CBQ

Criminal Bar Quarterly Issue 2: July 2010

A FAMILY AT LAW:
Caroline Sumeray writes about her grandfather

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The Editor


John Cooper Q.C.

This is the first CBQ since the General Election and without doubt, there are challenging times ahead.

Putting the pressing issues of public funding to one side for just a moment, it will be interesting to discover what pieces of criminal legislation will remain on the statute book this time next year.

The coalition have already targeted extradition as an area in urgent need of reform and potential proposals to afford unconvicted defendants in rape trials anonymity will be welcomed in many quarters. The counter-argument that rape complainants will be discouraged from informing the police if an unconvicted person is given the protection of anonymity is simply not borne out by any statistics.

There is no competing interest in bringing those who commit rape to justice and ensuring that people who are acquitted do not have to face the stigma of an unsubstantiated allegation which will affect their home and work lives.

Both imperatives are vital, both can be achieved if all parties are given protection until the jury have delivered their verdict.

There are also consultations about whether the discount for an early plea of guilty should begin at the police station when charged, rather than at the Plea and Case Management Hearing. This is problematic. Although many defendants are represented by a solicitor or solicitor's clerk at the police station, the advice given is often in the absence of full disclosure, some of which may undermine the prosecution's case or expose fundamental breaches of PACE, providing legitimate defences, not necessarily apparent at a police station in the early hours of the morning.

To start the early plea clock running at the police station whilst being cost effective may not be just.

John Cooper Q.C.

The views expressed here are not necessarily the views of the Criminal Bar Association.

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CHAIRMAN'S COLUMN


Paul Mendelle Q.C.

Cuts to advocates' fees

Nothing became the last government so much as the manner of its departure, since on the very same day as it announced the election, it sneaked in a statutory instrument cutting the AGFS rates by 4.5 per cent per annum for three years starting on April 27 and extending AGFS to cases lasting up to 60 days from July 14. This was Option 2 of the Ministry of Justice paper issued in December 2009, and the more cynical reader might conclude that the word "Option" was misplaced in this context as the government appeared to do just what it had intended to do all along.

The Bar Council had already begun judicial review proceedings by sending pre-action protocol letters to the Ministry of Justice (MoJ). These letters delayed the whole consultation process by a month because it was apparent that we had identified serious flaws in the consultation paper of December. In the light of these responses the Bar Council sought the advice of leading and junior counsel and the view was expressed in forthright terms that there were no reasonable prospect of success in judicial review proceedings on either procedural or substantive grounds.

Meeting June 12

On April 22 a Heads of Chambers meeting called to discuss these fee cuts resolved to take no action ahead of the election but to call a meeting of the criminal Bar to canvass the views of all practitioners, most especially those of the young Bar.

At this meeting of June 12, there were over 200 attendees in person and about another 50 or 60 via video links to Bristol, Birmingham, Nottingham, Liverpool and Manchester. I chaired a panel consisting of Nicholas Green Q.C. and Peter Lodder Q.C., respectively the Chairman and Vice Chairman of the Bar Council; Belle Turner and Nicola Higgins, the Chair and Vice Chair of the Young Barristers Committee; and Anthony Berry Q.C. of 9 Bedford Row who had called the original Heads of Chambers meeting.

Particular concern was expressed by everyone at the meeting for the future of the young Bar upon whom most of the pressure is being felt because they come into this profession with high debts and are almost wholly reliant on the Graduated Fee Scheme. All of us at every level are concerned to do all we can to help the young Bar through these difficult times and to encourage junior practitioners to come to and stay at the publicly funded Bar.

To describe the mood of the meeting as one of anger, bitterness and frustration would b e perhaps to put a rather optimistic gloss on things but there is little doubt it reflected the mood of criminal Bar as a whole.

We are facing a future in which the fees for our work are back below the level they were 15 years ago when the graduated fees scheme was first introduced, and now we have to do very much more work for those fees. The savings produced are footling in the scheme of things but the cost to the criminal justice system as members give up publicly funded work will in the long run far exceed the short-term savings. We are not blind to economic circumstances and we fully appreciate that the Bar must bear its share of pain but we do not accept that theses cuts are a fair share.

The overall sentiment of the meeting and doubtless of the wider Bar is that we do have to draw a line in the sand. We have suffered very deep cuts, possibly deeper than any other publicly funded practitioners, and we are firmly of the view that any future cuts will damage not only the profession but the entire criminal justice system. We will make the government understand, if it does not already, that any further cuts may result in an irresistible call for action no matter what the views of the leadership.

Restructuring legal aid

Not only have there been cuts to our fees, there are big changes planned to the way legal aid is structured and these changes may well have a profound impact on the ways that criminal barristers practice in the future.

On March 22, 2010 the MoJ issued a paper entitled "Restructuring The Delivery Of Criminal Defence Services". The vision laid out in it was of a consolidated market, with a far smaller number of providers catering for everything within a criminal justice system area, from the initial police station contact to the Crown court trial. The paper envisaged no more than 8 to 10 providers per CJS area, with perhaps as few as 30 to 40 in London.

Some estimates in the immediate aftermath of the paper said that such a change could result in up to 75 per cent of existing firms disappearing and there are those who believe that the number of firms will be reduced from 2,500 to 400, not so much a cull as a mass extinction.

One thing that all practitioners should be aware of is that this paper expressly talked of One Case One Fee [OCOF]. It promised a consultation on the issue in summer 2010 with possible implementation in summer 2011.

We do not yet know how much of the MoJ March paper will be adopted by the new government, although following a meeting the Bar Council and CBA had with the Justice Secretary and officials on June 10, the strong feeling is that the paper generally and OCOF in particular do represent the likely direction of travel.

On June 23 the government announced the fundamental review of the legal aid system that had been trailed in the Coalition Programme document in May. The stated aim is to "create a stable and sustainable system providing access to justice for those who need it most" and a "more efficient legal aid system".

In a written statement to Parliament, the Justice Secretary made plain that deficit reduction is the government's immediate priority and that he is " ... seeking to develop an approach to legal aid spending which balances these necessary financial constraints with the interests of justice and the wider public interest".

The government said it will consider the policy and intends to seek views on a proposed new approach in the autumn, but you don't have to be Nostradamus to see that none of this means more money for criminal legal aid.

New business structures

Fee cuts and changes to the way that legal aid is delivered are inextricably linked to the issue of new business structures for the Bar. New structures and new ways of doing business are not so much part of the problem as possible solutions to fee cuts.

I can only touch on the topic in this column. For a far more detailed examination of where the Bar is at present and where it is likely to be in the next five years or so, I urge you all to download from our website the paper written by Nicholas Green entitled "The Future of the Bar". It is a masterful piece of work and it repays careful reading.

The Legal Services Act 2007 has opened up the legal profession to new forms of providers. Some of these changes have already taken effect and barristers can now form Legal Disciplinary Practices (LDPs) with solicitors and up to 25 per cent non-lawyers. Next year may see the introduction of Alternative Business Structures (ABSs) where there is no requirement for the owners of the business to be lawyers.

The Bar Standards Board has already removed restrictions upon barristers practising in partnerships and extensively increased the ability of the Bar to conduct matters formerly regarded as the preserve of solicitors, such as proofing witnesses and attending police stations. As I have said before, all these changes introduced by the BSB are permissive only and sets are not compelled to organise themselves in any particular way, there is just more choice now.

Independently of these changes, the Bar Council has pioneered the use of procurement companies. I wrote about these in my last column and the CBA has now published on its website the model documentation prepared by solicitors on behalf of the Bar Council. These documents provide a framework or template for chambers that wish to establish their own procurement companies, and the documentation can be adapted to meet the needs of each individual set.

There is a pressing need for practitioners to be aware of why these vehicles are necessary. If the March 22 paper is indeed the direction of travel then we may be faced with OCOF within the next 12 months or so.

If that is right, then the Legal Services Commission (LSC) will be making a single payment for a case to the legal service provider. That means that there will be no separate ring-fenced advocacy fee; there will be one fee for both the litigation and the advocacy.

We already have a species of OCOF in AGFS fees since the instructed advocate has to pay the substitute advocate. Although there is a Bar Council protocol governing the division of fees, solicitors are not bound by it and, where the instructed advocate is employed in a firm of solicitors, there is no obligation to follow it. Solicitors will put downward pressure on the fee to be paid to the advocate who covers the trial and we know for a fact this is already happening.

So the Bar must be in a position to be the receiver of the single fee for the case and that means it must be in a position to provide all the legal services that the fee covers, from police station to Crown court trial. We do not do any of this at the moment and no-one is suggesting that we should or could turn ourselves into solicitors: we will have to subcontract for those services in exactly the same way as solicitors have always subcontracted the advocacy. The LSC has said it is now prepared to do business with the Bar on such terms.

Procurement companies will offer a sound long-term solution because they will allow chambers to contract with the LSC and thus gain control of the single fee for each case.

Of course, this raises difficult practical problems of organisation as the Bar has never before done business this way. The CBA is working closely with the Bar Council in examining these problems and devising possible solutions. Will this any of this be easy? No it will not. Will it be welcome? No it will not. But will we have any real choice? I fear not.

So we must plan and make provision accordingly; to do otherwise and stick our heads in the sand is to invite disaster. It is therefore important that all of us but especially the young Bar become involved in these procurement companies so that their chambers are in a position to contract directly with the LSC when it is ready to do so sometime next year.

The future of the Bar

I know that the vast majority of criminal barristers would prefer to see the profession remain as it has always been, a referral profession providing specialist advocacy services of the very highest quality. However, change is being forced upon us, by legislation, by executive action and by economic circumstances. It may be that many sets will survive by remaining as they are but those who want to adapt to change must have the means to do so.

So where in all these unlooked for and for many I suspect unwelcome changes do I see the future of the criminal Bar? Let's get back to basics. Unlike civil litigation, the vast majority of criminal cases do end up in court. Even though only a minority result in fully contested trials in the Crown court, criminal cases require advocacy at every stage, from a bail application to a closing speech. Barristers are specialist advocates, it is what we are trained to do and it's what we do better than any other type of lawyer. I am not starry eyed about the criminal Bar and unquestionably there are HCAs who are more than good enough to be barristers, just as there are a few barristers who are not good enough to be HCAs. But overwhelmingly the best advocates come from the criminal Bar and the criminal process will always require the best advocates. However we organise or have to organise ourselves in the next five, 10 or 15 years, I have little doubt that a demand for quality advocacy will remain and that demand will be largely met by the criminal Bar.

I am sure that in five years time, some of the criminal Bar will be organised differently from how it is now but I am equally sure the criminal Bar will still exist in five years time. And I believe that if it adapts to the change that is thrust upon it, it will be stronger than ever.

New government proposals

Although it may not always seem so, the CBA stands for far more than just fighting about fees. It responds to a wide range of papers on all aspects of criminal law, indeed, it would welcome being able to devote more of its time and energy to the topics of improving the criminal justice system than arguing over money.

On May 19, the new government published its Coalition Joint Programme. Despite an understandable lack of detail, it contained much of interest to criminal practitioners, although not all to be welcomed. I single out just three topics taken from two sections, those on Policing and Justice.

Self-defence

The government says it will give people greater legal protection to prevent crime and apprehend criminals. It will ensure that people have the protection that they need when they defend themselves against intruders. This seems set to revive the debate, if debate is the right word, over the use of force in self-defence against burglars. I have written and spoken on this topic many times before and my view remains that the existing law strikes the proper balance between the rights of citizens to defend themselves and the amount of force to be used in so doing. If it is proposed to amend the law to allow disproportionate force in self-defence, then this is to be deprecated.

Sentencing

The government says it will conduct a full review of sentencing policy to ensure that it is effective in deterring crime, protecting the public, punishing offenders and cutting re-offending. I welcome this proposal. I hope that the review will gather evidence from other jurisdictions that seem able to control crime with far lower levels of imprisonment than we have.

Only last month, I wrote about the cost of prisons and how they are sucking a disproportionate amount of funds out of the system. The prison population presently stands at about 85,000 and the last government had planned to increase it to 96,000 by 2014. We heard talk before the election that the Conservatives wanted to reduce the prison population by 5,000. Since each prison place costs about £45,000, that modest reduction would save a headline figure of over £200 million, a considerable sum even after adding back the costs of alternative disposal methods.

When our new Justice Secretary was last in charge of jails, as Home Secretary, the prison population was under 45,000 and he is very well aware of that fact. Over the weekend of June 14, he confirmed that he is looking for cuts in the £2.2 billion prison budget and seemed to indicate that he did not regard short prison sentences as effective in cutting re-offending rates. He indicated that the government wants to be "sensible on sentencing" and he is in favour of spending "when it's effective and justified". He said the government is "… looking at sentencing, not starting just from let's have more people in prison, let's have fewer people in prison … but what actually works…".

The CBA and the Bar Council are firmly of the view that that prison policy does need to be reviewed and that the money saved could be more effectively spent on other parts of the criminal justice system. Prison is an expensive way of making bad people worse; we can employ less expensive ways of making them better.

Anonymity in rape cases for defendants

This is a controversial proposal and there was not enough detail in the document to make a considered response. We are unsure of the thinking behind it. Is it thought to be fair to acquitted defendants to grant them anonymity? It may indeed strike some as unfair that they do not have the same right to anonymity as complainants but we are not sure the how the positions of complainants and defendants are said to be comparable.

And then there is the question of openness. In general, trials should be open to public scrutiny. Anonymous trials run counter to that principle. They also run the real risk that other victims of the defendant may not come forward if they do not know he is being tried.

The Prime Minister has since suggested he could partially back down on the controversial plan during Commons exchanges with Harriet Harman when he suggested that anonymity may only apply between a defendant being arrested and then charged. Now there is talk of anonymity for teachers accused by pupils or for those in positions of trusts accused of any crime.

There needs to be a careful review before there is any change to the fundamental principle that justice must not only be done but must manifestly and clearly be seen to be done.

Children & Vulnerable Witnesses: Spring Conference Bristol April 24

The problems posed by children and vulnerable witnesses and defendants in the trial process have been much in the news of late, so this year's Spring Conference on the topic, co-hosted by the Wales and Chester and Western Circuits, was very timely. It aimed to explore the essential components of a criminal trial involving children and vulnerable witnesses, from first complaint through to trial.

Of particular interest were the sessions from two Registered Intermediaries who explained the utility of their roles for both vulnerable witnesses and defendants and showed that intermediaries, so far from being a barrier to counsel, can themselves assist to adduce evidence in both chief and cross-examination.

This was vividly illustrated in a practical demonstration, superbly conducted by Michael Bowes Q.C. and Ruth Henke Q.C., of the examination and cross-examination of a vulnerable witness using an intermediary, with Olivia Poulet (from *The Thick of It*) acting as a child complainant of 11 years of age with moderate learning difficulties. For many of us, it was the first time we had ever seen an intermediary used and it showed how valuable they can be to both prosecution and defence.

And so farewell

This is my last column as Chairman. It has been an enormous privilege to have been given the opportunity to lead the criminal Bar for a year and what an exciting and challenging year it has been. I have been proud to have been the voice (and occasionally the face) of the criminal Bar. Reflecting the views of nearly 4,000 individual members is by definition impossible but in defending the right to trial by jury, arguing for prison reform and against changes to the law on self-defence I have tried to reflect what I believe the majority of criminal practitioners believe in.

But it has also been a year of frustration and regret. I feel no sense of accomplishment, rather the contrary. When I took over in September last year, the MoJ had just issued the paper that proposed to cut advocates' fees by 23 per cent and, despite a long campaign, the net result as we all know is that fees will be cut by 13.5 per cent with the first 4.5 per cent cut already in effect from April. The replacement VHCC scheme the CBA designed, GFS Plus, was essentially dumped at the last minute by the MoJ and replaced by the extension of AGFS to 60-day cases, with the result that longer, more demanding trials will become much worse paid.

I want to thank the committee and, in particular, my officers for all their hard work. I want to thank all of you who took the time to write to me to show your support. I have been lucky to work closely with Chairmen of the Bar Council who have been extraordinarily dedicated to fighting for the criminal Bar. That fight continues and I hand over to Christopher Kinch Q.C. at the end of August confident that he will do a superb job of looking after your interests.

Paul Mendelle Q.C.
Chairman

CIVIL RECOVERY: THEN AND NOW

Thomas Jaggar and Mark Sutherland Williams review how civil recovery legislation has developed in the last eight years


Thomas Jaggar


Mark Sutherland Williams

It is nearly eight years since the Proceeds of Crime Act (POCA) 2002 received Royal Assent, thereby adding considerably to the asset forfeiture regime that existed at that time, which consisted principally of the Drug Trafficking Act (DTA) 1994 and the Criminal Justice Act (CJA) 1988. Unapologetically draconian, POCA established a broad-based and pervasive regime for criminal asset confiscation in the United Kingdom.

Particularly controversial were POCA's use of civil law procedures for asset recovery, its application of rigid mandatory assumptions and its general application to a broad range of offences. The Pt 5 provisions of POCA introduced a new form of civil confiscation into UK law. They permitted confiscation to take place even in the absence of a criminal conviction. As such, they threw the question of defendants' rights into sharp focus. These characteristics, along with a host of accompanying features such as an apparent reversed burden of proof, meant that POCA was likely to come into conflict with defendants' rights. That having been said, organisations such as Liberty[1] and Justice[2] acknowledged at the time that the Government has a legitimate interest in disrupting the criminal economy and in depriving criminals of their ill-gotten gains.

The civil recovery provisions came into force on February 24, 2003.[3] The Act, in its original form, created a new government agency, known as the Assets Recovery Agency (ARA). The ARA's task was to implement the new legislation and spearhead the new powers in relation to civil recovery. By June 2005, the ARA had collected £4.6 million, and had targeted some 200 individuals. In addition, the Agency had been given recovery orders to liquidate assets amounting to a further £5.5 million against a target of £13 million. It had also frozen a further £16.8 million worth of property and assets.

Whilst the ARA enjoyed measurable success before the courts (particularly with challenges to the legislation), it nevertheless failed to come close to collecting its target figures. One of the problems cited was delays with legal aid, which created a considerable backlog in applications. The cost of the ARA, which employed 162 staff, to June 2005 was £29 million. This led the press and other commentators to question its value for money, and this, perhaps inevitably, applied pressure on ministers to consider yet more reform. As a result, s.74 of the Serious Crime Act (SCA) 2007 abolished the ARA with effect from April 1, 2008. Schedule 8 of the SCA transferred the civil recovery powers of the ARA to the Serious Organised Crime Agency (SOCA) and extended those powers to the Director of Public Prosecutions (DPP), the Director of the Revenue and Customs Prosecutions Office (RCPO) and the Director of the Serious Fraud Office (SFO).

In SOCA's first year it collected £16.7 million in relation to civil and tax recovery, exceeding the Government's target of £16 million, with the other agencies contributing in excess of £2 million. This compared with £7.7 million in the ARA's last year of operation.[4]

Background and overview

The rationale underpinning POCA, and asset forfeiture law in general, is relatively clear. It was encapsulated by Tony Blair in 2000 when he endorsed an influential Cabinet Office Report on the proceeds of crime. Mr Blair wrote in its Foreword that:

> "The Government is determined to create a fair and just society in which crime does not pay … For too long, we paid insufficient attention to the financial aspects of crime. We must remember that many criminals are motivated by money and profit. Leaving illegal assets in the hands of criminals damages society."[5]

In addition to sending out the message that "crime does not pay", Mr Blair identified three additional benefits to tackling the proceeds of crime: it would prevent criminals from funding further criminal activity, help to alleviate the risk of instability in financial markets and remove negative role models from the community.[6]

Despite the fact that there was a broad consensus on the need to tackle the proceeds of crime, fears were voiced at the time of POCA's inception that the new legislative scheme would constitute an "excessively draconian"[7] means of obtaining what were, it was agreed, legitimate ends. In particular, concerns were raised that the proposed provisions would come into conflict with the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) 1998.

One particular area where there was an acute possibility of conflict with human rights instruments was in the area of civil recovery. The statutory framework in Pt 5 of POCA represented a notable departure from the approach adopted by earlier legislation. Under both the DTA and the CJA, confiscation of the proceeds of crime had been dependent on a criminal conviction being obtained.[8]

By contrast, under POCA civil recovery proceedings may be commenced irrespective of whether or not there has been a conviction. The relevant authorities were therefore to have the relative luxury of being able to pursue tainted money in the civil courts, without the need first to secure a conviction. The attractions of this from a prosecution/Exchequer standpoint are clear: the lower, civil, standard of proof (which, it has been emphasised, is to the balance of probabilities standard,[9] and not the kind of heightened civil standard

1 Ryder, Freedman and Montgomery, "Proceeds of Crime: Consultation on Draft Legislation", Liberty's response (May 2001), para.1.2.
2 "Proceeds of Crime Bill: JUSTICE Briefing for Second Reading, House of Lords", March 2002, para.2.
3 SI 2003/120.
4 SOCA annual report 2009.
5 Cabinet Office (June 2000), *Recovering the Proceeds of Crime*, London: Cabinet Office (Performance and Innovation Unit), p.3.
6 ibid.
7 fn.1, above.
8 See s.2 of the DTA and s.71 of the CJA.
9 *R. (on the application of the Director of the Assets Recovery Agency) v (1) Jia Jin He and (2) Dan Dan Chen* (2004) EWHC Admin 3021.

that has been applied in some other cases);[10] the admissibility of hearsay evidence; the lack of a jury and the lack of complicated and burdensome rules of evidence. In short, recovery of the proceeds of crime through the civil courts looked to be an expedient method of appropriating criminals' ill-gotten gains when compared to the clumsy and expensive unpredictability of the full criminal trial.

Checks and balances

The Government was mindful of the potential problem involved in this approach, and admitted before POCA was enacted that the new civil recovery powers could "be expected to be viewed as controversial by some".[11] It was for this reason that a number of safeguards and exemptions were introduced. Under s.243(1) of POCA, for example, proceedings for civil recovery are brought in the High Court, and parties accordingly have the same rights of appeal as in other High Court actions. Pursuant to ss.270 to 272, there are protections for third parties who assert an interest in the property in question. There are further protections for true owners (s.281) and bona fide purchasers (s.308); defences are available to those who received the property in good faith (ss.266(3) and (4)); limits preventing double recovery are in place (ss.278 and 279); there is compensation for financial losses (s.283); a financial threshold exists of £10,000, below which recovery proceedings may not be pursued (s.287); and a 12-year limitation period on recovery actions prevents the relevant authority going back too far (s.288). The final two measures were specifically requested by Liberty and others.[12]

Notwithstanding these numerous protections, the basic position is

that under s.240(2), it is possible to commence civil recovery proceedings where there has been no criminal prosecution; where there has been a prosecution, but the defendant has been acquitted[13]; and even where a conviction had been quashed due to the defendant's unlawful arrest.[14] Given that this is the case, one must be mindful of the danger that the Crown, lured by the relative simplicity of the civil courts, will opt for civil recovery at the expense of the criminal trial and its attendant range of protections. The Government was mindful of this danger when it observed in its original Cabinet Office Paper that "The introduction of civil forfeiture must not perversely affect the priority of law enforcement activity, i.e. the prosecution and conviction of criminals".[15] An amendment was made to the Bill to reflect such concerns.[16] Thus, s.2A(4) of POCA provides that "the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings". Section 2A therefore provides a clear legislative "steer" towards favouring traditional prosecutions as the best means of reducing crime. As Collins J. remarked in the case of *Director of the Assets Recovery Agency v (1) Jia Jin He (2) Dan Dan Da Chen*,[17] "the approach of the [relevant authorities] must be to let criminal proceedings take precedence, and only act if such proceedings are either not being taken, or for any reason may have failed".

Discretion

Prosecutors have been making wide use of their discretion under POCA. In 2006, a research paper by Anthony Kennedy[18]—former head of legal casework in the now defunct Asset Recovery Agency of Northern Ireland—identified six sets of circumstances in which civil recovery cases would be brought by the ARA: where a criminal defendant had died, where a criminal defendant had been acquitted, where a criminal defendant had been convicted but the confiscation hearing had failed, where the defendant was out of the jurisdiction, where the owner of the property was uncertain and where the defendant could not be prosecuted due to insufficient evidence. A survey of proceedings revealed that the ARA had been making robust use of the civil recovery provisions in all six of these types of case. Kennedy quotes the approving words of a Northern Ireland Sunday newspaper in order to convey the degree to which POCA's civil recovery powers had been utilised: "now it seems like rarely a day passes without another alleged racketeer being hauled through the courts and asked to account for his unimaginable wealth".[19]

Formulated in such a manner, civil recovery appears eminently attractive, but where do the objections lie?

The presumption of innocence

The principal objection, as enunciated by Liberty, is that civil recovery "contravenes the spirit of the presumption of innocence by providing an expedient path to findings of criminal guilt with lesser protection".[20] Arguably, to make reference to a finding of criminal guilt in the context of civil recovery is to misunderstand what is involved in civil recovery proceedings. As Liberty itself has acknowledged,[21] civil recovery proceedings are aimed at property, and not at the "defendant", who would, of course, not be a defendant properly so-called in any case, but merely a "respondent" or holder of property that was suspected of being "obtained through unlawful conduct".[22] Liberty argues that proceedings against property, or in rem proceedings (as opposed to proceedings against a person, or in personam proceedings), are "archaic" and based on "the absurdity of the legal fiction … that property itself could be sued".[23] As such, the concept is "dubious",[24] and, for Liberty, was another reason to oppose POCA's civil recovery provisions as a whole.

However, to dismiss the in rem/in personam distinction is harder than it first appears. The dichotomy has deep roots in English law, and the recovery regime was sensibly designed to fit neatly within existing principles of English civil law with which the judiciary are familiar.[25] The classification of the action as in rem also has important connotations for third parties, such as bona fide purchasers. Further, the fact that the proceedings are in rem militates against the overriding objection to the provisions, namely that they involve findings of criminal guilt against an individual without the full rigours of a criminal trial; for it is not the guilt or innocence of the individual that is at stake, but merely the genesis of the property. Admittedly, allegations of wrongdoing will inevitably be raised by the agency responsible as part of their endeavour to convince the judge that the property in question is related to unlawful conduct,

10 See, for example, *B v Chief Constable of Avon and Somerset* [2001] 1 All E.R. 562.
11 Point 5.21, Recovering the Proceeds of Crime: A Performance and Innovation Unit Report, the Cabinet Office, June 2000.
12 fnn.1 and 2, above.
13 *Director of the Assets Recovery Agency v Taher* [2006] EWHC 3402 (Admin).
14 *Serious Organised Crime Agency v Olden* [2009] EWHC 610.
15 fn.1, above, para.5.26.
16 *Hansard*, House of Commons, July 24, 2002, col.1055.
17 [2004] EWHC (Admin) 3021 at [13].
18 Kennedy, A, "Justifying the civil recovery of criminal proceeds" *The Company Lawyer* Vol.26 No.5.
19 "Racketeering Days Numbered" *Sunday Life*, January 8, 2006.
20 fn.1, above, para.7.4.
21 fn.1, above, para.7.2.
22 s.240(1) POCA.
23 fn.1, above, para.7.2.
24 ibid.
25 fn.5, above, p.227.

but the individual concerned is not charged with committing any such conduct, and the proceedings do not focus upon him as criminal proceedings would.

Convention rights

The notion that civil recovery proceedings are proceedings in rem is a notion inextricably linked with their civil, as opposed to criminal, character. As such, the distinction is a central reason for courts holding that various provisions of the ECHR do not apply to Pt 5 of POCA. In *Scottish Ministers v McGuffie*, the Inner House made the following observations:

> "The proceedings are directed against property (*in rem*) rather than against Mr. McGuffie's person. The recovery procedures are under the control of the civil court. Mr. McGuffie's guilt is not in issue. He is not facing a criminal charge. He is not an accused person. He cannot be arrested or remanded or compelled to attend. There has been no formal accusation by the prosecuting authorities. He will not be subject to a criminal conviction or finding of guilt. He will not be imprisoned. He will not receive a sentence. A civil recovery order will not form any part of his criminal record."[26]

A host of other cases show similar reasoning to that adopted by the court in *McGuffie*. In *Director of the Assets Recovery Agency v Walsh*,[27] for example, it was argued that civil recovery proceedings should be treated as criminal proceedings, and as such should attract the protection afforded by art.6(2) of the ECHR, which provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Following the test set out in *Engel v The Netherlands*,[28] Coghlin J. held that the proceedings were essentially civil in nature; accordingly, art.6(2) had no application. Similarly, in *R. (on the application of the Director of the Assets Recovery Agency) (Paul) v Ashton*,[29] Newman J. held that civil recovery orders were not punitive in nature because the defendant has no right to hold the assets in question in the first place. In *Director of the Assets Recovery Agency v (1) Jia Jin He (2) Dan Dan Chen*,[30] Collins J. held that art.7 ECHR (which prohibits the retrospective application of criminal law) did not apply because no penalty was involved. For good measure, the court also re-emphasised the proposition that orders can be made even where there has been no criminal conviction. As such, the court made it clear that "there will be no let up by the authorities in the pursuit of illicit funds".[31]

It is suggested that these decisions are analytically unassailable when considered against the backdrop of objective criteria expounded in *Engel v The Netherlands*[32] and related decisions. In *Walsh*, the case went to the Court of Appeal in Northern Ireland.[33] The Court examined comprehensively a range of objective criteria which distinguish civil cases from criminal ones. The Court found that all of the criteria pointed towards civil recovery being civil in nature. There was no charge; the individual concerned was not liable to be imprisoned or be fined (and any recovered funds were restitutionary in nature rather than penal); there was no imputation of guilt and no prosecutorial function. "The primary purpose of the legislation is to recover the proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction"[34], the Court held.

Preventative model

Despite the fact that it can be said with certainty that civil recovery is civil in nature, it is perhaps best to view the civil/criminal distinction as a continuum rather than a clear-cut dichotomy. Different states organise their affairs differently and it is difficult to arrive at universal criteria. In the United Kingdom, a number of recent legal devices occupy the grey areas between civil and criminal proceedings, such as anti-social behaviour orders and football banning orders. Moreover, this jurisdiction and others have long allowed victims of crime to sue alleged perpetrators for damages, irrespective of whether or not they have been convicted. The rationale for allowing this is familiar: the object of the proceedings is not to establish guilt but simply to compensate an injured party for a wrong committed. In the context of civil recovery, the injured party is society as a whole. The confiscated property is given back to the victim—society—through forfeiture to the Crown. Furthermore, the confiscated property cannot then be used by criminals to lavish on themselves and to fund further crime. Therefore, as Kennedy notes, "civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice"[35]. This notion deserves serious thought at a time in which the effectiveness of prison as a means of reducing crime is being increasingly questioned.

The role of civil recovery is therefore clear: to supplement criminal prosecution by giving prosecuting authorities carefully tailored and appropriate powers to recover property which has been obtained through the commission of crime. Individuals have a right to be presumed innocent until proven guilty—but so too do the Government and society at large have a legitimate interest in ensuring that organised crime is disrupted and that crime does not pay.

The civil recovery regime enacted by POCA was always going to be controversial, and it is only right that—whatever Government targets may dictate—the criminal trial, with its carefully designed protections for the defendant, remains the centrepiece of the criminal justice system. But that is not to say that there needs to be the same cumbersome and expensive level of protection in place where an individual's assets are in jeopardy, as there is when their liberty is at stake.

The trend is clear: civil recovery is here to stay, and those practising in the field must ensure that it works to the greatest effect, whilst ensuring that the rights and needs of the respondent are not trespassed upon too heavily.

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26 [2006] SC(D) 26/2, at para.127.
27 [2004] NIQB 21.
28 (No.1) (1976) 1 E.H.R.R. 647.
29 [2006] EWHC (Admin) 1064.
30 fn.9, above.
31 Gerlis, SM, "Court grabs illicit proceeds" *Busy Solicitors' Digest* December 9, 2004.
32 fn.29, above.
33 [2005] NICA 6
34 ibid, at para.39.
35 Kennedy, A, "Justifying the civil recovery of criminal proceeds" *The Company Lawyer* Vol.26 No.5, p.138.

Alan King-Hamilton Q.C. —my grandfather


Caroline Sumeray

The relationship with one's grandparents is always a special one. And for my sister and me, the fact that we only had the chance to know one of our grandfathers, the other one having died over 60 years ago, made him an especially unique figure in our lives.

His Honour Alan King-Hamilton Q.C. was the epitome of a doting grandfather and I adored him.


Alan King-Hamilton Q.C.

When he passed away in March aged 105, I lost my mentor as well as my grandfather. I have no doubt that were it not for his example, I would not be at the Bar today.

Although he had a very public role which extended well into his late nineties with involvement on committees and boards of various organisations, he was, in fact, an extremely private man whose family meant everything to him. Much has been written in various obituaries published in the newspapers about how he was regarded as being an eccentric judge who revelled in publicity. I think he would have been horrified at such a description, believing himself to be "very establishment".

Some of my earliest memories involve being taken to visit him whilst he was sitting at the Old Bailey. Special dispensation was granted to admit me to the court as I was considerably younger than the permitted age of 14. One particular memory involves being taken into the large Court 8 by my father, and sitting near the side of the dock, watching the spectacle of the court, and my very stern looking grandfather, in hushed awe. On that particular day, there was much hilarity amongst the court staff as the defendant's name was "Alan King"! I was probably about eight or nine at the time, but the seed had been well and truly sown.

To my amusement, my first "appearance" in Court 1 of the Old Bailey came about when my grandfather retired in 1979 as his family was invited to sit in Counsel's benches to listen to the valedictory addresses. The magic of that special court has bewitched me, as it does to so many, ever since.

As a child, I remember being asked constantly by others if I was going to follow in his footsteps, but never by him. He was far too subtle for that! But my mother swears that he was telling me that I had to go to the Bar whilst whispering in my ear, one summer's afternoon as I sat on his knee in the garden. Of course I was around a year old, so I can't say I actually remember the incident, but the photograph speaks volumes about our relationship.

My grandfather finally retired at the age of 80 after sitting as a Deputy Circuit Court Judge for five years, and as a teenager I enjoyed trips to a number of the courts in London with him. I vividly remember being taken to explore the High Court and sitting in on various cases to pique my curiosity about all things legal. He also took me to dine at his beloved Middle Temple as his guest. I had no idea what was going to happen as the large wooden doors to the Hall swung open. Processing into Hall with the Benchers and sitting at High Table was awe-inspiring. And of course he introduced me to such a fascinating array of people, all of whom were his friends. It was such a seductive experience. I realised how special this place was to him—and, without saying it, how much he wanted for me to experience it for myself.

I was inspired enough to read Law at university, and then to read for the Bar. I hadn't told my family when my Bar Final results were going to be available as I couldn't cope with them all being on tenterhooks with me. Finally I had my result … and it was good news! I went to see my grandfather and casually asked him if he, as a Bencher, would sign my Call Forms. He was thrilled to bits. My Call to the Bar is indelibly etched in my memory. Middle Temple's Call ceremony has a line of Benchers with Master Treasurer in the middle. Once your name is called, you process down fully robed, bow to Master Treasurer, shake his hand and he gives you your Call certificate. My grandfather stood next to Master Treasurer and after I was given my certificate, he stepped forward and bowed to me. That gesture told me so much about how he felt at that moment, and I was deeply moved by it.

He kept a close eye on my career—always interested to hear what I was doing. He never missed an opportunity to ask judges in front of whom I'd appeared, how I'd performed. "How's trade?" he'd say whenever I called him for a chat. I loved telling him about my practice and dissecting cases with him. His eyes would light up whenever legal matters were discussed.

A few years ago, I was being led on a multi-handed murder at the Old Bailey. The trial lasted three months. We talked about it and I suggested that he might like to come and watch for a few hours. He jumped at the chance! H.H.J. Hone Q.C. was the presiding judge and he heard through the clerk that my grandfather was going to visit, and very kindly invited him to lunch with the judges. Grandpa was honoured to be invited and delighted to accept, particularly as he regarded visiting the Old Bailey as "like coming home". At the time, he was almost 102 years of age. H.H.J. Hone gave a little speech of welcome to him in open court just before rising for lunch. In it, he told the court, including the jury and the defendants, who the "distinguished gentleman" was who was sitting on the far side of the court. He gave a brief synopsis of his life and career, and it was only when he mentioned that he would be turning 102 in a month or so that there was a collective sharp intake of breath and the dock erupted into a round of spontaneous applause. (Some months later I attended a dinner and this story was recounted. The speaker referred to it as the only time that an Old Bailey judge had been applauded from the dock—but that was

only because the defendants had heard that he would not be sentencing them!)

My grandfather's dry sense of humour has been well documented —the Billy Rees-Davies story is almost legendary now, but whilst he could be very serious and stern, (not just on the Bench but to my sister and me if he felt that we had transgressed or been rude in some way), he had a delicious sense of fun. When he was well into his eighties, he holidayed with my late grandmother and couldn't resist trying the helter-skelter water slide into the swimming pool at their hotel, much to her consternation! And I have kept and treasured the postcards that we always used to receive from them whilst they were away. The cards were filled by my Grandmother's large shaky handwriting telling us all that they had been up to, and right at the bottom, in the beautiful copperplate hand that was unmistakably his, he used to write "I concur and have nothing further to add. Grandpa LJ".

My grandfather was very much born into the law, his father being a well-respected solicitor (and one of the founding members of the Automobile Association) who encouraged his son to follow him into the legal profession. My great-grandfather had longed for a son and had initially been blessed with three daughters, so when my grandfather was born, he was thrilled. Their relationship was an exceptionally close one. Whenever my grandfather mentioned his father, he always did so with great affection and called him "a dear man". His long life meant that he had many wonderful memories, including some which were of the time before the First World War. It's astonishing to know that he remembered when the Haymarket in London actually *was* a hay market, and recalled travelling in hansom cabs as a boy.

As he became older, he was asked by many for the secret of his longevity. He swore it was down to doing his breathing exercises by an open window every morning. But I think that the real secret was his huge enthusiasm for life. He was interested in everything and kept mentally and physically active all his life. He was still contributing letters to *The Times* well into his hundreds, and had a very lively social life until about 18 months ago, attending dinners in Middle Temple Hall, and appointments in London, matches at Lords as well as holidaying in Cornwall with my aunt. He had a huge social circle which encompassed people of all ages—and as my brother-in-law observed, liked nothing better than discussing the latest developments in the England cricket team.

Technology fascinated and baffled him in equal measure. One Saturday evening a couple of years ago I took my laptop over to his flat to show him some things and to explain how the world-wide web worked. I connected wirelessly to the internet, and when one of my Australian friends logged into MSN Messenger, we were able to chat with her in real-time using the built-in webcam on my computer. He struggled to comprehend how he could be talking to a woman in Australia, where it was now Sunday morning, and she was waving to him, and he to her – and it was all happening for free with no wires involved. "Bless my soul!" he declared!

To the fury of my mother and aunt, as he grew older, his favourite phrase when he was being pushed to do something which didn't appeal, became "Wait until *you're* in your second century …", always said with a mischievous twinkle in his eye. Indeed he revelled in his great age. In 2006, when he was 101, as the Senior Past Master of his Livery Company, the Worshipful Company of Needlemakers, he was invited to propose a toast to the Master and Company at a white tie banquet for 650 people at the Guildhall. Silence descended as this tiny figure got to his feet. After a long pause he began. "When I was in my nineties …" Everyone roared and gave him a standing ovation. He spoke without a note, telling joke after joke, and had everyone eating out of the palm of his hand. It was spectacular.

He was blessed with good health all of his life, and was fortunate to have been able to live at home until the month before he died. Reluctantly, he agreed to have a carer, but only when he was 104. Until that time, he had stubbornly managed on his own. I believe his independence of spirit was crucial in his attaining such longevity. Much of that independence was achieved by him retaining his driving licence until he was at least 95. When he was reluctantly persuaded that it was time to give it up, he terrified my mother and aunt by saying that he was going to buy a bicycle! When he turned 100, I asked him if he could do anything that he hadn't done before or go anywhere that he hadn't been, what would it be? He replied that he wanted to go skiing in New Zealand! I reminded him of this conversation the last time I saw him, the week before he passed away and he laughed. It was just so him.

He was thrilled and so proud of me when I was appointed as an Assistant Deputy Coroner last year. I visited him in hospital in early March on my way back from my second and final training course. By now, he was extremely frail. It was so sad to see such a vibrant man near the end of his life. He was very tired and wished to sleep, but I wanted to read him the first summing up I had drafted as part of my training. We both knew that he wasn't going to see me actually sitting, but of course it remained unsaid. He agreed to listen to it—and was rapt throughout—and when I reached the end he immediately declared "Excellent! First class!". Of course it wasn't perfect—far from it, but it meant the world to me to see his reaction. I treasure that memory, and the fact that I will wear his bench wig when I sit.

It's hard to mourn a man who has lived to 105, and who had the most remarkably fulfilling life. I associate mourning with lost opportunities, but my grandfather took every opportunity that life offered him. He had a wonderful marriage which lasted for over 56 years until my grandmother passed away in 1991, a close and loving family, a fascinating and successful career, a huge circle of interesting and distinguished friends—and as he put it in his autobiography, these were his riches. His passing created a huge vacuum in our lives. I miss him and always will.

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Luke Gittos

JON VENABLES AND THE "COURT OF PUBLIC OPINION"

Luke Gittos examines how the Venables debate has been influenced by different definitions of "the public"

On 2nd March this year, it was disclosed that Jon Venables had been recalled to prison, nine years after his release on licence in 2001. The event triggered a call to arms from certain sections of the media, with demands for details of Venables' new offences be made public. The Home Secretary Alan Johnson told BBC news on the morning of the 3rd March that, "I do believe the public have a right to know and I believe they will know all the facts in due course".

Uncertainty

Jack Straw disagreed, and on the following day he issued a statement informing the House of Commons it would not be in the interests of justice to release any such information. Yet confusingly, on the morning of the 5th March, Straw seemed to implicitly accept there was some truth to stories claiming Venables possessed images showing violent sexual acts being committed on children. He said, "It may become in the public interest to disclose, especially given what has been made public so far". On 21st June, we were told the broad details of the child pornography allegations.

Since his conviction in 1993, the Judiciary, the legal profession and the executive have been divided on the extent to which so-called "public outcry" should impact on decisions surrounding Venables. Yet, at the same time, Venables' recall seems to have established an assumption amongst all three that were his identity made public, he could not receive a fair trial. On this issue, there seems little disagreement.

This odd combination of dispute and consensus is indicative of the social and jurisprudential discussion occurring beneath the surface of the decisions associated with Venables. This is really a discussion about what constitutes "the public", and how involved any "public" should be in decision making.

In the name of "the public"

In 1993, Jon Venables and Robert Thompson became the youngest people ever to be convicted of murder. They were both 10 years old when they led the two-year-old Jamie Bulger from the New Strand Shopping Centre in Bootle to the side of a railway, where they tortured and then killed him. At a hearing on the 24th November, H.H.J. Morland sentenced them both to a minimum of eight years. Morland ordered their identities be made public, as this was a "special case" involving an "unparalleled act of evil and barbarism".

The boys had an immediate impact on the Criminal Justice system. Their conviction inspired s.34 of the Crime and Disorder Act of 1998 that abolished *doli incapax*, or the rebuttable presumption that a child between the ages of 10 and 14 could not be held criminally responsible. The effect was that children over 10 years old who committed serious offences were no longer assumed to be outside the reaches of criminal responsibility. The Government White Paper which led to the Crime and Disorder Act, "No More Excuses: A New Approach to Tackling Youth Crime", claimed that presumption against criminal responsibility was "contrary to common sense" and that its abolition "was necessary to remove the practical difficulties for prosecutors and courts".

Whilst the White Paper offered practical concerns for the abolition of *doli incapax*, the move was undoubtedly a response from the legislature to what it perceived as "public outcry". The media attention the case received, coupled with the sentencing remarks of H.H.J. Morland, had convinced the legislature that the public no longer wanted children to be protected by the constraints of criminal responsibility.

Petitions

In 1998, Venables subjected the decision of the then Home Secretary Michael Howard to set his tariff at 15 years, to judicial review. The case (R. v Secretary of State for the Home Department ex. p. Venables) [1998] A.C. 407) is now cited in constitutional law textbooks as an authority on the grounds of "improper considerations" in judicial review. Venables argued that Howard had been wrong to be influenced in his decision-making by the submission of a petition signed by some 278,300 members of the public, with an additional 4,000 letters of support, demanding the boys should remain in detention for life.

The case caused a two-fold disagreement in the House of Lords: firstly as to whether the signatures on the petition were capable of capturing the "public character"; and second, as to whether the consideration of the petitions was improper. Lord Goff authoritatively declared, "That there was public concern about this terrible case there can be no doubt". Lord Browne-Wilkinson went on to say, "I understand it to be common ground that the Secretary of State, in setting the tariff, is entitled to have regard to 'broader considerations of public character'… How is the Secretary of State to discover what these attitudes are except from the media and petitions?". Lord Steyn disagreed, claiming the petitions were "worthless and incapable of informing him in any meaningful way of the true state of informed public opinion".

Are the public relevant?

In addition to disagreeing about what constituted "the public", the Lords disagreed about whether the public needed to be considered when determining tariff decisions at all. Lord Hope, Lord Wolf and Lord Goff agreed the public was an irrelevant consideration, whilst Lord Browne-Wilkinson argued that the "public character" was a proper consideration for a Home Secretary in determining a tariff. The House was in disagreement not only about whether the Home Secretary could properly consider "public opinion" in his decision but also what exactly could be taken to constitute the "public" in the first place.

Despite this disagreement, the underlying consensus amongst the Lords was that there was, at least, a "public" of some sort or other to consider. Whilst they differed on how to access their opinions, or "character", and on whether or not these should be

considered in the decision-making process, they implicitly agreed there was a uniformity of anger amongst the public. This tallied with the sentencing remarks of H.H.J. Morland who, in acknowledging the importance of "public opinion" in passing sentence, clearly assumed the public had such opinions in the first place.

Serious personal injury or death

The assumption of uniformity purveyed by the House of Lords and H.H.J. Morland can be contrasted with later decisions involving Venables. In 2001, Baroness Butler Sloss granted *contra mundum* injunctions to protect the new identities of the boys being from being published. *Contra mundum* injunctions require that an applicant demonstrate that were no restrictions imposed, there would be a "likelihood that the individual seeking confidentiality would suffer serious personal injury or death". In *Venables v News Group Newspapers* [2001] EWHC 32, Sloss found that Venables' case reached such a threshold, holding that "a level of hostility and desire for revenge existed amongst certain members of the public". Interestingly, Sloss did not recognise any danger from any coherent or collective "public". Instead she uses the term "the public" to describe individuals alone in their "desire for revenge". On the 9th March Sloss' individuated conception of the public resurfaced as she voiced her support for Jack Straw's stance on disclosure, saying, "those who wanted to kill him in 2001 are likely to be out there now".

The distinction between the two conceptions of "the public" is helpful in understanding why, now, on his return to prison, it is assumed almost exclusively that were Venables' identity to be known to the jury he could not be tried fairly. This assumption is based on a conception of the public as uniform and united in their anger against Venables. In reality, whilst there may be individuals in the public who would like to do him harm, there is not, and arguably never was, any uniform public outcry against Venables. People did not take to the streets to protest against his release, or to demand that the details of his current offences be disclosed; neither has there been any sustained campaign against his release.

So what is driving the assumption amongst the Judiciary and legal commentators that Venables could not be tried fairly?

Would a fair trial be possible?

In his statement to the House of Commons on 4th March, Jack Straw justified the non-disclosure of details about Venables' new offences by assuming that were disclosure to take place a fair trial would be impossible. He claimed, "it is critical that if charges do follow it is possible to hold a fair trial. Fair for the defence, fair for the prosecution". The assumption behind his remarks was that were a panel of jurors to find out they were trying the killer of Jamie Bulger, it would be impossible to direct them in a way that would neutralise the bias. The jury would be incapable of putting Venables' previous crimes from their minds.

The extent to which this assumption has caught on has been striking. On 8th March 2010, during a debate in the House of Lords, Lord Elystan-Morgan said:

> "Many noble Lords have made the proper point that excess publicity could jeopardize the validity of a trial …The risk that members of a jury may be affected by prejudice is one that cannot wholly be eliminated."

During a debate in the House of Commons on the same day, Peter Kilfoyle the M.P. for Liverpool Walton, the constituency in which Bulger was murdered, criticised the "wilted sepulchers" in the press and said they were "putting a fair trial at risk". Francis Gibb, writing in *The Times*, quoted Sally O'Neill Q.C., former head of the Criminal Bar Association, who said, "If the legal restrictions are in place and abided by, as they should be in the interests of justice then there can be a fair trial". Presumably, in the absence of such "legal restrictions" on disclosing Venables' identity, a fair trial would be impossible. Gemma Delaney and Tariq El Tayara, writing in *Criminal Law and Justice Weekly*, were emphatic: "For Venables to have a fair trial his anonymity needs to be upheld, at least until the point where it is decided whether his previous conviction is to go before a jury".

The assumption that the disclosure of Venables' identity would necessarily lead to an unfair trial is powered by a false conception of the public. If you believe in a system of trial by jury, you trust that jurors have the ability to understand the need for impartiality, the need to start from an assumption of innocence, the need to differentiate between evidence and rumor, and you trust they are able perform their duties in even the most difficult circumstances. This means acknowledging that the members of a jury are capable of reasoning as individuals and are not simply part of a uniformly angry and irrational public. Once the mythical public is done away with there is no reason to doubt any juror's ability to try Venables fairly, regardless of their knowledge as to his identity.

The recall of Jon Venables to prison has raised important questions about the relationship between the criminal law and the public. I have suggested that at least two differing conceptions of the "public" have emerged from the Judiciary and the Executive since Venables' conviction. The first is of a unified angry mob bent on revenge. The second is a far weaker conception, which merely acknowledges there may be individuals who still seek to do Jon Venables harm. I have also suggested that it is our conception of "the public" that informs our view about the ability of jurors to try cases fairly. Adopting the "angry mob" conception is not only wrong, it is conducive to edging those from outside the legal profession further away from the important decisions of criminal justice.

Establishing such a trend may yet be the most socially significant impact of Jon Venables' crimes.

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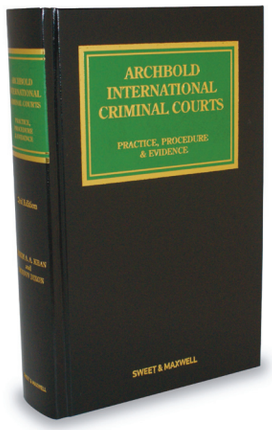
BOOK REVIEWS

Archbold International Criminal Courts Practice, Procedure and Evidence

Karim Khan and Rodney Dixon have completely revamped this impressive book. Gone are the rather academic sections on legal jurisprudence, replaced by a searingly practical text which, as Mr Justice Fulford put it at the book's recent launch, is required reading for all who intend to appear before him at The Hague.



There is a new section on victim participation and reparations chiming effectively with the International Court's attempts to win the confidence of the sceptics who argue that the tribunal fails to deliver timely and equal treatment to all nations.

The practicality of the book is emphasised by chapters on legal representation and funding and an imaginative CD presents appendices comprising material from Sierra Leone, Rwanda and the Lebanon, making this text required reading for all those who practice or have an interest in the work of the International Criminal Court.

Published by Sweet and Maxwell, price £305

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This deceptively wide subject includes consideration of legislation including the Anti Social Behaviour Act 2003, the Protection from Harassment Act 1997, the Police Reform Act 2002, as well as the central legislation within the Public Order Act 1986.

The authors have done a great service to practitioners by combining in one succinct volume the essence of this far-reaching subject, and in one book have given us the definitive text.

Published by Oxford University Press, price £95

John Cooper Q.C.


Nicola Padfield

Is a trial fair if the evidence cannot be tested?

Nicola Padfield examines the recent case of *Horncastle*

As a result of the major reforms to the "hearsay rules" introduced in the Criminal Justice Act 2003,[1] trial judges may now allow statements to be read to juries in a wide variety of circumstances, without the possibility of cross-examination. This appears to be becoming common practice (though we lack serious empirical evidence). Thus, in November 2007, on a second retrial, Christopher Horncastle and David Blackmore were convicted of causing grievous bodily harm with intent. They appealed on the ground that the trial judge had wrongly allowed the admission in evidence of the written statement of the alcoholic victim, who had died a year after the attack from an unrelated illness. Quite separately, in May 2008 Abijah Marquis and Joseph Graham were convicted of kidnap. The prosecution case was that six men had broken into a house occupied by HM and GP, had stolen a car and kidnapped HM. One defence argument was that there had been no kidnapping; the victims were attempting an insurance fraud. Here too the victims did not give live evidence at trial. The judge admitted the statement of HM, under s.116(2)(e) of the Criminal Justice Act 2003 on the basis that she was too frightened to give evidence. He did not accept that GP was too frightened, and so refused the defence application to admit his statement.

Sole or decisive?

Meanwhile, in January 2009, the Fourth Section of the European Court of Human Rights (ECtHR) in *Al-Khawaja and Tahery v UK* (2009) 49 E.H.R.R. 1, upheld complaints in two unrelated cases that, in each case, since a written statement had been admitted which was "the sole or, at least, the decisive basis" for the applicant's conviction, the rights of each applicant under arts 6(1) and 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms had not been respected. The ECtHR took as its starting point the statement in *Lucà v Italy* (2001) 36 EHRR 807, [40], that:

> "where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by article 6."

In April 2009 the United Kingdom requested that the decision in *Al-Khawaja* be referred to the Grand Chamber. The appellants in both *Horncastle* and *Marquis* relied on this "sole or decisive rule": since their convictions were based solely or to a decisive extent on the statements of absent witnesses whom they had had, necessarily, no chance to cross-examine, their rights guaranteed by art.6(1)(3)(d) had been violated and their convictions were unsafe. In May 2009 a five judge Court of Appeal dismissed Horncastle and Marquis' appeals: see [2009] EWCA Crim 964. In June 2009 the Grand Chamber adjourned consideration of *Al-Khawaja*, pending the judgment of the Supreme Court in *Horncastle*. The cases rushed from the Court of Appeal to the House of Lords, where argument was heard in July 2009 before seven Law Lords. As the months passed many commentators (including this one) started to anticipate a fierce dissent or two. The reality was something else: when the judgment eventually appeared in December 2009, the Supreme Court had prepared a unanimous "block-buster of a judgment" (see Spencer at [2010] 1 *Archbold Review* at p.5) to put straight the ECtHR: see [2009] UKSC 14; [2010] 2 W.L.R. 47.

Supreme Court question Europe

Lord Phillips, speaking for all seven members the Supreme Court, emphasised that the Court was not bound by the ECtHR decision. He accepted that the requirement of s.2 of the Human Rights Act 1998, that a court should "take into account" the Strasbourg jurisprudence, will normally result in the domestic court applying

> "principles that are clearly established by the Strasbourg court ... there will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case" (at [11]).

Lord Phillips offers a hard-hitting summary of his conclusions (at [14]), which illustrates how hard the Supreme Court is urging the ECtHR to change its mind:

(1) Long before 1953 when the ECHR came into force the common law had, by the hearsay rule, addressed that aspect of a fair trial which article 6(3)(d) was designed to ensure.

(2) Parliament has since enacted exceptions to the hearsay

1 Any comments on this piece will be gratefully received either by Nicola Padfield or *CBQ*.

rule that are required in the interests of justice. Those exceptions are not subject to the sole or decisive rule. The regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary.

(3) The continental procedure had not addressed that aspect of a fair trial that article 6(3)(d) was designed to ensure.

(4) The Strasbourg court has recognised that exceptions to article 6(3)(d) are required in the interests of justice.

(5) The manner in which the Strasbourg court has approved those exceptions has resulted in a jurisprudence that lacks clarity.

(6) The "sole or decisive rule" has been introduced into Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions.

(7) Although English law does not include the "sole or decisive rule" it would, in almost all cases, have reached the same result in those cases where the Strasbourg court has invoked the rule.

(8) The "sole or decisive rule" would create severe practical difficulties if applied to English criminal procedure.

(9) *Al-Khawaja* does not establish that it is necessary to apply the "sole or decisive rule" in this jurisdiction.

Strasbourg has spoken

Lord Phillips' judgment ends with four annexes: Annex 1, prepared by Lord Mance, reviews the law in Canada, Australia and New Zealand (though it is not explained why these jurisdictions were chosen); Annexes 2 and 3 prepared by Lord Phillips, provide short summaries of ECtHR case law; Annex 4 is Lord Judge C.J.'s analysis of how the relevant ECtHR cases would have been decided in English law (allowing the Court to conclude "that in general our rules of admissibility provide the defendant with at least equal protection to that provided under the continental system" (at [93]). Finally, Lord Brown gives a brief judgment, stressing the consequences if the Strasbourg court in *Al-Khawaja* really did intend to lay down "an inflexible, unqualified principle" that any conviction based solely or decisively on evidence adduced from an absent or anonymous witness is necessarily to be condemned as unfair and set aside as contrary to arts 6(1) and 6(3)(d) of the Convention. The Supreme Court in effect joins with the UK Government in inviting the Grand Chamber to overrule the Chamber decision. This case is a very far cry, Lord Brown, says, from *Secretary of State for the Home Department v AF (No.3)* [2009] 3 W.L.R. 74, where the House of Lords was faced with a judgment of the Grand Chamber in *A v United Kingdom* (2009) 49 EHRR 625 on the point at issue and where each member of the Committee felt no alternative but to apply it. As Lord Rodger had put it there, at [98]: "*Argentoratum locutum, iudicium finitum*—Strasbourg has spoken, the case is closed."

A milestone

The case may represent a milestone in the evolution of the judging style of the Supreme Court. Not only is there one hybrid judgment, with four annexes (and a short additional judgment), but Lord Phillips states that "this judgment should be read as complementary to that of the Court of Appeal, not as a substitute for it" (at [13]). The appellate judges may want to speak with one voice, but is it likely that the common law will be enriched by appellate judges' newfound sense of collegiality?

In *Chan* [2010] EWCA Crim 272, one of the first appeals on this point since *Horncastle*, the disputed statement was that of a complainant in a rape case. The Court of Appeal dismissed the appeal saying:

> "it was decided unanimously by the Supreme Court [in Horncastle] that ... the Criminal Justice Act 2003 represented a *crafted* code enacted by Parliament which regulated the admission of hearsay evidence at trial in the interests of justice and it also contains specific safeguards which did not include any rule prohibiting evidence which was sole or decisive being admitted as hearsay evidence. The Supreme Court also held that the statutory code struck the *correct balance* between the fairness of the defendant's trial and it protected the interests of the victim in particular and society in general that a guilty person should not be immune from conviction" (at [10]; italics added).

Trust the trial judge

Is this confidence well placed? It rests on the belief that trial judges can be trusted to use their broad discretionary powers appropriately: if the trial judge cannot be persuaded to exclude the evidence, there seems little likelihood of success on appeal. The trial judge in *Horncastle* told the jury unequivocally that the prosecution's case depended upon the evidence of the victim, a deceased alcoholic (see [103]). It seems surprising that counsel had made no application to have his statement excluded under s.125 of the Criminal Justice Act 2003. And the trial judge in *Marquis* found that the investigating police officer had significantly contributed to the victim's fear by referring repeatedly to a notorious local example of witnesses being hunted down, although relocated, and killed (see the judgment of the Court of Appeal, at [88]). It would be interesting to know whether, and at what depth, there were arguments at trial as to whether this provided good grounds for exclusion.

The English law needs safeguards

Professor Spencer argued (at [2010] 1 *Archbold Review* 6) that English law has only itself to blame, having abolished committal proceedings. He concludes:

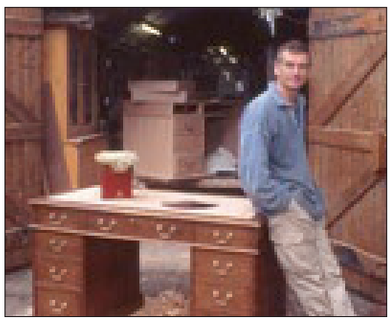
> "a sensible, and workable, qualification would be to say that [art.6(3)(d)] only applies to those witnesses whom, by taking reasonable efforts, the state could make available for the defence to question. Under this interpretation, the defendant would have no valid complaint if, for example, he were convicted on the statement of a person who had died just after making a statement to the police, or someone who died in the witness-box just as he was about to be cross-examined. However, he might have a valid complaint if he were convicted on the out-of-court statement of a witness to whom, if the state had constructed its criminal justice system more intelligently, or had operated it more conscientiously, he could have put his questions ahead of trial".

The debate must continue (see also Dennis' fascinating analysis of the right to confrontation at [2010] Crim LR 255). Before we get too used to trial by absent witness, let us recognize both the complexity and the flexibility of the framework of the 2003 Act. Whilst it may be true that, often, a conviction will be "safe" even when based on untested evidence, the ECtHR are surely right that English law needs more certain safeguards in order for convictions to be consistently "fair" and, indeed, "safe".

Nicola Padfield is Director of Studies in Law at Fitzwilliam College, Cambridge.

Any suggestions for topics for the Monthly Archbold Review should be sent to nmp21@cam.ac.uk.

New uses for Archbold



How Steve Hancox found himself on the shelf

I had a varied, some might say directionless career at the bar. Having spent a brief period in the probation service I assumed I would do crime, but I never really had the cut-and-thrust wit and rapier cross-examination techniques required of a trial lawyer. Instead of Norman Birkett, think Norman Wisdom. I was quite good with juries, though; somehow I always managed to evoke sympathy with my client.

So I ended up mainly doing civil. I think I was good at thinking through a problem, seeing the angles and coming up with the answer; a technique which I apply to my current occupation. I enjoy making unusual pieces to deal with a particular problem—a desk to fit in a bay window, a tall corner cabinet to enclose a particularly large TV, or one with a dog-basket in the base. There is no denying the glamour of crime, though. It's taking instructions through the bars at Bow Street Magistrate's Court (yes, I am that old) and the armed robbery trial at the Old Bailey that I'll be telling my grandchildren about. (I may not mention the indecency trial in Merthyr.)

The change of career was mainly due to family commitments—I couldn't manage the commuting and unpredictability of my practice at the bar. I've always liked working with my hands and had a very large shed so …

The shed—now proud to be known as "The Workshop". Crown Office Row eat your heart out!

"I couldn't afford a proper house"

I had cut my first set of dovetails at school. I guess I must have been about 13 because I gave up woodwork quite soon afterwards to do chemistry or something useful instead. (I wasn't disappointed; playing with chemicals and setting fire to the gas taps was much more interesting.) I still have the resulting pencil-box, although I rarely display it as a sample of my workmanship! I attended some evening classes (somewhat distracted by the tutor—an attractive young lady aptly named Rachel Sycamore), but most of my knowledge was gained doing up houses in London. Being a very junior and very impoverished barrister I couldn't afford a proper house, so we bought one that was unfit for human habitation and did it up. (100 per cent mortgage at about four-and-a-half times our joint income I think; those were the days—thanks Abbey National!) I did have a lot to learn, though—I nearly cut my finger off trying to make a sash window on the kitchen floor with a Stanley knife. (Thanks Plastic Surgeon!)

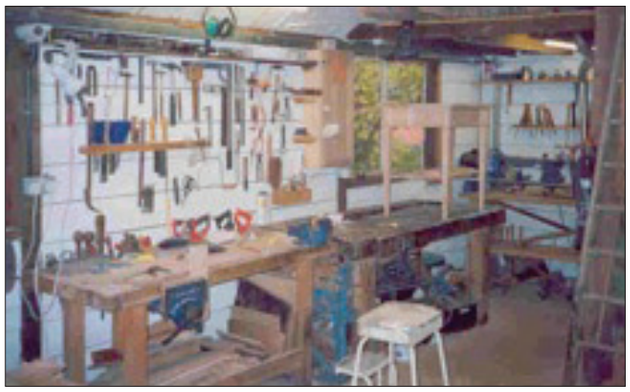
The idea was to make desks for my former colleagues. As I'm sure lots of readers will know, it's actually quite hard to find a really good desk. There are plenty of veneered chipboard ones around which look very shiny for a while, but don't last and never really look quite right. There are antique ones if you've got the time to spend trawling round to find one, but they are usually in poor condition with woodworm, drawers that don't fit, finished in some horrible thick yellowing varnish, just the wrong size—or hugely expensive! A member of my old chambers bought an ornately carved desk freshly imported from the virgin rain-forest. It looked so impressive when delivered that another member of chambers ordered one as well, but sadly the timber must have been a bit too virgin and the forest a bit too rainy. A few weeks in the dry and gaps were opening up all over the place. It was replaced, but the new one did the same. That was enough market-research for me … handmade desks for lawyers, that's the thing!

The nether regions of Sir Louis Blom Cooper Q.C.

I made a sample desk and took it to the Bar conference. I got in touch with the organisers hoping to get permission to put the desk in the entrance or something, but of course conferences are major exhibition opportunities these days! What size display-stand did I require? Crikey, I didn't have anything else to display. So the desk that had looked huge in the workshop was swallowed up in the cavernous ballroom of the Royal Lancaster Hotel. I stood around, struggling to get delegates realise that it was part of the exhibition at all! A lack of convenient seating made it a popular resting-place for the great and the good. That particular desk is available with a blue plaque pointing out that it has been graced by the nether regions of Sir Louis Blom-Cooper Q.C. It is possible that the bottoms of even more important people were there, but if so I failed to recognise them.

On the shelf

Those that did notice it made suitably appreciative noises but, as they stroked it and tried the drawers, the most common question was "Do you make bookcases?" My market research was flawed. There is actually much more demand for bookcases. While an "off the peg" desk isn't as nice as a bespoke one, an "off the peg" bookshelf can't be bought at all! Not if you want it to fit a particular wall, anyway. I'm really happy making bookcases—but what will I do with all those desk leaflets!



A very old walnut tree which grew in the middle of this field overlooking Llangorse Lake in mid Wales. It had been particularly popular with the nuns from a nearby retreat who, according to the farmer, used to pinch his nuts! Eventually the base rotted and it blew down. It was destined for firewood, but thankfully someone mentioned that I might be interested before the chain-saw massacre had taken place and we were able to plank it on site with a mobile saw-mill. Because walnut trees grow in isolation, there are not so many of them around and as the timber is so beautiful, English (or, in this case, Welsh) walnut is very sought-after. Although this tree was hollow in the middle, there was enough good wood to make it worthwhile. It looks fabulous and hopefully won't be thrown on the fire for many years to come!

It was lambing time and the field was full of sheep. While we were sawing away, new lambs kept appearing. Either we were very slow or the sheep were very efficient, because the population had about doubled by the time we had finished!

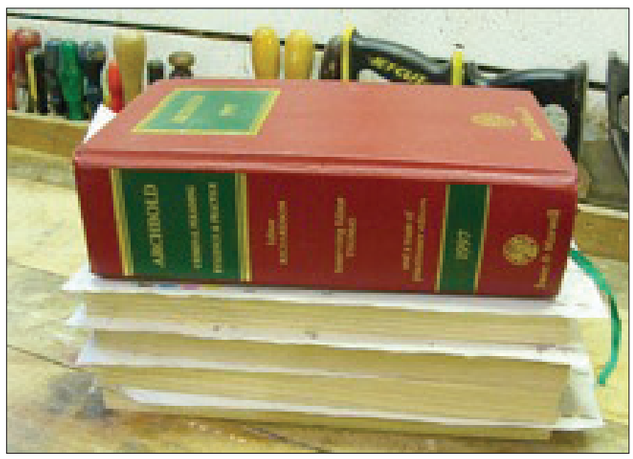
Trussed up in ear defenders

So do I miss the bar?

At a party with some of my old colleagues in Cardiff a few months ago, I was shocked to realise that I had achieved mythical status in chambers. "The one who escaped!" The legend had even been handed down to younger members who I'd never met. I guess everyone dreams of escaping sometimes, especially after a tedious afternoon trawling through someone else's bank statements, and the idea of working with wood sounds terribly romantic, but is the grass really greener? When I'm trussed up in ear defenders and a dust-mask passing heavy boards through a noisy machine and covered in dust, to be honest, the answer's still "yes"! The shed has now increased considerably in size, but it's still quite cosy in the winter with the off-cuts on the woodburner, and in the summer it's great to be able to throw open the doors and do some of the work outside. The money isn't as good (yes, even worse than criminal legal aid!) but I do at least get paid on time. At the same party I met a solicitor who happily recalled that she owed me for some work I did in 1999!

"The wig is fantastic for buffing-up a waxed finish"

The lawyer in me hasn't been killed off entirely; I still enjoy pontificating on some legal issue in the pub, helping draft a letter for someone threatened with a miscarriage of justice in the form of an unfair parking ticket and looking out for former friends and colleagues in the Maundy Thursday lists. But the gown is now a dust-cloth and the wig is fantastic for buffing up a waxed finish!



The full weight of the law being brought to bear in the workshop—Archbold still has its uses!

Steve Hancox was called in 1986 and practiced from Francis Taylor Building (now Tanfield Chambers) and then Temple Chambers in Newport and Cardiff, before leaving the bar in 2001 to start a small cabinet-making business. His work can be seen at www.hancox.info.

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