CBQ

Criminal Bar Quarterly Issue 1: March 2010

Non-jury trials

Also on the inside:

- Defending people with disabilities
- Professor Gary Slapper considers some unusual cases, and
- Drug Court in Jamaica

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For all enquiries please contact:
Aaron J Dolan
adolan@barcouncil.org.uk

The Editor


John Cooper

Since the last edition of CBQ, the first criminal trial without a jury has been the subject of some discussion. After the controversies surrounding the so called "Diplock" Courts, this was always going to be a difficult issue. Nicola Haralambous has written an insightful piece on trial by judge alone which I know will add to the debate.

Public participation in the Criminal Justice process validates the practice and procedure of our criminal courts. Apart from sitting in the public gallery and watching a trial, the jury is the only way that a citizen, unconnected with the issues in a case, can take part in what is done in their name.

A century or so ago, people queued around the perimeter of our criminal courts to get a seat in the public gallery to observe how we worked and watch the process done in their name unfold. Perhaps, in some palpable way, this helped to promote a respect for the criminal justice system which at times, sadly seems to have been eroded.

The participation and inclusion of general society in the criminal justice system is an essential ingredient both for the respect of the process and ultimately its conclusions but also for an understanding of the courts and the work of those of us who practise in them.

Putting aside, for a moment, the complex issue of whether there can be any overriding reason to remove a jury from a crown court trial, what is vitally important is that we acknowledge that any diminution of the involvement of the citizen in the criminal justice process is a cause for concern.

John Cooper

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

Criminal Bar Association

Executive Officers

Paul Mendelle Q.C.
Chairman
paul.mendelle@btinternet.com

Christopher Kinch Q.C.
Vice-Chairman
christopherkinch@23es.com

Jonathan Mann
Treasurer
jonathanmann@25bedfordrow.com

Adrian Chaplin
Secretary
a.chaplin@9-12bellyard.com

Lesley Bates
Assistant Secretary
lesleyBates@23es.com

Jeremy Dein Q.C.
Director of Education
jdein@25bedfordrow.com

Kim Hollis Q.C.
Equality and Diversity Officer
khollis@25bedfordrow.com

John Cooper
Editor of CBQ
jcooper@25bedfordrow.com

CHAIRMAN'S COLUMN


Paul Mendelle Q.C.

This continues to be a most challenging time for the Bar in general and the Criminal Bar in particular. We are facing structural changes, competition from other parts of the profession and, that old favourite, fee cuts. Indeed, you could throw a dart at any *CBQ* in the past five years and chances are you would come up with a chairman's report dealing with fee cuts. It must sometimes seem even to us, let alone outsiders, that it's all we care about, yet nothing could be further from the truth. The overwhelming majority of us came into this profession for reasons other than to make money, which is just as well since the prospects of doing so are diminishing with every passing year. So it is that I have to start the New Year with a depressingly familiar tale, the ongoing saga of the consultation papers issued by the Legal Services Commission (LSC) and the Ministry of Justice (MoJ).

VHCC rider

The LSC finally issued its VHCC Consultation paper on December 2, 2009. It offers three options:

Option 1: The existing panel scheme, where you sign a three-year contract or go off panel and do it "ad hoc".

Option 2: A variation of the present scheme called Benchmarking, in which a minimum time is automatically allowed for many common tasks like reading statements exhibits and interviews. The contract is for one case at a time.

Option 3: The extension of the existing RAGFS to cover cases lasting between 40 and 60 days. There is obviously no contract.

In the annex to the paper is the Advocates' Sub Group's scheme called GFS Plus, designed by the Bar Council and SAHCA. That scheme is not being formally consulted upon because, we are told, the LSC does not yet have sufficient data to cost the scheme accurately. I wrote to members in December saying my view was that GFS Plus is easily the best of what is on offer but that until it is tested against the data, I would find Option 2 the most attractive of those being consulted upon.

On December 14, 2009 came the MoJ paper on (inter alia) cuts to RAGFS. This offered two Options:

Option 1: an immediate cut of 17.9 per cent across the board on all fees; or

Option 2: a phased cut of 13.5 per cent in total, being 4.5 per cent each year beginning in April this year conditional upon our acceptance of Option 3 in the LSC VHCC paper, i.e. extension of RAGFS to cases lasting 60 days.

A cunning plan

So in what ministers obviously think is a Cunning Plan to tempt us all into accepting VHCC Option 3, the extension of RAGFS to 60 days, the government offers the sweetener of reduced and phased cuts to RAGFS.

Isn't this a no-brainer? Only the top brass do VHCC, the poor, bloody infantry have to survive on the rations of RAGFS. Surely it is better to have lower cuts over three years and get rid of those damned contract managers by extending RAGFS to 60 days? Well, no, and we must be careful not to fall into this trap which the government, whether deliberately or not, appears to have set for us. Why is this a trap? Because there will be further cuts to RAGFS even if RAGFS is extended.

Firstly, Lord Bach in the Executive Summary to the MoJ paper said "We are aiming to save £47–48m from advocates' fees in order to contribute towards overall efficiency savings". But according to the LSC paper, the proposed cuts in VHCCs will only save £8.7 million p.a., so that leaves the government still having to slash £40 million from the legal aid budget.

And, secondly, buried in the MoJ paper at para.29, is an easily overlooked statement that, as reduced and phased cuts do not produce the savings the MoJ wants, it will issue yet another paper "early in the New Year … on proposals to pilot a single graduated fee, as was originally recommended by Lord Carter. If we proceed to implement a single fee we anticipate that we might make some further savings that would help to make option 2 sustainable in the longer term".

After careful consideration, the Bar Council and the CBA took the view that the interlinking of the two papers to each other and to a third as yet unpublished one made it impossible for us to respond to them and that the consultation process was unfair and unlawful.

The Bar Council has now taken the first step on the road to issuing judicial review proceedings by serving on the MoJ a letter before action. It states that the consultation is unfair and unlawful for two principal reasons:

(i). by declining to join the current consultations to the proposed consultation on a single graduated fee, the MoJ and the LSC have failed to conduct an adequate consultation;

(ii). by failing properly to gather adequate information about, or assess and consider, the effects of the proposals on, in particular, women and BME advocates, the MoJ and the LSC have failed to discharge their general equality duties under the Race Relations Act 1976 and the Sex Discrimination Act 1975.

The letter itself is on both the Bar Council and CBA websites and it has been sent to all members. This decision to institute proceedings has not been taken lightly—it is the first time the Bar Council has taken such action in 20 years—but we cannot simply do nothing when the government proposals threaten not just our incomes or livelihoods but the very criminal justice system in which we work and of which we are rightly so proud. Even at this late

stage we hope the government will see sense, stop this process and begin sensible negotiations with us. Indeed, that is what we have asked for in the letter, as you will see.

Penny wise, prison foolish

Many commentators have pointed out that in this flurry of cost-cutting initiatives, the role of government itself in driving up costs is often remarked upon and equally often ignored. The Howard League has reported that since 1997 the government has created over 3,000 new criminal offences—almost half of which can attract a prison sentence—introduced over 50 bills and enacted 23 criminal justice acts. And that was before the Criminal Justice and Immigration Act 2008.

All this legislative hyperactivity has a price. According to the immensely significant Justice Select Committee report *Cutting Crime: The Case For Justice Reinvestment* issued January 14, 2010, it costs an average of nearly £40,000 a year to keep a person in prison, and the average cost of each prison place built between 1998 and 2008 has tripled to just under £153,000. The new building programme will cost between £3.2 billion and £4.2 billion, with running costs for the extra places estimated at £482 million a year. These sums dwarf the savings the government wants to make from its penny pinching on legal aid.

As the Committee itself observed:

> "The criminal justice system is facing a crisis of sustainability. Public expenditure generally is under pressure in all areas in the worst economic climate since the Second World War. The Ministry of Justice is no exception, being tasked with finding £1.3 billion worth of cost savings over the next three years. New and existing resources are being pre-empted by planned spending to accommodate a potential prison population of 96,000 by 2014 at enormous capital and running costs. This forecast represents the highest incarceration rate in Western Europe … These huge sums of money have been committed without any obvious cost-benefit analysis of alternative options or any public consultation on the desirability of a prison building programme."

In any event, the savings from cutting legal aid may be more apparent than real if costs are simply transferred from one part of the system to another and that will happen if inadequate defence representation leads to, for example, trials being delayed or needlessly extended, defendants being wrongfully convicted, greater numbers of inappropriate prison sentences being imposed and more appeals being brought against both conviction and sentence.

Changing the Bar

In November 2009, the Bar Standards Board (BSB) made historic changes to the way in which barristers can supply legal services. These decisions are fundamental to the future of the Bar and will allow practitioners greater flexibility in the way they organise their practices. It is worth stressing that these changes *allow* us to practise in different ways, they do not compel us to do so, and many will prefer to practise as they have always done.

The BSB decided that barristers should, in principle, be allowed to practise in barrister-only bodies, whether partnerships, LLPs, or limited companies. It is unlikely that partnerships will be of much interest or utility at the Criminal Bar except possibly for new entrants who might set up small partnerships if they cannot get into established sets. However, the Bar Council does not currently have the power to regulate such bodies and therefore, until such time as the Bar Council acquires this power, they cannot be permitted in practice.

LDPs are firms of legal professionals that can offer legal services (and only legal services). They can be owned by different types of lawyers and/or up to 25 per cent of non-lawyers. They are regulated by the SRA. The Code of Conduct has historically prohibited barristers from providing legal services through partnerships. If barristers wanted to become partners in firms of solicitors, they had to re-qualify as solicitors. Once the BSB rules changes are approved, barristers will be able to become managers of LDPs without having to re-qualify and will be able to go into partnership with solicitors, with or without non-lawyer managers.

Self-employed barristers can, under the Code as it stands, make use of corporate vehicles to procure legal services, provided that (a) the vehicle is not itself supplying legal services, and (b) barristers are not paying referral fees to procure instructions.

A procurement company is an incorporated vehicle that administers and procures legal services. It does not (and cannot) provide any legal services itself through employees; however, it can provide the administrative capability for others to provide legal services.

The administration of chambers through the clerk's room is quite close to what a procurement company can do, but a procurement company can do other things as well. Procurement companies can enable chambers to bid for work and enter into contractual arrangements. They could also be used for barristers to arrange for solicitors to join them to bid for work that requires a full composite of advice, litigation and advocacy services. As a result, a procurement company can provide a creative way for barristers to compete for work from which they currently risk being excluded. There are many potential models of the procurement company but of most immediate interest to criminal practitioners will be whether and if so how they could contract with the LSC.

We are in discussion with the LSC at the moment as to exactly how a procurement company would be able to contract with them. The LSC agrees there is a strong public interest in the Bar being able to contract during this current round. For our part, we see no insuperable legal obstacles to this, although the business models involved may require further work. If you need more information, you should contact the Bar Council.

Raising the Bar

Assuring the high quality of barristers is one way we can compete effectively with advocates from other parts of the profession. The BSB and Bar Council take the view that the responsibility for assuring quality must rest with the regulators. The BSB has established a Joint Advocacy Group with the SRA and ILEX that published a consultation paper in December 2009 on proposed advocacy standards.

The LSC has issued its own paper on the topic. The BSB and the Bar Council have jointly written to both the LSC and Jack Straw about this. They take the view that the LSC has no statutory role to play and that it is difficult to reconcile any attempt by the LSC to set professional standards with the requirements of the Legal Services Act 2007.

The LSC issued a discussion paper in February which acknowledged that ownership of delivering and defining a final scheme has passed to this Joint Advocacy Group.

The LSC will seek to rely on quality assurance as pre-requisite for the funding of advocacy in legal aid cases in the future and it

endorses the common advocacy standards proposed by the JAG in its consultation paper. Fundamentally, they contain all that the LSC proposes to require as a minimum for funding purposes.

The Magee Report

This report on the delivery of legal aid by the LSC has still not been published and it seems unlikely it will be before March. I suspect there will be some structural changes but that is guesswork and we will just have to wait and see.

CPS in the House

As you know, Chatham House talks have now resumed and later this month there will be further discussions between the CPS, the Bar Council and the CBA. As I have said before, these talks are confidential but I will report back to you on the progress made in the talks. Certainly from the government and CPS side, there is a desire to see real progress by the end of March, a date that is, of course, wholly unrelated to any events in the wider political world.

Paul Mendelle Q.C.
Chairman

BOOK REVIEWS

Archbold 2010

The consistently high reputation of this corner stone of the criminal practice is maintained in this year's annual publication.

Fascinatingly, the preface of this edition reminds us that at Chapter 25 of the 2009 work, we could read some of the few remaining passages that have survived from the 1822 First Edition. Reaching for my old 2009 volume at Chapter 25 I was referred to the Traitors Act 1351 and a definition of what it was to do treason to the Crown. The point being made by the editors was that old law ultimately has to make way for the new.

It reminded me somewhat of those old games that used to be the staple of amusement arcades up and down our coastline, you may recall the ones, where you slide in a coin, skilfully hoping that it would force others, ultimately, to fall over the ledge.

As treason falls off the edge of this comprehensive work, we are assisted by concise and practical explanations of some of the more modern laws facing the criminal practitioner. The Counter Terrorism Act 2008 and subordinate legalisation, the decisions of the House of Lords in Purdy on assisting suicide and the developing conflict between Europe and the Court of Appeal as to reliability of hearsay evidence of an absent witness where the evidence is, or may be, the sole decisive evidence against the defendant.

As always the editors have presented us with a single volume, which if it were an airport novel, would be described as "action packed". As a legal text it must suffice to describe it as simply invaluable and as much a part of the criminal justice process as the jury itself.

Archbold 2010 is published by Sweet & Maxwell. Sweet & Maxwell has just launched a new, free, service for Archbold subscribers: **Archbold e-update**. Instead of waiting for the quarterly supplement, the **Archbold e-update** will fire relevant changes in criminal law directly to your inbox every week. What's more, the content will be archived online so you have access to it any time. To take full advantage of this new service, simply register at *www.sweetandmaxwell.co.uk/archbold* using the activation code in the front of your copy of Archbold.

Pleading Guilty


Paul Genney

Paul Genney is a criminal barrister, but that is not the only thing he is. He worked as a dentist for six years before becoming a potato merchant. Having stood unsuccessfully for Parliament on two occasions, he decided to try his hand at the Bar.

Many would have stopped there, but *Pleading Guilty* is Genney's first novel. No doubt having the choice of writing about a dentist, politician or a potato merchant, "write about what you know" being the first piece of advice any agent gives to an aspiring novelist, Genney turned his attention to the Bar.

His main character is Henry Wallace. You can tell immediately that Wallace is not a modern-day barrister by the fact that he still refers to himself as "barrister-at-law". He is based in Hull; "there's a rich vein of crime in Northern England" we are informed.

Described as "an over-the-top bittersweet comedy" the novel has to be taken with that health warning. It is not meant to represent the norm. But what it does do is articulate the nitty-gritty of life as a criminal barrister with eloquence and passion.

There are resonances of Rumpole in the dinosaur that is Wallace, but beyond all that, and more importantly than that, there is true humour and observation.

When Wallace is told by a client recently convicted that he had been "studying", Wallace observes, "oh please God not this. I do not like the sound of this at all. This sounds like a prelude to yet another hopeless appeal – the punter basing his ideas on reading Archbold ...".

Genney has a sure touch and is able to fuse undoubted humour with a compassion for the people who find themselves caught up in the uncertainties of the criminal justice system, and his chapters upon developing family tragedy are genuinely moving.

Pleading Guilty introduces us to Henry Wallace, Horace Rumpole on circuit, and a welcome acquisition to the fictional Bar.

***Pleading Guilty* by Paul Genney is published by Dedalus, priced £9.99.**

John Cooper

The Disability Discrimination Act 1995—what does it mean for criminal practioners?


Louise Curtis

Louise Curtis analyses the options

The Equality and Human Rights Commission (EHRC) is a statutory body created by the Equality Act 2006. The EHRC replaced the former equality commissions which dealt with issues of race relations (The Commission for Racial Equality); sex and transgender discrimination (The Equal Opportunities Commission); and disability discrimination (The Disability Rights Commission). The EHRC has duties and powers across the whole spectrum of equality, covering the three grounds covered by the former equality commissions plus age, sexual orientation and religion and belief. The EHRC also has duties and powers to promote human rights. The Equality Act 2006 Pt 1 s.3 states:

> "The Commission shall exercise its functions under this Part with a view to encouraging and supporting the development of a society in which –
>
> a) people's ability to achieve their potential is not limited by prejudice or discrimination
> b) there is respect for and protection of each individual's human rights
> c) there is respect for the dignity and worth of each individual
> d) each individual has an equal opportunity to participate in society
> e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights."

These aims are central to our work in challenging discrimination. The nature of these duties show how relevant they can be to those facing discrimination in the criminal justice system. This group do have rights not to be discriminated against on the grounds outlined above, with the exception of age which is presently only protected with regard to employment. The EHRC has experience of dealing with the full range of discrimination complaints in all spheres of life including those involved in the criminal justice system. I will highlight the neglected area of disability rights—the right not to be discriminated against for a reason relating to one's disability. I start by outlining the basic legal provisions and then giving some practical examples of disability discrimination.

The Disability Discrimination Act 1995 (DDA)

The DDA came into force in December 1996 and was seminal legislation giving disabled people rights not to face discrimination. Most relevant to criminal practitioners is Pt 3 of the DDA, which gives disabled people rights in relation to accessing goods, facilities and services. Firstly, there is statutory guidance on whether a person meets the definition of disability. Key publications are as follows and can be found on the EHRC website:

- The DDA as amended;
- The Code of Practice Rights of Access: services to the public, public authority functions, private clubs and premises;
- The Code of Practice The Duty to Promote Disability Equality;
- Guidance on the definition of disability.

Definition of disability

Certain conditions are covered by the definition of disability from diagnosis; these are HIV, cancer, multiple sclerosis and severe disfigurement (although disfigurement by tattoos and piercings are excluded). Examples of conditions that are likely to meet the definition are: mobility impairments, sensory impairments, mental health problems and learning difficulties. The impairment is to be considered as if the person were not on any medication for the condition. For example, if someone has depression they should be considered without their anti-depressants, a person with diabetes without insulin. This is likely to require the client's evidence and that of their GP.

Section 1 of DDA: A "disabled person" is a person with "a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". You must meet this definition to bring a claim.

When considering normal day-to-day activities under the DDA you consider the following headings:

- mobility, manual dexterity;
- physical co-ordination, continence;
- ability to lift, carry or otherwise move everyday objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand;
- perception of the risk of physical danger.

Other relevant issues concerning definition of disability include:

- corrective measures (such as medication and aids, other than glasses,

are disregarded when considering the impact of an impairment);
- it covers not only visual impairments, hearing impairments, etc. but also conditions such as epilepsy, diabetes and arthritis;
- past disabilities are also covered, e.g. someone who has had depression in the past;
- there are certain exclusions—including addictions to alcohol and drugs; however, another impairment which arises as a result of this addiction (e.g. depression) could be covered.

What amounts to disability discrimination?

There are two main types of disability discrimination; firstly less favourable treatment, and second failure to make reasonable adjustments.

Regarding less favourable treatment, here a service provider such as a prison or a crown court discriminates against a disabled person if it treats the disabled person less favourably than other people (for a reason related to his or her disability) and cannot justify the treatment.

Since a House of Lords decision last year in *London Borough of Lewisham v Malcolm EHRC Intervening* [2008] UKHL 43 this now has to be interpreted narrowly, and I will explain the law via an example. If an employer were to dismiss a disabled employee for being off work sick for a year, then the treatment is now to be compared with how the employer would treat employees who are absent for some similar period for a reason unconnected with disability. If these others would have been dismissed he would not have been treated less favourably and the employer would not be liable for disability-related discrimination.

Similarly, if a prisoner had Tourettes Syndrome and swore profusely at a prison officer, and a non-disabled prisoner also swore at a prison officer, and both were disciplined, the disabled prisoner no longer has a less favourable treatment claim; however, he is likely to have a valid reasonable adjustment claim.

Service providers such as prisons are under a duty to make reasonable adjustments and they discriminate if, without being able to justify it, they fail to comply with a duty to make reasonable adjustments imposed on them in relation to the disabled person. There are three main types of reasonable adjustment which the service provider has to consider.

Firstly, making changes to practices, policies and procedures which make it impossible or unreasonably difficult for disabled people to make use of its services. Here the prison could make a change in its disciplinary policy for the prisoner with Tourettes Syndrome not to automatically discipline him for his language.

Second, overcoming a physical feature making it impossible or unreasonably difficult for disabled people to make use of the services, by providing a reasonable alternative method of making its services available to disabled people; or removing, altering or providing a reasonable means of avoiding the feature. Physical features will include steps, stairways, building entrances, doors, toilets and bathroom facilities lifts floor coverings and court layouts. An example would be a lift being broken in a prison which meant that a wheelchair using prisoner is unable to get fresh air.

Third, provision of auxiliary aids and services if they would enable (or make it easier for) disabled people to make use of its services.

Practical examples of disability discrimination

A case was settled against a prison which failed to provide accessible toilet facilities for a disabled family member who required access to toilet facilities when visiting a prison. That case settled and the prison's practice was changed so that it was possible for disabled people to access toilet facilities.

Disability discrimination can be justified on certain grounds where a service provider reasonably believes that one or more of the following conditions is satisfied:
- the treatment is necessary in order not to endanger the health and safety of any person, including the disabled person;
- the disabled person is incapable of entering into an enforceable agreement, or of giving informed consent;
- there was a refusal to provide a service to the disabled person because the service provider would otherwise be unable to provide the service to other members of the public.

There can also be a defence regarding national security; however, the writer has not been aware of its use to date in this type of case.

Your dealings with disabled clients—what does disability discrimination look like?

As a criminal barrister if you have a disabled client it is worthwhile considering whether any of the problems they face with the court service or prison service amount to disability discrimination which could be put right by asserting their legal rights under the DDA. The DDA is a statutory tort and legal proceedings are taken in the county court. The DDA does not cover

judicial decisions which are exempt from the legislation. It is possible to take cases on multiple grounds and include a Human Rights Act claim in the same proceedings.

Since the race discrimination case of *Alexander v Home Office* prisoners have been held to constitute a section of the public. A high percentage of those involved in the criminal justice system will meet the definition of disability under the DDA. Examples include many forms of mental illness, learning difficulty or dyslexia. Also relevant is the ageing prison population and the known correlation between onset of disability and ageing, which is likely to increase the problems in the system.

Another situation involved a wheelchair using prisoner forced to live on the healthcare wing because it was the only accessible wing and not getting fresh air because of a broken lift for a period of months. This is a breach of the reasonable adjustment duty as arrangements should have been in place to ensure that the lift should not have been out commission for a lengthy period of time.

Gichura v Home Office [2008] W.L.R. (D) 164

This case involved a disabled (wheelchair user) detainee in a detention centre, and the Court of Appeal allowed the appeal from the decision of the county court to strike out the application. Buxton L.J. said that the courts should take an expansive view of the application of discrimination legislation to matters done in the course of government functions; see *Farah v Metropolitan Police* [1998]. It is useful to know that carrying out a public function and the provision of a service could occur at the same time. Correctly the judge outlined that if the DDA was not to apply to it should have said on the face of the legislation. Also certain things in detention centres were purely governmental, e.g. the administrative handling on arrival, however once there a claimant such as Mr Gichura was provided with services and there was no reason why the DDA should not cover those services.

Other practical examples of disability discrimination in the court service include an individual with a hearing impairment and who needed to use a loop system in the court room to enable him to hear the proceedings he was bringing, which was not provided. He had informed the court at allocation stage of his requirement for provision of this auxiliary aid. It must also be remembered that in this type of case the duty on the service provider is anticipatory in nature so the court service should have these facilities in place and regularly check that the equipment is in full working order. The EHRC reached a financial settlement including a written apology and the court agreed it would do a full audit of its provision for hearing impaired people and would report back to the EHRC within eight months. This case can be referred to by criminal practitioners if there is difficulty due to failings by the court service in ensuring that the loop systems are working for hearing impaired court users. Cases concerning the service provider's duty to make anticipatory reasonable adjustments are a strategic priority for us.

Louise Curtis is a Senior Lawyer (Solicitor) at the Equality & Human Rights Commission.

The EHRC has a website where you can find a great deal of information on how to tackle many forms of discrimination and human rights breaches: www.equalityhumanrights.com.

There is also a helpline: England Helpline 0845 6046610; Wales Helpline 0845 6048810; Scotland Helpline 0845 604 5510. They can also be contacted by email at info@equalityhumanrights.com.

It is also possible to refer strategic legal cases to us by writing to Casework and Litigation Department EHRC, Arndale House, The Arndale Centre, Manchester M4 3AQ, telephone 0161 829 8100.

NOTICES

Criminal Procedure Rules 2010

A number of new rules come into force on April 5, 2010 including:

- Investigation anonymity orders;
- Objecting to the reading of committal statements at trial in the Crown Court;
- Measures to assist a witness or defendant to give evidence (see the new Part 29);
- Hearsay evidence and evidence of bad character;
- Final representations at trial in the magistrates court.

The full text can be read at *http://www.opsi.gov.uk/si/si2010/uksi_20100060_en_1.*

Bar Conference 2010

Advance Notice

This year's Bar Conference entitled "Raising the Bar: Core Values and Opportunities" is to be held Saturday November 6, 2010. In addition, the celebratory dinner for the 25th anniversary of Bar Conferences will be held in Lincoln's Inn Hall Friday November 5, 2010.

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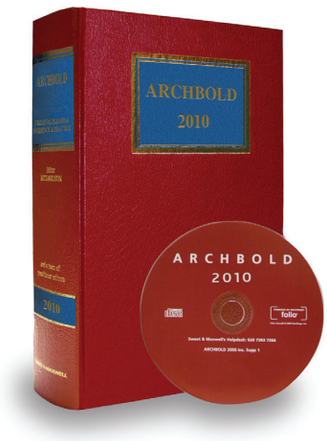

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SWEET & MAXWELL

THOMSON REUTERS

Twelve empty seats: reflections on judge only trials after jury tampering

Nicola Haralambous and Chris Monaghan give their verdicts


Nicola Haralambous


Chris Monaghan

For the first time in legal history the Central Criminal Court is sitting at the Royal Courts of Justice in a judge alone trial. *R. v T; R. v B; R. v C; R. v H ("R. v T")*[1] has proved to be highly controversial. The trial, taking place in Court 35, has attracted the attention of practitioners, academics, the media and subsequently, the general public. It is no exaggeration to say that this landmark decision will have a lasting impact on the nature of the adversarial criminal trial.

In *R. v T*, three trials collapsed, two of which were due to allegations of jury tampering. The final trial was terminated by H.H.J. Roberts Q.C. in the interests of justice in accordance with s.46(4) Criminal Justice Act 2003 ("CJA 2003"). The prosecution's initial application for a retrial without a jury was refused by Calvert-Smith J. The prosecution then appealed to the Court of Appeal. Allowing the appeal, Lord Judge C.J. acknowledged that trial by jury "is a hallowed principle of the administration of criminal justice".[2] However, citing Lord Bingham C.J. in *R. v Comerford*,[3] Lord Judge C.J. recognised that a defendant's right to trial by jury is qualified where the integrity of the jury is compromised. His Lordship stated that "any attempt at interference with the jury constitutes an abuse of misuse of the process".[4]

The Court of Appeal decision in *R. v T* has forced us to consider the importance of the jury within the criminal justice system. Not since the time of the Stuarts, a dynasty that challenged Parliament and brought about the civil wars, has a defendant charged with an indictable only offence been denied the opportunity to be tried by a jury.

Rationale behind the CJA 2003

The CJA 2003 makes significant inroads into the right to trial by jury. Section 44 entitles the prosecution to apply for a trial to be conducted without a jury where there is a danger of jury tampering. Section 44(3) states that in order for "the trial to be conducted without a jury" two conditions must be met. The first condition is s.44(4) "that there is evidence of a real and present danger that jury tampering would take place". The second condition is contained in s.44(5) and this states that taking into account the preventive measures that could be employed to prevent jury tampering, the "likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury".

What amounts to evidence of a real and present danger is contained in s.44(6). This subsection lists factors such as where at the original trial the jury were discharged as a result of jury tampering and there has been actual or attempted intimidation of potential witnesses.

Aside from the protection of jurors, one of the main reasons for the introduction of s.44 was cost prevention. In November 2002, Sir Ian Blair, Deputy Commissioner of the Metropolitan Police, informed the Home Affairs Select Committee that jury tampering was a "major problem". He expressed his concerns that such cases were usually ones involving organised crime. Jury tampering has been alleged in high-profile cases such as *R. v Anthony Martin* in 2000 and *R. v Nicholas van Hoogstraten* in 2002. It was reported in 2002 that the protection of jurors was costing the Metropolitan Police approximately £4.5 million per year.[5] This statistic would suggest that jury tampering is a real problem and the cost implications of protecting jurors need to be addressed.

Calvert-Smith J. considered the cost of protecting the jurors in *R. v T* and stated that there were two resource packages available costing £1.5 million at the lower end and involving 32 police officers, or £6 million at the higher end and involving 82 police officers.[6] In the Court of Appeal Lord Judge C.J. regarded the lower cost estimate as "far from trivial" and stated:

> "in our judgment these protective measures do not sufficiently address the extent of the risk. … Even if it did deal with the dangers posed to the integrity of trial by jury, it would be unreasonable to impose that package with its drain on financial resources and police manpower on the police."[7]

His Lordship also considered that providing such protection would be a "totally unfair" imposition on the individual jurors.

As noted above, the second condition that must be satisfied before a judge only trial is ordered in cases of jury tampering provides that preventative measures (such as the provision of police protection) might reasonably be taken into account in applying the interests of justice test.[8] Therefore, even where the protection of jurors would be an effective measure, if the cost of such protection is too burdensome, the CJA 2003 allows for a judge only trial.

The CJA 2003 has been criticised for diluting the right to jury trial in order to save money.[9] However, the Court of Appeal has clearly expressed its concerns that even such high expenditure does not guarantee the safety of jurors and would be an unfair imposition on them. It has also been suggested that the objectivity of jurors' deliberations might be compromised by high level protection, thus undermining the function of the jury and public confidence in the integrity of the jury. These cost and objectivity

1 [2009] EWCA Crim 1035.
2 Ibid. at [10].
3 [1998] 1 Cr App R 235.
4 Above fn.1 at [11].
5 Goodchild, "Cases of jury tampering soar", *The Independent*, December 29, 2002. Available at *http://www.independent.co.uk/news/uk/crime/cases-of-jury-tampering-soar-612261.html* [Accessed January 31, 2010].
6 See the Court of Appeal judgment, above fn.1 at [6].
7 Ibid. at [33].
8 s.44(5) CJA 2003.
9 Berlins, "Trial by jury: is an ancient right being diluted to save money?", *The Guardian*, January 10, 2010. Available at *http://www.guardian.co.uk/uk/2010/jan/10/trial-without-jury-heathrow-robbery* [Accessed January 31, 2010].

considerations are highly persuasive in the case for the use of judge only trials under s.44 CJA 2003.

Even a staunch defender of trial by jury must concede that an overwhelming majority of criminal cases are tried without a jury. Commentators suggest that a mere five per cent of cases are tried by jury.[10] Statistics also show that less than four per cent of defendants charged with an either way offence elect to be tried in the Crown Court.[11] This surprising figure seems to dispel the myth that defendants prefer trial by jury, especially since defendants can be committed for sentencing after summary trial.

Effect on the criminal trial

Auld L.J. considered there to be no constitutional right to a jury trial.[12] The jury is nonetheless a special institution for a number of reasons. Firstly it is democratic as it "gives citizens some input into the application of the criminal law" and the defendant is tried by his fellow citizens and not the state.[13] The jury serves as a defence against the state, as Alexis De Tocqueville wrote:

> "The man who judges in criminal proceedings is therefore the real master of the society ... All the sovereigns who wanted to draw the sources of their authority from themselves, and to direct the society instead of allowing themselves to be directed by it, have destroyed or weakened the institution of the jury."[14]

Although only a minority of cases are tried by jury, the institution serves a symbolic purpose which should not be underestimated. An illustration is the famous comment by Lord Devlin "[i]t is the lamp that shows that freedom lives"[15]. Lord Devlin clearly regarded trial by jury as a constitutional right and a safeguard against tyranny, or perhaps today, government interference in the name of modernisation.

Another crucial effect of trial by judge alone is that the judge will not only be required to act as the tribunal of law, but will also sit as the tribunal of fact. In delivering his verdict at the end of the trial, the judge is required by s.48(5)(a) CJA 2003 to give his reasons for the conviction. This juxtaposition of the functions of judge and jury would appear to be objectionable on first inspection. However, while recognising that in a judge only trial, the judge's function would be to assimilate "all the functions of the jury with his own unchanged judicial responsibilities",[16] Lord Judge C.J. reminds us that this function is already "well known in the ordinary operation of the criminal justice system … for example, by District Judges ... in less serious summary cases".[17]

On a lighter, yet still important note, judge alone trials will significantly alter the advocacy element of criminal trials in order to accommodate the professional audience of a Crown Court judge. Counsel who is adeptly skilled at persuading a jury via an impassioned closing speech may very well find that his speech falls on less sympathetic ears.

10 Ashworth and Redmayne, *The Criminal Process* (OUP, 2005), p.297.
11 Auld L.J., *Review of the Criminal Courts of England and Wales*, (2001), Appendix 4, para.7.
12 Ibid. at Chapter 5, para.7.
13 Above fn.10 at 299.
14 De Tocqueville, *Democracy in America* (Hackett, 2000), pp.124–125.
15 Devlin, Trial by Jury' p164.
16 Above fn.1 at [12].
17 Ibid.

All bases covered

Counsel already mentally drafting the grounds for appeal should be warned that Lord Judge C.J. has been more than thorough in respect of the obvious grounds of appeal.

His Lordship held that a judge alone trial does not violate the requirement that a trial take place before an independent and impartial tribunal under art.6 of the ECHR. Lord Judge C.J. stated that such a trial would not be unfair because "the necessary procedural safeguards available in a trial by jury are and remain available to the defendant". Consequently, trial by judge alone would not be "unfair or improperly prejudicial to the defendant".[18] Given that the majority of criminal trials currently take place at the Magistrates' Court, it is doubtful that an argument based on a breach of art.6 would find much favour with the European Court of Human Rights.

The particular facts of *R. v T* made this case more likely to succeed on appeal than many others. In an ex parte hearing, Calvert-Smith J. ruled that much of the material upon which the prosecution based their application for a judge alone trial should be withheld from the defence on grounds of public interest immunity. The evidence in question is still subject to PII and has not been fully disclosed to the defence. This is concerning given the effect that this trial may have on the future of the criminal justice system and perhaps on the constitutional rights of British citizens. Lord Judge C.J. stated that H.H.J. Roberts Q.C. should not have terminated the trial, but should have continued with the trial by judge alone. His Lordship held that the presence of PII material "should not normally lead to self-disqualification".[19] This is, perhaps, a more controversial case than most future jury tampering cases. Defence arguments that the application for a judge only trial should fail because counsel had been unable to address the evidence of the alleged danger which was withheld under PII principles, were dismissed by Lord Judge C.J. His Lordship stated that if that argument was correct:

> "... it would produce a remarkable outcome. It would mean that the court's ability to discharge a jury because of jury tampering and order trial by judge alone could never be exercised if the evidence of the real and present danger was so sensitive that it could not be disclosed to the defendant. In short, the process could not apply where the actual or potential interference with the jury was of the most serious of sophisticated kind …."[20]

Lord Judge C.J. envisaged that the Court of Appeal would rarely have to consider matters under s.44, because trial judges considering s.46 applications would usually continue the case without a jury.[21]

His Lordship appears to be warning trial judges of the Court of Appeal's expectations of them. Indeed, His Lordship's judgment could be construed as an aid for prosecutors and trial judges to refute future submissions by defence counsel.

Nicola Haralambous is a Lecturer in Law at the University of Hertfordshire.
Chris Monaghan is a Visiting Lecturer in Law at Anglia Ruskin University.

18 Ibid. at [18].
19 Ibid. at [20].
20 Ibid. at [25] to [26].
21 Ibid. at [32].


Elizabeth Forrester

DRUG COURT IN JAMAICA

Elizabeth Forrester reports from Jamaica

"You must pull up your socks and show us you are serious." The judge was talking to a scruffily dressed man who stood in the middle of the court, a few feet away from the dock. The gallery benches held four other men, more smartly dressed, watching gravely. "We cannot commend you this time." The standing defendant had been late to court, tested positive in his latest drugs test, and clung on to his place in the programme by a whisker. It was his third appearance at the Drug Rehabilitation Court at Halfway Tree, Kingston, Jamaica.

Established in 2001

There has been a specialist Drug Court in Jamaica since 2001. It is a long-term pilot scheme, run by a dedicated team of lawyers, medical practitioners and social workers. It has as its target the casual criminals motivated by addiction who clog the criminal courts of many countries, and focuses on rehabilitation rather than punishment. I was able to observe Drug Court over three months during Autumn and Winter 2009.

As anyone familiar with the phenomenally high murder rate there will know, the criminal justice system in Jamaica has substantially different strains upon it to that of England and Wales. In terms of drug abuse however, the situation is less grave than Europe and America. Jamaican courts see practically no cases of heroin addiction—the magistrates are unfamiliar with the idea of Drug Treatment Orders—and women are a rarity in the dock for the whole spectrum of crimes. There are only 250 women in prison island-wide (compared to nearly 5000 men), most of them foreign drug mules.

The Court was created by the Drug Court Act 1999, and further Regulations that were made in 2001. Legislation dictates who is eligible for entry onto the programme, the length of treatment they can receive, and what that treatment entails. Nancy Anderson, resident defence counsel, described how there are two limbs in the fight against drug abuse. First, there is supply reduction, which involves national security, customs and the police force. The other limb is demand reduction, which requires social and health services and a focus on treatment and rehabilitation. Dr Oo, resident psychiatrist, calls it therapeutic jurisprudence—a product of the Ministries of Health and Justice joining forces to address a problem which affects all aspects of society.

Carrots and sticks

Drug Court in Jamaica is not open to all comers. Would-be participants must be referred by either police or a Magistrate. The court clerk of Drug Court and a probation officer must accept their application. The Drug Court panel will then screen the candidate to decide whether they are eligible. Each participant is required to be a first-time offender with an acknowledged drug problem: they must have a supportive family and a home to go to, and must not suffer from a significant mental illness. This is an outpatient programme and, as such, the people enrolled need family encouragement—even if this is merely having someone to give them the bus fare.

When a defendant has been accepted onto the Drug Court programme, he must present himself for drug testing, counselling and a court appearance, weekly. He must test negatively for drugs and respond to group and individual sessions with the Court's social worker in order to move to the next phase. There are three phases to pass, and then graduation. Upon graduation he must plead guilty, whereupon the judge will give him 12 month's probation, and strike his conviction from the record.

I asked the judge what she would say to people who complained that Drug Court was a soft option. "It is a soft option", she replied, "but sometimes that is what's necessary". Any alternative to a Jamaican jail is likely to tempt a reasonable person, and the advantages of an unrecorded conviction are significant. To ensure that defendants are not just jumping through hoops, their performance and motivation during the programme are closely monitored.

A lack of commitment to the Court can show itself in a number of ways. In one pre-Court meeting I attended, the Drug Court team had discovered one man's habit of scooping up water from the lavatory in the place of a urine sample. Another man had been searched on his way into the Court building, and the police had discovered a knife in his pocket. Most common were participants who had started to show general signs of indifference. Mr A was a Rastafarian who was charged with malicious destruction of property. His drug problem was heavy use of marijuana. The social worker reported that he had not attended his test appointment on time, and that when she had called him, he had sucked his teeth at her and walked away. He had been heard to say that he looked forward to taking drugs again after the programme, for religious reasons. "You have shown disrespect for the rules and regulations of this Court", said the judge. "You have a choice: you may spend some time in custody to think about your behaviour, and remain on the programme, or exit it now and return to regular court." Mr A opted for custody, and was sent down to the lock-up for two nights. The next week, he was well behaved, punctual and tested negative. Mr R, who had been charged for another crime whilst on bail for House Breaking, was expelled from the programme entirely. "You had a chance, but didn't use it. You've shown no indication of a wish to change. We will not allow you to remain on the programme." Mr R begged, but to no avail. The other defendants looked on stonily. The staff had not wanted to send him back to regular court, but it was agreed afterwards that yielding would have sent dangerously casual signals to the others.

It is undoubtedly an achievement when a participant tests negatively week to week. The judge gives personalised encouragement, and seems genuinely concerned with each individual. "Mr P, I am very happy to hear you're doing so well. I must also commend you on how you are dressed—your pants aren't torn, you've put yourself together nicely—very clean and tidy. I'd prefer you not to wear that kind of belt though, it blinds me when I look at it." When a defendant has tested negative and made no transgressions, he is commended by the bench and applauded. Occasionally a new, unsuspecting policeman is in attendance in court—they have been known to leap up and shout "Silence!". It is simple praise, but nevertheless encourages even the toughest of defendants.

Victories and defeats

When participants have successfully passed through the programme, there is a formal sentencing, and then a brief graduation ceremony, where the judge comes down from the bench and presents the graduate with a certificate and gift. I went to two such ceremonies, both

were surprisingly moving affairs. As happens frequently in Jamaica, all those present made a speech commending the successful man on his achievement. Mr H was told that everyone was proud of him: "We wish you well, and hope you will be fine. You have to know where you're going and never look back. May the Lord be with you, and may you not return where you came from". Dr Oo reminded Mr H of the first time he came to the Court; how he was brought by the police "in a box"—a mess. Now, graduating and proud, he looked so smart "people thought he was an attorney". He gave Mr H credit for getting so far, warned him of the challenge ahead, and reminded him that the staff would be available if he needed any support in the future. Mr H's turn to speak came at the end. He said "I'm tired of breaking my life and I want to change. I'd like to thank Dr Oo and Your Honour for your week in, week out constructive talks … Lots of times you say things that are really true".

Lunch is served in court after the ceremony, and counsels' benches filled with staff and members of the programme eating jerk chicken and festival. Old graduates speak to people in the first phases of rehabilitation and pass on advice—they warn the others to "be careful at parties and keep away from people and places that mean trouble".

When the Court had emptied, I spoke to the judge. She told me: "We can't reach everyone. In fact, we can't reach most people. They will fail to last six months, or go back to drugs after completing the programme. We might only succeed with one in five, but that one is worth it."

Therapeutic jurisprudence

"Not everyone we see is going to be off drugs forever", said Dr Oo. During the pre-Court meeting held each week to discuss the cases set for each day, he asked the Court staff, "How many of you have been on a diet?". Several people nodded. "And how many of you failed to stick to it? That's nothing compared to how difficult it is to stay off drugs."

The advantages of a dedicated court such as this surely lie in the combination of therapeutic and penal models. In the opinion of Dr Oo, the tilting of the scales towards therapeutic jurisprudence and away from punishment is one of his proudest successes. If an individual can be made to stay off drugs for the six months he is on the programme, that six month's success stays with him, even if he goes back to drug-taking later.

The staff of the Kingston Drug Court are guardedly optimistic for the future. Their vision for the programme has it expanding to each parish on the island, with a larger paid staff and a wider ambit of eligible defendants—including those charged with indictable crimes, repeat offenders and people with mental problems. A multi-agency approach is required to address the root causes of substance abuse in Jamaica. The Ministry of Education and Social Welfare should be involved to stem the flow of people from the street into the criminal justice system. There should also be more help locally. The Mayor of each town should take an interest, along with local Government officials and M.P.s.

Dr Oo would like a parallel programme to exist within the prisons, to reach those more serious offenders who are refused bail and need treatment. Currently, their situation worsens on remand, where they are exposed to the strain and temptations of incarceration without help. He states that the public and political will is there; the bar to further progress is largely financial.

Drug Court and the UK

A specialist Family Drug and Alcohol Court is nearing the end of a three-year trial in the United Kingdom at the Inner London Family Proceedings Court. It differs from the Jamaican model in several ways, most significantly in that its focus is upon keeping families together, and avoiding the enforced separation of children from drug-addicted parents. In Jamaica, the aim is to rehabilitate individuals with drug problems to avoid reoffending—a criminal rather than family law focus. Participants in the Drug Rehabilitation programme must already have a supportive family—without which they cannot be helped. The idea is that the therapeutic approach will be more successful in the long term, and more useful to society, than the penal approach will be. Drugs are available readily in Jamaican jails, as they are in the United Kingdom, but rehabilitative drug treatment is not. The Court in Jamaica suffers from a huge lack of funding and resources. Several key figures involved—Dr Oo, whose main job is running a mental hospital of 850 patients, and Ms Anderson, who teaches advocacy at the Norman Manley Law School, and runs the Jamaica Council for Human Rights and a busy criminal and civil practice—are volunteers who should be paid; they want to recruit replacements, but no other practitioners are stepping forward to fill their shoes. In Jamaica the project has only been able to extend as far as Kingston and Montego Bay—the drug addicts living in the rest of the island do not have the option to join. Although funding in the United Kingdom for such projects would doubtless be limited, advocates for an English Drug Court should take heart from the progress that has been possible in Jamaica with only the lowest amount of funding.

There is much more to say about the prospects for Drug Court in the United Kingdom. It should also be noted that the powers of the courts in relation to drug rehabilitation are wider and more useful than those that exist in Jamaica. Still, the comparison is a valuable one which will hopefully encourage further investigation into the possibilities of therapeutic jurisprudence.

Elizabeth Forrester is a barrister and member of Middle Temple.

LEGAL SPLASHES BEYOND THE TITANIC

Professor Gary Slapper considers some unusual cases


Professor Gary Slapper

The English jurist Herbert Hart wrote that at the core of our legal system we need rules against violence to stop society becoming a "suicide club". Most legal systems began from rules of elemental importance such as "thou shalt not kill". Today, there are thousands of rules controlling every conceivable type of violence, including threats and emotional assault.

The law, moreover, now runs expansively against multifarious wrongdoing. There are over 12,000 offences under English law. Between 1997 and 2009, 4,289 separate offences were the subject of legislation. These include disturbing a pack of eggs when directed not to do so by an authorised officer, selling or offering for sale game birds that have been shot on a Sunday, and swimming in the wreck of *The Titanic*. Nevertheless, most of the odd cases that come before the courts arise from human foibles and bizarre dramas rather than strange laws.

Every week a great many people slide into court either to do battle in a claim for compensation or court order or because the state thinks that they ought to be punished for a crime. The court is a theatre of calamity. With quiet deliberation, and controlled by thousands of legal rules, courts must often come to rational conclusions about events that would in fact be rejected by television drama producers as implausibly bizarre. In 1823, Lord Byron noted that "truth is always strange; Stranger than fiction". But in a good gloss in 1897, Mark Twain noted that the reason is "because Fiction is obliged to stick to possibilities; Truth isn't". No stage hosts more wayward truths than a courtroom. The following are some recent examples.

Does that feel tender?

A key feature of any profession is that it restricts admission to those who have successfully achieved the required training.

Certainly, you would expect that your dentist met that professional standard. But you would be disappointed if you were a patient at the surgery of Alvaro Perez in Sampierdarena in northern Italy. Mr Perez, from Ecuador, was arrested in 2008 after his patients complained that he had been knocking out their old fillings with screwdrivers and pulling teeth with household pliers. His main apparatus was a DIY power drill. Mr Perez was arrested after one patient suffered unendurable pain and summoned the police.

Perez, who has no dental qualifications, was charged with deception. There have been several comparable imposter offenders in Britain. In the world of medicine, there have been 40 cases in the last 70 years. In 1992, for example, Mohammed Saeed, a layman, was found to have been fraudulently practising as a family doctor in Bradford for 30 years. His partners had grown progressively suspicious of his absence of medical knowledge. He was given a five-year jail sentence.

From the 1980s, Paul Bint, a former hairdresser, posed as a doctor in many hospitals for 12 years. He did all sorts of medical procedures—including trying to assist in a heart by-pass operation.

In 1994, Roy Grimshaw, another fake doctor, was jailed for fraud after gaining a job as a clinical services manager at Guy's Hospital in London. He had previously posed as a surgeon at a private clinic in Lancashire, where he had carried out nine surgical operations, many gynaecological procedures and three vasectomies. He was only exposed when Bolton magistrates' court, where he was facing a driving ban, had his medical qualifications checked.

People have even been discovered faking it as lawyers. Say hello again to Paul Bint the former hairdresser and would-be doctor. He had also been convicted of fraud for posing as a barrister, having stolen a wig and gown and worked on his eloquence. His smooth speech though wasn't delivered in a court room but on a Virgin train in 2000. Proclaiming he was a distinguished advocate, he tricked the chief executive of Virgin, who happened to be travelling on the same train, into compensating him for expensive goods and tickets he claimed to have been stolen while on board.

But the prize for faking it so well that no legal proceedings followed exposure goes to Dr Kenneth D Yates, an associate professor of physics at the University of New Hampshire in America. In 1954, "Dr Yates" was revealed to be Marvin Hewitt, someone who had dropped out of high school with no qualifications but who had a teaching compulsion. When caught, he was in his fifth academic job in seven years. He was not prosecuted because, despite his fraud, he was an admirable and respected physicist.

In the frame

"Give me all the money from the safe or I am going to batter you," shouted Kevin Staples, waving a stick as he tried to rob the Bottoms Up liquor store in Bournemouth, Dorset in 2008.

But Mr Staples would not be a good candidate for any criminal team like the one featured in *Ocean's 11*. The shop assistant to whom he made these threats wasn't unduly alarmed because Mr Staples suffers from severe arthritis, a ruined hip, and back problems—and he walks with a Zimmer frame.

When the shop assistant said that he had no access to the safe, Staples begrudgingly changed his tack and said "give me some fags then".

But two days after his Bottoms Up plan went bottom up, he attempted another robbery, this time at a shop called Past Times in Crawley, West Sussex. On this occasion, he brandished a 12-inch bread knife at a shop worker and barked "get the money out".

At his trial for robbery, attempted robbery and assault, Bournemouth Crown Court heard that he tried to lunge over the counter. When staff shouted at him, he put his knife back into a bag on his Zimmer frame and left the store as quickly as he could— which was very slowly—only stopping outside to punch a security guard.

He later said he committed the crimes after voices had urged him to do so. He was sentenced to a minimum of four years' imprisonment.

Unsuccessful robberies are not uncommon. When Marcus Brewster, 21, and his 16-year-old accomplice entered a Domino's Pizza in Cincinnati, Ohio, in June 2008, they showed they were armed. This was followed by some remark like the famed one in the opening scene of *Pulp Fiction*: "Everybody be cool, this is a robbery". In fact, things were about to get a lot cooler for them than they realised. In trying to make a quick escape, they opened a door at the rear of the pizza parlour, ran through it, and slammed it shut behind them. It wasn't, though, into sunshine and freedom that they ran—but into the pizza freezer room where they were kept until the police arrived.

The prize, however, for the most quickly caught robber goes to Mr Clive Bunyan. In 1970, Mr Bunyan raided the village store in Cayton, Yorkshire. He had burst into the shop carrying an imitation gun and wearing a motorcycle crash helmet. He escaped with £157 but police were able to track him down swiftly from a single clue appearing in capital letters on the front of his crash helmet: CLIVE BUNYAN.

Bottom heavy justice

The identity of an alleged bank robber in a German case in 2008 depended on the reliability of testimony about the size of her bottom. A witness said the culprit has an unusually large backside. So, a variant on the common question, "does my bottom look big in this?" became the key evidence issue in the case: "does my bottom look big in this bank queue?".

A bank in Norf in western Germany had been robbed at gunpoint and the robber had escaped with €15,000. The main clue police had to work on was that witnesses had reported the suspect was a woman with "a very large backside" and "powerful thighs".

Then, some weeks later, one of those witnesses was standing in a queue in the same bank when he noticed what he thought was the same backside. He said he was sure because he would "never forget anything that big". He called the police and the suspect, 26-year-old Sandra Meiser, was arrested and found to be in possession of a ski mask and a handgun. She was suspected of being about to rob the same bank again. She was charged with firearms offences and attempted robbery, standing trial in September 2008.

In the German case, the mistake allegedly made by Ms Meiser is that, while being easily identifiable, she tried to rob the same bank twice. Bank robbers, however, have made worse mistakes than that. In 1975, a Scottish court heard that three men intent on robbery had charged into the Royal Bank of Scotland at Rothesay but had got stuck in the revolving doors. They had to be helped free by the staff, after which they sheepishly left the building. Moments later they rushed back in, declared they were robbing the bank, and demanded £5,000 cash but got no reaction other than laughter from the head cashier. One of the robbers then jumped over the counter in a rage but crashed to the floor clutching his ankle. Seeing that, the other two tried to make their getaway but, once again, got trapped in the revolving doors.

A very serious mistake

Being a back-stabber isn't necessarily a bar to becoming a lawyer. It is occasionally said to be an advantage in some law firms. Shooting people in the back, however, is a different matter—even cynics agree that is incompatible with being a good lawyer.

In 2009, the Law Society of Upper Canada heard the case of a man who argued that the fact that he shot someone in the back while he was highjacking a

plane should not prevent him from being a lawyer. He is applying for a licence to practise law.

In 1984, Parminder Singh Saini shot at several people on board an Air India flight carrying 264 people. Twenty minutes into the flight, he put a gun to the head of a flight attendant and fired. The attendant survived but there was a predictable reaction among passengers. Risking the plane's destruction, and the consequential carnage, Saina then fired several more shots. One of his shots hit a crew member in the back. Other passengers were stabbed by members of Saini's terrorist squad. He seized control of the aircraft and forced it to land in Pakistan where everyone was told to say their final prayers as the plane was going to be blown up. Saini was eventually arrested and sentenced to death. His sentenced was then commuted to life imprisonment in Pakistan but he was released after 10 years on condition that he left the country. He did so and gained entry to Canada by lying and then qualified as a lawyer.

During his "fitness to practise" hearing in 2009, Saini engaged his capacity for legal analysis. Referring to his act of terrorism he conceded "I had no legitimate right to do that". Well, that is one way of putting it, certainly. He went on to explain that he also understood the underlying reason why shooting people on a plane in mid-flight should be avoided: "It's not legal". Clearly, he had read sedulously in law school. Referring to the mid-air terrorism and shooting people as "a very serious mistake", Saini's lawyer told the Law Society tribunal he should be given the right to practise law in Canada.

Barristers have been convicted of various acts of aggression ranging from biting a policeman to attacking a barber with a fencing sabre. Acts of violence, though, don't necessarily ruin a legal career. In 1900, an English barrister from Liverpool was on a tram when a man boarded it and jostled a female passenger. The barrister went over and punched the man in the face so hard he sent him flying on to the kerb where he cracked his head and was killed instantly. The barrister fled the scene and left England on a vessel sailing to the Mediterranean. He lived in Malta for a while then, being caught in bed with another man's wife, smashed a chamber-pot over the husband's head and fled the scene again. He was never charged for the killing or the assault but went on to have a distinguished career at the Bar as F E Smith and later became Lord Chancellor.

Gary Slapper is Professor of Law and Director of the Centre for Law at The Open University, and a door tenant at 36 Bedford Row. His latest book *Weird Cases: comic and bizarre cases from courtrooms around the world* is published by Wildy, Simmonds & Hill priced at £9.99.

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John Cooper,
25 Bedford Row, London WC1R 4HD
cbq.mail@thomson.com
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