информации с получаемой из текста, которая кодируется средствами литературного языка. Типовой языковой код того или иного текста предопределяется коммуникативной функцией, которую такой текста выполняет в определенном социуме.

В настоящих методических рекомендациях рассматриваются экстралингвистические средства организации текстов судебных решений англо-говорящих стран. Необходимо отметить, что данные тексты находятся в открытом доступе на сайтах судов. Публикуя акты в открытом доступе, суды обеспечивают принцип прозрачности правосудия. Однако, соблюдая права граждан на неприкосновенность частной жизни, личную и семейную тайну, защиту чести и деловой репутации граждан и компаний, при публикации из текстов судебных актов исключают персональные данные.

С целью изучения особенностей структурно-композиционной организации текстов судебных решений в настоящем издании предлагается курсантам исследовать судебные акты Апелляционного суда Англии и Уэльса (гражданские дела) (England and Wales Court of Appeal (Civil Division) Decisions), решения Верховного суда Ирландии (High Court of Ireland Decisions), решения Верховного суда Новой Зеландии (New Zeland High Court Judgments), Верховного суда Ямайки (Supreme Court Of Judicature Of Jamaica) и Верховного суда США (U. S. Supreme Court). Можно заметить, что суд Англии и Уэльса, суд Ирландии и суд США основной своей целью ставят обеспечение доступа к информации о

деятельности судов, заботясь об общих моментах деперсонификации. Верховный суд Новой Зеландии и Верховный суд Ямайки ставят своей целью не только обеспечение доступа, но и сохранение документальности данной информации, так как пользователь может работать с документом именно в том виде, в котором документ был создан. С этой точки зрения судебные решения Новой Зеландии и Ямайки представляют большой интерес для исследования.

1. Судебное постановление как вид текста. Паралингвистические средства

Судебное постановление как вид текста имеет своеобразную структуру и ее оформление. Несомненно, вербальные средства обладают определяющей ролью при информационном кодировании, однако особая композиция, характерная для данного вида текстов, строится с помощью невербальных средств. Структурно-композиционные средства, используемые в конкретной ситуации, состоящие из множество факторов, которые имеют значение для содержания самой коммуникации, относятся к области изучения паралингвистики. Паралингвистика как научная дисциплина занимается изучением факторов, сопровождающих речевое общение и участвующих в передаче информации. В своем словаре доктор психологических наук М. И. Еникеев дает следующее определение: «паралингвистические средства (от греч. para –около и лингвистика) – невербальные (неречевые) средства передачи информации. Различаются три вида паралингвистических средств: фонационные, кинетические и графические (в письменной речи)». В этом ключе необходимо выделить два понятия: «паралингвистика» и «параязык», где паралингвистика представляет собой науку о неязыковых средствах, а под параязыком подразумевается совокупность самих средств, участвующих в языковой коммуникации.

Под паралингвистикой изначально рассматривали все виды кинесики, все виды фонации (от говорения до вокального искусства) и все виды общения с участием «ситуативного контекста» (от диалога до врачебного интервью). В настоящих рекомендациях под паралингвистическими средствами понимаются инструменты, употребляемые в письменном языке (восклицательные знаки, многоточие, комбинации восклицательных и вопросительных знаков, рисунки, чертежи, графики, графическая сегментация текста и его расположение на бумаге, шрифтовой и красочные наборы, необычное написание). Параязык представляется совокупностью самих средств, участвующих в языковой коммуникации.

Любой связный текст, раскрывающий определенную тему и выполняющий соответствующую коммуникативно-прагматическую функцию, представляет собой высшую коммуникативную единицу, организованную в соответствии с его коммуникативно-прагматической нормой. В изучаемых нами судебных решениях такими факторами, участие которых в вербальном (письменном) общении обусловливается их паралингвистической функцией, являются графическая сегментация текста

и его расположение на бумаге, шрифтовой набор, необычное написание, т. е. графика, линии, отделяющие название от остального текста, квадратные и круглые скобки, буквенные обозначения и другие.

Являясь носителями определенной информации, паралингвистические средства приобретают особую значимость в тексте. Так, при восприятии письменного текста получатель информации лимитирован только узким каналом, а именно письменными знаками определенного набора. Эти условия и накладывают больше ограничений на использование паралингвистических средств в письменной речи.

Требования современной коммуникации, особенности передачи и восприятия информации, тенденция к росту её визуализации в обществе обусловливает активное изучение языковедами семиотически осложнённого, гетерогенного текста. Исследуя проблемы текстовой гетерогенности, отечественные и зарубежные ученые применяют разнообразные термины – «поликодовый текст» (Г. В. Ейгер, В. Л. Юхт), «гибридный текст» (В. Е. Чернявская), «изовербальный комплекс» (А. А. Бернацкая), «иконо-текст» (М. Нерлих) «видеовербальный текст» (О. В. Пойманова), и некоторые другие. Широкую известность получил термин Ю. А. Сорокина и Е. Ф. Тарасова «креолизованные тексты» – «тексты, фактура которых состоит из двух негомогенных частей (вербальной языковой (речевой) и невербальной (принадлежащей к другим знаковым системам, нежели естественный язык)».

При работе с такими текстами следует обратить внимание на членимость текста. И. Г. Гальперин придал членимости текста статус текстовой категории как свойство текста в своей работе «Текст как объект лингвистического учения». Категория членимости, с одной стороны, имеет субъективную природу, так как она всегда интенциональна (запрограммирована автором) и экстенсиональна (осмыслена читателем). С другой стороны, она объективно обусловлена необходимостью отражения мира в его упорядоченности и устроенности. Членимость текста также напрямую связана с характером человеческого мышления, включающего одновременно операции анализа и синтеза поступающей информации, взаимодополняющие друг друга, что также объясняет объективную обусловленность этой категории.

И. Г. Гальперин разделил членимость на два вида, отмечая, что «размер части обычно рассчитан на возможности читателя воспринимать объем информации "без потерь"»:

1) объемно-прагматическое (синтактико-смысловое), когда отрезки текста расположены последовательно и ориентированы на оптимальную организацию текстовой информации. Этот вид членения связан с

изучением единиц, которые по сложившейся традиции называются сверхфразовыми единствами (СФЕ), изучающимися под разными углами зрения и лингвистами, и литературоведами;

2) контекстно-вариативное (или композиционно-смысловое), которое предполагает различные типы передачи информации и реализуется в формах речи (повествование, описание, рассуждение), а также в элементах композиции как способе содержательно-смысловой упорядоченности текста (абзац, параграф, раздел, глава и т. д.).

Эта особого рода интертекстуальность в виде ссылок на законы, используемые в ходе судебного процесса, служит для аргументации концептов.

Практическая часть

Упражнение 1.

Изучите примечание к приговору Верховного суда Новой Зеландии по уголовному делу Королева против Кларка Джона Периско (R v Clarke John Persico) от 27 сентября 2016 года и назовите паралингвчистические средства, используемые в данном документе.

Hearing: 27 September 2016

Counsel: M Wong for Crown
S J Gill for Defendant

Indication: 27 September 2016

SENTENCING NOTES OF CLIFFORD J

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[1] Mr Persico, you appear for sentencing having pleaded guilty to:

(a) two representative charges of being in possession of methamphetamine for supply;[1]

Упражнение 2.

Изучите решение Верховного суда Ямайки по гражданскому иску Эррол Бахас против Совета прихода Уэстморленд, Чарльз Бехари и Опал Бехали (Bacchas, Errol v Westmoreland Parish Council, Beharie, Charles and Beharie, Opal) от 12 февраля 2016 года, обращая внимание на абзацы, их нумерацию и поднумерацию. Выделите причину выделения такого количества абзацев и определите микротему каждого.

[1] By Notice of Application filed on the 29th September 2015 the Defendants seek:

a) Leave to enlarge time to appeal against an Order made on the 21st April 2015 that the Defendants pay costs to the Claimant on applications at a Case Management Conference and that half the costs on Case Management Conference be costs in the claim.

b) That Leave to Appeal the Order of the Judge awarding costs against the Defendant in an Interlocutory proceeding in which the discretion to award costs is prescribed by Law.

c) An Order that proceedings to recover costs awarded to the Claimant to be taxed or agreed be stayed pending the determination of this Application.

Упражнение 3.

Изучите в решение Апеляционного суда Англии и Уэльса по гражданскому иску Крукс против ООО Хендрикс Ловелл (Crooks v Hendricks Lovell Ltd) от 15 января 2016 года и обратите внимание на оформление цитаты.

Предположите причину подобного выделения.

11. Hendricks Lovell made its offer to settle the claim under CPR Part 36 on 12 September 2012. The offer was made in the standard form N242A "Notice of offer to settle". In the box on the first page of the offer form the offer was stated to be:

"£18,500 net of CRU and inclusive of interim payments in the sum of £18,500."

On the second page of the form, in the section headed "To be completed by defendants only", the box against the statement "This offer is made without regard to any liability for recoverable benefits under the Social Security (Recovery of Benefits Act) 1997" was ticked.

Упражнение 4.

Изучите в решение Апеляционного суда Англии и Уэльса по гражданскому иску Крукс против ООО Хендрикс Ловелл (Crooks v Hendricks Lovell Ltd) от 15 января 2016 года и обратите внимание на нумерацию абзацев и их подзаголовки, выделенные курсивом или жирным шрифтом.

Conclusion

49. I would therefore allow the appeal.

Lady Justice Arden

50. I agree.

Lord Justice Moore-Bick

51. I also agree.

Упражнение 5.

Изучите примечание к приговору Верховного суда Новой Зеландии по уголовному делу Королева против Кларка Джона Периско (R v Clarke John Persico) от 27 сентября 2016 года и обратите внимание на оформление постраничных ссылок на правовые акты, упоминающиеся в ходе процесса.

[10] As regards your methamphetamine offending, the tariff case is called *R v Fatu*.[5] A tariff case sets bands within which Judges generally sentence particular types of offending. The specific amount of methamphetamine here, seven grams, placed your methamphetamine offending in band 2 (which covers offending involving 5 to 250 grams). Such offending attracts starting points of three to nine

[5] *R v Fatu* [2006] 2 NZLR 72.

Упражнение 6.

Изучите примечание к приговору Верховного суда Новой Зеландии по уголовному делу Королева против Кларка Джона Периско (R v Clarke John Persico) от 27 сентября 2016 года и обратите внимание на нумерацию абзацев, заключенных в квадратные скобки, а также поднумерацию и разделение на абзацы без нумерации с меньшим межстрочным интервалом.

[17] The report concluded:

> There appear to be numerous risk factors leading to Mr [Persico's] early involvement with drug use. These include inconsistent parenting, poor experience of schooling, association with peers who use drugs, to name but a few.
>
> Protective factors (that is supportive factors) are [Mr Persico's] mutually supportive relationship with [his partner] over the last three years. His apprenticeship and fulltime employment in a positive environment has encouraged him to make plans for the future, including saving for a home. He has taken on his new role as a father with enthusiasm and clearly wants to be a positive role model for his son. As well, his voluntary attendance at Narcotics Anonymous has provided him with support and positive reinforcement around his goal of abstinence from all mood altering substances. Mr [Persico] now has a good relationship with his mother and his former stepfather, whom he visits regularly and supports him with his terminal cancer diagnosis.
>
> Providing Mr [Persico] uses the support he now has, his prognosis appears to be positive in terms of his substance use and further offending.

[18] I note that you have not only addressed your drug dependency in the way just described, but you have also successfully entered into an apprenticeship in your trade of plastering. And I note that you continued that employment whilst you were on trial, notwithstanding the fact that it required you to work in the early hours of the

Упражнение 7.

Изучите решение Апеляционного суда Англии и Уэльса по гражданскому иску Крукс против ООО Хендрикс Ловелл (Crooks v Hendricks Lovell Ltd) от 15 января 2016 года и обратите внимание на цитаты из правовых актов, упоминающихся в решении, которые выделяются кавычками. Обратите внимание на цитату, начинающуюся с красной строки, и употребление квадратных и круглых скобок.

> 15. In the judgment he gave on 15 November 2013 the recorder found that the symptoms in Mr Crooks' lumbar spine had not been caused by the accident, that those symptoms would in any event have prevented him from continuing to work for Hendricks Lovell from 8 July 2010 – 12 months after the accident, that there were symptoms in his cervical spine sufficient to prevent him from working, but that these had resolved by 15 March 2011 – 20 months after the accident. The claim for loss of earnings was therefore limited to 12 months.

16. The preamble to the recorder's order of 15 November 2013 – which he approved on 21 November 2013 – stated that the court had awarded "damages of J25,500 (inclusive of interest) in respect of the Claimant's past loss of earnings for the relevant period of 12 months", and that "the amount awarded for loss of earnings [had] been reduced by J16,262.76 (comprising J6,475.92 by way of Disablement Pension (IIDB), J1,803.89 by way of Employment and Support Allowance (Income Related) (ESAI) and J7,982.95 by way of Employment and Support Allowance (Contributory) (ESAC)) in accordance with Section 8 and Schedule 2 to the Social Security (Recovery of Benefits) Act 1997 and the present CRU certificate issued by the Department of [sic] Work and Pensions". It also recorded the fact that, between 21 April 2010 and 11 February 2011, Hendricks Lovell had paid Mr Crooks a total of J18,500 by way of interim payments. Paragraph 1 of the order stated that there was to be judgment for Mr Crooks in the sum of J29,550, comprising J4,000 for "general damages for pain, suffering and loss of amenity", J25,500 for "past loss of earnings", and J50 for "past miscellaneous expenses", all these awards including interest. Paragraph 2 stated:

> "The Defendant has discharged the judgment sum by virtue of the interim payments and deductible benefits referred to in the preamble above …".

Because Mr Crooks had indicated his intention to "appeal and/or review" the CRU's certificate of 14 August 2013, the recorder adjourned his consideration of costs for the parties' further submissions in due course (paragraph 3(3) of the order).

17. On 4 December 2013 Mr Crooks' solicitors wrote to the CRU, requesting a review of the certificate. On 20 March 2014 the CRU issued its decision on the review, accepting that, in the light of the recorder's judgment, "the Employment Support Allowance …, the Disability [L]iving Allowance … and the Industrial Injuries Disablement Benefit … can be limited to 15 March 2011". It did not accept that the "[Employment Support Allowance] should be limited to 10 July 2010", despite the fact that the recorder had found that Mr Crooks should then have been fit to return to work but for his underlying back condition. It said Mr Crooks' accident "[did] not have to be 100% responsible for the claim to benefit", that "[even] if the back problem was considered no longer relevant to the compensation claim by July 2010, it is apparent that he had ongoing issues with his shoulder, neck and right arm", and that he had "scored more than enough points to satisfy the work capability assessment". Because the recorder's judgment had not compensated Mr

Crooks beyond 15 March 2011, the recovery of all benefits was limited to that date. A revised certificate was issued, showing a gross liability to the Department for Work and Pensions of J11,735.91 for recoverable benefits paid to Mr Crooks as a consequence of the accident. This comprised J2,117.68 for Industrial Injuries Disablement Benefit, J4,642.43 for Employment and Support Allowance (Contributory) – making a total of J6,760.11 deductible from Mr Crooks' compensation, plus J2,435.70 for Disability Living Allowance (the care component) and J2,540.10 for Disability Living Allowance (the mobility component). Thus the relevant difference in recoverable benefit between the August 2013 certificate and this one was J9,502.65.

Упражнение 8.

Изучите титульный лист решения Высшего суда Королевской скамьи в Лондоне от 15 января 2016 года по делу между Куртис (он же Джейсон) Девисом и Комиссаром Столичной полиции и выделите композиционные части судебного решения. Определите используемые паралингвистические средства.

Case No: HQ10X00297

Neutral Citation Number: [2016] EWHC 38 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2016

Before :
MR JUSTICE NICOL

- -

Between :
Curtis (a.k.a Jason) Davis **Claimant**
- and -
Commissioner of Police of the Metropolis **Defendant**

- -
- -

Heather Williams QC and Jude Bunting (instructed by **Powell Spencer and Partners, solicitors)** for the **Claimant**
John Beggs QC and Aaron Rathmell (instructed by **Directorate of Legal Services, Metropolitan Police Service)** for the **Defendant**

Hearing dates: 18th, 19th, 20th, 23rd-27th and 30th November 2015

- -

Judgment

Упражнение 9.

Изучите текст примечания к приговору Верховного суда Новой Зеландии по уголовному делу Королева против Кларка Джона Периско (R v Clarke John Persico) от 27 сентября 2016 года и обратите внимание на названия актов, выделенных курсивом.

[13] I then assessed mitigating factors personal to you.

[14] I considered the successful rehabilitation you had achieved at that point to be of particular significance. You have now been on bail for these offences since being arrested in October 2013, some three years ago. You have during that time successfully participated in a rehabilitation programme. I accept that you have done so notwithstanding the one relapse that you honestly admitted to to the assessor. In *R v Hill* the Court of Appeal recognised the significance of that factor.[6] It commented:[7]

> In this type of case, we consider that a sentencing judge may properly give significant, even decisive, weight to the prospects for rehabilitation. This will be particularly so if the assessment that there are good prospects for rehabilitation is based not simply on conjecture or expressions of intent or hope, but on evidence which demonstrates that the offender has made a real commitment to change and is working towards that in specific and realistic ways.

[15] Your alcohol and drug assessment report advises that you first used methamphetamine at the age of 17. You used it intermittently thereafter. You were also a user of cannabis and BZP. At the age of 24 you became a heavy user of BZP. That pattern of behaviour was brought to an end by your arrest.

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6 *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381.
7 At [39].

Упражнение 10.

Изучите текст решения Высшего суда Королевской скамьи в Лондоне от 15 января 2016 года по делу между Куртис (он же Джейсон) Девисом и Комиссаром Столичной полиции и обратите внимание на строение данного судебного решения. Определите цель наблюдаемого явления (текст в тексте) и выделите используемые паралингвистические средства.

Mr Justice Nicol :

1. On 27th January 2009 the Metropolitan Police received intelligence that Curtis Davis, the Claimant, who lived in Kent or London, was assembling some ‘muscle’ in order to commit a robbery on domestic premises in Rugby, Warwickshire the following day.

2. Mr Davis was already known to the Trident unit of the

Metropolitan Police. Formally known as SCD8 (Special Crime Directorate 8) this is a unit targeting gangs and gun crime in London. In February 2003 Mr Davis had been in a car in the King's Cross area of London with Carl Robinson when they were stopped by a police officer. Mr Robinson was in possession of a 9mm self-loading automatic pistol which he gave to Mr Davis, who tucked it into the waistband of his trousers. Mr Davis at first appeared co-operative. He introduced himself to the police officers (though with a false name). The officer who searched Mr Robinson found that he had a lock knife tucked into the waist band of his trousers. Mr Davis had by then run off and waved the gun in the direction of the police officers who had stopped the car. He made for a block of flats where his girl friend lived. He had keys to the same block and his girl friend's flat, but dropped them as he ran. In an effort to gain admission, he fired 9 or 10 rounds at the front door of the block. When he was still unable to get in, he again ran off. Still waving the (now empty) gun he tried to commandeer a taxi unsuccessfully, but he did manage to push a motor scooter rider off his vehicle. He was chased and caught. He was prosecuted and pleaded guilty to using a firearm with intent to resist arrest and damaging property being reckless as to whether life was endangered. He was sentenced to 9 years imprisonment (reduced to 8 years by the Court of Appeal). He was released on licence in June 2008 at what would seem to be the 2/3 point of his sentence.

3. The Metropolitan Police did not believe that the Claimant's criminal activities then came to an end. In September 2008 an investigation was begun by Trident into him with the name 'Operation Dexirote'. Intelligence which was obtained in October 2008 included claims that Mr Davis was involved in trying to acquire firearms. Trident also believed that Mr Davis's association with Mr Robinson continued. That was significant because Mr Robinson was believed to be involved at a high level in serious offending.

…

18. Z32 was in a semi-crouch position or boxer's stance. In a statement which he made three days later he gave his account of what happened. He said,

'I was shouting armed police. I had my weapon raised as I came round to the nearside I saw a movement in the front passenger seat that I could see was occupied. I was not standing next to the front passenger door but saw more than a left side profile, it was as if the face turned towards me. At the same time I immediately saw a small black object with a square end. I did not see his hands. I focussed on the head and the object. I believed immediately that a gun was pointing at me and I was about to be shot. I feared for my life. I fired one round at the area where I believed the centre of his mass would be. I did not have time to aim, it was instinctive, to protect myself in view of the fact that I believed a gun

was pointing at me.'

…

Evidence

26. In addition to a substantial volume of documentary evidence, I heard oral evidence from the following witnesses:

i) For the Claimant Mr Davis himself and Anton Duncan.

ii) For the Defendant Det. Supt. Richardson (Gold Commander), ZT12 (author of firearms authorisation application), MM1 (on-call senior tactical advisor on 28th January 2009), Q9 (Bronze, operational commander in charge of the team of SFOs), LN140 (one of the surveillance officers), Z32 (the SFO who shot Mr Davis), Q38 (another SFO), W18 (a further SFO who was also the designated medical officer), ZT10 (helped MM1 prepare tactical advice and drove Silver in his vehicle during the day), MM2 (crime scene manager who attended the scene after the shooting), ZT11 (the officer who, with Q9, briefed the SFOs at Bexleyheath Police Station).

The claim in battery: the law

27. Z32 shot Mr Davis. There is no dispute that this was a battery. In colloquial terms it might be described an assault, but, strictly, an assault is the apprehension of violence, while battery refers to the blow (or equivalent) itself. Nothing turns on the technical distinction between assault and battery.

…

The claim in battery: Did Z32 honestly believe he was about to be shot when he fired?

41. There is a stark difference between the evidence of the Claimant and of Z32. I shall consider their evidence in due course, but it is convenient to look first at other evidence which is relevant to this question and which I take into account when assessing their testimony. Some of these are matters which the Claimant has raised as to why Z32 should not be believed. The Claimant is entitled to advance such arguments, but, in doing so, I have always borne in mind that it is the Defendant who has the burden of showing (to the civil standard) that Z32 did honestly believe that he was in imminent lethal peril. That will, of course, also be the case when I come to consider whether any such belief was reasonable.

Did the lighting conditions preclude Z32 seeing what he says he saw?

42. These events took place in January just after midnight. There was no light on inside the Mercedes. There was some ambient light from street lights on this busy road, but the lighting conditions were far from ideal. In such circumstances there is more scope for mistakes to be made. Ms. Williams, though, went further and suggested it would have been impossible for Z32 to see anything inside the car. She relied, in particular, on the evidence of Q38. He, too, had come to the nearside of the

Mercedes when the SFOs left their vehicles. He was just behind Z32. He said that he could see nothing in the Mercedes and, for that reason, he smashed the nearside rear passenger window.

…

The expert forensic evidence

58. I have been shown a Joint Report by the forensic experts for the Claimant (Dr. P.J. Seaman) and for the Defendant (Mr A. De V. Horne) dated 22nd June 2015. The two experts were asked,

'In light of the bullet damage and site of the injury to Curtis Davis, what was the position of the Claimant in the nearside front seat of the Mercedes vehicle when the shot was fired, in which direction was he facing, and how upright was his torso at the time?'

59. They responded,

'Based on the reconstruction events by both experts and in particular those involving the Claimant in Dr Seaman's reconstruction, Mr Horne and I agree, that the Claimant would have been positioned, highly contorted, inclined to the right (offside of the vehicle) highly twisted leaning forward such that his back would have to be facing the front nearside door. Furthermore, in this position, it seems unlikely that the Claimant would have been able to rotate his head, such that anyone looking into the vehicle would have had a 'face on' view of the Claimant at the time the shot was fired. We therefore agree that, at the time the shot was discharged, the Claimant's back would have to be facing the Officer, allowing the bullet to pass through the door (as depicted in the photographs) and follow the line of trajectory as indicated in medical records. We can exclude the Claimant from having been seated upright in the passenger seat (facing towards the front of the vehicle) or leaning merely forward in the seat at the time the shot was discharged.'

…

Conclusion

97. For all of these reasons, I find that the Defendant has discharged the burden which is on him of showing that Z32 honestly believed that he was about to be shot by Mr. Davis. At the morning briefing at Bexleyheath, Z32 and the other members of the CO19 team had been reminded that they could only open fire 'when absolutely necessary'. In my judgment that is what Z32 thought was the position when he discharged his weapon.

…

The Human Rights claim: the law

140. Article 2 of the ECHR provides,

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a court following his conviction of a crime for which this penalty is prescribed by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

…

The Human Rights claim: the facts

153. I can now apply the law on Article 2 to the facts of Mr Davis's claim. I have found that Z32 honestly and reasonably believed that he was about to be shot. In those circumstances, the shooting itself did not amount to a breach of Article 2.

…

Human Rights claim: conclusion

156. It follows that the claim under the Human Rights Act 1998 also fails.

Overall conclusion

157. In summary, the claim in battery fails because the Claimant was shot in lawful self-defence by Z32 who wrongly, but honestly and reasonably, believed that he was about to be shot. The claim in negligence fails because the Defendant owed the Claimant no duty of care, but, in any case, there was no material negligence on the part of the police. Article 2 of the European Convention on Human Rights was engaged, but it was not violated either by the act of Z32 in shooting the Claimant, nor in consequence of the planning or conduct of the operation.

158. Accordingly, it follows that the claim is dismissed.

Упражнение 11.

Изучите текст решения Высшего суда Королевской скамьи в Лондоне от 26 января 2016 года по делу между Десмонд Аткинс и ООО Кооперативная группа (апелляция) и обратите внимание на композиционную структуру, когда заявление истца не выносится в отдельную структурную часть судебного решения, а описывается в части «Factual Background» («Обстоятельства дела»).

Mr Justice Supperstone :

Introduction

1. The Defendant appeals the order of Master Gidden made on 25 March 2015 by which, inter alia, it was ordered that:

i) Judgment be entered for the Claimant with damages to be assessed.

ii) The Defendant to make an interim payment in the sum of J25,000 in respect of damages and J8,000 in respect of costs by 15 April 2015.

2. The Defendant seeks an order that:

i) There should be judgment for the Claimant on breach of duty, with the issues of causation and quantum to be

assessed.

ii) The issue of whether the interim payment made pursuant to the order dated 25 March 2015 should be repaid in part or in whole should be reserved and addressed at the conclusion of the trial on causation and quantum.

3. On 20 November 2015 Singh J granted the Defendant an extension of time in which to appeal the order of Master Gidden and permission to appeal the order.

Factual Background

4. In these proceedings the Claimant claims damages for diffuse pleural thickening ("DPT") and asbestosis caused by his exposure to asbestos dust during the course of his employment by the Defendant between June 1958 and November 1962.

5. The claim was issued on 4 July 2014.

6. On 25 March 2015 a CMC was held before Master Gidden by telephone. Mr Matthew Philips appeared for the Claimant and Mr Edward Broome for the Defendant. Mr Broome agreed to judgment being entered for the Claimant (Transcript at 1F). An interim payment was not agreed, but after hearing submissions from Counsel Master Gidden made the order for an interim payment in the terms set out in paragraph 2 of the Order (see para 1(ii) above). The order made by Master Gidden, which contained in addition various directions, was sealed on 26 June 2015.

7. By paragraph 4 of the Order the Claimant was permitted to rely upon the evidence of Dr Sinclair, consultant respiratory physician, and the Defendant was permitted to rely upon the evidence of Dr Limbrey, consultant respiratory physician.

8. By an application notice dated 16 July 2015 the Defendant sought permission to rely upon the report of Dr Peebles, a cardiothoracic radiologist, dated 2 April 2015 (addressed to Dr Limbrey). Mr Chris Booth of Forbes, solicitors for the Defendant, in a witness statement dated 16 July 2015, in support of the application stated (at para 23) that without such evidence "the court will be incapable of properly considering the issue of medical causation and, indeed, diagnosis of any compensable condition".

9. On 18 August 2015 Master Eastman dismissed the Defendant's application.

10. By an application notice dated 19 August 2015 the Defendant applied for the judgment entered on 25 March 2015 to be set aside and there to be substituted an order for "judgment to be entered on breach of duty, with causation and quantum to be assessed", and to have permission to rely on the report of Dr Peebles dated 2 April 2015. This application was supported by a witness statement by Ms Evans, a senior litigation executive at the

Defendant's solicitors.

11. On 24 September 2015, having heard by telephone counsel for the Claimant and counsel for the Defendant, Deputy Master Partridge dismissed the Defendant's application.

12. By an appellant's notice dated 7 October 2015 the Defendant appealed against the order of Master Gidden dated 25 March 2015, and applied for an extension of time for filing the appeal notice.

The circumstances in which judgment was entered on 25 March 2015

…

Упражнение 12.

Изучите текст судебного решения Высшего суда Королевской скамьи в Лондоне от 12 января 2016 года по делу между СЛУ Груп Лимитед и Королевским банком Шотландии и обратите внимание на деление на композиционные части с подзаголовками. Обратите внимание на выделение межличностного аспекта судьи в данном решении.

JUDGE BIRD:

1. In this judgment I will refer to CGL Group Ltd as the "claimant" and the two defendants RBS and NatWest as "the bank" or the "defendant" as the context requires.

…

8. I now turn to deal with the applications before me. By an application notice dated 19 October 2015 the defendant banks apply to strike out the claimant's claim or, alternatively, for summary judgment in respect of the same. In each case the defendant says the claims are statute barred. The claimant denies that the claims are statute barred and it pleads that it had the requisite knowledge to bring the claim only when the media first published reports about the miss-selling review to be conducted by the FCA in June 2012.

…

18. I deal first of all with the application to strike out on the grounds of limitation. The claimant submits that the claim is not statute barred. It submits that its date of knowledge for the purpose of section 14(8) was within the requisite three year period. It submits that the very earliest dates at which it might have been able to be in possession of the relevant knowledge was 29 June 2012. The claimant refers to the decision of Hamblen J in Kays Hotels v Barclays reported in 2014. The claimant submits that there are facts which are outstanding which require investigation with the consequence that it would be wrong to bring this claim to a premature end.

…

20. I deal with the law. The test for summary judgment and

strike out is set out in the claimant's skeleton at paragraphs 28-33. It seems to me that there is no substantive dispute as to that test and I need not rehearse it here. I must refer to the Limitation Act 1980. Section 2 provides that:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Section 5 lays down a similar period in relation to actions founded on tort.

21. I now set out section 14A of the Limitation Act:

> " (1)This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> …

28. For my part I do not see that any difficulties here arise in any perceived differences between section 14A(8) and (9). The essence of the complaint in the present case is what I must concentrate upon. In my judgment the essence of the claim is precisely as Ms Oppenheimer for the bank put it; this is a claim for miss-selling in the light of failures to provide certain advice and certain information. Mr McGarry for the claimant realising that the formulation of the claim is of central importance referred me to the case of Kays Hotel v Barclays [2014] EWHC 1927 (Commercial). The bank applied to strike out or have summary judgment awarded in its favour on a claim such as this based on miss-selling a hedge product.

…

30. I turn then to my decision on the strike out. I remind myself as I have briefly set out for the purposes of the strike out, I treat the facts and matters pleaded against the bank for the sole purpose for determining the strike out as proved. I therefore proceed on the basis for this application alone that there was miss-selling. I need hardly say should the matter proceed to trial that may not be shown to be the case. Bearing in mind the evidence before me and the test that I must apply, I am entirely satisfied that by mid-November 2009 and certainly before January 2012 the claimant was in possession of the knowledge required for bringing an action for damages in respect of the relevant damage. I find that by mid-November 2009 and certainly before January 2012 that the claimant had knowledge that the damage was attributable in whole or in part to the act or omission which now is alleged to constitute negligence. From the emails and transcripts I have seen, it is plain that the claimant had more than a mere suspicion that it had been the victim of miss-selling in light of

the bank's failure to provide advice and information.

…

32. In my judgment there is no need for any further investigation of the facts, given that the nature of the telephone conversation and the emails is not disputed. Bearing in mind the statutory purpose behind section 14A I have come to the conclusion, therefore, that it is entirely just and proper that the time outside of the primary limitation period began to run against the claimant in mid-November 2009. I therefore conclude as that date is more than three years prior to issue that the claim in its presently drafted form is statute barred and I strike it out.

33. I turn now to deal with the application to amend. In my judgment the only issue for me in considering the application to amend is whether the amendment would pass the summary judgment test. If it would, then I should grant permission; if it would not, then I should refuse it. If allowed, given the findings that I have made the amendment will be the sole surviving part of the claim. The amendment is set out in the proposed amended particulars of claim at paragraphs 28.1 to 28.3. Paragraph 28.1 pleads that the defendant owed a duty of care to conduct the sales review in accordance with undertakings given and in the manner that I have already explained. At paragraph 28.2 it is pleaded that because the defendants' takings to and agreement with the FCA conferred a benefit on the claimant that the defendant owed the claimant a duty in like terms. Paragraph 28.3 sets out particulars in short form of the breach.

…

52. I then come to my conclusion. I am satisfied for the reasons advanced by Ms Oppenheimer that no duty of care can arguably be said to arise for the reasons which she sets out. I therefore decline to permit the amendment. It seems to me that it is right to say that the bank cannot be treated as having taken on a duty of care when it has expressly excluded the possibility of it doing so and I am further persuaded that it is not just or reasonable to impose a duty of care in circumstances where such imposition would ride a coach and horses through a clearly defined statutory scheme.

53. As to Suremime, it seems to me in short that the learned judge there did not have the benefit which I have enjoyed of having the full regulatory picture painted before him. Ms Oppenheimer submits that I should treat the decision as wrong. In my judgment there is no strict need for me to do so. I am satisfied here that the absence of the full factual background was sufficient to justify the judge's conclusion. The case with which I deal is different; there are no factual gaps and all matters are before me.

54. In the event that it is necessary to decide if Suremime is to be followed then I would decline to do so. It seems to me with the benefit of the submissions that I have heard that were it necessary so to conclude

and if another court were to conclude that His Honour Judge Havelock-Allan QC had before him all necessary matters, then I would respectfully conclude that the decision was wrong and one which I should not follow.

55. For those reasons I decline to permit the amendment sought.

2. Особенности юридического дискурса

Одной из задач в современной лингвистике является выделение особенностей, специфичных для определенных сфер коммуникации, например, коммуникация в сфере массовой информации, в узко-профессиональных сферах и т. д. В связи с этим возрастает необходимость рассмотрения текстов одной и той же сферы коммуникативной деятельности в совокупности с их экстралингвистическими свойствами. Начало этому положила статья американского лингвиста Э. Харриса «Анализ дискурса» (1952). Взаимодействие лингвистики, которая традиционно занималась изучением слова и фразы, с другими гуманитарными науками – семиотикой, социологией, психологией – вывело лингвистику за пределы фразы, включив в ее предмет новое понятие: дискурс. При таком подходе фраза приобретает значение простого высказывания, а дискурс, состоящий из нескольких фраз, становится сложным высказыванием.

О. И. Таюпова в своей монографии «Медиатекст и медиадискурс» отмечает, что только применение комплексности научно обоснованных подходов к исследованию дискурса может способствовать раскрытию и описанию его сущностных характеристик. С точки зрения когнитивного подхода, дискурсом называется текст, взятый в событийном аспекте, это «речь, рассматриваемая как целенаправленное социальное действие, как компонент, участвующий во взаимодействии людей и механизмах их сознания (когнитивных процессах)». По определению И. А. Солодиловой, дискурс – это «…коммуникативное явление, включающее всю совокупность знаний, связанных с процессом текстопорождения». Э. Бенвенист считает, что актуализация языковой системы отдельными субъектами в речи в условиях коммуникативной ситуации, называется дискурсом. Таким образом, именно коммуникация, диалог, или интерактивное взаимодействие адресата и адресанта в условиях контекстной, вербальной или невербальной, коммуникативной ситуации становится предметом изучения «дискурсного» или «дискурсивного анализа».

Однако необходимо разграничить понятия дискурса и коммуникативной ситуации. Л. О. Чернейко и В. В. Тюп выделяют социальный компонент, который является определяющим для коммуникативной ситуации. Коммуникативная ситуация создает условия возникновения дискурса, а дискурс реализует коммуникативные ситуации в речи. Эта взаимозависимость объясняется тем, что оба понятия строятся по схеме коммуникации Р. Якобсона и содержат такие элементы, как адресант, адресат, сообщение, которое написано с помощью кода, контекст и контакт одинаковой структурой.

Кроме того, ряд подходов к изучению понятия дискурса учитывает тот факт, что дискурс подразумевает использованием языка для выражения

особой ментальности, и формулируется как «коммуникативно-когнитивное событие социокультурного характера». С нашей точки зрения, дискурс представляет собой отдельное явление, сочетающее в себе элементы семантического, прагматического, социологического, психологического, этнического порядка.

В современной лингвистике выделяются личностный и институциональный типы дискурса. Разновидностями институционального дискурса могут быть юридический, политический, экономический и другие дискурсы, так как их реализация обуславливается коммуникативными ситуациями в различных сферах профессиональной человеческой деятельности. Рассматривая тексты судебных постановлений в нашем исследовании, мы изучаем особенности судебного дискурса, который также является одной из форм институционального общения юристов в их профессиональной деятельности. Анализируя дихотомию «юридический дискурс» – «судебный дискурс», судебный дискурс можно классифицировать как подтип юридического дискурса, который также может включать в себя законодательный, следственно-дознавательный, полицейский и т. п. с учетом специфики целей и функций коммуникативных ситуаций.

Практическая часть

Упражнение 1.

Определите к какому виду относится предложенный текст и какой тип дискурса он реализует.

NATIONAL NOTARY ASSOCIATION
Notary Signing Agent Section

NNA Certified and Background Screened Notary Signing Agent

David Bonner

has through examination, demonstrated superior knowledge and proficiency in the administration of loan document signings, and having successfully passed an industry-recognized background screening, has earned the professional designation of **NNA Certified and Background Screened Notary Signing Agent.**

CERTIFIED NOTARY SIGNING AGENT BACKGROUND SCREENED NNA

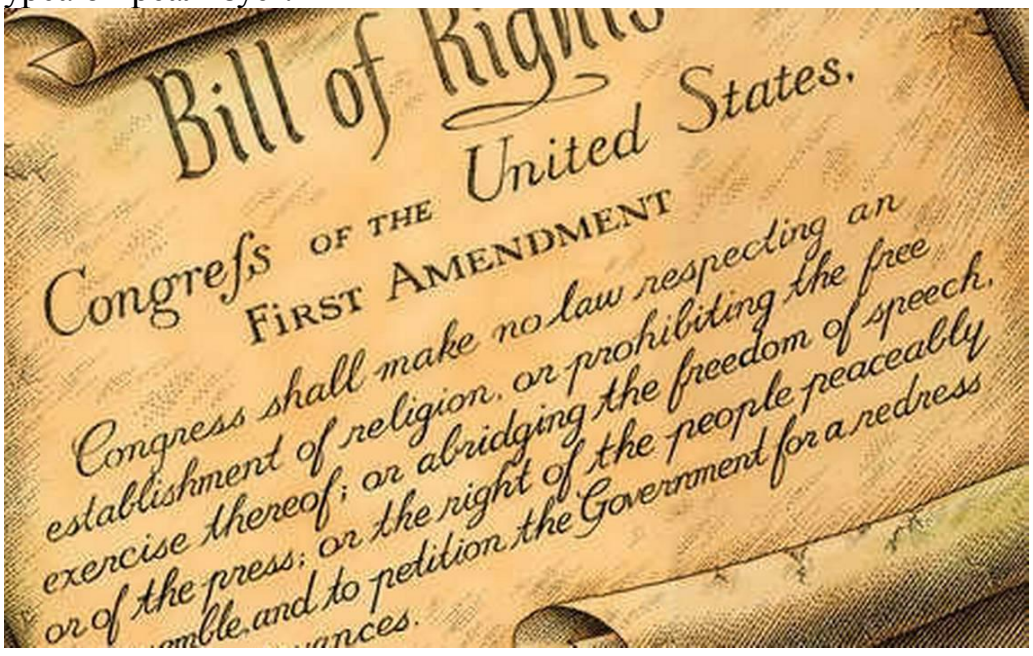
Certification and Background Screening valid through: **04/2009**

Timothy S. Reiniger, Esq.
Executive Director

NOTE: This certificate is for personal use and is not an endorsement.

Упражнение 2.

Определите к какому виду относится предложенный текст и какой тип дискурса он реализует.



Bill of Rights

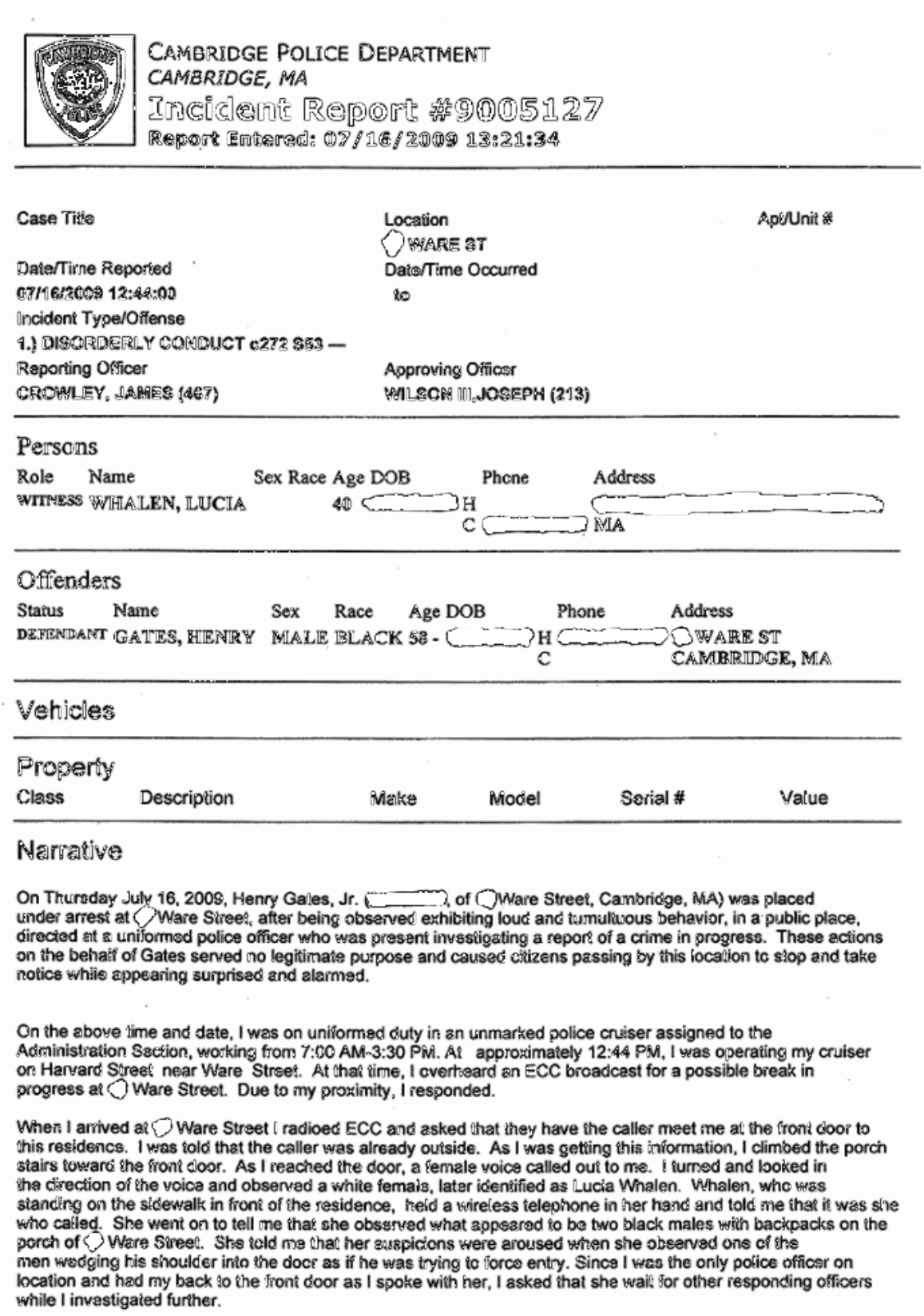
Congress of the United States.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Упражнение 3.

Определите к какому виду относится предложенный текст и какой тип дискурса он реализует.



CAMBRIDGE POLICE DEPARTMENT
CAMBRIDGE, MA
Incident Report #9005127
Report Entered: 07/16/2009 13:21:34

Case Title

Location
WARE ST

Apt/Unit #

Date/Time Reported
07/16/2009 12:44:00

Date/Time Occurred
to

Incident Type/Offense
1.) DISORDERLY CONDUCT c272 §53 —

Reporting Officer
CROWLEY, JAMES (467)

Approving Officer
WILSON III,JOSEPH (213)

Persons

Role	Name	Sex	Race	Age	DOB	Phone	Address
WITNESS	WHALEN, LUCIA			40		H C	MA

Offenders

Status	Name	Sex	Race	Age	DOB	Phone	Address
DEFENDANT	GATES, HENRY	MALE	BLACK	58	-	H C	WARE ST CAMBRIDGE, MA

Vehicles

Property

Class	Description	Make	Model	Serial #	Value

Narrative

On Thursday July 16, 2009, Henry Gates, Jr. ( ), of Ware Street, Cambridge, MA) was placed under arrest at Ware Street, after being observed exhibiting loud and tumultuous behavior, in a public place, directed at a uniformed police officer who was present investigating a report of a crime in progress. These actions on the behalf of Gates served no legitimate purpose and caused citizens passing by this location to stop and take notice while appearing surprised and alarmed.

On the above time and date, I was on uniformed duty in an unmarked police cruiser assigned to the Administration Section, working from 7:00 AM-3:30 PM. At approximately 12:44 PM, I was operating my cruiser on Harvard Street near Ware Street. At that time, I overheard an ECC broadcast for a possible break in progress at Ware Street. Due to my proximity, I responded.

When I arrived at Ware Street I radioed ECC and asked that they have the caller meet me at the front door to this residence. I was told that the caller was already outside. As I was getting this information, I climbed the porch stairs toward the front door. As I reached the door, a female voice called out to me. I turned and looked in the direction of the voice and observed a white female, later identified as Lucia Whalen. Whalen, who was standing on the sidewalk in front of the residence, held a wireless telephone in her hand and told me that it was she who called. She went on to tell me that she observed what appeared to be two black males with backpacks on the porch of Ware Street. She told me that her suspicions were aroused when she observed one of the men wedging his shoulder into the door as if he was trying to force entry. Since I was the only police officer on location and had my back to the front door as I spoke with her, I asked that she wait for other responding officers while I investigated further.

Упражнение 4.

Определите к какому виду относится предложенный текст и какой тип дискурса он реализует.

FORENSIC SCIENCE SERVICES - CRIMINALISTICS

REPORT OF EVIDENCE EXAMINATION

NAME: TAMENY, Catherine (v) LR #: 85-4591

CRIME: 187 P.C. DATE: 8/5/85 DEPT.: ANAHEIM P.D. DR #: 85-30525

SEXUAL ASSAULT EVIDENCE:

Property Items Examined:

1 : Vaginal swabs and slides from TAMENY
2 : Breast swabs and control from TAMENY
#19 : Anal and oral swabs and slides from TAMENY

EXAMINATION RESULTS:

Semen was not detected in the anal or oral swabs. Spermatozoa were found in a vaginal swab from TAMENY; however, the semen concentration and sperm density were very low and therefore indicated that the semen was not deposited at or near the time of death. The breast swabs were examined for amylase, an enzyme found in high concentrations in saliva and at lower concentrations in other body fluids. An elevated amylase level, indicating possible saliva, was detected in the right breast swab from TAMENY.

Упражнение 5.

Определите к какому виду относится предложенный текст и какой тип дискурса он реализует.

BOOK.

The man who was killed tonight was a policeman, Sam. It's my job to find out who did it. I want you to tell me everything you saw when you went in there.

SAMUEL
(stammers)
I saw him.

BOOK
Who'd you see?

Sam looks at his mother.

BOOK
Who'd you see, Sam? The man on the floor?

SAMUEL
No... I saw the man who killed him.

Book stares at him in surprise, speaks over his shoulder to Carter.

BOOK
Anybody know about this?

CARTER
I didn't even know about it.

BOOK
(back to Sam)
Okay, Sam. Can you tell me what he looked like?

SAMUEL
(groping, touching his clothes and pointing at Carter)
He was... like him.

BOOK
(nods)
Black... I understand.

3. Концепты, реализуемые в судебном дискурсе

Дискурс связан с ментальными процессами, которые участвуют в коммуникации, то есть концептами. В книге «Справочник по дискурсивному анализу» Дебора Таннен, Хайди И. Гамильтон, и Дебора Шиффрин утверждают, что существуют три теоретические основы, связанные между собой: дискурс, когниция и общество. Анализируя данную точку зрения, можно сказать, что дискурс является средой и основным фактором формирования концептуального содержания.

Пользователи языка, будучи социальными субъектами, обладают как личными и социальными концептами (личные воспоминания, знания и мнения), так и концептами, являющимися общими для членов своей группы или культуры в целом. Другими словами, пользователи языка как социальные субъекты соединяют реальное взаимодействие между обществом и дискурсом.

В. З. Демьянков соединил в своем определении дискурса понятие текста и концепта, утверждая, что «дискурс … произвольный фрагмент текста, состоящий более чем из одного предложения или независимой части предложения. Часто, но не всегда, концентрируется вокруг некоторого опорного концепта; создает общий контекст…». Так, например, в судебном дискурсе можно наблюдать отражение таких понятий и отношений, как свобода, право, обязанность, штраф, суд, наказание, родительский долг, гражданский долг и другие. В. З. Демьянков также подчеркивает важность коммуникативного пространства, которое выстраивается по ходу развертывания дискурса. Ученый выделяет такие элементы дискурса, как «излагаемые события, их участники, перформативная информация и ряд «не-событий»» (экстралингвистические факторы).

Учитывая тот факт, что под концептом понимается явление, обладающее коммуникативными функциями и хранящее определенные знания, можно сказать, что коммуникация создает условия для реализации концепта, а проявляется он на уровне дискурса. Таким образом, при проведении анализа определенного типа дискурса необходимо, с одной стороны, учитывать ментальные единицы, образующие его смысловое пространство (концепты), а также выявлять способы и закономерности их материализации (изучать структурные особенности текстовых воплощений).

В настоящее время концепт считается ментальной единицей, представленной в коммуникативной ситуации посредством кодирования средствами языка. Это явление, представляющее взаимодействие сознания,

языка, текста и культуры. Рассматривая концепт в таком аспекте, можно выявить такие его свойства, как динамичность и дискурсообразующие характеристики, обеспечивающие выход на дискурсивный уровень (Ю. Е. Прохоров, В. Г. Зусман, А. Л. Филатова, О. А. Алимурадов).

Лингвокультурное пространство дискурса образует концептосферу, в которой находится базовый концепт, который может быть ядерным и для всех подвидов определенного институционального дискурса. Например, концепты «право» и «закон» будут являться базовыми концептами для всех подвидов юридического дискурса, а именно судебного, законодательного, следственно-дознавательного, полицейского и т. п.

Стоит отметить, что концепты судебного дискурса обуславливаются не только правовой нормой, но и социальными, культурными, морально-этическими и другими предпосылками с связи с самим характером судебной коммуникации, открытым для всего общества. В текстах судебных постановлений отражаются такие понятия и отношения, как свобода, право, обязанность, штраф, суд, наказание, родительский долг, гражданский долг и др. Эти понятия связаны с когнитивной деятельностью человека, т.е. такой деятельностью, в результате которой человек приобретает определенные знания или приходит к соответствующему решению. Л. Н. Шевырдяева утверждает, что в американском судебном дискурсе содержание концепта Constitution раскрывается в соответствии с тремя смысловыми лексическими парадигмами - Конституция-документ, Конституция-право и Конституция-контроль.

Для судебного дискурса характерно внимание к фактической стороне дела, значимость установления истины по делу, торжество закона в целом. Представляется, что в судебном дискурсе находит свое проявление концептосфера «ЗАКОН», которая на аксиологических основаниях рассматриваемого дискурса состоит из системы концептов (истина, справедливость, законность). Данные концепты определяют критерии качества судебных решений, принципов правоприменения, а также дают обоснование того или иного юридического действия и определяют коммуникативное поведение участников, которое включает в себя выбор языковых средств для демонстрации защиты, обвинения и так далее. Стоит отметить, что судебный процесс демонстрирует на концептуальном уровне ритуал осуждения, игру легитимных сил или, например, раскрытие истины в разное время в разных культурах.

Таким образом, семантическое представление концептосферы «ЗАКОН» заключается в базовых концептов судебного разбирательства, таких как «законность», «истина», «справедливость». Так, семантический

(дефиниционный) анализ позволяет выявить такой концепт судебного дискурса, как «legitimacy»: «conformity to the law or to rules», русский вариант: «верховенство закона, неукоснительное исполнение законов и соответствующих им правовых актов всеми органами государства, должностными и иными лицами, один из элементов демократии и правового государства». Данный концепт выражается с помощью таких лексем, как «legal», «lawful», «legitimate», «validity», «permissible», «allowed», «acceptable», «warranted», «licensed», «binding», «genuine», «right», «sound», «just», «fair», «rightful» и других. Например, «It is legitimate to ask how this objective could be achieved on the Court of Appeals interpretation of s 296(3)(c)…».

Семантический анализ концепта «истина» основывается на дефиниции «truth»: «That which is true or in accordance with fact or reality»; русский вариант «истина»: «адекватное отражение объекта познающим субъектом, верное отражение действительности; противоположное – заблуждение». Следующие лексемы используются для выражения данного концепта: «truth», «honesty», «accuracy», «rightness», «factual» и другие. Например, «Finally, he submits that the evidence was so unsatisfactory, and its benefit to Staponka was in truth so slight that the judge was wrong to allow it to go before the jury at all».

Семантический анализ концепта «справедливость» показывает его корреляцию с концептом «законность», поскольку «justice»: «The administration of the law or authority in maintaining this»; русский «справедливость»: «один из фундаментальных принципов, регулирующих взаимоотношения между людьми на основе представлений о должном, о сущности человека и его правах». Лексемы, выражающие данный концепт несколько совпадают с лексемами концепта «законность»: «validity», «justification», «legitimacy», «reasonableness» и другие. Например, «…as Justice Breyer does, that "federal courts have long become accustomed to reviewing for reasonableness or constitutionality the rate-setting determinations made by agencies"».

Следует отметить, что через рассмотренные концепты проявляются более специфичные концепты, например «наказание» и «преступление». Например, «I have all justification to impose a fine…» или «This (crime – примечание автора) is liable to imprisonment according to …». Таким образом, концептосферу «ПРАВО, ЗАКОН» графически можно представить следующим образом:

	Справедливость		Справедливость	
Преступление	Законность	ЗАКОН	Законность	Наказание
	Правда		Правда	

Таким образом, в настоящих методических рекомендациях когниотип судебного дискурса, то есть ментально-лингвистическая модель представления типической ситуации, рассматривался посредством анализа выборки судебных постановлений. Такой дискурсивно-когнитивный подход имеет своей целью выявить лингвокультурный концепт и описать его связи с изучаемым дискурсом. По нашему мнению, в судебном дискурсе реализуется концептосфера «ЗАКОН», так как для нас важным является право в его формальном, юридическом значении. Обращая внимание на ценности, охраняемые законом, можно выделить систему концептов (правда, справедливость, законность), через которые, в свою очередь, проявляются более специфичные концепты, например «наказание» и «преступление».

Практическая часть

Упражнение 1.

Изучите судебное решение и найдите средства реализации следующих концептов: правонарушение, наказание, справедливость.

[2015] NICC 2 Ref: WEI9568

Judgment: approved by the Court for handing down Delivered: 27.02.2015

(subject to editorial corrections)*

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT BELFAST

_____

THE QUEEN
v
ALAN PETER IRVINE AND ELIZABETH IRVINE

_____

WEIR J

Introduction

[1] Alan Peter Irvine you have pleaded guilty to the murder of George Gray and I have previously sentenced you to life imprisonment which is the only sentence permitted by law for that offence. It is now my responsibility to fix the minimum period that you will have to serve in prison before you will first become eligible for consideration for release by the Parole Commissioners. I make clear to you and to the public that you will be entitled to no remission of the period that I will fix and that you will serve the entirety of it.

[2] The circumstances surrounding this murder were both brutal and senseless. Between 28 and 30 August 2012 you and a friend, whom I shall call M, were drinking together in the friend's flat at Cregagh Road in Belfast. At some time during this drinking spree the deceased, who lived in a flat in the same block, became included in your activities and drinking continued in his apartment. At various points more drink was obtained and the deceased was last seen alive on CCTV at 3:53 am on 30 August outside his apartment receiving a delivery of what subsequent enquiries revealed was a bottle of vodka. Sometime later that morning another neighbour, whose flat adjoined that of the deceased, heard loud voices, which appeared to be those of males, coming through his wall. Listening at the wall he heard someone saying "that's enough, leave him alone" and heard the words "paedophile" and "how would you like it if that

was your two children" being shouted. He then heard what sounded like banging on the wall and then nothing more.

[3] On 31 August a friend of the deceased who had been trying unsuccessfully to telephone him went round to his flat where she found the door ajar and the deceased lying on his back on the living room floor. The emergency services were called and the deceased was found to be dead. The room was in disarray with furniture and other items scattered about and a considerable amount of blood spatter on the walls and furniture.

[4] The deceased has suffered very extensive injuries all over his body. They are described in detail by the Assistant State Pathologist, Dr Lyness, in his commentary as follows:

"There were multiple bruises and abrasions on the head, in particular on the face on the left side and back of the scalp. There were also lacerations of the eyebrows, the left upper eyelid, both of the cheeks, the left ear and the nose. The external and internal surfaces of the lips were also lacerated and heavily bruised. Internally, the injuries were associated with extensive bruising of the under surface of the scalp and fractures of the nasal bones and upper jaw. There was also slight haemorrhage over the surface of the brain and reactive swelling and early degeneration of the brain substance, indicating that he had survived for a period of time after the injuries had been inflicted. In addition, the injuries to the mouth and nose had caused heavy bleeding into the oral cavity and windpipe, with evidence of blood having been aspirated into the lungs. Such haemorrhage would have obstructed the flow of air into the lungs and severely impaired his ability to breathe, a potentially life threatening condition.

Whilst some the head injuries could have been sustained as a result of punching, it seems more likely that the majority were caused by kicking, stamping or a combination. Indeed, patterned bruising on the left side of the scalp, towards the back, was suggestive of a footwear mark. Furthermore, an area of stippled abrasion on the right side of the back of the scalp was consistent with having been caused by counter-pressure and indicates that at least some of the blows to the head were inflicted whilst he was lying on the floor.

There was also bruising and abrasion on the front and sides of the neck, in association with heavy bruising of the underlying muscles and fractures of the delicate structures of the voice box. Whilst the possibility of his neck having been forcibly grasped cannot be completely excluded, the extent and severity of these injuries would favour that they had occurred as a result of blunt force trauma, such as kicking or stamping. These injuries would

have compromised the integrity of the upper airway, further reducing his ability to breathe.

In addition, there were multiple bruises and abrasions on the chest, abdomen and back, in keeping with having occurred as a result of blunt trauma during the assault. Of particular note there was a U-shaped bruise on the left side of the front of the chest consistent with having been caused by a shod foot. Internally these injuries were associated with bruising of underlying muscles and fractures of least 7 of the left ribs and 9 of the right ribs which would have further compromised his ability to breathe.

There were also multiple bruises and abrasions on all four of the limbs. Some of these may have been caused by his having raised his arms in an attempt to protect his head, but the majority were relatively non-specific. There were also abrasions and heavy bruising on the back of the right hand. Whilst the possibility of his having thrown a punch cannot be completely excluded, the nature of these injuries would be more in keeping with his hand having been stamped upon.

He had also been stabbed twice. These wounds were consistent with having been caused by a bladed weapon, such as a knife. One was on the left side of the front of the chest and had entered the left chest cavity causing a puncture wound of the left lung. The second stab wound was identified on the back of the body, just below the left side of the base of the neck, and had passed into the underlying muscles. However, neither of these stab wounds would have been immediately life - threatening and played no significant part in the fatal sequence.

The report of Forensic Science Northern Ireland showed that at the time of his death there was a considerable amount of alcohol in the body. The concentration detected in the blood stream, 317 milligrams per 100 ml, is just under 4 times the current legal limit for driving and indicates that he was severely intoxicated when he died. Indeed, the degree of intoxication would have decreased his co-ordination and reflexes, potentially reducing his ability to protect himself. Furthermore, whilst the severity of his injuries was such that they were likely to have caused his death on their own, the alcohol intoxication would have rendered him more susceptible to the effects of any head injury including the inhalation of blood into the air passages. … From the findings at autopsy it is not possible to state the order that the injuries were sustained or over what length of time."

[5] You at first attempted to deny any involvement in this murder by claiming that you and M had left the deceased in his flat and gone back to drinking upstairs in M's flat. However, the police

noted what looked like blood stains on M's clothing and you and he were both arrested and detained for questioning. Unfortunately, M died of natural causes while in police custody so that the only available version of what occurred in the deceased's flat comes from you. You initially attempted to deny any involvement in these events, claiming that on 29 August you had returned home to your mother's house on the bus and gone to bed at 9 pm. You continued to prevaricate even when confronted by various elements of evidence that contradicted your lying account.

[6] Fortunately, the police were able to retrieve significant CCTV evidence from a camera at the front of the flats. It showed, inter alia, you returning to the flats with M at 8:36 pm on 29 August with an off-licence plastic bag, you and M leaving again at 9:29 pm and returning at 10:59 pm by which time you had claimed to be in bed at your mother's house, at 3:53 am on 30 August Mr Gray collecting the vodka delivery, at 5:26 am you leaving the entrance to the flats and looking through the front window of the deceased's flat before going back in by the entrance, and significantly, you at 7:57 am coming out again from the communal entrance and placing something in a rubbish bin. At 8:22 am you were seen getting into a taxi outside the flats.

[7] Police later found the item in the bin to be a plastic bag in which was a knife bearing the blood of the deceased and your DNA on the handle. They also traced the taxi and found that it had taken you to your mother's home. Mobile phone traffic was examined and it was found that you had phoned your mother at 8:06 am from the flats, that you phoned for the taxi at 8:17 am and phoned your brother at 8:21 am. You also had a total of 23 telephone or text contacts with M between leaving the flats at 8:22 am on 30 August and being arrested about midday on the following day.

[8] This was a merciless and sustained attack upon a man who was hopelessly incapacitated due to his level of intoxication and who would have been quite unable to defend himself or to escape from his attackers. A disreputable attempt has been made to justify or explain the attack by the suggestion that the deceased was a paedophile. You claim that M made the suggestion and that that caused you to join in the attack because of some experience you had had in childhood. I entertain the gravest doubt as to whether it was M who said anything of the kind and I am informed by Mr O'Donaghue QC for the prosecution that the police have looked into the suggestion and can find no basis for it whatsoever. Even had it been true it would not have constituted any valid excuse or justification for any attack upon the deceased never mind the dreadful and prolonged violence to which he was subjected.

[9] The deceased was aged 52 years and lived alone in his Housing Executive flat. At the time of his death he was unemployed and suffering from a number of medical complaints. He appears, like you and M, to have had a problem with alcohol dependence. I have received very full victim impact statements from a brother and on behalf of the children of the deceased and it is clear that they have all in their different ways been very much affected by the death of their sibling and father in such a mindless and brutal fashion. They particularly emphasise and with good reason that after the assault nothing whatever was done to summon help for the deceased who was left for dead while you set about trying to save yourself. It is of course impossible to know whether prompt medical attention would or might have saved him but your callous behaviour in abandoning the deceased, especially when you knew he lived alone, is impossible to comprehend especially when I have been told by your counsel that your intention was not to kill him.

[10] You are now 31 years of age and were 29 at the date of this offence, much younger than your victim. It is clear from the probation report that you endured a difficult early life in a home where you were exposed to drunkenness and domestic violence and, possibly, though details are sketchy, to some sexual abuse from within the family. You were placed in care at the young age of seven and experienced multiple moves within the care and juvenile justice settings to which you did not react well. At 14 you were returned to the care of your mother and thereafter appear to have avoided criminal activity until the present offence. You have a small number of fairly minor convictions, the last of which related to events in November 1997 when you were aged 14. I therefore do not propose to take those convictions into account against you in this case.

[11] It is clear from the probation report that you have a serious problem with the misuse of alcohol and other illicit substances. You are prone to binge drinking as you had been doing at the time of this crime and have in the past had alcohol-related hospital admissions. You appear to have no insight into your condition although your addictions have ruled your life for many years and have now helped to destroy that of the deceased and caused you to be imprisoned for many years to come. Unless you reflect upon your past while in prison and set about changing your approach to alcohol and substance misuse I fear the outlook for you will be bleak. The probation officer assesses you as being at high risk of re-offending and as a significant risk of serious harm to others in the future. You will have to satisfy the Parole Commissioners that you have made serious changes to your outlook on addictive substances if you hope to be released after you have

served the tariff which I am about to impose.

[12] I have a very thorough and detailed report upon you from Dr Pollock, Consultant Forensic Clinical Psychologist, and another report from Dr Bunn, Consultant in Forensic Psychiatry. Neither provides any excuse or explanation other than intoxication for what you did. The picture that emerges of you is the unfortunately now common one of a feckless individual who lives for alcohol and drugs and who becomes violent when sufficiently fuelled, as you were, by both.

[13] I intend to sentence you in accordance with the principles established by the Court of Appeal in R v McCandless [2004] NICA 1. The first question that arises is whether this case attracts the normal starting point of 12 years with a higher starting point of 15/16 years. The prosecution contended for the latter while your counsel, Mr O'Rourke QC, urged me to adopt the former. The higher point applies to those cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position and where the case is characterised by a feature which makes the crime especially serious. Examples of such features appear in the guidance and in my judgment two such apply to this case:

(i) The victim was exceptionally vulnerable having consumed about 4 times the legal driving limit of alcohol at the time of the attack.

(ii) The injuries inflicted on your victim could not be described as other than multiple and extensive.

I therefore take as my starting point a term of 16 years.

[14] Mr O'Donoghue urged upon me that that starting point ought to be increased by a number of aggravating factors. One such quoted in the guidance and upon which he relied was what he described as "the destruction of the crime scene" by, he submitted, taking away the knife and putting it in the dustbin outside and disposing of your boots and clothing. I do not consider that those actions constituted "destruction of the crime scene" which was otherwise intact and I do not take account of them as constituting an aggravating factor.

[15] It was further submitted on behalf of the prosecution that you had armed yourself with the knife from the upstairs apartment of M and that you committed the stabbing but that is not established by the admissible evidence. Mr O'Donoghue fairly conceded that where a belief on the part of the prosecution could not be established by admissible evidence then the benefit of doubt must be accorded to you and I consider that position to be correct. I therefore do not increase my 16 year higher starting point by reason of any

aggravating factor.

[16] As to mitigation, I accept Mr O'Rourke's submission that it has not been established that there was an intention to kill as opposed to the causing of grievous bodily harm. I have already referred to the neighbour overhearing a man say "that's enough, leave him alone" and, just as with the obtaining and use of the knife, there is no evidence as to whether you or M spoke those words. True it is that you left the grievously wounded deceased to his fate but I cannot infer from that fact that you intended to kill him. Therefore, giving you the benefit of the doubt as Mr O'Donoghue enjoined me to do, I sentence you on the basis that your intention was to cause grievous bodily harm.

[17] A further mitigating factor is that you did eventually plead guilty and, as Mr O'Rourke points out, well before then had acknowledged the truth of the basic facts of the prosecution case after being confronted with the formidable evidence that the police had gathered in order to contradict your lying story. Your legal advisers thought it appropriate to investigate your mental state by obtaining the reports of Doctors Pollock and Bunn and I consider that it was reasonable for them to do so before you entered your plea of guilty to the murder charge. I also note that you have expressed remorse for your actions but, as the Court of Appeal has pointed out in the past, it is not easy to distinguish between genuine remorse for the victim and his family and regret for the position in which the perpetrator finds himself when facing a long period in prison.

[18] Taking account of all the mitigating factors I have identified I reduce the starting point from 16 years to a minimum term of 12 years which, as I have earlier said, you will serve in full without any remission.

[19] I turn now to you Elizabeth Irvine. You are now almost 65 years of age and have pleaded guilty to two counts, one of perverting the course of justice by providing both a verbal and a written alibi for your son in respect of his whereabouts at the material time and the other of withholding the information from the police that your son had told you that he had beaten the deceased.

[20] The law rightly regards offences of this sort as most serious because it looks to members of the public to assist the police in detecting crimes and those responsible for them and not to conceal them, or worse assist offenders by providing false alibis. You must have known very well before you made your false written statement that your son had been involved in an assault following which a man had died. I find it impossible to comprehend how, knowing that, you could lend yourself to such a misguided deception.

[21] Your counsel, Mr Tom McCreanor, readily acknowledged that your position is serious and that the authorities establish that crimes of this sort will attract sentences of imprisonment. That most experienced criminal judge, Hart J, explained it thus in R v Kernohan and others [2011] NICC 9 at [14]:

"Those who mislead the police, or withhold information, about serious crimes are at risk of immediate prison sentences unless there are strong mitigating personal or other circumstances."

[22] Your counsel acknowledged that your case may appropriately be compared with that of Veronica Deery who was one of the defendants in Kernohan. I do not consider that there are any mitigating factors attaching to your contemptible offence and I therefore impose upon you a sentence of two years imprisonment on each count to be served concurrently.

[23] The question is whether, as in Deery's case, there are personal circumstances pertaining to you that would warrant the suspension of your sentences? I have a detailed probation report which affords you little assistance as you appear not to have yet understood the seriousness of what you did and indeed you told the probation officer that you did not intend to mislead the police in their investigation. It is impossible to understand what else you thought you were doing by providing your son with a false alibi which, given the fact that he had disposed of the knife, boots and clothing, the death of M and of the deceased might well have been effective to wrongly protect your son had not the police had the CCTV evidence with which to contradict it. There is however, information in the report on you by Dr Bownes, Consultant Psychiatrist, that causes me to pause in requiring you to serve your sentences immediately. Having examined you and considered your general practitioner's notes and records, Dr Bownes finds that you had been displaying mental health problems during the 25 years prior to your arrest and you have been treated with anxiety-lowering and sedative drugs throughout that period. As early as 1996 you were found to have difficulty in coping with everyday demands and responsibilities. He concludes that:

"The nature of the psychological reaction produced by adjustment to the custodial setting is liable to be particularly marked in individuals with a prior history of stress-related mental health problems" and that "your mental wellbeing is significantly more likely to deteriorate on exposure to the prison environment than most women of a similar age and background."

I observe that Dr Bownes is particularly well placed to make that judgment given his experience as a psychiatrist providing services within the prison setting. I am conscious that one of the

victim impact statements expresses doubt about your need for the wheelchair which you have used when coming to this court and claims that you have been seen walking in public. I do not feel that I need to resolve that issue as Dr Bownes' assessment is based not upon your physical state but upon your well-documented mental and emotional fragility.

[25] Accordingly, and not without hesitation as I regard your actions as disgraceful, I have decided to suspend the operation of both your sentences for a period of three years. That means that if you keep out of trouble for that period you will hear no more about this matter. If on the other hand you were to commit a further offence during that time the court that deals with you for that may implement these custodial sentences in addition to whatever sentence it imposes for that further offence.

Упражнение 2.

Изучите судебное решение и найдите средства реализации следующих концептов: правонарушение, наказание, справедливость.

APPEAL COURT, HIGH COURT OF JUSTICIARY
[2015] HCJAC 13
HCA/2014-005145-XJ

Lord Brodie
Lord Drummond Young
Sheriff Principal Stephen QC

OPINION OF THE COURT

delivered by LORD BRODIE
in
BILL OF SUSPENSION
by

MICHAEL STEWART
Complainer;

against

THE PROCURATOR FISCAL, GLASGOW
Respondent:

Complainer: C M Mitchell; Capital Defence Lawyers, Edinburgh for Fitzpatrick & Co, Glasgow

Respondent: Erroch, AD; Crown Agent

17 February 2015

[1] In terms of section 23(3) of the Misuse of Drugs Act 1971 if a justice of the peace, a magistrate or a sheriff, is satisfied by information on oath that there are reasonable grounds for suspecting that any controlled drugs are in the possession of a person on any premises, he may grant a warrant authorising any constable, inter alia, to search the premises and any persons found therein and to seize any controlled drugs found.

[2] The complainer in this bill of suspension is Michael Stewart. On 4 April 2012, on an application having been made to him, a justice of the peace granted a warrant in terms of section 23(3) of the 1971 Act to search the premises occupied by the complainer at 5 Daniel McLaughlin Place, Kirkintilloch. The complainer has now been indicted in the High Court along with six co-accused charged with contraventions of section 4(3)(b) of the 1971 Act. The complainer understands that the Crown intends to lead evidence at trial as to what may have been found during the search of the premises at 5 Daniel McLaughlin Place under the authority conferred by the warrant dated 4 April 2012. The complainer wishes to suspend the warrant by reason of it having been granted in circumstances which were wrongous, unjust and incompatible with the complainer's human rights with the object of rendering any evidence as to what may have been found during the search inadmissible.

[3] The Lord Advocate has lodged answers to the bill of suspension. No point is taken on competency, either generally or in respect of the proposal in the bill that the matter should be remitted to an evidential hearing presided over by either a sheriff or a single judge "to establish whether the information provided to the JP was correct, and to provide an assessment to the court on the behaviour of the police".

We would see that position as being correct; where a warrant has been granted by a justice of the peace in exercise of power conferred, for example, by section 23 of the 1971 Act, and it is proposed to lead evidence about what may have been seized in execution of that warrant in a forthcoming High Court trial, then application can be made to a quorum of this court by way of bill craving suspension of the warrant on the basis of illegality: see eg Birse v MacNeill 2000 JC 503. On such an application the powers of this court include power to remit to a single judge to determine any issues of disputed fact; see eg Evans and Kerr v PF Glasgow, Appeals no XJ767/12 and XJ811/12. While the consequent procedure can be seen as cumbersome: see Stuart v Crowe 1992 SCCR 181, Herd v HM Advocate 1999 SCCR 315 and Sir Gerald Gordon's associated commentaries, the decision in Allan v Tant 1986 JC 62 makes it clear that where the contention is that an ex facie valid warrant should not have been granted, it is not open, at least to a sheriff, to "go behind the warrant". The warrant has to be suspended, or reduced or set aside and that is something that only the High Court can do. It was not argued to us that the power of the High Court could be exercised by a single judge at, for example, a preliminary hearing in terms of section 72 of the Criminal Procedure (Scotland) Act 1995. It is presumably because of a consensus on that point that, in the knowledge of the complainer's intention to proceed by way of bill of suspension, a continued preliminary hearing in the case was discharged and 24 February 2015 fixed as a new diet.

[4] Before turning to the averments in the bill it is convenient to set out the terms of the report by the justice of the peace on the circumstances in which he granted the warrant.

"This Report concerns a Bill of Suspension by Michael Stewart in respect of a Warrant granted by me on 4 April 2012.

On 4 April 2012, Detective Constable Elizabeth Bair, Strathclyde Police, stationed at Paisley Police Office and under secondment to SCDEA, called at my home at [an address in Glasgow] and indicated that she wished to apply for a Search Warrant under the Misuse of Drugs Act 1971. The said officer was duly placed

on Oath and then informed me that she had reasonable grounds for suspecting that a quantity of controlled drugs were to be found in the possession of a person at premises occupied by Michael Stewart, at 5 Daniel McLaughlin Place, Kirkintilloch.

When placed on oath, DC Blair informed me that as a result of on-going police surveillance and current intelligence, categorized as B2, being received that (a) Michael Stewart, Gary Grant and Barry Letham were frequently involved in the use and distribution of controlled drugs; (b) on 3 April 2012 Stewart and Grant had supplied a source in Airdrie; (c) Letham intended to have a criminal meeting with a Lee Wood in order to obtain cocaine and money from the said Lee Wood; (d) police witnesses had observed Letham attend outside 1 Daniel McLaughlin Place, Kirkintilloch, the home of Grant and meet there with Wood; (e) Letham and Wood thereafter entered 1 Daniel McLaughlin Place with a weighted carrier bag; (f) within a space of minutes, Grant exited 1 Daniel McLaughlin Place whilst carrying a small child and an unidentified object and walked to 5 Daniel McLaughlin Place, the home of Stewart; and (g) Grant thereafter left 5 Daniel McLaughlin Place with the child but without the aforementioned object.

Having examined the Informant on Oath and having considered her Application and being satisfied that there was reasonable ground for suspicion, I granted the Warrant".

[5] The basis of the challenge to the warrant is set out in Statements 3 and 4 in the bill. These statements are in the following terms:

"3. That this warrant was sought and granted on the basis of information provided to the Justice which it is contended did not provide a comprehensive position to the JP, such that a proper consideration of all the information could inform the JP's decision. Moreover it is contended that (at least as presently disclosed) some of the information about disclosure is not borne out by the information having been given to Agents.

The Justice appears from the Report not to have been told that, at the time the warrant was sought, the Accused had been searched with negative result shortly

earlier, nor that his car had been searched with the same negative result, nor that his girlfriend had also been searched and nothing of evidential value found. Moreover, at the time of the present warrant being sought Barry Letham had also been subject to personal search with negative result. The Accused, at the time the warrant was sought was arguably being illegally detained.

Of the matters the Justice was provided with, as set out in the Justice report of 16 October 2014 there are the following criticisms. The criticisms follows the (a)-(g) reasons as reported by the JP:-

a) The 'B2' information provided (information apparently which is 'mostly reliable' and 'known personally to source but not to Officer' is inspecific in that it does not identify how current this information is, and why there is a belief that the Accused has drugs in his home at that time.

b) There has been no disclosure to the defence of any surveillance log to support assertion 'b'.

c) There is nothing in this information which relates to the Accused or his property or gives an indication of when this purported meeting was due to take place.

d) The police had observed this, but again, this provides no reason as to why a warrant was required at that time for the Accused's house.

e) The 'weighted carrier bag' assertion is not supported by the surveillance logs, and the Crown having precognosed the Police some considerable time later, the statements produced still do not go so far as to support this proposition.

f) The 'unidentified object' assertion is not supported by the surveillance logs, and the Crown having precognosed the Police some considerable time later, the statements produced still do not go so far as to fully support this proposition. Moreover, it cannot be said that the witness walked to the home of Stewart. The best that can be said is that he entered a block of flats, one of which flats belonged to the Accused.

g) Again, the best that can be said is the witness left a block of flats one of which flats belonged to the Accused.

In the circumstances the decision to grant the

warrant was based on an understanding of the evidence that was not complete. Moreover, it is now contended that the factual nexus of some of the information put before the JP is subject to criticism and/or doubt.

4. That in the circumstances a Sheriff/Judge ought to preside over an evidential hearing, to establish whether the information provided to the JP was correct, and to provide an assessment to the Court on the behaviour of the police (particularly with reference to the fact the surveillance logs do not seem to support the assertions made about meetings and the carrying of bags etc.). That after such an assessment is made and a report is provided to this court, that court can have the opportunity to consider whether the grant of warrant in these circumstances should stand".

[6] After an initial false start, the advocate depute confirmed that the Crown position was that the bill should be refused without further procedure.

[7] The first question to consider is whether the complainer's averments set out a relevant basis on which this court might be persuaded to suspend the search warrant granted by the justice of the peace on 4 April 2012. In our opinion they do not. It is to be borne in mind that what this court is being asked to exercise is not an appellate jurisdiction but rather a supervisory jurisdiction, the object of which is to determine whether the party with the relevant jurisdiction, here the justice of the peace, has exercised the jurisdiction conferred on him (and him alone) by statute in a lawful manner. Thus, in order to suspend the warrant, this court would have to be satisfied that the justice of the peace was not entitled to form the requisite suspicion on the basis of the information presented to him on oath by the police officer. There may of course be cases where it is said that police officers acted in bad faith and presented information to a justice of the peace which they knew to be false or clearly unreliable. This is not such a case. True, the complainer avers that police may have been guilty of over-interpretation of the information available to them and may be unable to refer everything to an entry in a surveillance log, but that is something very different from bad faith.

[8] It is to be stressed that the information

available to the police did not depend exclusively on surveillance but included what was described as B2 intelligence. Here the justice of the peace put the police officer on oath and obtained from her information which satisfied him that there was a basis for the suspicion necessary before he could grant a warrant in terms of section 23(3) of the 1971 Act. That was the proper procedure for him to follow. In considering DC Blair's application and in granting the warrant the justice of the peace was carrying out a judicial function. He understood that. An application for a warrant should never be regarded as no more than a formality. The requirement that a magistrate, justice of the peace or sheriff be satisfied as to the requisite suspicion is an important safeguard against arbitrary search: Birse v MacNeill supra at para [10]. However, what is required is reasonable suspicion, not full proof. Of necessity, an application for a warrant to authorise or search must accommodate the reasonable operational requirements of law enforcement agencies. The bill of suspension sets out a number of criticisms of the quality of the information provided by the police and it questions (but does not positively deny) the accuracy of some of that information, with a view to suggesting that the matter should be remitted to an evidential hearing in order that a single judge or sheriff can hear the relevant evidence and then report back (although on precisely what is not clear). We do not exclude the possibility of such a procedure, unwieldy as it undoubtedly is, being followed in an appropriate case. This, however, is not an appropriate case. In our opinion, the complainer's averments here are insufficient to make a case that the justice of the peace was not entitled to grant the warrant that he did. It is nothing to the point that another justice of the peace or a judge or sheriff faced with the same information might not have formed the necessary suspicion. It is only if it can be said that no reasonable justice of the peace would have granted a warrant in the circumstances which applied on 4 April 2012 that this court would be entitled to suspend the warrant.

[9] As it appeared to us, Ms Mitchell, who appeared for the complainer, accepted that the bill did no more than present rather diffident or tentative criticisms of the quality of the information presented to

the justice of the peace. That no criticism whatsoever is made of the justice would seem to be made explicit by the averments:

"In the circumstances, the decision to grant the warrant was based on an understanding of the evidence that was not complete. Moreover, it is now contended that the factual nexus of some of the information put before the JP is subject to criticism and/or doubt".

Just what is meant by "nexus" in this context may not be clear, but it is not said that the justice was not entitled to decide as he did on the basis of the information put before him. The question for him was whether what was spoken to by DC Blair, in her deposition on oath, satisfied him that there were reasonable grounds for suspecting that controlled drugs were in the possession of a person in the premises to which the application related. He was entitled to proceed on hearsay information from the constable: cf Birse v MacNeill supra and Renton & Brown Criminal Procedure at 5-05, and that remains so even if it later turns out to have been wrong: Lord Hope of Craighead in O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286 at 298, followed in Coalter and Ferns v HM Advocate [2013] HCJAC 115.

[10] While it might be different if the case were that the justice had been deliberately deceived by the police officer who deponed before him or, possibly, by other officers who had provided the deponing officer with information, that this bill of suspension contains no averments to the effect that no justice could reasonably have granted a warrant on the basis of the information provided to this justice, means that it is irrelevant and therefore cannot be passed.

[11] We attempted, but failed, to elicit from Ms Mitchell what exactly she maintained had to be established by the complainer in order that the warrant should be suspended, reduced or otherwise set aside. She agreed with the suggestion by the court that if behaviour constituting bad faith on the part of the police were established, that would justify suspension of a warrant that had been granted by reason of that behaviour, but beyond that Ms Mitchell had no sharp criterion or bright line to offer. Her approach was a different one. Here, she did not go the distance of

averring bad faith; she could not do so. However, as counsel, she explained that her role was to be satisfied that any warrant on the faith of which evidence prejudicial to her client had been seized was lawful. Where, as here, a warrant had been granted on the application of a police officer and without prior notice to the complainer, she had very little information as to the basis upon which the justice granted the warrant. This was in fact the second bill of suspension that had been presented by the complainer in this case. It was only on presentation of the first bill that the complainer and his representatives were provided with the justice's report and therefore placed in a position to advance criticisms of the evidential basis upon which the warrant had been granted. She had averred all that she could. In order for her to say more she required to explore matters at an evidential hearing. Thus, the purpose of the remit was essentially an inquiry at large in order to arrive at, as it is put in the bill,

"an assessment ... on the behaviour of the police (particularly with reference to the fact [that] the surveillance logs do not seem to support to support the assertions made about meetings and the carrying of bags etc) ...[so that] the court can have the opportunity to consider whether the grant of a warrant in these circumstances should stand."

[12] In our opinion, our criminal procedure does not, and indeed should not, provide for such a second-guessing of the decision by a justice of the peace, magistrate or sheriff to grant a search warrant, in exercise of the power conferred by section 23(3) of the 1971 Act. It is different when a police officer at his own hand, purportedly in terms of the power conferred on a constable with the requisite suspicion by section 23(2) of the Act, has searched the person of an accused person or his vehicle. Then, the admissibility of any evidence recovered during such a search can be objected to and the issues as to whether the constable did indeed have both the requisite suspicion and whether objectively he had reasonable grounds for forming it, can be explored, if necessary after the leading of evidence at an evidential hearing in terms of sections 72(6)(b) and 79(2)(b)(iv) of the 1995 Act. A reason for the difference is that in the case of a section

23(3) warrant, authority for the search only arises through the intervention of "an independent judicial figure who actually considers the circumstances and decides whether to grant the warrant": Birse v MacNeill supra at para [10]. The statutory scheme is to confer the jurisdiction to grant the warrant to the justice of the peace and with it the jurisdiction to consider whether the statutory criterion for granting the warrant has been met. That criterion is no higher than the justice's satisfaction that there is reasonable ground for suspecting and, consistent with the frequent need for expedition, hearsay (and indeed hearsay of hearsay) may be enough to supply the justice with the necessary information.

[13] This is not to say that a section 23 (3) warrant cannot be suspended by this court. If the justice's decision has proceeded on the basis of no or very clearly insufficient information, that would permit this court to suspend a warrant. Similarly, if the justice's decision was vitiated by the police knowingly having supplied him with erroneous information, this court could intervene. There may be other circumstances in which a relevant case could be pled. However, as is usually the case with litigation, at least as conducted in Scotland, if a party has a case he must plead it and do so with reasonable specification. Only then, if the averments are relevant and it is necessary to do so, will he be allowed to go to proof. In other words his pleadings must state in terms why he is entitled to the remedy he seeks before he is allowed to lead evidence in support of his case. It is not good enough to say that he does not know whether he has a case or not but that he might, and that therefore the court should help him to find out what that case may be. That is often described as "fishing". At best that is what the complainer is seeking to do here, that is to embark on a hearing with a view to acquiring information which might allow him to plead a relevant basis for setting aside the warrant granted on 4 April 2012. We say "at best" because at least some of what appears in the bill and some of what was said by Ms Mitchell seemed to suggest that it might be open to this court to evaluate, in the light of all available information, the quality and completeness of what was

put before the justice, with a view to revisiting the decision to grant a warrant. This court has no power to do that.

[14] For these reasons we refuse to pass the bill of suspension.

Упражнение 3.

Изучите судебное решение и найдите средства реализации следующих концептов: закон, нарушение, справедливость.

Commonwealth v. Clarke
Supreme Judicial Court, January 13, 2012

A suspect’s nonverbal expressive conduct, such as shaking his head back and forth in a negative manner, suffices to invoke his right to remain silent both under the Fifth Amendment and Article 12.

While being held by the police for custodial interrogation, and after being advised of his Miranda rights, the defendant shook his head from side to side in response to the question, "So you don't want to speak?" The police continued questioning the defendant, who eventually made incriminating statements. The defendant was subsequently charged with assault and battery and indecent assault and battery. He moved to suppress his incriminating statements, arguing that he had invoked his right to remain silent by shaking his head from side to side. A lower court judge allowed his motion to suppress, and a single justice of Supreme Judicial Court allowed the Commonwealth's application for leave to appeal that ruling (Mass. R. Crim. P. 15(a)(2), as appearing in 422 Mass. 1501 (1996)), and reported the case to the full court.

Fifth Amendment:

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself...." In Miranda v. Arizona, 384 U.S. 436 (1966),

the United States Supreme Court held that the privilege against self-incrimination extends to state custodial interrogations. During custodial interrogations, Miranda requires that the defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Miranda, supra at 479. Unless the government can prove the voluntary, knowing, and intelligent waiver of these rights after such warnings are given, any statements

made by the suspect are inadmissible. See Commonwealth v. Simon, 456 Mass. 280, 286-287 (2010).

While the "responsibility for invoking the protections guaranteed by Miranda and art. 12 rests squarely in the hands of criminal defendants." Commonwealth v. Collins, 440 Mass. 475, 479 n. 3 (2003), quoting Commonwealth v. Beland, 436 Mass. 273, 288 (2002), Miranda sets a "lower bar" for the invocation of those rights. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda, supra at 473-474. In the recent case of Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010), the United States Supreme Court ruled that criminal defendants must "unambiguously" announce their desire to be silent. This is an objective test, requiring "that a reasonable police officer in the circumstances would understand the statement" to be an invocation of Miranda rights. Davis v. United States, 512 U.S. 452, 459 (1994).

Relying on Thompkins, the Commonwealth in this case argued that the defendant must actually speak to invoke the right to remain silent. The Supreme Judicial Court rejected that argument, ruling that the defendant's negative shaking of his head satisfied both federal and state constitutional standards for invoking his right to silence. Despite his silence, the defendant's conduct, "an explicit headshake in response to a direct question" was sufficiently communicative to invoke his right to remain silent.

The Court also addressed whether Article 12 provides greater protection against self-incrimination than the Fifth Amendment, in light of the "unambiguous" standard articulated in Thompkins. The Court found that Article 12 does afford greater protections than the Fifth Amendment. "To impose a heightened standard of clarity as a prerequisite for prewaiver invocation of the right to remain silent would strike at the core of the privilege against self-incrimination." The Court held that "even if the defendant's conduct was insufficient to meet the federal Thompkins standard, the defendant acted with sufficient clarity to invoke his art. 12 right to remain silent."

Scrupulously Honored:

Once invoked, the right to remain silent must be "scrupulously honored" by law enforcement officers. Michigan v. Mosley, 423 U.S. 96, 104 (1975). See Commonwealth v. Brant, 380 Mass. 876, 882, cert. denied, 449 U.S. 1004 (1980). The Mosley Court looked at three factors in deciding whether the suspect's rights were "scrupulously honored": the police (1) had immediately ceased questioning; (2) resumed questioning "only

after the passage of a significant period of time and the provision of a fresh set of warnings"; and (3) limited the scope of the later interrogation "to a crime that had not been a subject of the earlier interrogation." Mosley, supra at 106.

The Court found that none of the three factors were present in this case: the police did not immediately cease questioning after the defendant's "unambiguous" nodding of his head, there was no pause in the interrogation, and the police continued questioning the defendant regarding the crimes for which he had been arrested. Thus, the Court found that the officers did not "scrupulously honor" the defendant's right to remain silent and affirmed the lower court's ruling to suppress the defendant's statements.

Упражнение 4.

Изучите судебное решение и найдите средства реализации следующих концептов: власть, закон.

Commonwealth v. Rodriguez and Dean-Ganek
Commonwealth v. Rodriguez
Supreme Judicial Court, January 12, 2012

Mass. R. Crim. P. 29(a) gives a judge the authority to reduce a defendant's sentence after accepting the Commonwealth and defendant's agreed plea recommendation.

On November 19, 2009, the defendant and the Commonwealth entered into a plea agreement where the defendant agreed to offer a plea of guilty to the charges of possession with intent to distribute a class B and D substance and additional charges in Boston Municipal Court for a concurrent two and one-half years sentence to the house of correction. The Commonwealth agreed not to seek indictments for those charges. A judge accepted the defendant's plea and adopted the sentencing recommendation.

On January 6, 2010, on his own motion, the judge ordered a hearing to consider whether the sentence should be revised and revoked under Mass. R. Crim. P. 29(a). Immediately thereafter, the judge revised the sentence to a concurrent sentence of two years in the house of correction with one year to serve and the balance suspended for two years. The Commonwealth filed a petition under G.L. c. 211, § 3 asking a single justice to revise and remand the sentence to its original form, and the single justice reserved and reported the case to the full Court.

The Commonwealth argued that "once a judge accepts the terms of an agreed recommendation in a plea agreement, the judge is bound by the terms of the agreement and may not exercise the authority under rule 29 to revise or revoke the sentence." The SJC disagreed.

The Court cited the language of Mass. R. Crim. P. 12(b)(1)(B) that indicates a plea conditioned on an agreement "shall not be binding upon the court." Unlike Federal R. Crim. P. 11, rule 12 does not create any plea agreement where the recommendation is binding on the judge. "[R]ule 12 protects a defendant from the risk that the judge will exceed the prosecutor's recommendation, but does not protect the Commonwealth from the risk that the judge will impose a sentence below the prosecutor's recommendation." The Court acknowledged that sentencing is one of the most difficult judicial responsibilities and that Mass. R. Crim R. 29(a) permits a judge to revise a sentence based on new information that is learned after sentencing, to correct incomplete or mistaken information offered at sentencing and to revise a sentence where justice otherwise "may not have been done."

Based on these reasons, the Court held "[a] judge, therefore, is not barred from reducing a sentence the judge has imposed until the time limits established in rule 29 to revise or revoke a sentence have expired. The existence of a plea agreement, even a plea agreement with an agreed recommendation, does not bind a judge to a sentence the judge later determines to be unjustly harsh."

Commonwealth v. Dean-Ganek

Supreme Judicial Court, January 12, 2012

The Commonwealth has no authority to require a judge to vacate a defendant's guilty plea, when the Commonwealth made a charge concession as part of an agreed upon plea and the judge imposed a less severe sentence.

The defendant was charged with one count of armed robbery, in violation of G.L. c. 265, § 17. The Commonwealth and the defendant agreed that the Commonwealth would reduce the charge to larceny from a person for an agreed upon plea to two years with six months to serve and the balance suspended with detailed probation conditions (the Commonwealth also agreed to dismiss an unrelated charge of leaving the scene of property damage). The judge accepted the plea and then imposed a lesser sentence. The Commonwealth appealed.

The Commonwealth argued that Mass. Rule Crim. P. 12 did not preclude the Commonwealth from withdrawing its consent to a plea where the judge imposes as sentence less severe than the agreed sentencing recommendation. The SJC was not persuaded by this argument. "The Commonwealth relinquishes nothing where a defendant pleads guilty; it has simply obtained the guilty finding it would have sought at trial without the time and expense of a trial. Therefore, in a plea colloquy, the Commonwealth's only role is to provide the factual basis for the charge; at no point does the judge ask for or need the Commonwealth's consent." The only time the Commonwealth's consent is relevant is when the defendant unilaterally attempts to plead to a lesser

offense because the charging decision belongs to the prosecutor. However, when the Commonwealth exercises its prerogative to nolle prosequi a portion of a charge, the defendant is entitled to offer a plea of guilty to that charge without the Commonwealth's consent.

"Where the Commonwealth has entered into a plea agreement and the defendant has honored its terms and relied on the agreement to waive his right against self-incrimination and admit his guilt at the plea hearing, we shall not release the Commonwealth from its obligations under the agreement simply because the judge, who is not a party to the agreement and under rule 12 is not bound by the agreement, did not accept the sentencing recommendation."

NOTE: When the Commonwealth is reducing a charge contingent on the judge's sentencing the defendant to the agreed recommendation, the Commonwealth must notify the judge to the provisions of the agreement under Mass. R. Crim. P. 12(b)(2) and best practice suggests all contingencies should be written on the nolle prosequi. The Court suggests a prosecutor concerned that a judge may impose a lenient sentence despite a plea agreement can conference the case with the judge before the tender of plea and inquire whether the judge is inclined to accept the plea; however, a judge is under no obligation to reveal any inclination before sentencing.

Упражнение 5.

Изучите судебное решение и определите концепты, реализующиеся в нем.

Elvis Heremia Teddy v New Zealand Police [2015] NZSC 6 (17 February 2015)

IN THE SUPREME COURT OF NEW ZEALAND
SC 101/2014
[2015] NZSC 6

BETWEEN

ELVIS HEREMIA TEDDY
Applicant

AND

NEW ZEALAND POLICE
Respondent

Court: McGrath, Glazebrook and O'Regan JJ

Counsel: R M Mansfield, M Heard and D A C Bullock for Applicant
B J Horsley and K Laurenson for Respondent

Judgment: 17 February 2015

JUDGMENT OF THE COURT
The application for leave to appeal is dismissed.

REASONS

[1] Mr Teddy was charged with two offences resulting from protest activity close to the site of proposed oil exploration activity outside New Zealand's territorial waters. He was the master of a protest ship. He was charged under s 65(1)(a) of the Maritime Transport Act 1994 (MTA) with operating that ship in a manner that caused unnecessary risk to the oil exploration vessel. He was also charged under s 23(a) of the Summary Offences Act 1981 (SOA) with resisting a constable in the execution of his or her duty.

[2] The District Court Judge held that the Court did not have jurisdiction in respect of the charges because neither s 65 of the MTA nor s 23 of the SOA had extraterritorial effect.[1] That decision was reversed on appeal to the High Court.[2] The High Court decision was upheld by the Court of Appeal, though for reasons that differed from those of the High Court.[3]

[3] The essential difference between the High Court and the Court of Appeal related to the effect of s 413 of the MTA, which provides:

413 Place where offences deemed to be committed

For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed either in the place in which the same actually was committed or in any place in which the offender may be.

[4] The Court of Appeal found that s 413 gave extraterritorial effect to s 65 of the MTA.[4] Both the District Court and the High Court had found that it did not. But the High Court found that s 65 had extraterritorial effect for other reasons.

[5] In the High Court, Woolford J found s 65 had extraterritorial effect for the following different reasons:•(a) By virtue of the decision in Sellers v Maritime Safety Inspector[5] and arts 92 and 97 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), New Zealand has exclusive jurisdiction over New Zealand ships on the high seas.

•(b) Under art 94 of UNCLOS New Zealand is required to exercise its jurisdiction by taking such measures for ships flying its flag as are necessary to ensure safety at sea with regard to the prevention of collisions.

•(c) While New Zealand ships were not part of New Zealand Territory, and there is no express wording in the MTA conferring

extraterritorial jurisdiction, the MTA applies by necessary implication to New Zealand ships beyond the territorial sea because of both the statutory context and New Zealand's international law obligations.[6]

[6] Woolford J also decided that the Court had jurisdiction in respect of the charge under s 23(a) of the SOA because:•(a) The power of the Police under s 317 of the Crimes Act 1961 to enter premises to arrest an offender authorised the Police to board the San Pietro to arrest Mr Teddy because a vessel is within the expression "premises" and they had witnessed him breaking the law. This power applied extraterritorially by virtue of s 5(1) of the Crimes Act.

•(b) The power of the Police to arrest Mr Teddy without a warrant came from ss 31 and 315 rather than s 317A of the Crimes Act. Sections 31 and 315 applied because Mr Teddy was liable under s 65(1) of the MTA to a term of imprisonment of up to one year and s 5(1) of the Crimes Act gave them extraterritorial effect. Section 317A did not apply because a vessel is not a "vehicle".

•(c) The offence of resisting arrest under s 23(a) of the SOA must apply extraterritorially as a necessary corollary of the extraterritorial application of the power to arrest.

[7] The Court of Appeal said that on its face s 413 does appear to give jurisdiction under the MTA by deeming every offence to have been committed either where it was committed or "in any place in which the offender may be". The latter is intended to extend the Court's jurisdiction in respect of any offence under the MTA to the place where the offender is, even if that is not where the offence was in fact committed. This interpretation would mean that a person in New Zealand who is alleged to have committed an offence under the MTA outside the territorial jurisdiction of the New Zealand Courts may nonetheless be tried for that offence in New Zealand.[7]

[8] The Court of Appeal considered that the decision in R v Hinde[8] supported this approach to the interpretation of a predecessor to s 413. The Court held that the High Court was wrong to hold that R v Hinde did not apply and should have followed it, despite the views of certain commentators doubting Hinde.[9] The Court of Appeal considered whether it should depart from its own previous decision in Hinde and decided that it should not do so.

[9] The Court of Appeal held that, based on the decision in Hinde, s 413 does expressly confer extraterritorial jurisdiction on a New Zealand Court in respect of offences under s 65. Alternatively the jurisdiction arises by necessary implication from the text of s 413.

[10] The Court held that the arrest powers provided by the Crimes Act empower the New Zealand Police to stop and board vessels and to arrest offenders extraterritorially. The Court agreed with Woolford J that by virtue of s 5(1) of the Crimes Act, the police were able to arrest Mr Teddy

without a warrant pursuant to ss 31, 315 and 317 of that Act and that as a necessary corollary of this the offence of resisting arrest under s 23(a) of the SOA must also apply extraterritorially.[10]

[11] The MTA was amended with effect from October 2013. The amending legislation removes any doubt about the extraterritorial effect of s 65 of the MTA.[11] There are also now new offence and enforcement provisions in the Crown Minerals Act 1991 dealing with conduct interfering with structures or ships engaged in mining activity in the territorial sea, in the exclusive economic zone or above the continental shelf.[12] The effect of these amendments is that any decision in the present case will have no ongoing significance.

[12] The present application does not therefore meet the criterion in s 13(2)(a) of the Supreme Court Act 2003 for the granting of leave: no point of general or public importance arises.[13] So the application falls for consideration under s 13(2)(b) of the Act: has there been a substantial miscarriage of justice or could there be one if the proposed appeal is not heard by this Court?

[13] We accept that there is room for argument about the effect of s 413. But, in order to establish a substantial miscarriage of justice, the applicant would need to establish that the reasons given by both the Court of Appeal and the High Court were incorrect. Having carefully considered the reasoning of both Courts and the submissions made by both parties in this Court, we are not persuaded that the applicant has satisfied that criterion.

[14] Leave to appeal is therefore refused.

Solicitors:
Lee Salmon Long, Auckland for Applicant
Crown Law Office, Wellington for Respondent

[1] R v Teddy DC Tauranga CRI-2011-070-2669, 26 July 2012 (Judge Treston).

[2] New Zealand Police v Teddy [2013] NZHC 432, [2013] NZAR 299 (Woolford J) [High Court judgment].

[3] Teddy v Police [2014] NZCA 422 (Stevens, White and French JJ) [Court of Appeal judgment].

[4] At [58].

[5] Sellers v Maritime Safety Inspector [1999] 2 NZLR 44 (CA).

[6] The language of "necessary implication" comes from the decision of the Court in Poynter v Commerce Commission [2010] NZSC 38, [2010] 3 NZLR 300, which sets out the general proposition that legislation does not have extra-territorial effect except for express statutory wording or necessary implication.

[7] Court of Appeal judgment, above n 3, at [48].

[8] R v Hinde (1902) 22 NZLR 436 (CA).

[9] Court of Appeal, above n 3, at [52]–[53].

[10] At [76].

[11] Maritime Transport Amendment Act 2013, ss 6 and 81. Section 6 adds a new s 4(4) to the MTA which says: "Except where the context otherwise requires, where this Act applies to ships, it applies to New Zealand ships wherever they may be.".

[12] Crown Minerals Act 1991, ss 101A–101C (inserted by the Crown Minerals Amendment Act 2013).

[13] See New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc [2013] NZSC 15; and Kain v Wynn Williams & Co [2013] NZSC 26.

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