CBQ

Criminal Bar Quarterly Issue 3: October 2010

Getting an indication: developments in *Goodyear*

Also on the inside:
The latest from the London Film Festival
The Bribery Act
Bad character
Special needs witnesses
and much more ...

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Cover Photo: Conviction, Image Net

The Editor

John Cooper Q.C.

Since the last issue there have been significant developments in various areas of the law and the pieces in this issue ranging from *Goodyear* directions, bad character to the provision of evidence from special needs witnesses, reflect this. We also have an illuminating analysis of the long-awaited Bribery Act, which quite literally has been over 100 years in the making. It all makes for essential reading for anyone trying to keep up with the latest developments in criminal practice.

But this publication is not just about the written law, it is also about the lives of criminal barristers, "bread and butter" issues as I once described them, and nothing is more frustrating than having to go through the trauma of security checks which exist outside the boundaries of all Crown Courts. They are, of course, essential.

But members have been experiencing an increased enthusiasm for comprehensive searching of members of the Bar, particularly at some courts. At the Old Bailey for instance barristers are not allowed to take in dictaphones, neither will security staff accept responsibility to hold them, advising rather that there is a shop opposite the court that has developed a thriving business of charging two pounds to hold them for the day.

But perhaps the most frustrating experience goes to Woolwich Crown Court, who insist at security that everyone, including Counsel, remove their footwear. When I enquired if it was really necessary, I was told that it was .... unless I was a police officer. It seems that those at Her Majesty's Courts Services have decided that if police officers were required to remove their shoes in public and particularly in front of potential jurors they would, quote, "lose their dignity".

As I say, security is vital, but administered with common sense and, most importantly, even handedly.

Your views?

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

Christopher Kinch Q.C.

It has become almost traditional for an incoming CBA Chairman to be faced with dark storm clouds building over the future of the profession. Repeated onslaughts on publicly funded advocacy fees from the last government at least meant that the CBA built up a bank of experience that underpinned and informed its responses to the government.

Successive Chairmen were able to draw on an extensive range of arguments that pointed to the value for money provided by the criminal bar, our long commitment to putting in unsocial hours and getting the job done, the value we add by deploying our experience to assist governments with consultation on new legislation, etc. etc. They railed against the dangers of demoralising the young bar and causing an exodus from publicly funded work at a time when the criminal bar had spent several decades changing its outlook and recruitment and emerging better, more diverse and more representative of the communities it serves. We won many of those arguments, although we did not always win the contests as our opponent in the argument was also the judge and jury on the issues in play.

What is going on now is different. Faced with the need to make substantial savings in the Ministry of Justice budget, the government is looking at making savings on the legal aid spend. The thinking quite clearly envisages a radical consolidation of the "supplier base" with a smaller number of "more efficient" suppliers providing the full range of criminal defence services. It is thought that this change will need to be more achievable and require greater savings than continuing "salami slicing" of fee rates. The design was foreshadowed by Jack Straw in the dying days of the Labour Government in a paper called "Restructuring the Delivery of Criminal Defence Services." Anyone who is in any doubt about government thinking should read that paper on the MoJ website: *http://www.justice.gov.uk/publications/restructuring-delivery-criminal-defence-services.htm.*

A key feature of the proposals was a drastic reduction in the number of contractors. The "cull" may not end up being as severe as the March 22 paper envisaged but anyone in doubt as to the direction of travel should follow what has been happening with legal aid contracts for family and civil work. The attraction of being able to streamline MoJ administration following a reduction in the number of contractors is surely obvious. It is not hard to see that further simplification would follow if the MoJ introduced one case fee instead of preserving the present system of paying a litigators' fee and a separate advocates' fee. That is why OCOF is back on the agenda, but do note that the reorganisation starts with the reduction in the contracting base.

Whatever else is coming when the government publishes its plans in October, the reduction in the supplier base seems certain to be there. I fear that the CBA "playbook" does not prescribe a clear battle plan for this situation. I have no doubt that we are now dealing with a government that genuinely recognises the values and the need for an independent bar. However, respect and even affection will not deter ministers from pursuing a course that they believe will lead to savings.

What should our response be? The first point to make is that there have as yet been no negotiations. The Bar Council and the CBA are trying to get a clear outline of what shape the government proposals will take. Of course the MoJ know that the bar is studying the contracting issue in detail and considering how sets of chambers could participate. Nothing has been given away. No-one is underestimating the scale of change involved or the problems that will be thrown up over administering the different work streams required by a contract and organising the distribution of work in a way that is transparent and fair and rewards effort and ability.

Before we rush to man the barricades in defence of the current system, we should spend a moment considering where that is leading. The more fees have been cut all round, the more solicitors look to insert employed HCAs into cases at the Crown Court. Consider the implications of the growing practice of squeezing the advocates' fee. Some solicitors are asserting that their HCA will be the instructed advocate when they have no intention of conducting the trial. Having gained control of the fee in this way they often insist on a 30 per cent slice of the grad fee for the trial. An example is the letter sent by a firm in the midlands to the large sets of chambers in Birmingham and elsewhere and sent on to the Bar Council:

> "Dear Sirs
> **Re: Criminal Crown Court Cases**
>
> As you will no doubt appreciate times are hard and all criminal firms are looking at ways to increase revenue.
>
> [The firm] now has an advocate with Higher Rights which means that some of the cases that would normally be sent to Counsel will be kept in house. This will include all committals for sentence matters, preliminary hearings and plea and case management hearings where a guilty plea is expected.
>
> In relation to those cases that are expected to run to a full trial, we intend to adopt a different approach. We still intend to instruct Counsel to run the trials. We will however be taking care of the plea and case management hearings. As such we will then be recorded as the instructed advocate and all fees due under that representation order will fall payable to us. We propose to split that fee on a 70/30 basis in your favour.
>
> We would appreciate your response and confirmation that you are happy for our working relationship to continue on the basis outlined above."

This is a blatant breach of the regulations and one that runs entirely contrary to the whole principle of the instructed advocate that underpins the Criminal Procedure Rules. It is however a commonplace practice and one which solicitors claim is permitted by the LSC guidance on fee sharing.

The letter provides a chilling foretaste of the future under the present system. The more successful we are at ring fencing and protecting advocacy fees, the more some solicitors will try to make inroads by appropriating the fees for themselves. The more senior members of the bar might survive while they remain in practice but

the struggle for the junior bar would get even more difficult. If we are to fight for the present system to be retained, how will the government achieve its savings? Is it really worth further cuts to fees?

If the present system causes real concerns for the future prospects of the bar, what of the possible changes? Some entrepreneurial spirits will be enthused at the prospect of contracting directly with the government. They will be having discussions and making plans already. Whenever the new contracts come, some sets of chambers will want to bid. They at least will be watching the progress of the Bar Council working groups with interest. In fact we should all be contributing our ideas, our fears and concerns to the debate.

The government's preferred direction of travel should be apparent in a consultation paper that we are expecting around the time of the spending review announcements towards the end of October 2010. There will be a short window of time after that in which we can seek to influence the shape of the detailed proposals that we can expect to emerge early in 2011.

My apologies to anyone who read the letter signed by my predecessor Paul Mendelle Q.C. and I in August. You may have noticed some repetition if you have struggled through this far. However, I make no apology for revisiting the issue. We all need to be discussing these problems. They go to the heart of our future existence. The absence of response to our August letter cannot denote lack of interest in these matters. Get talking and get writing please.

Christopher Kinch Q.C.
Chairman

NOTICES

CRIMINAL PROCEDURE (AMENDMENT) RULES

Section 51 of the Criminal Justice Act 2003 came into force on April 26, providing for the admissibility by closed circuit television of evidence from anywhere in the United Kingdom outside the court building. The criteria is "in the interests of the efficient and effective administration of justice".

It is anticipated that the measures will assist experts, special needs or vulnerable and intimidated witnesses. Time will tell whether provision is made equally for defence as well as prosecution witnesses, given funding restraints.

AUTUMN CONFERENCE

Event	CBA Autumn Conference	
Topic	Criminal Practice & Procedure; an update	
Date	Saturday 16th October 2010	
Location	Church House Conference Centre	
CPD	6 Hours	
Guest Speakers	David Perry QC	The Supreme Court
	Alison Levitt QC	The Code for Crown Prosecutors
	HHJ Denyer QC	The Criminal Procedure Rules
	Paul Keleher QC	Defence Statements
	Rudi Fortson QC	Partial Defences to Murder
Pricing	Less than 5 years call £75.00	
	Over 5 years call £95.00	
	Non-Members £130.00	
	For more information please contact Aaron Dolan; adolan@barcouncil.org.uk	

IT IS WHY WE HAVE JURIES

David Wurtzel considers the appeal of James Watts

On July 24, 2002 the criminal law entered a new world of evidence giving. Witnesses who would never have been asked to give evidence, could now do so, with the assistance of special measures. On nearly the eighth anniversary—July 23, 2010—the Court of Appeal handed down judgment in *R. v James Watts* [2010] EWCA Crim 1824. As Mr Justice Mackay stated, "less than half a generation ago the criminal courts would not have contemplated attempting to receive evidence from persons in the position of these complainants". Indeed, this was the first time on which the evidence of complainants suffering from such profound levels of disability has been brought to the court's attention. Nevertheless, "The ordinary principles governing criminal trials require both the judge and the jury to face the realities which can sometimes arise where special measure are put in place, but these arrangements do not alter the principle that the primacy of the jury should be respected". There was "no sensible basis on which we, sitting in this court as a constitution of three judges, should set aside the verdict reached by the jury on the grounds that they are unsafe".

The facts

The jury in *Watts* convicted the defendant, a care worker, of several counts of sexual assault on women with a mental disorder. The victims all lived in a Leonard Cheshire residential home in Devon where Watts, now 58, worked part time. He was a man with no previous convictions and called a good deal of evidence in support of his positive good character. Following his conviction, an article appeared in *The Guardian* about the case by a journalist who quoted his legal team's concerns that there had been a "gross miscarriage of justice".

The evidence

The first complainant ("Anne") had cerebral palsy resulting from brain damage. She was entirely dependent on others for her daily care needs and she could not communicate by any means other than by shouting, spitting and swearing when distressed. The evidence in support of the charge that Watts had touched Anne's breast in a sexual manner came entirely from a volunteer worker who said she had seen it. There was no appeal against this conviction but there were submissions about its significance in assisting the jury when considering the other complainants.

The second woman ("Barbara") had profound cerebral palsy and similar disabilities. She was interviewed twice in which she used an electronic communicator which was a tablet computer mounted on her wheelchair which had for investigative purposes programmed into it a number of pages relating to various topics. There were pages with pictures of the care staff, with depictions of male and female body parts and of actions such as oral sex or of sitting on someone's lap. She was helped by a communication supports officer from the Leonard Cheshire homes. Barbara could not read but there were pictures, drawings or symbols and a square for Yes or No. There was an illuminated cursor which ran along the rows. When it reached the row in which her desired answer lay she activated a switch by touching or bumping the left side of her

David Wurtzel

head against a switch in the left hand wing of her headrest. The cursor then ran down the columns and when it reached the correct column she activated the switch again. Where the two intersected an electronic "voice" would speak the written text. Barbara was asked closed questions such as 'is there someone she wanted to talk about?' to which she said Yes and picked out the photo of Watts. Mackay J. described this as a "tortuous and lengthy process, almost painful to watch, with long pauses as she watches the cursor move to the correct place". The questioning certainly was taken very slowly. The length of time it took bears little relation to the length of time we would take to read the text. The jury watched the videos but were (with everyone's consent) given transcripts to take into their retiring room.

After about 40 minutes Barbara became tired and her answers became unreliable as confirmed by the psychologist called at the trial. Later on the trial intermediary (referred incorrectly in para.29 as a "mediator") assessed Barbara and modified the icons on her communicator to add "I don't know" and "I don't understand" and "not true". At the appeal, counsel argued that if this had happened earlier, the officer might have been able to explore "truth and lies" in the interviews. It is submitted though that not all competent witnesses are able to do "truth and lies". The story may be too complicated for their cognitive skills. People with autism do not have the ordinary concept of deception, which is what "truth and lies" is supposed to establish.

Psychological evidence

As stated, a psychologist gave expert evidence at the trial. The judgment summarises the very full questioning of her by the defence about the methodology in the interview and the question of whether the jury could "cherry pick" the parts of the evidence which would be reliable from those which were false. The jury convicted the defendant in respect of Barbara of the count alleging sexual activity but acquitted of the counts alleging penetration.

Physical disabilities

The third woman ("Carol") also had cerebral palsy. She could communicate by movements of her eyes: raising them upwards meant Yes and moving them and to an extent her head from side to side meant No. Present at interview was the service manager of the home

who was familiar with her eye movements and she was assisted by a registered intermediary. Like Anne and Barbara it was not thought that Carol had any previous *sexual experience.* No one suggested that any of these women could have communicated with each other so as to contaminate their evidence. In respect of Carol, the jury convicted the defendant of two specimen counts alleging touching of her with his fingers but acquitted of two specimen counts alleging penile penetration.

The fourth woman ("Diane") was a wife and mother who had suffered a subarachnoid haemorrhage in adulthood. In cognitive terms she was intact at the time of her ABE interview but she later suffered a stroke which rendered her wholly unable to communicate. Her interview was admitted under s.116(2) of the Criminal Justice Act 2003. The jury convicted of two counts alleging sexual touching and acquitted on three counts of vaginal rape. In her interview she went on to embark "on a crescendo of further allegations of a more and more serious nature"; it was accepted that there were clearly "many parts of her evidence where she was confabulating".

Intermediaries

As stated, the trial intermediary met with and assessed Barbara and Carol and made recommendations on how they could best be questioned at trial so as to give meaningful answers. She was asked to come to court (the live link had been set up at the Leonard Cheshire home) where, as the judgment said, she gave evidence "of an expert nature albeit with some reluctance". It is fair to point out here that intermediaries are not expert witnesses and they are advised (by the author and others involved in their training) that the giving of expert evidence is not within their statutory role of facilitating communication. In any event she was also able to discuss the ground rules of cross-examination with counsel and the judge. Defence counsel decided not to cross-examine Barbara and Carol although they were competent. The judge called that "understandable" but, as the Court of Appeal pointed out, the opportunity was available. Instead the defence focused the jury's attention on the areas of evidence in which it was said that the allegations were false.

The grounds of appeal

The grounds of appeal fell into three main areas:

- There should have been a more thorough psychological assessment of Barbara, Carol and Diane before interview, with more exploration of their knowledge of sexual matters and their understanding of truth and lies. "A proper use could have been made of intermediaries and reliable evidence may have been forthcoming."
- The case should have been withdrawn from the jury at half time as being so weak and tenuous that no jury could properly convict.
- The summing up did not direct the jury properly about the care they would take when examining the complainants' evidence and it omitted "many points favourable to the appellant".

The Court of Appeal upheld the judge's decision to leave the matter to the jury at the conclusion of the prosecution case. That would have usurped "their function, which was to decide the reliability of the three complainants in the light of such support as the jury believed that evidence received from other sources".

The Court further rejected the submission that the verdicts were inconsistent. They found "an entirely logical thread running through the verdicts". Once the jury accepted the evidence of the eye witness in count one, they were entitled to treat it as fortifying the remaining complainants' evidence. The jury was entitled to feel sure that the appellant was "prepared to interfere sexually with a disabled and highly vulnerable woman [in a "fleeting" form], and, for good measure, to do so in a setting where the presence of others meant that he was prepared to take the risk that his conduct might be seen". The jury was told to reach different verdicts on each count and to approach each count separately, and they did so.

Finally the Court considered whether the verdicts were "unsafe". Here was perhaps the most difficult point for the court to deal with. Without being able to put the argument into any particular category or to give it a label it was said that the Court of Appeal should say that the complainants' evidence should have been rejected by the jury (who would have to "cherry pick" for reliability) as "unsafe even if some logical basis for the verdicts can be discerned". The Court however rejected the opportunity, as the prosecution put it, "to supplant the jury's decision and replace it with its own judgment". "Even in a case of difficulty and complexity such as this, the primary of the jury in our criminal justice system has to be respected, particularly where matters of reliability and the assessment of witnesses lie at the centre of the case. This applies to the assessment of any competent witness, whether disabled or able bodied." At the end of the day, everything which was said to the Court of Appeal was said to the jury. There was no "unfairness or lack of balance" in the summing up as suggested. The verdicts "were the responsibility of the jury". The appeal agains total sentence was reduced.

Four days later, a differently constituted Court of Appeal considered the trial which concluded at the Old Bailey in May, where two ten-year-old boys were convicted of attempted rape of an eight-year-old girl. There was no intermediary in that case, even though the use of intermediaries for defendants is now well established and has happened elsewhere at the initiative of the trial judge. Again the Court was asked to say that judge should have withdrawn the case from the jury because of the unreliability of the complainant's account but again it was held that that it was the jury's function to assess this.

David Wurtzel is a Door Tenant, at 18 Red Lion Court.

BOOK REVIEW

Sentence Adjourned

Paul Genney

This is the second novel by Paul Genney, a criminal barrister based in Hull. His first work, *Pleading Guilty*, was going to be a hard act to follow, second novels are always the most perilous for writers, defining whether you are a one-hit wonder or here to stay.

I am pleased to report that, on the strength of this novel, Paul Genney is very much a fixture in the writing world. The merits of the first novel are carried into this one, authority, borne of knowing the subject inside out, a dry and irrestistable sense of humour and that primaeval instinct of being able to tell a good story.

The narrative is always vital; once again, barrister Henry Wallace takes on the legal world as his cases hit the big time, terrorist cases merge seamlessly with the complex civil action—not necessarily good for your insurance cover, but making for compelling reading. There are touches of *A Tale of Two Cities*, as Wallace relies heavily on his brilliant pupil to keep up, but as always it is the recognisable insights which will delight his lawyer readership, from the CPS needing to make telephone calls before a decision can be made to the mysteries of "fixing cases administratively".

Genney once again has provided us with a jewel in the legal fiction crown.

JOHN COOPER
Published by Dedalus, priced £9.99.

BFI LONDON FILM FESTIVAL

Once again this premier Festival contained a fair representation of films of interest.

Perhaps principle of these was *Conviction*, starring Hilary Swank as a woman who puts herself through law school from humble beginnings as a high school drop-out and qualifies as a lawyer in an 18-year quest to clear the name of her brother, sentenced to life imprisonment in the United States, without parole. The film is all the more inspiring for being closely based upon real events. With the Criminal Cases Review Commission refusing to refer over 90 per cent of the cases sent to them, maybe we will be seeing more of these sorts of campaigns in this country!

Essential Killing (pictured below) is another showcased film that should not be missed. A member of the Taliban is subjected to interrogation and rendition. As he is being transported, he escapes over some snow-bound European country and attempts to live off the land. In many respects, this is a brave film, given the unequivocal background of the main protagonist, but its skill lies in the fact that the longer the film goes on, the more his background becomes irrelevant with the final, powerful message that whatever side you are on in War, no one holds a prerogative on human feeling.

Ken Loach's latest film, *Route Irish*, tackles the all too common trauma of family and friends trying to discover how their loved ones were killed in Iraq or, for that matter, in the Afghan conflict. The route in the title refers to a notorious road in Iraq, where a man was killed. It is one of the master director's darkest films, but catches brilliantly the desperation and anger felt by many bereaved in this country as a result of the loss of people close to them.

Finally, *Illegal* provides a harrowing account of the life of an illegal immigrant in one of Belgium's detention centres. Another film based upon actual events, the piece illuminates the inhumanity of these holding places and the struggle, resilience and determination shown by the young detained woman resounds with references to the timeless *One Flew Over The Cuckoo's Nest*.

JOHN COOPER

GOODYEAR—LOSING ITS GRIP?

John Edwards and Richard Gibbs road test the law

John Edwards

In the current climate where pressure on public budgets and expenditure is so great, it is understandable that the desire to avoid costly criminal trials should be stronger than ever. Indeed, under the current fee structure, the practice of "cracking" trials has been positively incentivised.[1] However, in these efficiency conscious times, it is vital that the Bar does not lose sight of the important issues of ethical practice which can be damaged by such emphasis.

Even before the onset of today's financial woes, there was a clear direction of travel towards encouraging early guilty pleas in criminal matters and, from the perspective of efficiency—measured in terms of saving public money and time—there is little valid argument against that stance. It is sometimes the inclination of the Bar to argue against certain efficiencies on generic grounds—the mechanics of financial savings, etc.—but a better stance may be more prosaic. In the following, we pose the rhetorical question whether economic expediency and the need "to do business" may, on occasion, impinge on questions of professional conduct. We are not arguing here that efficiencies cannot or should not be sought, but rather that far greater care needs to be taken than has been the case in recent years.

The world before *Goodyear*—halcyon days?

The issue of Advance Indications as to Sentence, so called *Goodyear*[2] indications, provides a clear case study for the argument that current practice puts practitioners in unnecessary jeopardy of finding themselves professionally embarrassed in the name of efficiency. The aim of *Goodyear* was to bring into being a framework whereby the longstanding informal practice of defence counsel seeking indications of likely sentence from a judge, would be put onto a more formal footing; at heart, where the indication would be moved from the judges' chambers and into the court .

Prior to *Goodyear* such indications were governed by the practice established in *Turner*[3] which, crucially, set out a general prohibition on the judge giving any indication of likely sentence in advance of a guilty plea;

> "The Judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of Guilty he would impose one sentence but that on a conviction following a plea of Not Guilty he would impose a severer sentence is one which should not be made." per Lord Parker C.J.

That one exception was that the judge could give an indication as to the form of any sentence—custodial or otherwise—but crucially, this would not be linked to the defendant's plea; it would apply if they pleaded guilty immediately or if they were found guilty following a trial.

It is this link—absent under *Turner* but enshrined at the heart of *Goodyear*—that rests at the heart of the conflict inherent in the current system. *Turner* allowed defence counsel the autonomy to ascertain what sort of sentence their client was likely to receive given a guilty verdict *or* plea. If their client was adamantly maintaining a not guilty stance, such an indication from the judge would allow counsel to inform their client as to what might happen if the trial did not result in acquittal. Equally it provided a basis to any discussion with a client pleading guilty as to what their likely sentence may be. At no point were counsel required to do anything other than represent one stance at any one time.

Turner gave voice to the inclination of the Court of Appeal against plea bargaining of any sort.[4] The authority was clear that guilty pleas should only ever be entered if the defendant had made it plain that they had committed the offence and so, on the face of it, gave counsel a tool to be used in informing their client.

Fundamentally, *Turner* heralded a departure from the practice, up to that point, of counsel seeking indications via private conversations with the judge in chambers. It levelled the playing field to the extent that counsel for all parties had to be present, together with their solicitors, when the judge was giving such an indication, and that a formal record of proceedings should be made. If the rules in *Turner* had been applied as rigidly as it would seem the Court of Appeal had expected them to be, then it would have appeared that the courts had reached the ideal balance; a practice which allowed for the defendant to be given an indication about the nature of his sentence if he pleaded or was found guilty, and one which allowed counsel for the Crown, as well as instructing solicitors, to be present. There was no issue of counsel not being able to maintain a genuinely unimpeded professional approach to representing the defendant.

Open but not open enough

Of course, reality was not to mirror the Court of Appeal's sentiments in *Turner*. There were numerous variations in the way these indications were handled; some judges saw them as a normal part of case management, others as a natural extension of the hitherto unrecorded and informal discussions they were accustomed to having with counsel. Still others refused to give any indication whatsoever; *Turner* granted the judges a discretion to make an indication but imposed no obligation and there was no statutory framework to insist upon one.[5]

Readers may have enjoyed similar experiences to those of the practitioner author, who on asking to see the judge for "an indication" was confronted by the judge glancing mischievously at the shorthand writer, whilst holding two fingers aloft and announcing; "I know we can't do this anymore, and you know I cannot conceivably help you, but a leopard never changes his spots!" History does not state what was actually recorded, but the defendant duly received two years.

It is clear that the unregulated access that counsel had to judges pre-*Turner* was not a habit which died easily and the lack of uniform practice perhaps inevitably meant that pressure for change

1 Something which in itself should perhaps give those who created the fee structures pause for thought—is this actually a good thing?
2 *R. v Goodyear* [2005] EWCA Crim 888.
3 *R. v Turner* [1970] 2 Q.B. 321.
4 Then as now, though, it is hard to say so with as much conviction in the post-*Goodyear* world.
5 CBA Sentence Indication Paper 2005; Peter Rook Q.C., Anthony Jennings Q.C., Max Hill, Gillian Jones.

grew. To this end, practice directions[6] were issued in the wake of *Peverett*[7] essentially affirming that the principles of *Turner* were all to be adhered to.

Whilst *Peverett* is cited as support for the contention that *Turner* was not properly adhered to in practice, it is worth bearing in mind that the rule set out in *Turner* was consistently applied in the Court of Appeal as the CBA paper acknowledges,8 notable examples being *R. v Ryan*,[9] *R. v Grice*,[10] *R. v Bird*,[11] *R. v Smith*[12] and *R. v James*.[13]

So the regime stemming from *Turner*, devoid as it was of overt problems in terms of professional standing, had operated from 1970 through to the beginning of the current century, albeit with the continual problem of varying application. The practice directions introduced in 2002 may well have been the solution to this problem but they coincided with a period of legislative explosion. In practice this meant that with the coming into force of the Criminal Justice Act 2003[14] a statutory framework now existed into which such sentence indications could be placed.

And so, to take stock. prior to *Turner* there had been no statutory or practice framework in relation to sentence indications; the 37th edition of *Archbold* (1969) says absolutely nothing at all about this practice[15] and the autonomy of both counsel and judges was absolute . After 1970, that autonomy was fettered with a common law framework, a situation which remained intact until *Peverett* where practice directions were considered the remedy to plug holes in the patchwork approach to the giving of indications. The key point though, is that none of these changes brought about any unwarranted pressure on the requirements of ethical practice, but that was all about to change.


Royal Courts of Justice

Not such a *Goodyear* after all?

On the face of it, the Court of Appeal in *Goodyear* merely took the opportunity to redress some of the criticism of the *Turner* rules by completely formalising the process. Gone were the two fingered salutes and shorthand writers and in came open procedures in court. The seeking of indications on hypothetical grounds were, rightly, outlawed and instead, a signed basis of plea was required before a *Goodyear* indication could be sought.

The root of the ethical dilemma for counsel lies in this very point. So as to avoid the hypothetical, the basis of plea is in reality often the setting out—by a defendant who is pleading *not guilty*—the grounds upon which he/she would plead *guilty*, if the basis is accepted by the Crown and the indication is acceptable to the defendant. Unlike the *Turner* position, where the judge was merely invited to express a view as to custody/non-custody, now the judge is invited to express the maximum sentence to be passed in pounds, shillings and pence.

Despite the words of *Goodyear,* the basis of plea *is* necessarily hypothetical; the accused will only formally enter a guilty plea if rearraigned on the indictment, something an accused will only agree to engage in after concluding he/she is amenable to the judge's indication.

This may place counsel in the invidious position of going into court armed with a basis of plea—from someone who may be pleading not guilty on grounds of alibi or lack of intent—and asking, "for argument's sake" what sentence the judge would be minded to hand down if the accused now suddenly recalls he *did* have the intention to inflict really serious injury; or his pleaded alibi to a burglary is unsustainable, or he did break the restraining order which ten minutes ago he denied. Rhetorical devices are often needed to give a veneer of respectability to the basis, for example; the accused pleads guilty to breaching the restraining order but not guilty to doing so with a knife, as alleged.

On any view counsel cannot maintain, on behalf of their client, a not guilty stance if they have been told, or led to believe, that the accused is guilty. Counsel cannot, in other words, be dishonest to the court, to whom a duty is owed.[16] If the accused is dogmatic in their stance, they would not bother to ask for an indication as to sentence, plainly. In such circumstances, they most certainly would not be willing to sign a basis of plea document which sets out hypothetical circumstances in which they would actually plead guilty!

Armed with such a document, can any counsel honestly say that they are not now at least on the verge of professional embarrassment? Consider the following highly likely scenario: the accused, raising alibi, is told by counsel that the alibi is unlikely to give evidence and that their bad character makes acquittal unlikely, and now seeks a *Goodyear* indication. A basis of plea document stating that they did breach their restraining order after all—or they were present at 33 Acacia Avenue after all, or that they did intend to commit GBH after all—is drawn up and signed. The judge gives a maximum sentence indication which is greater than expectations and so decides, as is his/her right, to take a chance with a jury. Despite having represented the accused to the court as *guilty* for a *Goodyear* indication, counsel now find themselves reverting to the position as per the defence case statement—all bets are off!

Anecdotal evidence suggests that many judges dislike giving such indications, both because of the issue of professional embarrassment but also because they fear creating the very scenario feared by the Court of Appeal in *Turner*; one where defendants plead guilty because it appears to them that this is the tacit recommendation of the court. It is clear that many counsel also see the inherent contradiction in their position in such cases and so this begs the question of what alternative there is to the practice.

Ideally, the Court of Appeal would seek the opportunity to revisit the rule in *Turner* followed by practice guidance along the lines of *Peverett.* Whatever the solution, the link between early guilty pleas and sentence indication must be reduced to no more than clear awareness on the part of the defendant that they would get credit for a guilty plea, something they forgo if convicted. At least everybody, including counsel, would then know where they stood.

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6 Practice Direction (Criminal Consolidated) [2002] 3 All E.R. 94; 1 W.L.R. 2870.
7 *Attorney-General's Reference No.44 of 2000 (Robin Peverett)* [2001] 1 Cr.App.R. 416.
8 Ibid.
9 [1977] 67 Cr.App.R 177.
10 [1977] 66 Cr.App.R 167.
11 [1977] 67 Cr.App.R 203.
12 [1990] 1 W.L.R. 1311.
13 [1990] Crim L.R. 815.
14 *http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_1.*
15 In contrast to the two pages (625–627) dedicated to the issue in the 2010 edition, not to mention the provisions of s.144 Criminal Justice Act 2003.
16 Something that may have been confused in recent years with a duty to the systemic efficiency of the Criminal Justice System rather than to the justice of that system.

RANDOM JOTTINGS FROM THE OLD BAILEY

Stephen Jones, Keeper of the Old Bailey, provides some fascinating background to the famous court

The term Old Bailey when referring to the building is, of course, a misnomer. The building is the Central Criminal Court and Old Bailey the street outside. What may not be known is how the street got its name in the first place. For this you have to return to the Roman City of Londinium, the west gate of which straddled what is now Newgate Street. The Roman city wall (a section of which is preserved in the basement of the current building) then stretched southwards. Outside the wall was a fortified earthworks known in the Latin as a Baillium and the Anglo Saxon as a Baillie. This accounts for the term Bailey but Old I cannot justify since to the best of my knowledge there was never a New Bailey.

The first reference to a Court of Hustings at this site is in the year 966 when Ethelwerder the wife of Ethelwaine was in dispute over the value of a broach!

The role of the Lord Mayor dates from 1132 when a Charter was granted by Henry I to citizens of London confirming their ancient rights and granting new ones. The right to appoint their own "Justicier" was granted. "And none other shall be Justicier over these same men of London."

The job title of Keeper is referred to in the Domesday Book when the site was Chamberlain's Gate and the entry read "Kept by William the Chamberlain".

In the 12th century the gatehouse was in a terrible state of repair and needed replacing. One can imagine the City's Planning Committee sat round discussing what to call the new gatehouse when one bright soul suggested Newgate. This was then immediately accepted and the committee repaired to the nearest tavern to celebrate.

Newgate itself was a terrible place known as a "heynhouse" or hateful gaol. So much so that in 1381 Wat Tyler, in the Peasants' Revolt, released all the prisoners and destroyed the building. Wat Tyler was then taken to West Smithfield for meaningful talks with the king. We don't know what was said but we do know that the Lord Mayor of the day drew a sword and got in with a pre-emptive strike and that was the end of Wat Tyler and his revolt. The sword now resides in the Fishmongers Livery Hall, which suggests that in 1381 the Lord Mayor was a fishmonger.

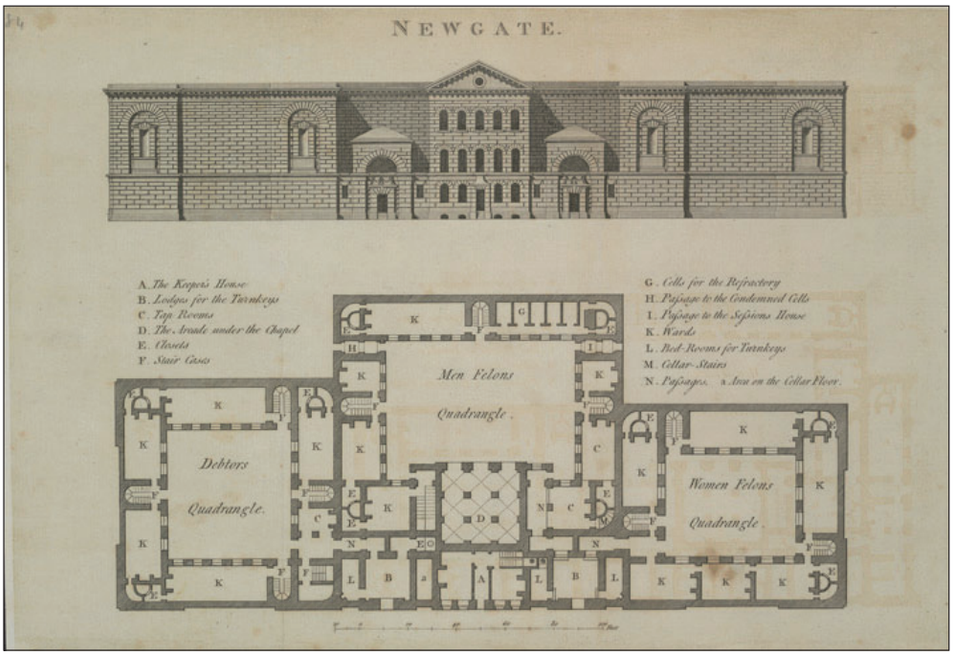
It was from Newgate Prison that those sentenced to death were taken to Tyburn for public execution. The method was to put the prisoner in a horse-drawn cart and head of in a westerly direction. It has been claimed that this is the origin of the expression "gone west". A public execution was a great day for feasting and binge drinking with thousands turning out to watch the spectacle. The gaolers on their journey felt that they too should join in the celebrations and used to stop somewhere around High Holborn and go into a tavern for a drink. They could hardly leave the prisoner outside so would take him in with them and declare to the landlord "Not for him. He's on the wagon".

Hangings at Tyburn were in the days before the drop and the condemned prisoner would use his last few coins to pay his friends and relatives to grab hold of his body adding their own weight to speed his demise. These were the "hangers on".

Eventually, in 1783, the streets leading to Tyburn became gridlocked and public executions moved to outside in Old Bailey in a position roughly where the 1907 iron gate now stands. As a measure as to how popular these events were, in 1807 29 people were killed in the crush. One can only imagine how many thousands were assembled at the time. The crush actually occurred when a pie seller's stall overturned and in the stampede to obtain a free pie the tragedy happened.

The last public execution in Old Bailey took place in 1868. This was Michael Barrett, a Fenian, who was convicted of a plot to blow up Clerkenwell Compter. The date is quite interesting in that members of the public wishing to attend could have travelled on the underground. When speaking of this I always make the point that my grandparents were alive. Not that they attended but people that I knew and grew up with could have seen a public execution. This makes it rather more modern that might otherwise be thought.

It wasn't until 1539 that a dedicated court was built in Old Bailey. Prior to that trials were either held in the open (as



Hustings) or in rented rooms. Even then, because of the prevalence of disease, part of the court was in the open air. This included the witness box but, in order that the witness did not get rained on, the box had a roof. This is why the witness box is court 1 is so constructed. All to do with history and nothing to do with the building having a leaky ceiling.

In 1563 a citizen and cutler by the name of William Matthew crafted a sword and presented it to the court as the "Sword of Justice". This he did "in return for the usual favours". Try as I might I have yet to discover what those favours were. The sword, of course, is still with us and each day hangs in the court of the senior judge sitting.

Still in the 16th century, in 1590 the Keeper of the day bought his post. For this he paid the sum of £2,500. By 1696 this sum had risen to £3,500. It is difficult to put this in modern values but they are huge sums of money. You may well wonder how he got his money back. To start with he charged every visitor to the prison. In addition he sold food and alcohol both to visitors and to the prisoners. He also had a scale of charges for "luxuries". To share your cell with only one other felon cost half a crown per night. A blanket was two shillings a night. A cleaning lady cost one shilling and the services of a lady of the night 12 pence. When Richard Whittington, three times Lord Mayor of London, died he left money in his will to arrange for a supply of fresh water to the prison. This, in turn, allowed the Keeper to charge for water. I have done some research into the practice of buying the post but have never been able to discover when this ceased. Certainly it was not the case when I started in 1991.

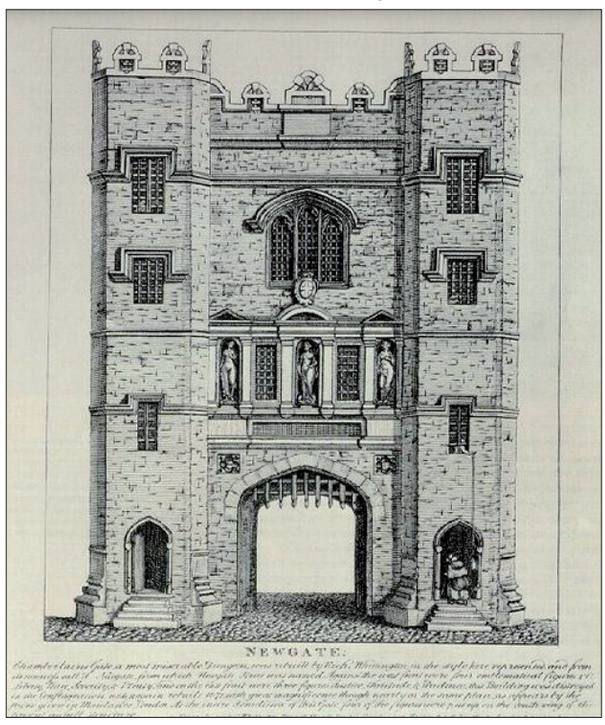
In 1750 there was a major outbreak of Gaol Fever (probably typhus) which carried off the Lord Mayor and 40 odd sundry other worthies. The fever was attributed to the smell of the prisoners and, after that outbreak, it became the norm for each judge to carry a posy of sweet smelling flowers. In addition herbs were placed on the bench. These were known as "strewings" since they were strewn along the bench. Miraculously there was never another major outbreak of Gaol Fever. From this comes the tradition whereby, when the Lord Mayor attends the court in the summer months, all the judges are supplied with a posy of flowers. The fact that a primitive air extraction system was fitted to the building at that time may just have had slightly more to do with preventing disease but why let the facts spoil a lovely tradition.

In the Gordon riots of 1780 the prison was broken into and set alight. The felons were freed, including some who were due for execution the next day. Subsequently Gordon lodged in Newgate and eventually died there.

I am frequently asked if we have any ghosts to which, of course, the answer is yes. Firstly we have a Lady in White who has been seen in the area that now houses the Probation Service. The ghost has not only been seen but, at the start of the day in winter months, has been known to turn the lights on. The ghost is said to be that of Elizabeth Dwyer who, in the 19th century, was a "baby farmer" (what I suppose would now be called a foster carer). Elizabeth was paid by the local authority to look after orphaned children and, whilst she rather liked the money, she was less keen on the children and drowned them in the Thames. Brought before the court here she was duly convicted and then hanged in Old Bailey.

Another ghost story concerns a gentleman called Scholler who was incarcerated in Newgate Prison in the 14th century. He must have been quite a big chap as his fellow prisoners killed and then ate him, describing the meal as "passing fyne meat". As revenge it is claimed that Scholler returned in the form of a black dog and terrorised Warwick Square. In my 20 years I have seen urban foxes and squirrels but have yet to see a black dog.

Stephen Jones is Keeper of the Old Bailey.



One hundred Years in the Making

Amanda Pinto Q.C. introduces us to the Bribery Act 2010

The Bribery Act 2010, after considerable debate and procrastination, replaces the existing Common Law offence and four pieces of legislation, three of which are 100 years old. What will be the effect in practical terms of this new piece of legislation? The steer for reform at the turn of the 19th century was the burgeoning opportunity for commercial businesses to gain unfair advantage through corrupt payments to private authorities and companies. Now the British government has sought to consolidate and adapt corruption law for the current environment, reacting to pressure from and commitments to the international community.

In 1994, the Council of Europe concluded that corruption posed a serious threat to fundamental values and, by 1997, many EU countries (including the United Kingdom) had adopted "20 Guiding Principles for the Fight Against Corruption" which included the aim of "co-ordinated criminalisation of national and international corruption". In 1999 the OECD Anti-Bribery Convention was the first international agreement to outlaw foreign bribery. In force in the United Kingdom from 2004, the Criminal Law Convention on Corruption's principal aims are to harmonise the definition and criminalisation of corruption offences and to facilitate effective international cooperation in the investigation and prosecution of these offences.

In force this autumn

The Bribery Act 2010 received Royal assent on April 8, 2010 and will be in force from the autumn. The Act can conveniently be divided into four offences with corollary sections: bribing another person; offences relating to being bribed; bribery of foreign officials and the corporate offence of failing to prevent bribery. Despite the absence anywhere of the word "corruption", it has been suggested that, with the exception of the corporate offence, nothing has changed very much.

Breakdown

Offences of bribing another: section 1 creates an offence where a person offers, promises or gives a financial or other advantage to another and intends that advantage either to induce the person to perform improperly a relevant function or activity or to reward the person for the improper performance of such a function or activity [case 1] or where he knows or believes that the acceptance of the advantage would of *itself* constitute the improper performance of a relevant function or activity [case 2]. In either case it does not matter if the person to whom the advantage is offered and by whom the function or activity is done is one and the same person.

Offences relating to being bribed: section 2 creates offences where a person requests, agrees to receive or accepts an advantage: intending that in consequence a relevant function or activity should be performed improperly [case 3]; or when the request, agreement or acceptance *itself* constitutes the improper performance of a relevant function [case 4] or as a reward for the improper performance of a relevant function or activity [case 5]; or where, in anticipation or in consequence of a person requesting, agreeing to receive or accepting an advantage, a relevant function or activity is performed improperly by him or another at his request, or with his assent or acquiescence [case 6].

A relevant function or activity to which the bribe relates is covered by s.3 and consists of two elements: first, it is one of a public nature or connected with business (which includes a trade or profession), in the course of a person's employment or performed on behalf of a body of persons; secondly, the person performing the function or activity is expected to perform it in good faith or impartially, or he is in a position of trust by virtue of performing it.

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Improper performance of a relevant function or activity is defined in s.4 as one which is performed in breach of a relevant expectation or which is not performed at all where that, in itself, is a breach of a relevant expectation. The expectation relates to the relevant function or activity and its performance not in good faith, or not impartially or in breach arising from the position of trust. The expectation test is effectively that of the reasonable person in the United Kingdom (even if the bribery happens overseas or in a specialised market). What would the reasonable United Kingdom person expect in these circumstances? This has two important consequences: first; it is a jury test, not a matter of law for a judge to determine; secondly, the only way in which local custom or practice can be taken into account is if "… it is permitted or required by the *written* law applicable in the country or territory concerned". This will rule out a defence plea at trial that "this is what you have to do in the industry to win the contract" or "all working in this part of the world have to make a payment to an official to get the permission granted".

Bribery of a foreign public official, is an offence contrary to s.6. Although only in respect of the briber, it is notably broad in ambit both in what it criminalises and jurisdictionally. It is an offence for a person to bribe a foreign public official [F], to influence his decision as a public official, intending to obtain or retain an advantage in business; business includes trade or profession. A person bribes the foreign public official if he offers, promises or gives an advantage to F or a third party by agreement with F, and F is neither permitted nor required by written law to be influenced in his capacity as a foreign public official by the offer, promise or gift. F is a person holding a legislative, administrative or judicial position anywhere outside the United Kingdom, who exercises that function for the country (or territory) or for any public agency or enterprise of that country or is an official or agent of a public international organisation. A public international organisation is defined as an organisation whose members are countries, governments, other international organisations or a mixture of these. Thus it can easily be appreciated that the net is thrown wide and that the Act is more far-reaching than the Foreign Corrupt Practices Act (FCPA), the US equivalent legislation. Furthermore, it is unlikely that, whatever local custom may be, this sort of conduct is either permitted or required by written law. In consequence, the prosecution will simply have to prove the fact of the bribe, the intention of the briber and the position of the recipient to prove a prima facie case.

Jurisdiction

The jurisdiction of the UK courts to entertain offences under ss.1, 2 and 6 of the Bribery Act is extremely wide: there is jurisdiction if *any* act or omission forming part of the offence occurs in the United Kingdom; but where the person has a close connection with the

United Kingdom, there is also jurisdiction even where all acts or omissions occur overseas but where, had they occurred here, they would have formed part of an offence. A close connection with the United Kingdom means a person who is a British citizen, passport holder or ordinarily resident in the United Kingdom (s.12(4)), or any business incorporated in the United Kingdom or a Scottish partnership.

Corporations

The new "**corporate**" **offence** is draconian. Section 7 provides a strict liability offence of failure of a commercial organisation to prevent bribery—it need not be a corporation at all. The Act provides that an organisation is guilty of the offence if an associated person bribes another intending to obtain or retain business or a business advantage for it. An associated person is anyone who performs services for or on behalf of an organisation, so all employees, agents and subsidiaries are caught. Liability for this offence obviates the exigencies of the doctrine of identification. For most criminal offences the guilt of a corporation is proved only when the guilt of a person "identified with the company" is proved first. The directing mind and will of the company is shown by that of its officers (or equivalent); but under s.7, no such constraint is necessary.

Once a s.1 or s.6 offence is proved to have been committed by an associated person, the company is prima facie guilty. It is likely that the burden on the defence will not be read down as an evidential burden, bearing in mind the prevailing international attitude to corruption; in spite of the Human Rights Act and its application to corporations, it will be for the organisation to prove its procedures are adequate not for the Crown to prove that they were not.

Moreover, the jurisdiction of the UK courts is not restricted as for ss.1, 2 or 6 offences. No act or omission need be done in the United Kingdom, nor need the organisation even be UK registered, it must merely have a business presence in the United Kingdom—"carries on a business or part of a business in any part of the UK". This could include, e.g. a branch office, or some retail outlets, or employees posted to the United Kingdom. Thus, a foreign business, with a local office in the United Kingdom is caught by this section if it has a third party agent in a foreign country who bribes someone in that country, even where no act or omission by the company has occurred in the United Kingdom. Indeed, the UK presence may have nothing at all to do with the bribery. The mere presence in the United Kingdom of the organisation gives the courts here jurisdiction to hear the case. This is a phenomenal extension of domestic limits and quite beyond the ambit of the FCPA.

Extensive

Jurisdiction exceeds the US model in two further significant ways: **facilitation payments** are caught by the Act. Also called "speed" or "grease" payments, these are characteristically small unofficial payments made to secure or expedite the performance of a routine or necessary action to which the payer of the facilitation payment has legal or other entitlement, for example to speed up the provision of a licence or consideration of an application. This contrasts with the FCPA which specifically exempts such behaviour from the criminal regime. Those opposing its presence in the Bill considered that it might put UK businesses in a disadvantageous position vis-à-vis their US counterparts. However, the Act is in line with the OECD's call in December 2009 for member countries to prohibit such payments.

The fact that a company may not have been negligent in its anti-bribery operations provides no defence (unlike the FCPA which requires the prosecution to prove negligence). Once the offence is made out, the only defence is for the organisation to prove that it had **adequate procedures** in place to prevent the associated person from undertaking the conduct. There has been debate about what that will mean in practice: Professor Sullivan of UCL recently suggested that the standard set for a successful defence may be relatively low. On the other hand, may it not be that, akin to health and safety legislation, a finding of bribery might tend to indicate that the procedures were in fact inadequate to prevent the associate from undertaking the conduct falling foul of the legislation? Only experience and interpretation of cases going through the courts will provide an answer.

Guidance

The Secretary of State is obliged to publish guidance about the procedures which organisations must put in place (s.9). Until this is done the provision (and, some argue, the Act) cannot be brought into force. It is understood that guidance is likely to be published this summer. However, it is not going to be prescriptive. When the Bill was going through the House of Lords the government indicated that: "in order to provide organisations with the necessary flexibility to develop procedures appropriate to their own circumstances and business sectors, we intend that the guidance will be indicative by setting out broad principles and illustrative good practice examples of 'adequate procedures' rather than detailed and prescriptive standards". This has the benefit of being adaptable for the many different sorts and levels of organisations which might be affected, but does not provide a template for business to follow.

Those looking to advise clients on the adequacy of procedures might wish to consider the OECD "Good Guidance on Internal Controls, Ethics, and Compliance", as well as the FCPA guidance in the 2009 Federal Sentencing Guidelines Manual, both of which are instructive. They provide for a culture of compliance within the organisation from the most senior level down, in terms of knowledge, effective compliance and the appointment of specified individuals responsible for the day to day running of the programme. Transparency International has also published Anti-Bribery business principles and the GC100 has prepared an anti-corruption compliance document.

The SFO

What should one make of the "Approach of the SFO to dealing with overseas corruption" as stated on their website (as at the time of writing)? This encourages self-reporting and has a list of "corruption indicators". In the light of the cases of *Innospec* and *Doughall* in which courts have criticised the SFO for compromising serious cases of international corruption, it is uncertain what the status of this guidance can properly be. Despite efforts by the SFO to set itself up as a type of regulator as well as a prosecutor, it has neither statutory foundation nor an approved framework for the courts to assess. Quite where this leaves the SFO guidance on self-reporting is unclear, although recently Richard Alderman, its Director, said that the SFO considered it had two functions: "to provide help and support to ethical businesses in staying clean of corruption" and, on the other hand, vigorously to pursue those organisations which use bribes in business; he said he welcomed the assistance the courts had given in those cases.

What is certain is that even in the current economic climate the prosecution of corruption has cross-party domestic and international support. With a third of the SFO's budget set aside for dealing with corruption cases, there is no doubt that businesses must be prepared to cope with the new regime which the Bribery Act 2010 provides.

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Evidence of Bad Character of a Non-Defendant: New Guidance on the "Substantial Probative Value" Test

Abigail Bright

Abigail Bright and Kakoly Pande outline the principles

The Court of Appeal in *Braithwaite* [2010] EWCA Crim 1082 (Hughes L.J., Maddison, Thirlwall JJ.) has sharpened the "substantial probative value" test in CJA 2003 s.100(1)(b). It considers what might fall to be admitted as a "matter in issue" where a bad character application relates to a non-defendant in connection with "mere allegations". The judgment is welcome as a succinct statement on the correct approach for trial judges in this anxious area of criminal evidence.

Section 100 of the 2003 Act provides:

"(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole, or

(c) all parties to the proceedings agree to the evidence being admissible."

1. Appeal point in *Braithwaite*

Stephen Braithwaite appealed his conviction for murder (before HHJ Radford at Snaresbrook Crown Court). On the Crown's case, Braithwaite had fatally stabbed the 17-year-old deceased following an altercation with him and his friends in the street. At trial, self-defence was asserted on the basis that the aggressors had been the deceased and his friends. Those friends appeared as Crown witnesses. Apart from convictions, there were also disclosed police (CRIS) crime reports of further incidents in which those witnesses had been under investigation. A defence application was made, under s.100(1)(b), to cross-examine those witnesses as to those certain unproven matters recorded against them. They comprised complaints centering on use of violence and public disorder. No criminal proceedings had resulted for lack of evidence.

The appeal, unsuccessful in the event, was based on the trial judge not having allowed the defence to raise those allegations against prosecution witnesses as "matters in issue" for cross-examination (s.100(1)(b)). The judge had allowed all witnesses subject to that defence application to be cross-examined as to previous convictions, cautions and penalty notices for violence. His reasoning, approved on appeal, was that those proven antecedents were relevant not only in terms of credibility but also as to the issue of whether it had been the defendant or the deceased and his friends who had instigated the violence. As identified on appeal, the case "… relied significantly on the evidence of the deceased's group. Of the nine [Crown witnesses] called, four had some previous history of violence or disorder" (para.5).

2. Approval of the trial judge's approach

The trial judge had correctly drawn a distinction between (a) conduct resulting in convictions, cautions and penalty notices and, differently, (b) material contained in police crime reports. The appellate court confirmed that those reports provided no proof of guilt. It followed that they were "most unlikely" to have any substantial probative value at trial. The thrust of the *Braithwaite* court's reasoning is at paras 13–17 (Hughes L.J. giving the leading judgment). If the conditions satisfying the test under s.100(1) were met, the trial judge enjoyed no residual discretion to refuse to admit the evidence. In itself, this is a significant statement asserting the limits of judicial discretion. The court then went on to consider the first relevant question at trial.

Kakoly Pande

3. First question: does the evidence "substantially go to the point on the issue in question"?

The task for the judge was to ascertain whether the evidence "substantially went to show the point which the applicant wished to prove on the issue in question". Often, but not invariably, the matter in issue related to the propensity of the person in respect of whom the application was made to act in a particular way, or else his credibility (para.12). On the facts of *Braithwaite*, the matter in issue did go to propensity, "… even if the witness in question gave rather limited evidence implicating the defendant in the offence, since it was central to the defence that he had been the victim of unprovoked aggression on the part of the group which included these witnesses" (para.13). The matters in issue were clearly of substantial importance to the case. The probative value of the evidence relied upon fell to be assessed in the context of the case as a whole. The same result, the court held, could alternatively be reached by considering whether or not a matter in issue "adds significantly" to other more probative evidence directed to the same issue (para.12).

It is not clear what the appellate court's indication of this alternative route to admissibility adds to the existing question, under s.100(1)(b)(ii), of whether the issue is of substantial importance *in the context of the case as a whole*. The court's mention of "adds significantly" seems best read down simply so as to confirm the statutory position by way of a precise, practical example. If this is right, "adds significantly" is a means by which to check or safeguard the more general, overarching concern that evidence must be substantially important in the context of the whole case.

4. Second question: whether "substantial probative value"

The next question was whether the material had "substantial probative value" in relation to those issues (credibility and propensity). In answering this, the court considered two separate scenarios—one of which potentially rendered a mere allegation admissible under s.100(1), where the other did not. In the first scenario, evidence was given of an assault by a live witness that the complainant, unprovoked, had attacked him in similar circumstances to the instant

case. The feasibility of this approach is doubted, in section 6 below, due to the unavoidable pitfall of satellite litigation. The second scenario, as in the evidence of the CRIS reports, represented "no more than evidence that a complaint or allegation had been made" (para.17).[1] It was not evidence of commission. Its admission therefore fell to be appraised "at best" as hearsay. Jury difficulties in assessing such evidence rendered "rare" the likelihood of its being judged to be of substantial probative value (para.20).

Moreover, the unproven nature of mere allegations rendered such evidence dubious by reason of its origin, as well as risks with its treatment as hearsay:

> "[I]f the complainant has failed to support the allegation that robs it of a great deal of probative value. If, in addition, there has been a decision by the police or CPS not to pursue the allegation or even, as in one instance in the present case, the formal acceptance of a verdict of 'Not Guilty', the probative value is even further reduced." (para.20)

Section 109 of the 2003 Act had no application where—as in this case—the material relied upon was not evidence that the witness did the act alleged. Moreover, "the assessment of substantial probative value has to be applied [only] to evidence that the conduct relied upon has occurred" (para.17).

5. Exercise of "judgment" by the trial judge, not discretion

The Braithwaite appellate court might well have stopped there, having fully approved the trial judge's approach. However, it continued so as to apparently replace recourse to discretion under the statutory scheme with the exercise by a trial judge of what that court termed "judgment". At para.12, the court stated (emphasis added):

> "What section 100(1) requires, except where there is agreement between the parties, is *not discretion but judgment on the part of the judge.* In a case such as the present, where "important explanatory evidence" is not in point, he must assess:
>
> a) the issue to which the evidence goes (s 100(1)(b)(i)),
>
> b) whether that issue is of substantial importance in the context of the case as a whole (s 100(1)(b)(ii)) and
>
> c) whether the evidence has substantial probative value in relation to that issue (s 100(1)(b))."

It added that this assessment for the trial judge was, of its nature, "highly fact-sensitive in each case" (para.12). The focus is on whether the evidence in question *substantially* goes to prove the point which the applicant wishes to prove on the issue in question. This simple reference to the familiar statutory wording in this area does not serve to flesh out what distinguishes "judgment" from discretion. The court did, however, reiterate the statutory distance between this test and the "relevance" test applicable to defendants under gateway (d) of s.101(1). At a minimum, then, any exercise of judgment in determining admissibility in respect of mere allegations against non-defendants must clearly not trespass on "relevance" territory. It is at least (and self-evidently) more stringent than that, but now seems to import a more global analysis than previously seen in the context of bad character evidence against non-defendants.

The reasoning behind this view is as follows. The *Braithwaite* appellate court considered its brethren decision in *Bovell and Dowds* [2005] EWCA Crim 1091. That appeal had dealt with the safety of a s.18 conviction in the post-trial knowledge that the complainant had himself been the subject of a s.18 investigation. That court had satisfied itself that the making of "mere allegations" was insufficient to pass the s.100(b) threshold test. However, the *Braithwaite* appeal court went further than the "important note of caution" it recognised the *Bovell* appellate decision as having sounded. It distinguished the position in *Bovell* itself whereby "all that the applicant seeks to adduce is the fact that someone else has made a complaint" (para.19, emphasis added). The *Braithwaite* appeal court specifically emphasised that "whenever a bad character application is made, the court must look at the *nature of the evidence*" (para.19, emphasis added). This is in light of the reality that trial judges must "examine all the different types of evidence which a party might attempt to adduce" (para.19).

It remains to be seen whether submissions by counsel will tease out the purported difference between "judgment" and simple discretion. Reference to the "nature of the evidence" may inform this exercise but it seems a rather ambiguous target for criminal advocacy at which to take aim.

6. The "possibility" of a mere allegation having substantial probative value

The *Braithwaite* appeal court chose to "leave open the possibility" that a live witness in an assault case "might in some circumstances (assuming truth) be assessed as having substantial probative value" (para.19). No further guidance was given as to when a "mere allegation" might be adjudged to have cleared the s.100 test. The court simply noted that that possibility had not arisen in the instant decision. The court did, however, raise the spectre of two circumstances where mere allegations might be admissible under s.100(b). These were: (a) the giving of live witness evidence "in circumstances very similar to those before the jury" (para.19), and (b) "if hard evidence of the allegation were to become available and if that is what the applicant were to seek to adduce" (para.20).

But neither of these scenarios looks navigable under s.100, not least because the court's caveat as to "assuming truth" (see paragraph immediately above) simply begs, rather than answers, the question of admissibility. In this respect, the reasoning of the appeal court in *Miller* [2010] EWCA Crim 1153 helps greatly, in underscoring what it identified as the "same insuperable problem" that had arisen in *Bovell*. The *Miller* appeal—decided in ignorance of *Braithwaite*—was heard on materially the same point, in that the appellate contended the trial judge should not have permitted cross-examination of the bad character of the appellant's friend, a non-defendant. (It was also heard on the further ground that, having done so, the judge had failed to give adequate directions to the jury on that evidence).

The *Miller* appeal considered much more fully the Bovell appellate approach. In so doing, it seems to have to shut the door left ajar by the *Braithwaite* appeal court. *Bovell* had referred expressly to the ratio of *Hanson* [2005] 2 Cr.App.R. 21, disproving that the admission of evidence where admitting it gives rise to satellite litigation (at para.12 of that judgment). What the *Bovell* court had recognised as satellite issues included "the aspersion on the credibility of the victim, the want of independent confirmation of his account, and the fact that he had withdrawn the allegation" (para.21). It was on account of such excursions that the *Miller* court saw as "insuperable" the problem of admitting evidence rooted in "mere allegations".

It is submitted that this problem can not be overcome by the giving of live witness testimony which orally explores mere allegations, contrary to the *Braithwaite* appeal court having left open this door. Live witnesses remain susceptible to cross-examination pursuing satellite matters. Further, the *Braithwaite* appeal court itself noted (at para.21) that the "especially desirable" procedure of admitting bad character evidence as agreed would generally be unavailable, absent any means of proof. "Insuperable" is, therefore, an apt description for the problem of seeking to admit evidence of mere allegations: it can not be cured except intractably by means of "trial within a trial".

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1 In asserting this point, the *Braithwaite* appeal court went too far in doubting that evidence of mere allegations was indeed "evidence" proper. The best approach, following the opening line of the first chapter in Professor Ian Dennis' *The Law of Evidence* (London: Sweet & Maxwell, 2007) is to recognise that "Evidence is information". Nothing is gained by disputing the fact that information contained in police CRIS reports is evidence. What is at issue is whether and how that information may be admitted (under s.100).

The Legal Profession in Pakistan

Reema Omer

Reema Omer comments upon some surprising differences

Unlike England and Wales, Pakistan has a fused legal profession; the only recognised legal profession is that of an "advocate" who is responsible for working on legal matters from beginning to end. It is in fact unlawful for any other person to solicit or obtain professional employment for advocates, and division of fees for legal services is also only permitted with other advocates. While some lawyers may choose not to appear in court and "specialise" in preparatory work instead, most choose to do both.

Becoming an advocate

Pakistan has made it surprisingly easy for aspiring lawyers to become advocates. According to the Legal Practitioners and Bar Councils Act 1973, candidates who have successfully completed their LLB degree have to work with advocates with 10 or more years of experience as their "apprentice", assisting them in at least 10 cases. Following this pupillage of sorts, they have to pass a written examination as well as a viva, which are held quarterly under the directions and supervision of the Enrolment Committee of the each Provincial Bar Council. Following that, all new advocates must join their respective Bar Councils before they become eligible to start their legal practice.

Not all lawyers, however, have to undergo the above-mentioned procedural requirements—there are some very striking exceptions. According to the Punjab Bar Council Rules, all candidates with LLM degrees from recognised universities, both local and international, as well as any other degrees which are declared as equivalent to the LLM; applicants who after having been called to the Bar in England have completed a full one year training with a senior counsel in England; applicants who have held judicial office in Pakistan for five years or more or have worked for an equivalent time in any other capacity where their chief task was legal interpretation or drafting; and lastly, applicants who are enrolled as advocates in any other jurisdiction and have practiced for at least a year, are exempt from the pupillage and examinations.

Exemptions

The most perplexing exemption in the above list is the blanket waiver of any sort of practical experience requirement for those who have completed an LLM degree. It is difficult to understand how the LLM, being an academic degree, teaches students practical legal skills and prepares them to appear before court, or in any way enhances their abilities to justify the superior position of LLM holders to lawyers with just an LLB degree.

This exemption raises a few more questions. Firstly, very few Pakistani universities offer the LLM, and it seems that the waiver particularly caters to students with foreign LLM degrees, many of whom come from elite backgrounds. Given the already stark divisions between public/private, English/Urdu medium education in Pakistan, this waiver further reinforces class divides, benefitting those who can afford expensive degrees abroad, but working against the vast majority of lawyers who only have local LLB degrees. Secondly, with the popularity of "external" (University of London) LLB degrees in Pakistan, where students are taught the law of England and Wales alone, it seems quite possible that many lawyers who are given "advocate" status and hence are permitted to represent clients in court have no previous knowledge whatsoever of Pakistani Law, as the combination of an external (University of London) LLB and an international LLM gives students no exposure to even substantive Pakistani law, let alone training them in procedural and skill-based matters.

The exemption relating to barristers is equally troubling. The Bar Professional Training Course (BPTC) is the favored post-LLB step for external LLB students in Pakistan, as they are eligible for the BPTC without any law conversion course. With the limited funding options available for the BPTC, this is available perhaps almost exclusively to lawyers from elite backgrounds who can afford the expensive course. Further, while in the England barristers need pupillages and tenancy in barristers' chambers to practice, in Pakistan no such requirement exists as "advocates", unlike barristers, are free to work individually without associating themselves with a set of chambers. The requirement for barristers to complete one-year training in England also exists only on paper—in practice, passing the BPTC is all a lawyer needs to be on the advocates roll in Pakistan, placing barristers in a much better position in a foreign country than the home of their degree.

Fourteen examinations

It may be argued that Pakistani lawyers do not need specialised courses such as the Legal Practitioner's Course or the Bar Practitioners Training Course and subsequent training or pupillages, as the required LLB curriculum consists not only of substantive law subjects but also procedural and skill-based courses. A Pakistani LLB, unlike the English law degree, consists of at least 14 examinations, with mandatory courses such as pleadings and conveyancing, civil and criminal procedure, legal ethics, and the law of evidence.

While the LLB curriculum can certainly help lawyers in the practical field, it is difficult to see how it can prepare them to take the responsibility of an entire case on their own at the very start of their careers. Further, the differences between local and foreign law degrees adds to the confusion as to why barristers and LLM degree holders with external (University of London) LLB degrees are treated as superior to those with local LLB degrees and six-month pupillages—if anything, it should be the local LLB which should be given preference!

Pupillages

Perhaps a word also needs to be said about the six-month pupillage required of LLB students. In their six-month pupillages, it is normal for pupils to remain on probation and receive extremely limited remuneration, if they are paid anything at all. Competition amongst lawyers is severe, and only the lucky few can hope to get pupil masters who actually teach and train. Also, it is surprising to note that the six-month pupillage replaced a 12-month pupillage requirement in 1998 as a result of an amendment to the Legal Practitioners and Bar Council Act 1973. While this change has certainly made it easier for young advocates to establish independent practices, the short duration raises questions about the usefulness of having a pupillage at all.

Unprepared

The impact of these rules on the legal profession cannot be ignored. On the one hand, lack of training and guidance in the initial period of practice greatly hampers advocacy skills. No matter how brilliant a lawyer is as a student, she would find herself unprepared for the actual practice of law unless properly guided and taught the tricks of the trade. Without a formal system in place that makes pupillage an attractive learning platform rather than a pointless inconvenience, it is understandable why those who can avoid it would choose that option. On the other hand, as it exists, the system works against the credibility of the legal profession at large as well. With lack of legal aid and extremely limited tortuous liability for professional negligence, the client in Pakistan is extremely vulnerable and completely at the disposal of her lawyer. Allowing fresh law graduates who are accountable to no-one (except perhaps in a limited way to their relevant Bar Council) and have no real practical experience to represent people in court, people who often have their lives and livelihoods at stake, may lead to an exploitation of their vulnerability.

Reforms needed

The problems plaguing the Pakistani legal system are multi-faceted, and of course it would be naïve to put the entire blame on the training of advocates alone. Training, however, is perhaps a convenient way to start, and has the potential to pave the way for more drastic change. The right kind of initiation system based on equality and merit rather than a blind infatuation with all things foreign, a system which instills amongst young lawyers pride in their profession and a sense of camaraderie with their fellow advocates, could greatly help the profession. The Pakistan Bar was paramount in liberating the higher judiciary from the shackles of military rule; it is certainly capable, if the will exists, to call for reform within its own ranks.

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