Sexual Offences Act Legal Principles

CBQ

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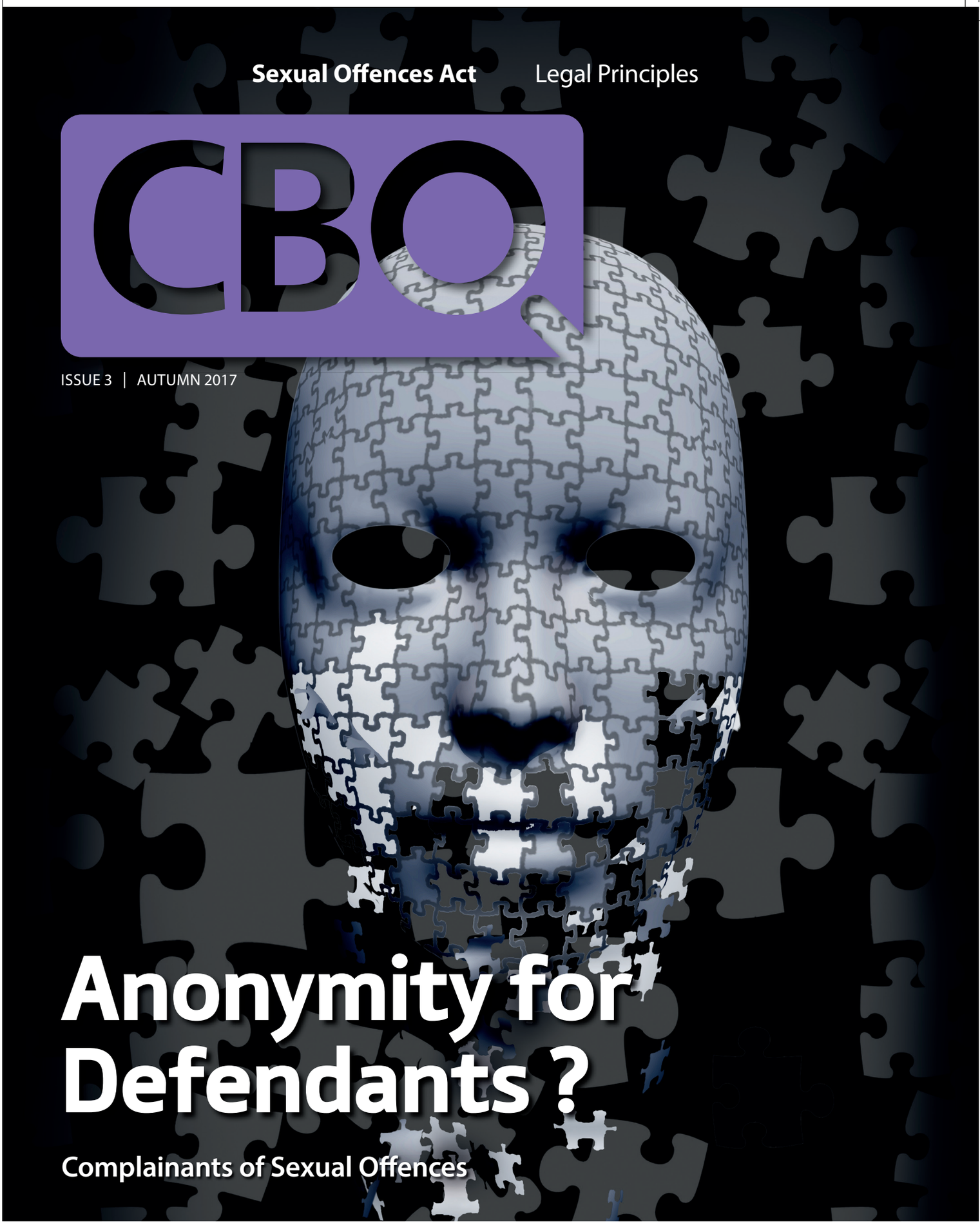


Anonymity for Defendants ?

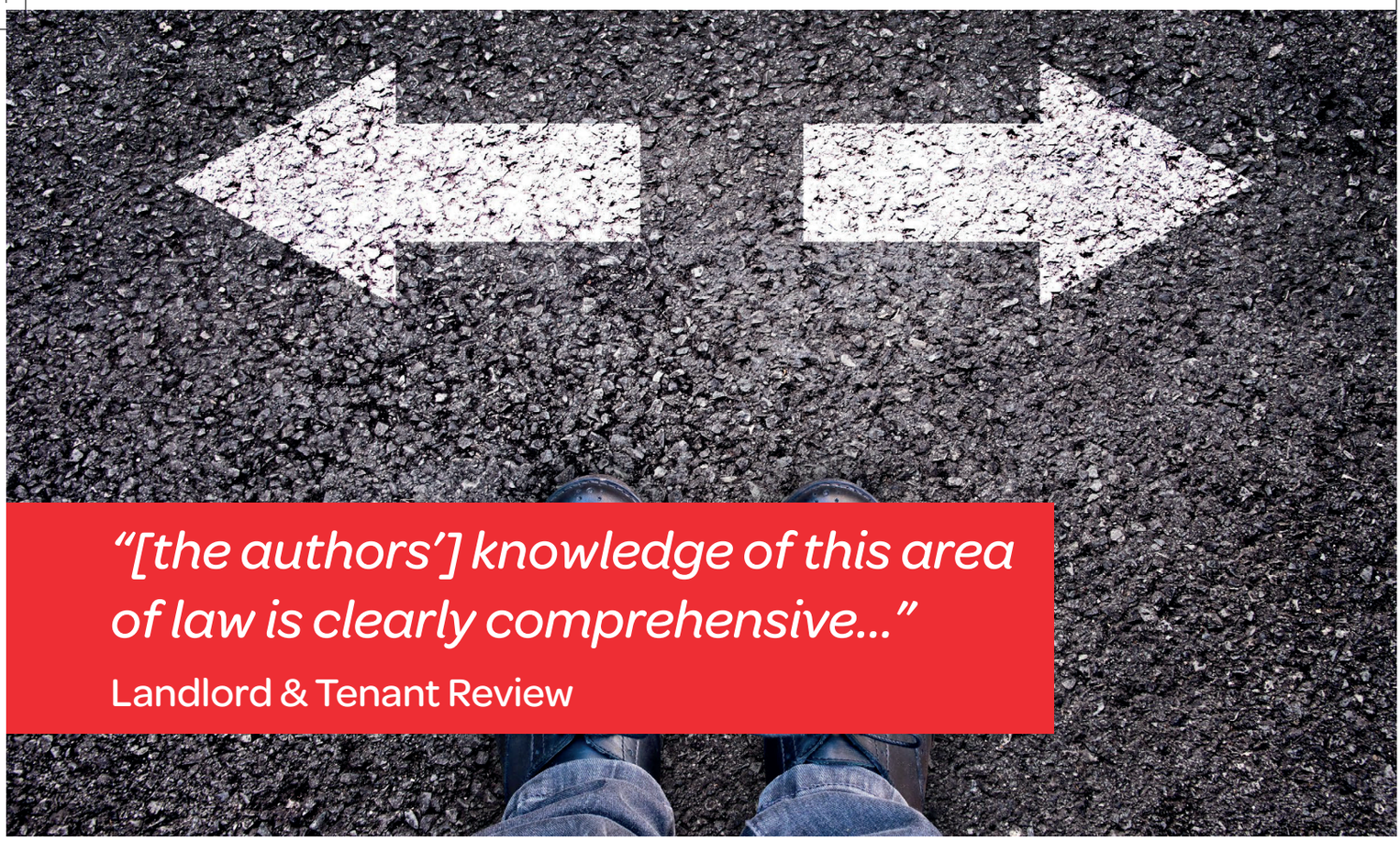
Complainants of Sexual Offences

IPP: Left in Limbo

Change the test for release

Publication of

THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES



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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

McNaughten

EDITOR **John Cooper QC**

Criminal law icons crop up in the most unlikely of places and sometimes it is easy to miss them.

Take the series finale of ITV's *Victoria* a few weeks ago. At about 4pm on Friday, January 20, 1843, Prime Minister Sir Robert Peel is making his way to Downing Street having just steered the abolition of the Corn Laws through Parliament. In a dramatic scene at the end of the programme, someone fires a gun at the Prime Minister but instead of killing him, fatally wounds his Private Secretary, Edward Drummond. The scene only lasts seconds and the only reference to the assassin is when the Queen is told that he was a disgruntled farmer who felt that the abolition of the Corn Laws would ruin him.In fact, the gunman was none other than Daniel McNaughten, who was ultimately found not guilty of murder on the grounds of insanity, and sent to Broadmoor, where he died two years later. Much has been written about McNaughten, including a fascinating piece in this magazine [Issue 3: September 2009, p.9] which brought into question whether he was really mad. Proving this sort of thing back in 1843 was difficult and "Psychiatry" had not yet been established adding to the very speculative nature of any mental health diagnosis. McNaughten's clinical notes from Bethlem depict a non violent, temperate, shy man who never exhibited any outward signs of the "chronic mania and dementia" with which he was supposed to be afflicted. His counsel, Alexander Cockburn QC argued persuasively that his client was suffering from a "partial insanity", allowing for the apparent loss of all self control in respect of one "powerful delusion" in an individual who was, in all other respects, of sound mind. His "powerful delusion" was argued to be that the Tories were his mortal enemies and that "they followed" him wherever he went. Many theories still exist about the killing of Drummond, including one propagated by the Drummond family only two days after his death that the wrong man had been arrested. Others suggest that McNaughten was hired by the Anti Corn Law League and that the considerable sum of money in his bank accounts spoke against him being an angry, struggling farmer, but rather a paid assassin.

Such an intriguing and continuing controversy, still cited today, and which flashed across our television screens for barely 30 seconds. ■

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

An Impossible Dream?

Chairman's column

Angela Rafferty QC

1980s pop music is inspiring I hope you all agree. Before I started on the path to the Bar I used to strongly identify with the immortal words of The Smiths – "*when you want to live, how do you start, where do you go. Who do you need to know?*" Succeeding at the Bar seemed, sometimes, an impossible dream.

From the outside we looked intimidating. With arcane rituals and fancy dress the Bar seemed of another era. Everyone appeared so confident and articulate all the time. It cost so much money to train, to get the fancy dress and to live. It was an uphill struggle for pupillage and everyone kept saying, "don't do it – you would be better off in Shipping".

In reality it ***is*** an intimidating and difficult profession. No one would become a criminal barrister for an easy life. There is a strong vocational element to what we do. We deal with the worst of society's problems every day. We represent all kinds of people, for both Prosecution and Defence, in cases of immense importance to those caught up in them. We have to ask difficult questions of vulnerable people, we must assimilate large quantities of information and explain it, and we have to negotiate often fraught relationships and complex factual situations as part of our daily work.

I am sometimes astonished by the tenacity and skill of criminal barristers. The intellectual effort, the emotional intelligence, the hard work and eye for detail, the ability to be detached yet passionate, the persuasive eloquence on display from the magistrates to the Supreme Court. It really is a wonderful profession and a uniquely challenging and worthwhile career.

However as I looked over the last 10 years of updates and articles by leaders of the Criminal Bar it is clear to me that the lack of investment in criminal legal aid is coming home to roost. We have faced such savage fee cuts in the last 10 years that we are still reeling. We may face further difficult issues with the proposed reform of AGFS this year. The system is in crisis and at breaking point. MPs know it, Judges know it, the prison service knows it and HMCTS should know it. The Government must face it.

"The intellectual effort, the emotional intelligence, the hard work and eye for detail, the ability to be detached yet passionate, the persuasive eloquence on display from the magistrates to the Supreme Court."

However there are also things **we** have to face. I want to focus on some of them here.

First, we have to concern ourselves directly and immediately with the plight of our pupils and juniors. They pay excessive amounts of money for their training, go into debt and then are often not remunerated for the work they do in practice.

The number of barristers under five years call has fallen by 30 per cent between 2005 and 2015. This is a threat to the future of the profession. It is not known how many of those who leave are from Crime – the suspicion is that it is many. Survival instinct alone should make us act.

The Young Barristers Committee annual report reveals that, following a survey, it is still the case in 2017 that many of the junior Bar have done hearings in the magistrate' court where they do not expect to be paid ***at all***. The Bar Council's protocol for payment of magistrates' court fees dates back to 2008 and appears to be frequently ignored. When fees are paid they are frequently less than the protocol requires and delays are endemic. When reports are made nothing changes and there are also concerns that raising this issue may compromise the barrister in Chambers.

We all know talented and committed junior barristers who have left or are thinking of leaving. It is not good enough to think that this is the way it has always been. The most economically vulnerable amongst us must be supported and protected. It is unacceptable that the most junior among us still face these problems. Heads of Chambers and clerks have a duty to ensure that those who appear in the magistrates court are paid and in good time.

The CBA supports the Young Barristers Committee proposal that fees should be paid directly to counsel from the court.

Wellbeing at the Bar is an initiative we should all embrace. For the most senior amongst us it can seem challenging, as historically we have not found it easy to confront the personal cost of our work. However

we now face immense financial pressures and increasing isolation in a digital world. Many of us have very heavy sexual offences caseloads. The support systems we used to have are eroding. This can sometimes result in stresses and strains emerging in court in the form of belligerent and unreasonable behaviour.

We have to stop those members of the Bench and Bar who behave badly towards very junior advocates getting away with it. Those of us who are senior can deal with it and must deal with it when it arises. Robust exchanges must be expected but we should not tolerate dishonourable behaviour towards the most vulnerable in our profession. It isn't good enough to say such things have always happened. If we want to keep our profession vibrant and diverse we have to move away from the worst practices of the past.

Without the junior bar we have no future. We at the Criminal Bar Association are determined to represent the most junior members and pupils in overcoming the things that hold them back.

Many young people still dream of joining us. It is our task to encourage them. We have to ensure that we inspire and recruit the next generation of barristers from all backgrounds. In order to attract juniors of high quality and with the necessary skills we have to treat them properly and allow them to see a future career path. We have to show that we welcome all kinds of people who will thrive professionally if they have what it takes. When asking the question of what to do as a career we have to be there to highlight the benefits and importance of our work.

We must offer practical help from bursaries to advice on filling out forms. We have to be there when potential young barristers might be listening at schools and colleges. We have to engage with them on a level they can accept and understand. We cannot ignore that we are not as well paid as other branches of law. However money is not everything. Criminal Law offers an unprecedented opportunity to make a difference at the same time as having a really rewarding and interesting daily professional life.

Once recruited we should give those who need it most support and encouragement. Whilst learning we should assist our most junior by empowering and advising them rather than constantly trying to put them off. If they are wearing a wig they have made a decision to come to us – we should respect that. I always feel for the pupil or work experience student who is enduring a lunchtime of more senior counsel bemoaning the future of the Bar. It seems sometimes like a mission to crush any optimism the aspiring barrister may feel. What's wrong with a bit of inspiration?

The CBA is determined through our Social Mobility initiative to work in partnership with other organisations to attract the right candidates who might doubt themselves but who would make excellent criminal barristers. We have to repeat again and again that this is a profession in which you can thrive through merit and not because of who you know or where you come from. In order to survive we must do this.

Finally I want to talk about gender diversity. It is really not good enough that women are leaving this profession in such numbers between 12 and 15 years call. Of the total Bar at entry level 48% are female. At Silk level only 13% are women. It is less in crime. The Work Foundation has published research commissioned by the QC appointments Agency into the gender imbalance of Silk. It offered some practical steps to encourage more women to apply for Silk. These include reducing the 12 case requirement and number of references, shortening the process, reducing the financial burden of applications and increasing transparency. A representative selection panel is recommended and emphasis should be placed on the fact that there is no restriction on places if the grade is met. It is made clear that the QCA must work alongside Chambers as well as other agencies to reduce the level of attrition of women before they even get to the application stage. Within this issue there is an article by Kate Brunner QC about how to approach the competency based application. It is essential reading. Flexibility and adaptation within chambers and clerks is critical when administering the careers of women (and men) who have caring responsibilities. Some Chambers get this spectacularly right and provide a supportive environment in which their female members can thrive and aspire. Some do not.

The proposed flexible operating hours scheme will drive even more women from the profession. Eventually, it will also force out all with caring responsibilities. And it is just not necessary. There are many other ways to work efficiently rather than make people work until 8 o'clock at night.

I do want to be optimistic. However we do need to make decisions and have a vision of our future that ensures survival. I know you will all enjoy further citation of lyrics from that great musical era (1985). This time it's Tears for Fears; "*I can't stand this indecision, married with a lack of vision*". We are a vital service for the public of great weight and worth. The members of the Criminal Bar Association should decide to work together for a vibrant diverse future. This year we do intend to take decisions that will help to achieve that. ■

IPP: Left in Limbo

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Preface

Five years after abolition of IPP – why are so many still serving this discredited sentence?

Contributor

Mark George Q.C

Garden Court North Chambers © 2017

The announcement last month that James Ward was about to be released from prison was met with more than the usual delight by many who heard of it. Ward was sentenced in 2006 to imprisonment for public protection [IPP] with a minimum term of 10 months. More than 11 years later his release was finally about to become reality. This sounds like a story from Alexander Solzhenitsyn's account of the Stalinist prison camps of the 1930s, *The Gulag Archipelago*. Instead all this happened in this country in the 21st century. And James Ward's terrible experience of wasted life and despair at a sentence that seemed like it would never end is far from unique

Nothing better illustrates the profoundly authoritarian nature of criminal justice policy under Tony Blair's Labour government than the new indefinite prison sentence contained in s.226 of the Criminal Justice Act 2003. Many will recall the pre-1997 mantra that Labour planned to be "tough on crime and tough on the causes of crime" which sounded to many as if Labour was concerned to investigate what actually causes people to commit offences. However, once in government this catch phrase rapidly morphed into being "tough on those accused of crime."

The 2003 Act [like many other provisions in the Act, IPP only came into force in April 2005] was then overseen by David Blunkett, a Home Secretary who seemed more interested in ensuring that his criminal justice policies met with the approval of the editors of the Daily *Mail* and

Sun newspapers than whether they were likely to serve the interests of justice.

Some years later during judicial review proceedings involving sentencing policy an affidavit was lodged which affirmed that at the time the 2003 Act was being drafted the Government had been advised that IPP sentences would be "cost neutral!" How anyone can ever have come to that conclusion defies belief. It certainly shows a profound ignorance of how the prison system and particularly the part dealing with indefinitely detained prisoners actually works. The reality was that Judges took to their new power with relish. And who can blame them? It was easy to see the potential benefits of such sentences in the case of serious and often repeat offenders. In theory it meant a short sharp shock for the inmate with many such sentences imposed for a year or less followed by an indefinite period on licence. This was profoundly useful from an administrative point of view. It meant that instead of having to charge an offender with a further offence followed by a lengthy court process the offender could simply be recalled to continue serving the original sentence.

The sentence of IPP was imposed with such regularity that there was soon a crisis brewing. Within the prison system IPP prisoners were treated like life sentenced prisoners except that the lifer regime wasn't designed for prisoners serving sentences of a few months or even a few years. And worse was to come. Offenders only got IPP sentences after a court had found them "dangerous" because the court had reached the opinion that there was a significant risk of serious harm to the public from the commission by them of further offences. And those sentenced to indefinite detention can only be released once the Parole Board is satisfied that the risk they present to the public is no more than minimal. That is a tough ask for any prisoner but it simply could not begin to be addressed by those with minimum terms as low as two or three years.

The currency the Parole Board works in are offender behavioural programmes with course work designed to challenge the behaviour that leads to offending and which aim to equip a prisoner with the tools to be able to avoid reoffending in future. Such courses are in high demand and short supply. They are usually only available in a few prisons. As a result a prisoner, even once assessed as suitable for the course, needs to obtain a transfer to an appropriate prison and then get on and successfully complete the course. After that the prisoner will endure a further wait often of a number of months to have a psychological assessment to monitor progress. In most cases further course work would be required. All this normally takes years. That is fine for ordinary lifers, those with minimum terms of 15 years or more, for whom the time scale is more than sufficient to enable them to complete any required course work well before the end of their minimum term. But in the case of those sentenced to short minimum terms this was disastrous.

A Kafkaesque, Catch 22 nightmare rapidly developed. A prisoner couldn't get released until the Parole Board said it was safe to do so and he could only prove his risk was reduced by completing the required course work. But the course work wasn't available to someone serving such a short minimum term, at least not until long after their minimum term had expired. And there is a further difficulty. Many of those who commit offences have cognitive behavioural problems or learning difficulties which make it impossible for them to complete the required course work. That in turn means such prisoners can never satisfy the Parole Board's test for release.

As a result IPP prisoners were left in limbo. Sentenced as if lifers but unable to access the sort of courses that such prisoners would normally be expected to complete. When the crisis started to gain public attention, in true fashion Blunkett blamed the Judges, claiming that he had never intended them to use the sentence as often as they had. But even then the Labour party took no steps to end this injustice. It wasn't until 2012 that the coalition government finally put an end to what must be the most disgraceful criminal sanction since the abolition of the death penalty.

"The reality was that Judges took to their new power with relish. And who can blame them? It was easy to see the potential benefits of such sentences in the case of serious and often repeat offenders."

Abolition of IPP sentences was of course very good news for the future but the abolition of the sentence was not made retrospective. Between 2005 and 2012 more than 8,700 prisoners had been sentenced to IPP. The majority of those had received minimum terms of four years or less and the majority of those had served well beyond their tariffs before they were released. This much is clear from the fact that in 2012 when the sentence was formally abolished significantly more than half of all those sentenced to IPP remained in custody.

Even today more than 3,000 prisoners remain in prison serving a sentence that was abolished almost five years ago.

The obvious solution, so you might have thought, is to change the test for release so that prisoners still serving these sentences will be released unless the state is able to establish that it is not safe to do so. It seems extraordinary that years after this problem was first recognised and five years after the sentences were abolished this step has still not been taken. Nick Hardwick, the Chairman of the Parole Board only since last year, is apparently very concerned. He has suggested the test should be changed along the lines I have suggested for all those with a minimum term of two years or less. Whilst that would be better than nothing surely we are long past the time when the MoJ should accept that all those sentenced to IPP should be released unless there are very strong and cogent reasons why not. ■

Mark George QC, Garden Court North Chambers, Manchester

The Right to Anonymity (Complainants of Sexual Offences)

Preface

Considering the current legal framework for anonymity of complainants in sexual assault cases and a lacuna in the legislation which sees the shield lost in circumstances which Parliament may have overlooked.

Contributors

Chris Henley QC and **Monica Stevenson**

A growing number of high profile sexual offence investigations in recent years has triggered debate about whether persons *accused* of sexual assault should be afforded anonymity. Some argue that this protection should apply, perhaps subject to judicial oversight, if not for the duration of proceedings, then at least up to the point of charge. The arguments for and against are compelling, and anonymity for defendants in such cases is likely to remain a contentious topic for some time.

By contrast, complainants of sexual assault enjoy lifetime anonymity; with a prohibition on the media reporting any details which could lead to their identification. This right, which is enshrined in statute, is not absolute though and may be lost in certain scenarios (detailed below).

The Right to Anonymity (s.1, 1992 Act)

The right to anonymity is established by **s.1** of the Sexual Offences (Amendment) Act 1992 which states that:

> *"**Where an allegation has been made** that an offence to which this Act applies has been committed against a person, **no matter relating to that person shall during that persons' lifetime be included in any publication if it is likely to lead members of the public to identify that person** as the person against whom the offence is alleged to have been committed".*

The wording of the 1992 Act means that from the time someone is accused of a sexual assault, the said victim is prima facie entitled as a matter of law to lifetime protection of their identity as a complainant. Significantly, this remains the case even if the person in question has not made a formal complaint to the police or denies that the said offence took place (such as in instances of alleged family abuse). The public policy rationale for anonymity is that public identification of complainants is likely to deter others from coming forward to report such matters. The shield of anonymity seeks to guard both the privacy and dignity

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of persons who have been the victim of what many would regard as a uniquely personal and traumatic form of offence.

Anonymity is a statutory consequence and freestanding legal right which automatically results from being identified as the complainant of a sexual assault and is not something which a Crown Court Judge independently has the power to make orders in relation to (or otherwise enforce).

Whilst a trial Judge can caution the media and others against reporting cases in a way that may breach anonymity, it is ultimately a matter for the media (and others) to police themselves to ensure they do not fall foul of the law. Self-regulation means that editors will often also have to make careful judgments as to which details can be reported to prevent possible "jigsaw identification" of a complainant.

The sanction for breaching anonymity is a £5,000 fine. Breaches are triable in the magistrate's court. A decision and the power to take action lies with the Attorney-General (s.5(4) Sexual Offences (Amendment) Act 1992), and will necessarily follow the "breach" event.

Prosecutions for breaches would appear to be relatively rare.

The controversial case of footballer Ched Evans provides a recent example, which saw nine people fined by the courts after they admitted to naming the complainant on social media. It is perhaps noteworthy that all defendants appear to have claimed to be unaware that naming her amounted to a criminal offence.

The Exceptions (s.1(4), 1992 Act)

The anonymity rule is not absolute. Broadly speaking, there are three scenarios in which it ceases to apply. These may be summarised as follows:

First, a complainant may waive his or her entitlement to anonymity by giving written consent to being identified (provided they are 16 years old or older).

Secondly, the court may lift the restriction upon application by a defendant to persuade defence witnesses to come forward **or** where satisfied that it is a substantial and unreasonable restriction on the reporting of the trial and that it is in the public interest for it to be lifted (ss.3(1) & (2) Sexual Offences (Amendment) Act 1992).

Finally, the media is permitted to report a complainants' identity in the event of criminal proceedings **other than the actual trial or appeal in relation to the sexual offences.**

The last exception flows from **s.1(4)** and has been interpreted in particular to cover situations where a complainant is subsequently prosecuted for perjury or perverting the course of justice in respect of the original complaint.

Both authors were instructed defence counsel in the recent perjury trial of *R. v. Jemma Beale* which involved an interim application for leave to appeal by News Group Newspapers Limited (pursuant to s.159 of the Criminal Justice Act 1988). The appeal raised a discrete but important point regarding the construction and ambit of s.1(4) of the 1992 Act (*R. v. Jemma Beale* [2017] EWCA 1012 (Crim)).

The argument centred principally on whether Ms Beale was entitled to anonymity during the course of the proceedings; the central issue being whether the allegations of sexual assault were false. Ms Beale's defence was that they were all true.

In the lower court, the trial Judge concluded that Ms Beale continued to be entitled to anonymity unless and until it had been proved that the original allegations were false. The Judge acceded to submissions, (challenged by counsel instructed by the press) that Parliament could not have intended to remove the protection of lifetime anonymity until the falsity of any complaint had been proved to the criminal standard. However, the Judge also understood that he had no practical power to enforce this conclusion. If the press disagreed, action by way of relatively modest financial penalty could follow publication, which meant her identity would have already been revealed and the damage which was to be guarded against would have been done. The creative solution of the Judge to this serious problem was to make a Contempt of Court Act order prohibiting the identification of Jemma Beale, which would be reviewed (likely rescinded) in the event of conviction. This order and its purported justification was the subject of the appeal brought by the press. Inevitably the Court of Appeal also considered with care the meaning and implications of s.1(4) Sexual Offences (Amendment) Act 1992 because it was the trial Judge's conclusions about whether Ms Beale was in fact entitled to anonymity at the perjury trial which caused him to make the Contempt order.

The point of appeal focused on whether the court had been correct to make an order under s.(2) of the Contempt of Court Act on the basis that the publication of anything that would lead to identification in this case would give rise to a substantial risk of prejudice to the administration of justice "in the effect it would have on future complainants". The Judge had accepted that proper reporting of the instant trial would not have caused any prejudice to those proceedings, and there were no other imminent proceedings which might have been impacted negatively by the reporting of Ms Beale's identity. Therefore a more general justification was invoked: that revealing Ms Beale's identity prior to conviction would potentially deter future complainants from reporting offences for fear that if truthful but disbelieved their anonymity might not be protected. The appellate justices found that the meaning of s.1(4) is clear on its face and that s.1(1) does not operate to limit reporting to protect a complainant's identity of any criminal proceedings **other than those in which a person is accused of the sexual offence in question** (or proceedings on appeal from such proceedings) and that proceedings in which a rape complainant is accused of perjury qualify as "other proceedings" for that purpose.

The Court of Appeal further noted as part of its judgment that there was a discussion to be had regarding the desirability or otherwise of permitting reports of proceedings in which those who have complained of rape are later prosecuted in respect of the alleged falsity of the said complaint. The presumption of innocence is arguably compromised by depriving such a person of their right to anonymity *before* any decision has been reached on the veracity of the allegation.

The Court of Appeal acknowledged that this was an important matter of public policy but that it remained a point for Parliament to grapple with, and not the courts.

The effect of the wording of s.1(4) would appear to mean that a complainant, later charged with assaulting the perpetrator, could be identified with full explanation in the assault proceedings (notwithstanding the fact that the rape may form the background or defence to the assault). Such a scenario was put to the Court of Appeal during the course of submissions but their judgment is silent on the issue. It is unclear whether Parliament contemplated such a scenario at the time of drafting. Furthermore, is it really likely that the legislation was drafted with eyes open to the possibility that the radical and precious right to anonymity would be discarded prior to a complaint being proved to be false? Whilst open justice is rightly a cornerstone of our modern legal system, the now settled meaning of s.1(4) of the Sexual Offences (Amendment) Act can operate to deprive peremptorily a complainant, still presumed to have given a truthful account of sexual assault, of their lifetime right to anonymity.

Prosecutions for false reports of sexual assault remain relatively rare and fewer still proceed to trial. It is nevertheless incumbent on the legislators to consider the proper parameters of s.1 to ensure this important right is not removed without a proper process having been followed. ■

Chris Henley QC (Carmelite Chambers) and **Monica Stevenson** (25 Bedford Row) were lead and junior counsel in the perjury trial of Jemma Beale at Southwark Crown Court earlier this year.

The Sexual Offences Act, 1967 – A Benchmark of Liberation or Spotlight on Discrimination?

Preface

Did the Sexual Offences Act 1967 fuel liberation or simply highlight issues of discrimination?

Contributor

Christina Warner

Fifty years on from the Sexual Offences Act, 1967 which decriminalised some aspects of LGBT life – it was hailed as the touchstone to the gay rights movement. But did it fuel liberation or simply highlight issues of discrimination?

The Sexual Offences Act, 1967 decriminalised sexual acts between two consenting gay or bisexual men. Although at the time, only extending to England and Wales, it was a landmark for the LGBT rights movement.

Perspective on the law

There had been no reform on matters surrounding gay sex since 1533. The Act didn't repeal anti-gay laws and nor did it decriminalise sexual acts between two, consenting same-sex persons, which remained in the statute books as "unnatural offences". Further, the target of regulation remained gay and bisexual men with the language also remaining clearly discriminatory and derogatory. "Buggery' and "gross indecency" being the formal legal terms at the time. "Gross indecency" went as far as to include touching and kissing between same sex couples. So, by simply displaying affection in public remained enough to justify an arrest. Many of the LGBT community were being prosecuted under alternative means such as for public order offences or breach of the

peace. The Act only applied in England and Wales, it would not be extended to Scotland until 1980 and Northern Ireland in 1982.

Fuelling the witch-hunts

Some claim the persecution of those of the LGBT community increased after the Act was introduced. Prosecutions rose as a result of police units being tasked with ensuring the Act's enforcement. Police stake-outs of bars, parks and public toilets formed part of the enforcement of the Act. Although a partial decriminalisation, it was also interpreted as an attempt by the authorities to limit social acceptance of the community by encouraging the public to ensure the legislation was properly adhered to. At a time of increasing sexual liberation younger generations seemed more open than ever before to the possibilities of differing relationships and challenging social norms. But the stigma and shame endured, as those of the LGBT community were deemed to be those who led lives of perversion. The consequences were more than just criminal with the monitoring of those of the LGBT community meaning that many lost their jobs, witnessed the breakdown of their families, were evicted from their homes or refused housing altogether due to being outed to family, friends and the authorities.

The Act was fuelling witch-hunts; justifying vigilante mentality as a means of enforcing the law.

Escalation in discrimination

Discriminatory legislation and anti-gay laws remained in place and allowed employers to dismiss or refuse employment to those based purely on their sexual orientation or suspicion thereof. This also applied to housing and services. With the LGBT community having no legal recourse to appeal or oppose.

Matters worsened in the 1980s with the then Conservative government's slogan of "traditional family values", meant the LGBT community found itself pushed to the fringes of society once again. Along with the condemnation of the LGBT community and the moral and social hysteria caused by the outbreak of AIDS or what was otherwise known as "the gay plague" sent homophobia sky-rocketing and saw an increase in vicious attacks and murders.

Although the Act had decriminalised some aspects of gay life, it intended to regulate other substantial areas of it. The Act controlled the location and manner in which sexual acts took place, meaning that all those who were engaging in consensual acts had to do so strictly in accordance with the legislation. The remit of partaking in gay sex was prescribed by the Act and only being legal when it involved no more than two consenting men over the age of 21 in a private dwelling. This meant no interactions in places such as hotels or bars. For many, it pushed their relations into a deeper sense of humiliation only interacting with others when behind closed doors and with the curtains drawn for fear of breaking the law.

"The Act was fuelling witch-hunts; justifying vigilante mentality as a means of enforcing the law."

It must be noted that the legislation did not exempt military personnel who up until 1993 were still being imprisoned for behaviour which was no longer a crime between gay civilians. It was as recently as 1997 where the Bolton 7 were jailed for committing an offence in accordance with the Sexual Offences Act and it was only in 1994 that the age of consent for gay men lowered to 18 and then in 2001 to 16, putting it in line with the age of consent between a man and woman.

The Act was the start of what still is a long battle for equality in the LGBT community. Bitter-sweet legislation which although permitted gay sex it only did so to a degree and any indication of an intention of such was to be kept well away from the public eye. By ensuring the enforcement of the law meant casting a shadow on many people's lives by causing suspicion or even confirming a persons' sexuality against their will. The Act, in turn rendered many defenceless to discrimination and violence, all justified by enforcing a law which on the face of it was meant to progress the gay rights' movement not regress it. ■

Christina Warner, Barrister, 1MCB Chambers

The Brazen-faced Beekeeper Who Fought the Law

Preface

Legal principles

Contributor

Noël Sweeney

Law is our language of natural justice which we use to speak equally for the strong and the weak. Part of its purpose is to protect people from the arbitrary power of the state and the caprice of the police. Law is not an arcane set of rules but a living instrument that enables us to gain and retain our hard-won freedom. The value of law beyond price is that it affects and applies to everyone regardless of position or riches.

Occasionally a case is decided which on its face is straightforward yet within the judgment it incorporates a philosophical gem. That is because when a claim is made it is never predictable where the legal argument in court may or will lead. A simple claim for a declaration on registration of bees might raise an issue of constitutional importance. It might even show the court in action against an anarchic threat of abuse of the law by a beekeeper. No court in a democratic society could afford to ignore such highfalutin words lest they become deeds.

Constitution

The Florida case of *Trescott v. Connor* [1975] is just such an example of one in operation. This case shows the power of bees in trees and hives can symbolise the nature of and reason for legal principles in our lives. There were three Judges on the bench as the plaintiff, Stanley Trescott, claimed his case raised a principle of the Constitution. Obviously such a claim struck a jurisprudential chord with the relevant authorities. As a result two District Judges and a Circuit Judge, rather than a single Judge, sat on the bench to rule on the case.

Trescott was a resident of Florida and a migratory beekeeper. He had maintained multiple beehives for many years in Florida. During the summer months, he transported them to New York and then brought them back into Florida for the latter part of the year.

The Florida Statutes regulated the bee industry in Florida.

Trescott agreed a regulatory bee industry law was needed in Florida and in other states of the United States subject to a quaint proviso: it was just that he did not want them to apply to him.

Initially Trescott contended that Florida's entire bee industry law was "unconstitutional". However he "amended" his complaint before the court and he focused on the certificate requirements contained in the Florida Statutes. Under ch.586, before he could bring his bees back into Florida, he had to obtain the certificate required by it. Trescott disputed the validity of that requirement and claimed it was "unnecessary, onerous, burdensome and unconstitutional."

So with a defined audacity Trescott took action and sought a "declaration" that that Act was "unconstitutional". His application went to the root of the Constitution. Trescott applied for an injunction to prevent the authorities from controlling the bees in Florida.

The issue centred on the interpretation of ch.586 of the Florida Statutes:

> "All honeybees (except bees in combless packages) and used beekeeping equipment shipped or moved into the state, or shipped or moved within the state, shall be accompanied by a permit issued by the Commissioner. Before any bees (except bees in combless packages) or used beekeeping equipment is shipped or moved from any other state into the stage, the owner thereof shall make application on forms provided by the commissioner for a permit. The application shall be accompanied by a certificate of inspection signed by the state entomologist, state apiary inspector, or corresponding official of the state from which such bees or equipment are shipped or moved. Such certificate shall certify that all of the colonies, apiaries, and beeyards owned or operated by the applicant, his agents or representatives, have been inspected annually at a time when the bees are actively rearing brood, including one inspection within the period of 30 days immediately preceding the date of shipment or movement into Florida, and that no American foulbrood or other contagious or infectious diseases have been found in any colony, apiary, beeyard or other places where bees or equipment have been held by the applicant, within the period of two years immediately preceding the date of shipment or movement into Florida; provided that when honeybees are to be shipped into this state from other states or countries wherein no official apiary inspector or state entomologist is available, the Commissioner may issue a permit for such shipment upon presentation of suitable evidence showing such bees to be free from disease."

Trescott challenged the validity of that "30-day requirement" which he claimed caused him hardship. He contended that such a period and even the extensions that had been granted to him by the defendants from time to time, did not give him sufficient time to bring his bees back to Florida from New York. As his truck was not big enough to haul all of his bees at once he was forced to make several trips. So the period allowed to beekeepers, in truth particularly him, was too short.

Doyle Connor was acting as the Commissioner of Florida Department of Agriculture in representing the defendants. He contended that Trescott's real problem was merely logistics. His problem of transportation was no different from that of any other migratory beekeeper. They did not find the period to be a problem. Connor claimed in his defence that that was the rub and the nub of his grievance which did not withstand scrutiny.

In his defence Connor claimed in effect that the problem, if any, was entirely self-engendered.

Indeed the evidence during the trial proved Trescott's claims were speculative and self-serving. For in the past he had been able to bring his bees back into Florida within the 30-day period or within the extended periods granted by the defendant. Those extensions were at his request. The evidence proved that other migratory beekeepers in Florida found "no insurmountable problem" in complying with the time requirements. Yet it went further in that one migratory bee-keeper testified he had more hives to transport to Florida than Trescott. Nevertheless that beekeeper found the requirements to be reasonable.

Trescott also challenged the "two-year requirement" of monitoring the movement of bees within America. He claimed it was unreasonable. Similarly the court gave Trescott short shrift and dismissed his claim out of hand as the requirement was "a reasonable one".

The court held that while there may be better ways of

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regulating the bee industry, as Trescott claimed, that was not a matter of judicial concern. That issue was purely for the Legislature. The court adopted the classic stance that their duty was simply to interpret the existing law. Any change to the law could only be achieved by the introduction of new legislation. Introducing new law was contrary to their judicial role and function. In conclusion the court clarified that they were only concerned with the reason for the requirements and how reasonable they were in relation to the community practice of beekeeping.

Threat

Bearing in mind the court was dealing with a serious challenge to the law, District Judge Arnow took the opportunity to formulate a point of principle for Trescott and other citizens. The words he carefully chose were well-aimed and well-timed as they chimed with an arrow-like accuracy. His pronouncement has such a resonance that it should be enshrined outside each hive:

> "In this land of liberty under law in which we have the good fortune to live, any law, because it circumscribes or affects, at least to some degree, freedom of action of

individuals, may to that extent be considered or viewed as a hardship and onerous upon individuals subject to it. Yet we would have it no other way because we know that, without our government of ordered liberty under law, we may lose all our precious freedoms. The plaintiff here must recognise and accept, as other migratory beekeepers Florida have recognised and accepted, that fundamental principle."

Perhaps on hearing the court's judgment most people would consider their position and realise that when you decide to fight the law there can only be one winner. Somewhat unwisely Trescott had a defined audacity that had led to his initial action. For after the institution of the action he decided to serve notice on Connor that he intended to move his bees back into Florida without obtaining the permit required by the statute unless he was restrained by a court order. Then he went further and added for good measure that any action to stop his "movement" would be met with any appropriate means at his disposal. Besides that open threat Trescott made yet one more foolish move by stating that the defendants should not "discount the use of force".

Hence that threat of violence by Trescott had to be initially met head-on by Connor. Then in turn it had to be grasped by the court. A self-appointed authority making a declaration on what is legally acceptable to him is hardly persuasive and unquestionably had to be quashed. No authority and certainly no common law court would take

> "Be you never so high, the law is above you. The Attorney General has no prerogative to dispense with or suspend the law of England."

such a threat lightly: so ignoring Trescott's threat was not even an option by Connor; a court would not even countenance the germination of the idea.

Injunction

Connor was compelled to act and promptly served a cross-complaint seeking an injunction. Initially, before the trial, a temporary restraining order against Trescott was granted to the Florida authority. During the trial Trescott proved to be outspoken and recalcitrant to the end. He specifically made it clear to the court that unless he was restrained by an Order he would act as he intended and would bring his bees back into Florida without complying with the law. That was his declared intention notwithstanding the court's ruling on the merits of his claim was manifestly against him.

Plainly given his positively negative approach the court was compelled to meet Trescott's brazen boast face-to-face. So they entered judgment in favour of Connor, dismissed his complaint "with prejudice". That unusual stricture was

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to restrain Trescott now and in the future. So they kept him in their vision and under their control and power. Then they added this condition: the court will retain jurisdiction over the defendants' cross complaint against the plaintiff for the purpose of enforcing the permanent injunction to be entered against him. That meant that the temporary restraining order issued against him was converted and changed into a permanent injunction.

That condition changed Trescott's position qua beekeeper and citizen. At a stroke it proved to render him powerless in his fight against the law.

By that judgment the court showed Trescott that even he had to recognise and abide by "that fundamental principle" of law. For much as Lord Denning, Master of the Rolls, said to the Attorney General, Sam Silkin, when the arrogant politician opposed an injunction by a freedom campaigner and in doing so openly threatened the English Court of Appeal: "Be you never so high, the law is above you. The Attorney General has no prerogative to dispense with or suspend the law of England." [See: *Gouriet v. Union of Post Office Workers* [1977]. In citing the aphorism of Dr Thomas Fuller from 1733 Lord Denning's tone served to nail the pale politician to the court floor.

The Florida Court had to meet and treat Trescott's threat in a similar lesson-learning manner. Given the circumstances the court then shot a metaphorical legal cannonball across his bow: all the costs of the trial were taxed against Trescott.

This case was about much more than a bunch of humble bees and their imprudent owner. This was a case about bees that served to prove that everyone, be you a beekeeper or a bricklayer, a Judge or a janitor, a president or a pauper, a saint or a sinner, you are still subject to the noblest idea known to us encased within the law: the pursuit of justice. ■

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Noël Sweeney, Barrister of Veritas Chambers

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