Indecent Images

Tasers

CBQ

CRIMINAL BAR QUARTERLY

ISSUE 3 | AUTUMN 2016

Hate Crime

Escalation of offences

Problems with Memories

Mistaken Identities

Publication of

THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

9 BEDFORD ROW

9 Bedford Row, are delighted to announce the appointment of **Steven Kay QC** as the new Head of Chambers.

Chambers would like to express grateful thanks to **Anthony Berry QC** for his stewardship over the last 16 years and he hands over a thriving set recognised as one of the leading sets in both criminal and international criminal law.

Anthony Berry QC will continue with his successful practice at 9 Bedford Row.

9 Bedford Row welcomes applications from established practitioners wishing to join chambers to continue our development as a successful and forward-thinking practice. Applications, in the strictest confidence, should be sent to **steven.kayqc@9bedfordrow.co.uk**

Steven Kay QC
Anthony Berry QC
Patrick Upward QC
Elizabeth Marsh QC
Abbas Lakha QC
Lee Karu QC
Jane Bickerstaff QC
Justin Rouse QC
Patricia May
Richard Germain
Roger Carne
Karina Arden
Kenneth Aylett
David Burgess
John Traversi
Louis French
David Hughes
John King
Jollyon Robertson
Adrian Amer
Gary Summers
Stephen Mejzner

Wayne Cleaver
Justin Hugheston-Roberts
John Cammegh
Simon Stirling
Peter Glenser
Jonathan Akinsanya
Anita Arora
Samantha Cohen
Anne Faul
Lawrence Selby
Yogain Chandarana
Gillian Higgins
Graeme Logan
Michael Stradling
Will Noble
Peter Hunter
Mustapha Hakme
Michael Edmonds
Toby Cadman
Daniel Higgins
Katrina Charles
Lucinda Dannatt

Sean Sullivan
Max Hardy
Ruth Becker
Rhiannon Sadler
Richard Paton-Philip
Corinne Bramwell
Jessica Clarke
Rebecca Nieto
Lennart Poulsen
Aneurin Brewer
Tessa Shroff
Sarah Bafadhel
Joe Holmes
Marija Bračković
Kirsty Sutherland
Kabir Sondhi
Puneet Grewal
Caroline Macpherson
Andrea Becker
Josh Kern
Alexandra Matthews

Chambers Director: Martin Secrett Senior Clerk: Paul Outen

Ranked In CHAMBERS UK BAR 2016 9 Bedford Row

www.9bedfordrow.co.uk

The LEGAL 500 UNITED KINGDOM LEADING SET 2015

PUBLISHING DETAILS

All submission and editorial inquiries to
John Cooper, 25 Bedford Row, London, WC1R 4HD
[tel] 020 8686 9141 [email] jgcooper58@yahoo.co.uk
CRIMINAL BAR QUARTERLY is the Journal of the Criminal Bar Association. It is published 4 times a year by LexisNexis on behalf of the Criminal Bar Association.

Magazine Editor: Diana Rose
[email] diana.rose@lexisnexis.co.uk [tel 020 7400 2828]

Head of Display Advertising: Charlotte Scott
charlotte.scott@lexisnexis.co.uk
[tel] 020 8212 1980 [mobile] 07919 690362

Printed by Headley Brothers Limited, Ashford, Kent.
This product comes from sustainable forest sources.

Cover image: iStockphoto/StockFinland

FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Cause for Concern

EDITOR **John Cooper QC**

Some years ago the so called Kilmuir Rules forbade any member of the judiciary making public comment about anything, to prevent, as the Rules put it, compromising their reputation for wisdom and impartiality. Those Rules are now, rightly consigned to the depths of antiquity and have no place in modern society where the public rightly demand accountability and accessibility and where, even in recent times, the deferential attitude to "Establishment" and "Leadership" can no longer be taken for granted. It is into this arena that the letter from magistrate, Margaret Gilmour, to *The Times* needs to be placed in perspective. In that open letter, this experienced magistrate expressed her frustration with the quality of Crown Prosecution Service performance. She was at pains to point out that the vast majority of lawyers fronting up cases for the prosecution strive to produce a quality service, but that the administration and support offered to them by the CPS was inadequate. As a magistrate of over 30 years' experience, it might be thought that when she is driven to say that "Anyone who goes into a magistrates Court on any day will see that the CPS is in a state of disarray" and describes, "Shambolic administration of the CPS" that what she says is both pertinent and in the public interest that the view be known. Of even more concern, this magistrate, who was saying no more than what many other practitioners have been saying for some time, was sanctioned by the Judicial Complaints Investigations Office and given a formal warning after some unnamed entity made a complaint about what she said. The JCIO observed in "Kilmuiresque" language that she " Failed to show circumspection and sound judgment expected of a magistrate". One can suppose that this means that she expressed her concerns, albeit with circumspect, publicly. She was also sanctioned for implying that she spoke for other magistrates rather than herself.

This whole affair raises concern on a number of fronts, especially if Margaret Gilmour accurately reports the situation in the magistrates court. The Junior Bar may have a view on this.

It is also concerning that she is sanctioned for writing a letter to *The Times* on a matter which is clearly causing this magistrate of 30 years great concern.

If we had not become aware of her views, it might be that the public at least would have been convinced that the CPS was in relatively fine fettle. Indeed the DPP says it is and for that we should be reassured, but sanctioning an experienced magistrate for raising a contra position which many feel are real and present or at the very least should be debated, is both unfortunate and retrograde.

And for the avoidance of doubt, I speak but for myself on this. ■

QC. 25 Bedford Row. The comments made are not necessarily those of the CBA.

Overriding Objectives

CHAIRMAN'S COLUMN

Francis Fitzgibbon QC

It is with a mixture of trepidation and excitement that I start my term as Chair of the Criminal Bar Association. The agenda for the year ahead is already looking crowded with known knowns, some known unknowns, and no doubt a crop of unknown unknowns to keep us on our toes. I am lucky to have had a year of "pupillage" with Mark Fenhalls QC. Not only has he won the respect of Judges, officials, administrators, the leaders of all branches of the legal profession, and the media, but he has made numerous quiet and unheralded interventions on behalf of the junior practitioners in difficulties. I have learned a mass of things from him that I had no idea about before. He has been a great leader of the Criminal Bar, and is a hard act to follow, but the officers of the CBA (Angela Rafferty QC, vice-Chair; Chris Henley QC, Treasurer; Sarah Vine, Secretary; and Donal Lawler, deputy Secretary) make a formidable team. We will continue to work together, united and determined to build on what Mark and his predecessors have done to serve our profession.

When the CBA members elected me as vice-Chair in 2014, they also voted to join our solicitor colleagues in strike action, to protest against a threatened second cut of 8.75% to their legal aid rates. I did not support the strike, because I thought it was not the right battle for us to be fighting at that time. But the whole legal aid profession then felt itself to be under threat from the state, as never before. It was not just the decimation of legal aid under the LASPO, but also the disrespect with which some in government were treating us. Emotions ran high. People feared not just for their livelihoods, but for the prospects of citizens for whom the law was now out of reach. Those fears have not gone away. Anyone who spends time in a criminal court knows that what holds the system together is the goodwill of those who work in it – lawyers, judges, court staff. The government has invested in digital technology to make the Courts work better, but paperless Courts won't do the job unless there is equivalent investment in people.

> "Paperless courts won't do the job unless there is equivalent investment in people."

Why do we still have that goodwill? It's because our profession of advocacy is a vocation, a calling. Cut through the toughest old cynic in a leaking, neglected robing room and you will find a person who sincerely believes in what we do. But the supply of goodwill is not limitless. In the last year and half the attitude of government to the Bar has changed, for the better. They realise we are serious when we say we are not in it for ourselves, but we want to the make the system work better for everyone. I firmly believe that the platform of constructive engagement on which I stood for the election, and which Mark Fenhalls has so skilfully put into practice, has been successful – thus far.

Of course, making the system work for everyone is not just a matter of how much the MOJ is willing to pay for our services. We have assisted in the implementation of Better Case Management, to make the court process more efficient, and the Digital Case System. The CBA has acted as a conduit to the administration and the judiciary for information about the successes and failings of these new ways of working, and we will continue to help as they are developed and refined.

It is a misconception to think of the CBA exists solely to defend the vested interests of criminal barristers– if that means unjustified privileges. On the contrary: from the time of its founding by those Titans of advocacy, Jeremy Hutchinson QC and Michael Hill QC, the CBA has its aim has to enable our members to serve the public interest as effectively as possible. You might say that the "overriding objective" of the CBA's work is serving the public interest by promoting and protecting the highest standards of advocacy in the criminal courts.

That sometimes means acting as the grit in the oyster – awkward, contrary, not taking yes for an answer. I used to think the concept of the Bar's independence was a bit of window-dressing, but now it's clear that it is the most distinctive and valuable feature of our profession. We are – or should be – beholden to no one, and prepared to stand up for anyone. We have a responsibility to give objective and impartial advice, not what the client or an employer wants to hear. We can speak truth to power. As good advocates, we know that the choice of words we use depends on the audience and the circumstances – there are many tools of persuasion. When we have to fight our own corner there have been times for militancy, when we have been faced with an overbearing administration that would not listen, and there have been times for quieter but no less forceful methods of making our case.

And so: for the good of our profession I hope to see the end of the Advocates Graduated Fee Scheme that pays for trials by the number of pages, without regard to the difficulty or complexity of the case; that penalises hard work by paying nothing for all sorts of appearances, or paying derisory amounts. One of the perverse consequences is the building of financial barriers that put off beginners and drive out too many practitioners before they have reached

their full potential. The introduction of a properly managed defence panel scheme goes hand in hand with the reform of fees – to ensure that advocates are accurately graded and are only able undertake cases in respect of which they have shown they meet the highest standards – not that they are just 'adequate'. Important though these reforms are to practitioners, their real value will be to preserve the best of the independent Criminal Bar for the benefit of society at large. By a paradox, our profession has long been undervalued but also taken for granted. I hope and believe that public and governmental perceptions have changed, and steps will be taken to make publicly funded criminal practice the jewel in the crown of our legal system. Many commercial lawyers who I meet say they regard what we do as real barristering.

The reform of fees and the proper grading of advocates is a strand in the cluster of reforms that are taking place in criminal justice. Hutchinson and Hill would barely recognise the world of criminal law as it is now. In 1969 there were no PTPHs or Criminal Procedure Rules. The idea that witnesses could give evidence from vans outside their homes would have seemed ludicrous to them. No one can sensibly disagree with plans to adapt the system to perform better in the age of online communications, but gains have to be measured against losses. I believe that there are real advantages in bringing people physically into the same room. Our human interactions and communications depend to a great extent on physical presence. Yes, we have decided to protect witnesses with 'special measures' which keep them out of the Court room – notably in sex cases. The loss is the immediacy of the evidence: as a defender, I greatly prefer cross-examination through video link because the physical absence of the witness drains colour and feeling from the process. It's more clinical, and the jury can't look into the eyes of a complainant in the same way, and she can't look at them.

The procedural reforms are meant chiefly to identify guilty pleas early, and the Sentencing Guidelines reinforce the importance of pleading as soon as possible. It's right that the guilty should not be given free rein to game the system, but there's a price here as well. The price is the erosion of due process. It goes like this: in my simple way, I believe that the main business of criminal law is to arrange for the State to identify wrong-doers and for the Court to decide if the State can prove their guilt to the required standard, and if so then mark its disapproval with a just and proportionate sentence. It is no part of our business to inquire generally into the truth of allegations except through the process of determining whether there is enough proof for a guilty verdict. In a trial, a comprehensive, factually accurate account of what has occurred may or may not emerge: if it does, it's a bonus. If the evidence is full of loose ends and unanswered questions it's no disaster, because the burden and standard of proof work to keep the Court's task within sensible limits. If every allegation called for a mini-Chilcot, trials would be unmanageable. The essence of due process is a balance between the interests and rights of each side of the case, to achieve what is acknowledged as fairness. A person accused of a crime is entitled to know the case against him, so the state must inform him of it. Maybe the evidence the prosecutor holds can't prove his case to the right standard, but the summary which is all that has to be given to the accused doesn't say that. How does the accused know whether the case against him is strong enough to prove his guilt? He doesn't. He may hear a Judge tell his representative at the first hearing that "your client knows if he did it or not", and demand that pleas are entered – and the Judge is doing no more than complying with the Criminal Procedure Rules. But he may just not know. If he pleads guilty, he acknowledges that the prosecution has proved its case, but if he fights on and eventually changes his plea or is found guilty, he suffers by getting a more severe penalty. The system places an increasing risk on defendants, and obliges them to make choices that they and their lawyers would prefer to delay – not for bad reasons, but because they have too little information. I recognise that the law has taken a new philosophical direction, but as I say it bothers me because of the risk of weakening due process for the apparent gain in convictions and financial savings.

> "A person accused of a crime is entitled to know the case against him, so the state must inform him of it."

In thinking about what due process amounts to, we should ask how high the quality of the process should be and how much of it is a defendant due. Both depend on the resources available. To my mind the quality should be as high as possible, so that the process is fair and commands respect. The guarantors of fairness are the judiciary and a corps of lawyers who are capable of presenting cases with great skill, to enable the decision makers to identify the real issues and weigh up the competing arguments. Good lawyers make good cases, and *vice versa*. Michael Gove as Lord Chancellor articulated what we all know – there is a two-tier justice system dividing those who can pay for their representation from those who can't. That is an evil and if I can do anything to mitigate it during the next year, my Chairmanship of the CBA won't have been a complete a failure.

The 'how much' question also depends on how much money is available. If the CPS can't afford to serve evidence at the beginning of a case, so the accused knows in detail what he is said to have done, there's a problem. Further down the track, trial preparation continues to be beset by tedious wrangles about disclosure of unused material. We rarely get paid to read it and it's in electronic form, so the cost of disclosing it is (you might think) minimal. These are examples of unnecessary limits to the amount of due process available – which knock on to the quality. It depressed me greatly to see the President of Family Division complain that too many legal-aid lawyers were acting in child care cases. If the senior Judiciary will not stand up to defend the people who appear in front of them – and help the Court make the right decisions – then I fear we are in trouble. ■

Problems with Memories

Preface

Wrongly convicted as a result of mistaken identification

Contributor

Matthew Scott

These days no prosecutor is considered properly trained until they have attended a course to sternly warn them of the dangers of believing "myths and stereotypes" about sexual offences.

The CPS website lists 10 such myths (defined as "a commonly held belief, idea or explanation that is not true"), including, for example:

"Rape occurs between strangers in dark alleys" (obviously it occasionally does, but the myth is that it *only* or *mainly* occurs in that way).

Or,

"You Can Tell if She's 'Really' Been Raped by How She Acts" (when, as the CPS correctly points out, reactions to rape are "highly varied and individual.")

It is all to the good that any myth should be expunged by the cauterising effect of truth, but there are even more fundamental assumptions underlying the whole criminal justice system. They are these:

- Jurors can generally rely on the memory of an honest witness;
- Jurors can safely assess when a witness's memory is mistaken;
- Jurors can safely assess whWen a witness is lying.

Unfortunately each one of these assumptions is a myth: a "commonly held belief that is not true."

"Lord Winton de Willoughby"

In 1877 a man with the unremarkable name of John Smith

was sentenced to five years' imprisonment for fraud. His *modus operandi* was to befriend women "of loose character," telling them that he was "Lord Willoughby" of St John's Wood. Having thus gained their confidence he would then ask to borrow money or an item of jewellery. Naturally they would happily agree, whereupon Smith, and the valuables, would disappear.

Smith was released from gaol in 1881.

Thirteen years later, in 1894, police started to receive reports that a "Lord Winton de Willoughby" of St John's Wood was carrying out almost identical frauds – again on women of "loose character."

The following year a blameless Norwegian, Adolf Beck, was accosted in the street by one of Lord Winton's victims, Ottilie Messonier. He protested that he had never seen her before, but she found a police constable who immediately arrested Beck. He was taken to the police station and charged on the basis of Messonier's allegation.

Soon other women started, as today's cliché would have it, to "come forward." They were shown Mr Beck, and 15 insisted that he had stolen from them. Then the police officer who had arrested Smith in 1877 also asserted that he recognised Beck as being one and the same man.

Beck was tried, convicted and sentenced to seven years penal servitude.

The details of how he came in due course to be pardoned need not detain us. It was conclusively established that despite the confident assertions of numerous witnesses, Beck could not have been Smith. The latter's prison records showed that he had been circumcised, whereas Beck had not.

The case led to a Parliamentary Inquiry, which in turn led to the establishment of the Court of Criminal Appeal, but cases continued to be successfully prosecuted on the basis of what would now be regarded as the flimsiest of identifications.

Despite the clearest evidence to the contrary, for more than 60 years the courts continued to operate on the assumption that eye-witness identification evidence was inherently reliable. Dock identifications, confrontations and crudely improvised identification parades formed part of many criminal trials. As late as the 1970s in one example[1], the defence objection to a proposed dock identification were over-ruled with a judicial ruling that an impromptu identity parade could be carried out in court by sitting the defendant amongst the jurors in waiting.

In the event the witnesses in question had already seen the defendant, both in the magistrates' court and by peering through the glass doors of the Crown Court as he stood in the dock for arraignment. The trial went ahead anyway and the defendant was duly convicted. Subsequent investigation revealed a cast-iron alibi.

The case was one of two that led to the establishment of the Devlin Committee on Identification Evidence in Criminal Cases, and following Lord Devlin's report to the seminal case of *R. v. Turnbull & others* [1977] 2 QB 224. A five Judge Court of Appeal headed by Lord Chief Justice Widgery issued the now familiar guidelines on how the courts should treat such evidence.

Judges are instructed to warn juries:

> "of the special need for caution before convicting in reliance on the correctness of the identification. He should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of such witnesses could all be mistaken."

There is still room for complacency, but it is certain that *Turnbull,* and an evolving Code of Practice for conducting police identification procedures under the Police and Criminal Evidence Act 1984 have cut the numbers of people wrongly convicted as a result of mistaken identifications.

The common assumption since *Turnbull* has been to believe that identification evidence falls into a separate category, and other eye-witness evidence is still generally admitted without any judicial warning.

So whilst juries are routinely told that an honest but mistaken *identification* witness can be convincing, no such warning is given in other cases which depend on a witness's memory. Nor are juries told to look for corroboration of a single witness's account. This is despite modern psychological research having shown that the ability to memorise is highly variable between individuals, and that memories themselves are imperfect, changeable and unreliable.[2] As Elizabeth Loftus vividly put it:

> "Our memories are constructive. They're reconstructive. Memory works … like a Wikipedia page: you can go in there and change it, but so can other people."

As with identification witnesses, ordinary eye-witnesses can be honest and convincing but still mistaken, particularly when attempting to remember details months or years after the event. In fact it is almost inevitable that witnesses will be inaccurate. Yet unless a case turns on evidence of identification, no judicial warning need be given and no special rules on admissibility exist when cases turn on a witness's memory. The warning that it was dangerous to convict on uncorroborated evidence in sexual cases – admittedly an anomalous and needlessly technical rule – was abolished in 1994.

Spotting a Lying Witness

Jurors are also routinely invited to decide who is telling the truth in circumstances in which the ability to make a safe (or "sure") decision is simply impossible. The myth here is that jurors are able to spot a lying witness simply by watching and listening.

Again, the psychological research is clear: it can't be reliably done. Study after study has shown that most people perform the task at best slightly better than chance.[3]

No recent case better illustrates this than that of David Bryant, a retired Chief Fire Officer who was convicted of historic sex offences and imprisoned on the uncorroborated word of someone who was later, after an enormous amount of work by a team of barristers and private investigators acting

1. *R v. Dougherty*, cited in detail the Devlin Report.
2. See (if, like me, you are not a specialist) Julia Shaw *The Memory Illusion* 2016 Random House Books
3. See Bond & DePaulo *Accuracy of deception judgments Pers Soc Psychol Rev.* 2006;10(3):214-34. http://www.ncbi.nlm.nih.gov/pubmed/16859438

pro bono, revealed as a compulsive liar. Understandably, Mr Bryant has called for an urgent review of the way that similar cases are prosecuted. He was right to do so, not least because neither the Crown Prosecution Service nor the Court of Appeal seems in the slightest bit troubled by the problem.

Mr Bryant's case is far from unique. The occasional exoneration of the innocent cannot muffle the cries of pain from those convicted on similarly uncorroborated and potentially unreliable evidence. Many may well be guilty; but many may also be innocent. We simply cannot tell which is which. It is even more difficult to do so when the resources available to defence solicitors have been cut to the bone, a point that has recently been taken up by Sir Henry Brooke, the retired former head of the Law Commission and Vice President of the Court of Appeal,[4]

Stories of Injustice

Sir Henry is one of the very few senior judicial figures even to acknowledge the existence of the problem. As far as today's Court of Appeal is concerned the verdicts of juries are sacrosanct, and the law is clear: juries are entitled to convict on the uncorroborated evidence of a single witness. As Lord Judge CJ put it in *R. v. Barker* [2010] EWCA Crim 4; [2011] Crim LR 233:

> "... it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability".

The reference to juries being "unequivocally directed about the dangers of doing so," rings hollow: there is no legal requirement that juries should be given any sort of warning about convicting on uncorroborated evidence. Instead, today's Judges are more likely to warn of the dangers of belief in a "rape myth" leading to a witness *not* being believed. And the notion that even historic prosecutions dependent on a single witness might amount to an abuse of process was seemingly squashed for good by the same Lord Judge in *R. v. F (S)* [2011] 2 Cr App R 28.

Questioning the ability of courts to return safe convictions on uncorroborated evidence would, of course, open up another "appalling vista." It would throw many convictions into doubt and undermine the complacent myth that we have the best justice system in the world. Yet the truth should be blindingly obvious: juries cannot always rely on the uncorroborated memories of the honest, and cannot safely be relied upon to detect the lies of the dishonest. The convenient fiction that they are able to do so means that some criminal trials are little better than grotesque games of chance. As a result, an unknown number of innocent people are almost certainly languishing behind bars.

The random sacrifice of the innocent in order to ensure the conviction of the guilty should not be acceptable in any civilised system of justice. ■

4. *Stories of Injustice (No 19)* https://sirhenrybrooke.me/2016/08/21/stories-of-injustice-19/

Pump Court Chambers

Hate Crime

Preface

Definition of hate crimes

Contributor

Ramya Nagesh

In the tumultuous weeks following the "Brexit" vote, much talk has centred around the Economy, immigration and our political constitution. However, one stark development that was not anticipated or, at best, was under-estimated, has been the rapid increase in hate crime. With growing concern, many of us have observed reports of hate crime against both EU and non-EU foreign nationals spiralling upwards, as well as – interestingly – those of only perceived foreign nationality. According to figures supplied by the Metropolitan police, there was a 500% increase in reports of hate crime in the weeks following the "Brexit" result – an average of 47 reports of hate crime *per* day, as compared to the pre-"Brexit" average of 63 reports *per* week.

Of course, hate crime is not a new concept. It is true that it sees a surge after any event with perceived racial or religious undertones – the clearest example is the documented rise in Islamaphobia following the 9/11 and 7/7 attacks. Nevertheless, it has bubbled under the surface for centuries. The Aliens Restriction Act 1905 acted to restrict Jewish immigrants fleeing persecution in Russia at that time. Those fleeing British colonies for the shores of the colonisers faced persecution in the 20th Century. The Lesbian, Gay, Bisexual and Transgender ("LGBT") Community has faced unacceptable discrimination for centuries. However, notably, there has been a recent surge in the focus on prosecuting such incidents as criminal offences. In 2015, for example, the Crown Prosecution Service ("CPS") completed 15,442 hate crime prosecutions, the highest number to date (*CPS Hate Crime Report 2016*[1]).

However, there remains discrepancy as to how these crimes should be approached. Some criminal offences include a racial or religious factor as an element of the offence, to be proved for the offence to be complete. In other cases, the "hate crime"

1. http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2016.pdf [last accessed July 19, 2016]

aspect forms part of sentencing only, taken into account as a sentencing uplift. It is imperative that practitioners are aware of the various approaches to hate crime, in order to ensure both consistency and fairness of approach.

What is Hate Crime?

Unlike many criminal offences, hate crime, by definition, focuses not simply on intention and action but on motivation. The National Police Chiefs' Council (NPCC) and the CPS have agreed a common definition of hate crime (*CPS Hate Crime Report 2016*):

> "Any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender."

Broadly speaking, if the offender is either demonstrably motivated by hostility towards one of the named characteristics, or immediately before or at the time of committing the offence demonstrates one of those characteristics, then the offence will be a hate crime. As noted above, however, whether that is reflected in the offence itself or the sentence will depend upon both the offence and the particular characteristic shown.

Statutory Offences

It may assist criminal practitioners to have a comprehensive list of offences that are statutory hate crimes. Therefore, the following are offences that incorporate the hatred aspect as an element of the offence:

Section 29 of the Crime and Disorder Act 1998 provides that a person is guilty of an offence if he commits a common assault, s.47 assault (assault occasioning Actual Bodily Harm) or a s.20 assault (assault occasioning Grievous Bodily Harm Without Intent) which is racially or religiously aggravated;

Section 18 of the Public Order Act 1986 provides that a person is guilty of an offence if he uses "*threatening, abusive or insulting words or display threatening, abusive or insulting written material, intending to stir up racial hatred or if racial hatred is likely to be stirred up.*";

Section 19 of the Public Order Act 1986 provides that a person is guilty of an offence if he publishes threatening, abusive or insulting material that he intends to stir up racial hatred or, having regard to all the circumstances, is likely to stir up hatred thereby;

Part IIIA of the Public Order Act 1986 addresses religious hatred. Under s.29A, "religious hatred" means "*hatred against a group of persons defined by reference to religious belief or lack of religious belief*";

Under s.29B of the POA 1986, a person is guilty of an offence if he uses threatening words or behaviour, or displays material which is threatening, if he intends to stir up religious hatred or hatred on the grounds of sexual orientation, unless he can show that he did so in a dwelling and had no reason to suspect that anyone would see the words unless inside that dwelling;

The following sections of the POA 1986 are in the same vein, covering publishing material, performing a play or distributing/showing/playing a recording, or broadcasting or including a programme in a distribution service;

Section 29G of the POA 1986 provides that possession of inflammatory material with a view to stirring up religious hatred or hatred on the grounds of sexual orientation is guilty of an offence;

The Protection of Freedoms Act 2012 created racially and religiously aggravated offences of stalking.

Interestingly, s.29J allows a *caveat* to the public order offences, with regards to the free expression of views relating to:

"…discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."

In the same vein, s.29JA states:

"*(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.*

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred."

In order to prove that an offence is racially or religiously aggravated, the prosecutor will need to prove both the "simple" element of the offence (such as the assault) as well as the racial/religious motivation. This is defined in s.28 of the Crime and Disorder Act 1998:

"*(1) An offence is racially or religiously aggravated for the purposes of ss.29 to 32 below if: (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.*

(2) In subs.(1)(a) above:
"membership", in relation to a racial or religious group, includes association with members of that group;
"presumed" means presumed by the offender.

(3) It is immaterial for the purposes of para.(a) or (b) of subs.(1) above whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph."

Therefore, the offender will need to either have the motivation proven, or demonstrated immediately before or at the time of the offence.

Sentencing Uplift

The increase in sentence for hate crimes is nothing new or surprising; s.145 of the Criminal Justice Act 2003 ("CJA 2003") states that where a crime is religiously or racially aggravated, that must be treated as an aggravating factor and – moreover – the sentencing Judge must state that fact in open court.

The recent increase in recognition of other forms of hate crime – namely, by virtue of disability or by identification as LGBT – has found footing in the legislation, at least as far as sentencing is concerned. Section 146 of the CJA 2003 provides:

"*(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subs.(2).*

(2) Those circumstances are:

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on:

(i) the sexual orientation (or presumed sexual orientation) of the victim, [...]

(ii) a disability (or presumed disability) of the victim, or

(iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly):

(i) by hostility towards persons who are of a particular sexual orientation,

(ii) by hostility towards persons who have a disability or a particular disability, or

(iii) by hostility towards persons who are transgender.

(3) The court:

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of para.(a) or (b) of subs.(2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section "disability" means any physical or mental impairment.

(6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment."

It is notable that it is not just whether a person is disabled or LGBT, but whether they are perceived to be as such. In this way, the focus is very much on the motivation of the offender, rather than the particular characteristics of the complainant that may render them vulnerable.

Motivated by Hostility or Demonstrating Hostility

Clearly before the sentencing uplift can be applied, there must be either demonstrable hostility or the crime must be motivated by hostility – the disability/LGBT status cannot just be a feature. This is an important distinction.

One clear example is that of a robbery where the victim is disabled. The offender may have considered that the victim was more likely to be a profitable target because he was vulnerable by virtue of an obvious disability. Certainly, this is an aggravating factor in the Guidelines. Nevertheless, when considering the uplift, the question for the Judge must be whether a) the offender can be said to have demonstrated hostility towards the victim by virtue of his/her disability; or b) whether they can have been motivated to commit the crime by virtue of his/her disability.

The first limb is relatively straightforward. Demonstrations of hostility will of course differ in many cases, but broadly speaking, language and specific actions will be good evidence of demonstrations of hostility.

The second limb is slightly less straightforward. Motivation relies upon the little used facet of the criminal law – motive. There is a clear overlap where there are overt actions or words used. Where there is not, motivation may be demonstrated by previous similar convictions, or other instances of hostile behaviour (such as anti-LGBT campaigning). That will, though, be a matter to be argued and determined before the sentencing Judge.

The Uplift

The case of *Kelly and Donnelly* [2001] 2 Cr App R (S) 73, sets out the approach that the court should take when sentencing hate crimes in general at para.62 and is the cornerstone for any criminal practitioner:

"… a sentencer should first arrive at the appropriate sentence, without the element of racial aggravation but including any other aggravating or mitigating factors. The sentence should then be enhanced to take account of the racial aggravation."

This must, logically, be extended to apply to hostility by virtue of disability or sexual orientation. Therefore, when prosecuting or defending a hate crime, this is the principle to be taken into account. Judges should be invited to state both the sentence without the element of aggravation and then state the level of uplift due to the aggravation.

Conclusion

It is perhaps concerning that racial and religious aggravation have been afforded the relatively higher status of criminal convictions in themselves, whereas disability and LGBT crimes are merely factors to be taken into account when sentencing. Whilst the result may be much the same, much of the law is in its perception. The fact that certain acts are openly criminalised as offences enhances how morally wrong they are; once the law recognises the equality of disability and LGBT crime to racially and religiously aggravated crime, those minority groups will feel the benefit. Until that day, and on a practical note, practitioners should be aware of how prevalent hate crime prosecution is and should be aware of how to deal with it, to satisfactorily represent the prosecution and defendants alike. ■

No5 Chambers. www.no5.com

Indecent Images: The Shift in Recent Years from "Possession" to "Making"

Preface

The importance of hiring a defence expert in these cases

Contributor

Gabrielle Moore

Indecent image cases have evolved over the years as technology and user capabilities have advanced. With increasing frequency the CPS are charging defendant's with making indecent images under s.1 of the Protection of Children Act 1978 (the 1978 Act) as opposed to possession of indecent images under s.160 Criminal Justice Act 1988 (the 1988 Act). This is as a result of developments in case law over the last 10 years.

Under the 1988 Act, it is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession. Possession involves both a physical and mental element. The Crown must prove that a person has custody and control of the photographs stored on a device in order to possess them. This means he must be capable of, or in a position to, retrieve them. For example, being able to show them on a screen, to make a copy of the image or to send the image to someone else. Proof of the physical element in such cases will depend on consideration of the following:

i. Where the photographs are stored on the device
ii. The means by which they could be retrieved
iii. Whether the defendant has the technical knowledge and software or other means

The mental element that needs to be proved is knowledge. A defendant must knowingly have custody and control of the photographs found on the device in question. Upon conviction on indictment, the maximum sentence is one of five years imprisonment.

i. Under s.1(a) of the 1978 Act, it is an offence for a person to take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child. The elements of the offence were explored in *R. v. Smith; R. v. Jayson* [2003] 1 Cr App R 13, CA, and it was held:
ii. That where a person opens an attachment to an email that contains an indecent photograph or pseudo-photograph of a child, he may be said to "make" that photograph within s.1(1)(a), and he will be guilty of an offence contrary to that provision if it is established that when he opened the attachment he did so intentionally and with knowledge that what he was making was, or was likely to be an indecent image of a child.
iii. The mere act of downloading a photograph or pseudo-photograph from the Internet to a computer screen could also be said to constitute the "making" of a photograph, and that a person who did such an act intentionally and knowing that the image was, or was likely to be an indecent image of a child, would be guilty of an offence under s.1(1)(a).
iv. That in neither case was it necessary to prove that the individual did any act with a view to saving the image on his computer.

Smith and Jayson was considered in the case of *R. v. Harrison* [2008] 1 Cr App R 29, CA. It was held that, where the appellant had accessed legal pornographic websites in which indecent photographs of children had appeared by way of an automatic "pop-up" mechanism, it was the appellant and not the web-designer who was the maker of the image. As to *mens rea*, the jury had to be sure that the appellant knew about the "pop-up" activity when he accessed the adult pornographic sites and that, in accessing those sites, there was a likelihood that the "pop-ups" would include illegal images. Upon conviction on indictment, the maximum sentence is one of 10 years imprisonment.

> The Crown must prove that a person has custody and control of the photographs stored on a device in order to possess them.

The law in this area really is Draconian and works against defendants at every turn. Considering the 1978 Act affords limited defences, the one thing that has assisted in recent times is that the prosecution rarely instruct qualified experts to examine the electrical devices in question. The "experts" they instruct are often police officers with very basic training in EnCase imaging, or other similar software. A copy of the device is made and the total images noted. They are often unable to comment upon whether or not there are duplications of any of the images, if the file or folder was live, recently deleted or recovered. Live files are not always accessible and therefore a user may not even be aware of their existence but the images may be included within the overall number. It is also important to note that evidence of searches does not automatically mean the defendant entered the search term. Moreover, recovered files may have been stored at any time by any user. It is essential to consider where the computer was found, whether in a shared room or bedroom, whether or not the computer had a password or if there were multiple users. This sounds obvious but is often overlooked by prosecution experts.

Compounding the situation is the apparent lack of experience of the officers tasked with grading the images. The new categorisation ranges from A to C. Officers are not always familiar with this and so the grading may be inaccurate. A defence expert will be able to check the categorisation and confirm the accuracy of the same. It is therefore extremely important to instruct a defence expert in cases where your clients are facing charges under the 1978 Act. ■

33 Bedford Row

"Neuromuscular Incapacitation"

© REX/Shutterstock/Jason Bye

Preface

Police use of Tasers

Contributor

Dan Bunting

In 2008, following a successful pilot, non-firearms officers in police forces in England and Wales were permitted to use Tasers, after having received suitable training. Tasers are stun guns that are capable of discharging an electric current to the tune of 50,000 volts into an individual.

The aim was a laudable one. The idea being that these are a non-lethal (now designated 'less lethal') alternative to firearms, with the consequence being that someone who would previously have been potentially shot dead by the police would now be "Tasered" – a painful experience certainly, so the official line went, but one that would incapacitate temporarily but leaving no lasting effects.

To publicise the benefits of Tasers, Richard Brunstrom, (then Chief Constable of North Wales Police), volunteered to film himself being on the receiving end of a tasering. An experience from which he survived none the worse for wear, albeit describing it is a "not pleasant" experience.

ACPO sets minimum standards for the training required before an officer is issued with a Taser – there must be a minimum of 18 hours contact training, and the risk presented by Taser use, including the heightened risks in relation to vulnerable individuals pointed out.

Beyond that, the training is does on a force by force basis. For example, in the Met, it takes the form of an "intensive" three day course. This is not a formality – one in five officers fail the test at the end.

This is an area which is heavily monitored, and there is good data available. We know that Tasers are used a lot – in 2014 they were drawn 10,062 times in England and Wales, although they were actually discharged in less than one in five of those instances (on 1,724 occasions).

However, this can be compared with only two instances of firearms actually being used by police officers against members of the public in that time frame (firearms officers were obviously deployed on many more occasions).

There is a wide, and not easily explained, variance in the use of Tasers ranging from two Taser uses *per* 100 officers up to 33. This cannot be explained by the different nature of the forces involved (urban *versus* rural for example) – the two forces with the least Taser use are Dyfed-Powys and the City of London. Also, use by the Metropolitan Police is three and a half times that of their neighbouring force.

Tasers do appear to be an effective deterrent – the most

common outcome is the person on the end of the Taser gets "red-dotted" (just over half the time), at which point they co-operate.

The IPCC has expressed concern over the use of Tasers, and has conducted extensive research into their use. As of 2014, of the eight investigations that they have conducted into deaths where a Taser has been deployed, none were found, by the IPCC at least, to have caused the death. This is a particular issue in assessing the impact of Taser use – it is not clear exactly how lethal they are. Any discharge of high voltage can cause cardiac arrhythmia, which can cause a cardiac arrest.

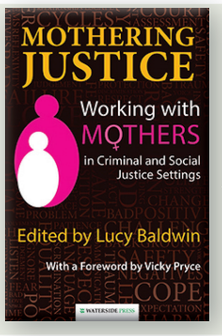
Tasers were recently in the news when former footballer Dalian Atkinson died on August 15, 2016 following a Taser being deployed against him. As this is being written, the inquest into his death has started, and investigation are ongoing, so no more will be said about the specifics of that case, but the public reaction is indicative of the concern.

As time has gone by, their use has become more controversial. For example, in 2013 Jordan Begley died in custody after being arrested, in the course of which he was Tasered. Last year a Manchester jury concluded that although the Taser was not the direct cause of death, it "*more than materially contributed to*" his death.

In many cases worldwide where a death has followed there have been other issues in the background, be it a pre-existing medical condition, or drug use. It is not clear whether Taser use of itself, in an otherwise healthy adult, is sufficient to cause death, but as Tasers appear to be used more and more frequently, this is a topic that will continue to be of concern to the public at large. ■

2 Dr Johnson's Buildings

BOOK REVIEW



Mothering Justice: Working with Mothers in Criminal and Social Justice Settings

Edited by Lucy Baldwin. With a Foreword by Vicky Pryce.
ISBN: 9781909976238.
Price £25. 320pp print Waterside Press

With a foreword by Vicky Pryce, a woman who has spoken so much for women in the justice system, *Mothering Justice* sets a precedent for practitioners working with mothers. Lucy Baldwin edited the book with a raft of practitioners contributing their experiences and thoughts across social and criminal remits.

The chapter, A Pregnant Pause by Laura Abbot drew my attention. Data and figures on babies in prison are hard to come by but the figures are sobering.

"There are approximately 4,000 women who are incarcerated at one time in the UK (MoJ 2015). The majority are already mothers, 66% being mothers of children under the age of 18" (p.189)

In her 2007 Report, Baroness Corston stated that women entering the system were already pregnant yet unaware until initial health checks. Laura Abbot probes a provocative Pause for Thought, a young woman sentenced on her due date for £5 worth of shoplifting. Laura asks: Do you think this was "just?" The question weighs heavy. The simple answer is – no. The detailed response demands answers from criminal justice practitioners – was this not discussed in her pre-sentence report? If not, why not? The custodial sentence in this case, imprisons two humans, for a shoplifting offence, a summary only offence. This sentence achieved nothing. A costly bill to the taxpayer was at best, achieved. It is not about doing more. I feel we should be doing better. Laura Abbot's probing chapter explores this little known about area, maternity care in prisons and the impact this has on a mother's life.

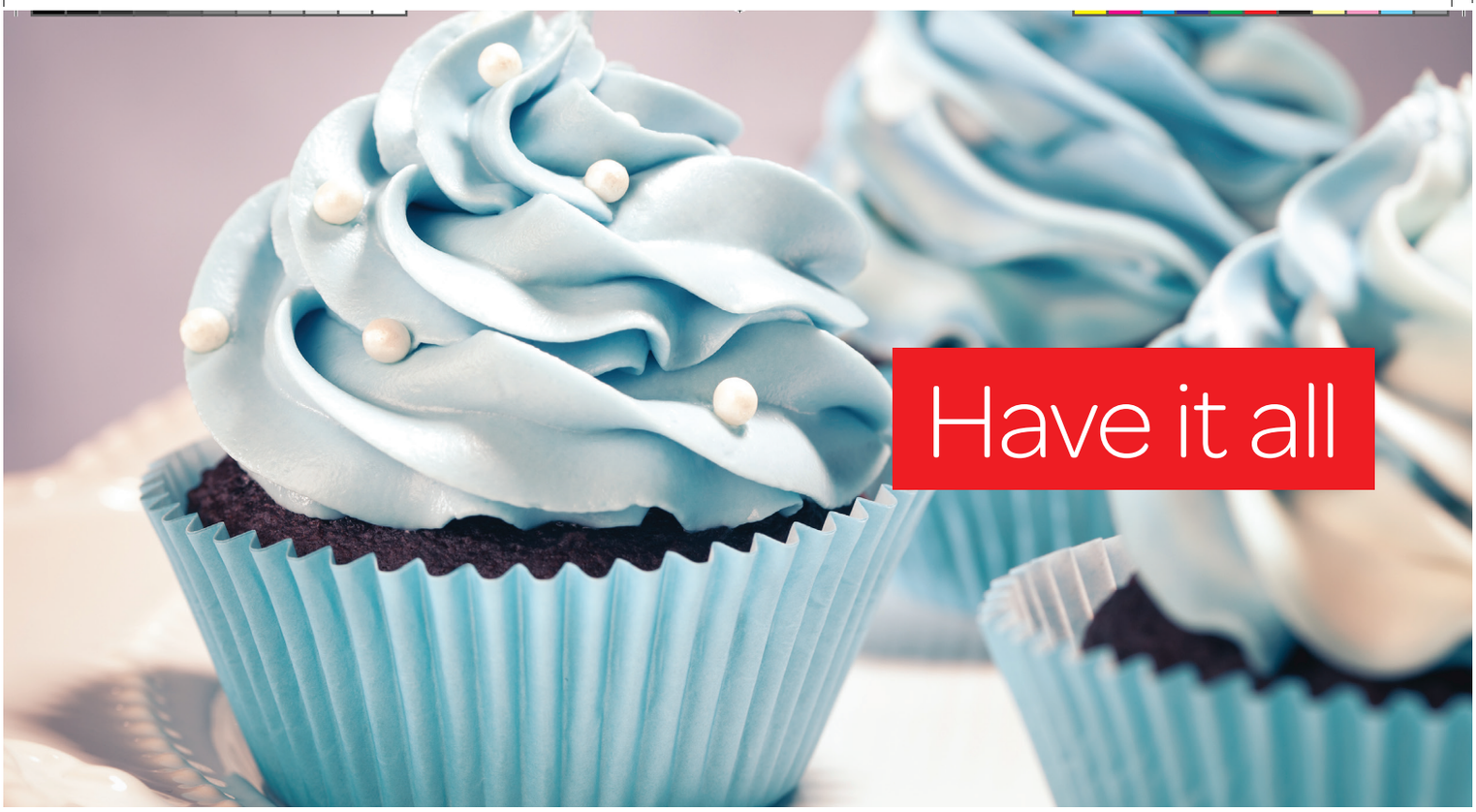
Mothers in the Dock – Lucy Baldwin & Leila Mezoughi: This chapter relives my experiences in a criminal dock. Baldwin and Mezoughi challenge judiciary attitudes towards women and mothers. The chapter briefly delves into the historical relationship of women in court yet cleverly focuses on the court's relationship with women. This stood out in that it defines the views of the Judiciary of a woman who commits crime. In the 21st Century, courts still take a dim view of a woman who stands in front of them. The chapter probes deeply and succinctly into the Judiciary, their attitudes on sentencing decisions in relation to women and mothers. Despite shouts from the backbenchers in Parliament of achieving equality means locking more women up for longer (Philip Davies MP *The Independent*) debate on harsher sentencing of women and mothers divides opinions. My own research leads back that harsher sentencing of women by the Judiciary is present. The chapter cites opinions from Hill in 1864 on "bad women inflicting more moral injury to society than a bad man" (p.114). One hundred and fifty one years on, elements of these attitudes underpin sentencing of women and mothers. Moreover, very few would dare to admit such a narrowed opinion.

Mothering Justice has dared to expose the barriers both in Criminal and Social Justice Areas. Lucy Baldwin *et al* have delivered a stunning panoramic view of Motherhood. This book brings a sense of power so practitioners and students can begin to challenge the effects of punishment has on women and Motherhood.

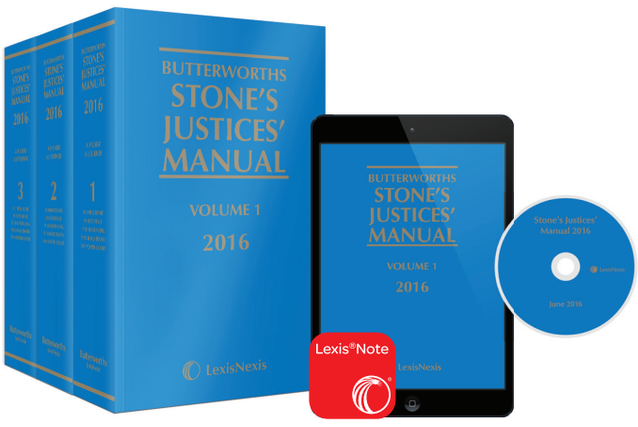
A courageous look at a powerful force – *Mothering Justice* is an eye-opening publication bringing the forces of Mother Nature to the Judiciary and Social Justice.

Proceeds from sales go to St Giles Trust, Women's Breakout and Birth Companions. The book can be purchased Here. ■

Tracey McMahon is the founder of The SHE Project



Stone's Justices' Manual 2016



This comprehensive, ready to use, three volume set covers all the new and amended legislation affecting the magistrates' courts, including criminal procedure. Accompanied by a CD, this title includes hundreds of new cases that clarify particular principles of law and set precedents.

Order your copy today.

Visit **www.lexisnexis.co.uk/stones2016** (get free postage and packaging on all online orders). Alternatively call us on **0845 370 1234** (Calls cost 7p/min) quoting **21169**.

LexisNexis®