COMMENT:

The Court of Appeal has again made clear that expert evidence is not an essential precondition to a finding that a victim suffered psychological harm. This case is an example of the distinction the criminal courts draw between "psychiatric" and "psychological" harm, which can be a source of confusion. The former is associated with medicalisation, whereas psychological interventions are non-medical, yet the terms are sometimes (wrongly) used interchangeably. For example, it is well established that a psychiatric disorder may amount to actual bodily harm, or even grievous bodily harm, whereas a psychological condition will not suffice (see *R. v Dhaliwal*, CLW/06/21/4, [2006] EWCA Crim 1139, [2006] 2 Cr.App.R. 24, CA; *R. Golding*, CLW/14/31/4, [2014] EWCA Crim 889, [2014] Crim.L.R. 686, CA). An allegation that is based on psychiatric injury must be supported by appropriate expert evidence (*R. v Chan-Fook* [1994] 1 W.L.R. 689, CA). However, in the present case the prosecutor appears to have suggested that an experienced judge can assess "psychiatric harm" (emphasis added, at [14]). Similarly, counsel for the first defendant contended that the trial judge had "wrongly … [applied] his own non-expert medical view" (emphasis added, at [46]) to the assessment of psychological harm.

Although irrelevant for the purposes of determining the appropriate offence label, "psychological harm", "distress" and "trauma" may be relevant to deciding the appropriate category for the purposes of sentencing. For example, the harassment guideline (CLW/18/26/17) requires consideration of whether the offence caused "serious distress" or "significant psychological harm" (category 1), "some distress" or "some psychological harm" (category 2), or "limited distress or harm" (category 3). Many of the guidelines in the sexual offences guideline (CLW/13/46/27) involve an assessment of whether the offence resulted in "severe psychological harm". And the burglary guideline regards "[t]rauma to the victim, beyond the normal inevitable consequence of intrusion and theft" as a factor indicating greater harm. (See *Chall* at [6]).

The defence here initially submitted that a court should not make a finding of "severe psychological harm" in the absence of expert evidence. This argument was bound to fail, not least because the financial consequences of requiring the prosecution to adduce expert evidence at sentence would be prohibitive. Earlier Court of Appeal cases have confirmed that expert evidence is not a requirement in such circumstances. In *R. v Dalton* [2016] EWCA Crim 2060, unreported, 9 December 2016, CA, the judge had presided over the trial and "heard the victim give her evidence" ([10]). He invited the prosecution to obtain a psychiatric report on the victim, but no such report was prepared. The Court of Appeal nevertheless held that the judge had been entitled to conclude that the victim had suffered severe psychological harm. See also *R. v Egboujor* [2018] EWCA Crim 159, unreported, 17 January 2018, CA, where the Court of Appeal noted that the judge "had ample opportunity to observe [the victim] as a witness" (16]). The Court of Appeal went even further in *R. v Boyle* [2018] EWCA Crim 2567, unreported, 8 November 2018, CA, upholding a finding of severe psychological harm based solely on the content of victim personal statements.

At the hearing in this case, the defence "modified" (at [12]) their submissions and suggested that the sentencing guidelines ought to provide "a sort of checklist to enable a court to assess the degree of psychological harm" (at [13]). Without explaining why, the Court of Appeal expressed the view that such a checklist was unnecessary and would not be appropriate or workable. While accepting that the degree of psychological harm involves a subjective assessment, the court simply stated that the judge "will act on the basis of the evidence and will be required … to give reasons" ([21]). If the evidence does not provide sufficient foundation for the judge's conclusion, "the point can be raised on appeal".

The Sentencing Council is currently consulting on a draft guideline for sentencing offenders with mental conditions or disorders (https://www.sentencingcouncil.org.uk/consultations/sentencing-offenders-with-mental-

health-conditions-or-disorders-consultation/), which contains a useful checklist for the purposes of determining whether mental ill health has affected an offender's culpability. In their 2015 report on reforming non-fatal offences against the person, the Law Commission noted a lack of clarity "in distinguishing treatable psychological conditions from unpleasant but normal states of mind such as shock, distress and feelings of depression, as the difference is often one of degree rather than kind" (Law Com No. 361, para. 4.124). It ought to be possible to devise guidance to assist sentencing courts to assess the nature and severity of any psychological harm to the victim, rather than expecting any errors or inconsistency of approach to be remedied on appeal.

Natalie Wortley