The receiver and the corporate veil Self-defence and the force of the law

CBQ

CRIMINAL BAR QUARTERLY

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Contempt in the News

Clarifying the reforms in social media

Asperger Syndrome

The provisions for defendants

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All submission and editorial inquiries to
John Cooper, 25 Bedford Row, London, WC1R 4HD
[tel] 020 8686 9141 [email] jgcooper58@yahoo.co.uk
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Magazine Editor: Diana Rose
[email] diana.rose@lexisnexis.co.uk [tel 020 7400 2828]

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

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Friends in the House

Editor
John Cooper QC

It is ironic that, at a time when MPs are attacking the criminal Bar in misinformed and misleading ways, they seem to be calling upon our services with increasing frequency.

Perhaps this is good news for the Bar because it will enable some politicians to see at close quarters the diligence, expertise and courage exemplified by the criminal Bar, day in, day out in courts throughout the country.

It should also be stressed that there are an increasing number of people in Parliament, who recognize the value of what we do and support the work we are doing protecting publically funded representation. It should not be assumed that we are without friends in elected quarters.

It is so important that we get our message across and Chair, Michael Turner QC is extremely persuasive and effective, whether it be in Parliament or just as importantly with the public at large.

The recent debate on the value of the jury system is an example of how vital it is that we get our views out there.

The first edition of 2013, of *CBQ* is packed with thought provoking articles from a wide range of criminal practice, for instance, Geraint Jones QC and Marc Glover write on the Proceeds of Crime Act and Professor Penny Cooper on the Gary McKinnon case and the issues provisions for defendants with Asperger Syndrome. ■

25 Bedford Row

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Protecting the Public Interest

Chairmans column

Michael Turner QC

If the exposure of the culture of the private sector in the running of publically funded services in the health sector, has not taught politicians from all parties a very costly lesson, nothing will. The report by Robert Francis QC catalogued failures at every level, resulting in the unnecessary death of 1,200 people "*failed by a system which ignored warning signs and put corporate self-interest and cost control ahead of patients and their safety*". The current proposals envisage handing publically funded legal services to the private sector. If the private sector values profit over lives, what will they do when they are charged with defending someone's liberty? There can only be one answer.

Is there a business in the world that institutes cuts and then fails to assess the effect of those cuts on its profitability? Of course there are none and yet that is precisely what this and the last Government have done when it comes to its cuts in the legal aid sector. The costs of delays in our criminal system far outweigh any costs savings.

Delays caused by a system of disclosure that is now broken almost beyond repair. I was invited to discuss with the Directors Office modification to the Criminal Procedure Rules. I was present with Brian Altman QC and a senior solicitor. They informed us that it was their intention to expand upon their system that only one lawyer would be tasked with understanding the non-disclosed material in a given case. That lawyer would not be trial counsel and would invariably not be present during the trial. We pointed out that in those circumstances the Crown's continuing duty of disclosure could never be met. Their response was to inquire whether we could suggest any modification to the Criminal Procedure Rules which would cure that situation. You can guess our response.

Delays caused by translators who cannot speak the language of the defendant provided originally by Applied Language Solutions, a private company that employed translators without qualification or CRB check and that obtained the contract by falsely claiming it had reputed translators on its books when it did not. Its contract has been taken over by Capita Translation Services, which provides the same service or lack of it.

Delays caused by a partly privatized prison service which has cut so many corners to maximize its profit it has one van servicing five court centres. The Government is currently proposing to return half of all magistrate prosecutions to police officers. Some of you reading this will remember how disastrous that system was some 30 or so years ago leading to the formation of the Crown Prosecution Service.

Taxpayer Conned

The taxpayer is being doubly conned. They pay just as much as they ever did for a legal aid service which lets down victim and defender alike. The Prime Minister has responded to the scandal in the Mid-Staffordshire Health Trust by indicating that nurses will now be paid on performance in relation to patient care. Before wrecking the Health Service nurses and doctors did not have to be incentivized to do their work; they were part of a vocation and a profession whose only driver was the care of patients. The parallels with what has happened to the Health Service and what is about to happen to criminal legal aid are, I hope. obvious. We are now regulated by the BSB and the LSB which have either no concept of the public interest or no care for it. The BSB is intent on introducing QASA, which is said to be a quality assurance system, it is nothing of the kind. Its only purpose is to provide a so called quality badge so that the company which gets its hands on the legal aid contract can fulfil its duty to the client, by providing them with a suitably accredited advocate. That the client will only get once choice of advocate is clear from the LSB's attack on the cab rank rule. They propose replacing it with the following, borrowed from the New York State Bar: "10. You may not be refused representation on the basis of race, creed, colour, age, religion, sex, sexual orientation, national origin or disability." They argue: "This rule is clear and unambiguous. It protects clients and it can apply to all lawyers, and we see an equivalent in the *SRA Handbook*. It has no need of exceptions and exemptions, which presently serve only to confound and confuse clients. For the purposes of the client and consumer representation will be supplied and access to justice and the upholding of the rule of law would be ensured by the profession. It would be practicable, within the English context, to augment the rule by including references to type of client, the nature of the case/crime or the defence required. These would deal with the original aspects – unpopularity of clients and heinous nature of crimes – of the cab rank rule that have since been overshadowed by arguments over funding."

The differences between the cab rank rule and the new proposal are glaringly obvious. One dictates that a barrister shall not refuse a case for a proscribed set of reasons, race, gender etc. The cab rank rule requires a barrister to take a case that is within their knowledge and expertise providing they are free to do so. There could be nothing clearer. It effectively outlaws any form of discrimination whether it is in the list or not. The purpose behind the proposed change is to ensure that when the Bar is forced into work with the likes of Eddie Stobart, because they have the contract, the public will be forced to accept the barrister they are given, provided he or she has the necessary QASA badge. The proposed rule would allow an Eddie Stobart employed barrister to turn a case down on the basis that the consumer has been offered a suitably QASA badged advocate but turned him/her down, the cab rank rule would not. Freedom of choice for the consumer will disappear, which of course is precisely the situation with publically funded cases in the US.

The public needs us to protect it from a threat to it's rights that we can see coming over the horizon but it cannot. Lord McNally, insists that all the Government can afford and indeed all the public deserve is a Mini-Cooper service as opposed to a Rolls-Royce one. How insulting is that to victims of crime, when the Government chooses to spend taxpayers' money on a silk and

leading Treasury Counsel to prosecute the perverting of the course of justice case over a speeding fine and yet insist in instructing in-house juniors to prosecute in murders. The real crime of the destruction of a system of justice which at one time was admired throughout the world is that it is entirely unnecessary. We have suggested the following ways in which the money can be found to provide a public service which can be the envy of the world again:

Levy on Banks

Ninety *per cent* of the criminal legal aid bill is expended on one *per cent* of cases, most of which are frauds perpetrated on the banking sector. It is the banks' systems or lack of them which allow these frauds to proliferate; why should the tax payer pick up the bill for a banking sector which refuses to ensure that its systems cannot be breached? A levy on offending banks would in itself allow for a Rolls-Royce service.

Returning the Magistrates' Court to the Magistrates' Courts Association

In 2005, the magistrates' courts were taken into the MoJ at a cost of well over £1bn. Hitherto the Magistrates' Courts Association had provided the country with the best example of David Cameron's Big Society in action. Returning the magistrates' court to its pre -2005 position would once again allow for a proper legal aid service.

Use of Restrained Assets

The current Government has refused to reveal how much it has taken in restrained assets.

The fact is that many charged with crime could pay for their legal advice but are prevented from doing so as all their assets are frozen.

Why should the taxpayer suffer when there is money within the system which can be properly utilized to provide a service which used to be the envy of the world.

Zero Rated VAT on all Publically Funded Cases

The practice of charging VAT on publically funded cases is an unnecessary costly merry-go-round. The administrative saving would, we anticipate, be vast.

Scrapping the Victims Surcharge

A more insulting piece of legislation to victims of crime it is difficult to imagine. Having passed a life sentence with a minimum recommendation, the Judge is now required to order the defendant to pay £120 to the victim's family. This ridiculous piece of legislation has a real cost because someone is then tasked with the pursuit of the impossible.

We have a duty, I disavow the word discretion, to act now in the public interest, to prevent our publically funded system of justice being dismantled at no saving to the taxpayer and only profit for the politician and their friends in the private sector. ■

INSOLVENCY

Let the Receiver Beware

Preface

Application of the common law rules

Contributors

Geraint Jones QC & Marc Glover

In December 2010 the Crown Prosecution Service applied *ex parte* at the Central Criminal Court for the appointment of a Receiver and subsequently a Receiver Manager (pursuant to s.41 Proceeds of Crime Act 2002) in respect of the property of named individuals who were under investigation for suspected excise duty evasion. After a cursory consideration of the evidential material presented by the Crown Prosecution Service the Judge made an Order on December 6, 2010 that not only restrained the named individuals from disposing of their assets, but also appointed a Receiver over their assets. They each had a 20% shareholding in a company (E), which had an annual turnover in excess of £140m. Although there was no restraining order against E, the Receiver was appointed over all E's undertaking and assets on the basis that the corporate veil should be lifted and E's assets treated as if they were the property of those named individuals. The corporate

veil was lifted upon a tenuous evidential basis by a Judge who had spent about 30 minutes considering a large volume of material. Thus the commercial future of a substantial company and the employment of its 100 employees were put into serious jeopardy – an important commercial factor usually ignored by those who argue that such applications are designed to protect the "public interest". The paucity of that argument was later recognized by the Court of Appeal when the original order was quashed in February 2011.

When the *ex parte* Order was made, the Judge had to decide no more than whether there was a good arguable case that the named individuals had been involved in excise duty evasion and that the property of the company should be treated as their property. He could not at that interlocutory stage decide, as a fact, whether any particular assets were or were not "realisable property" within the meaning of s.48 Proceeds of Crime Act 2002 ("POCA"), which provides:

"The Crown Court may by order appoint a receiver in respect of any realisable property to which the restraint order applies."

By s.83 POCA defines "realisable property" as :

"Realisable property is –

(a) any free property held by the defendant,
(b) any free property held by the recipient of a tainted gift.

When the order of December 6, 2010 was appealed, the Court of Appeal [2011] 1 WLR 1519, (Hooper LJ, Openshaw J and Sir Geoffrey Grigson) held that it was "implicit" in the December 6, 2010 order that "the assets of the Eastenders group were realisable property held by the alleged offenders"; but the court went on to hold that those assets were not, even arguably, realisable property held by the putative defendants and that there was no proper basis for treating the property of the companies as if it was property belonging to the named individuals. In other words, there was no basis for lifting the corporate veil. The Court of Appeal quashed the receivership order as well as the restraint orders. The Receiver later asserted a *lien* over the assets of Eastenders for the amount of his remuneration and expenses accrued during the currency of the short receivership, relying upon the decision of the House of Lords in *Capewell v. H. M. Revenue & Customs* [2007] UKHL 2. In that period the Receiver had taken possession of £774,556.01 in cash. After the order was discharged by the Court of Appeal all the assets which had been under his control were returned, save for the cash over which he asserted a *lien* to cover his fees and expenses which he put at around £700,000.

In February 2011, the Court of Appeal [2012] 1 WLR 1519, had made trenchant comments about it being wholly inappropriate for applications of this kind to be dealt with by a Circuit Judge who could apply so little time to pre-reading and to scrutiny of the merits of the application. That view was endorsed by Lord Justice Laws in *CPS v The Eastenders Group v. Brandon Barnes* [2012] EWCA Crim 2436 at paras.73-74. The Management Receiver had run up a fees and expenses bill that exceeded £700,000. He had also received in excess of £700,000 in cash, the property of the company. After the decision of the Court of Appeal in February 2011, the affairs of the company reverted to the control of its Directors but the Receiver refused to return the cash to E, asserting his *lien* and claimed to pay his fees and expenses.

Prior to his appointment the Receiver had agreed with the Crown Prosecution Service that he would look to the receivership property for his fees and expenses. The application to the court had been made under s,42, POCA, which, so far as material, had replaced similar provisions that earlier appeared in the Criminal Justice Act 1988. Section 88(2) of the 1988 Act (the "stopgap") had provided for payment of a Receiver's remuneration and expenses by the prosecutor if (in effect) there were insufficient receivership assets or funds got in by the receiver from which he could be paid. However, the 2002 Act, in contrast to the 1988 Act, contains no such provision.

When the Receiver made his application to the court for a direction that he was entitled to be paid from the £700,000 cash held by him, and so enforce his claimed *lien*, unsurprisingly E resisted the application.

"Grossly Unjust and Disproportionate"

Initially the matter came before Underhill J. He accepted the proposition advanced on behalf of the companies by their counsel, Geraint Jones QC and Marc Glover, that it would be grossly unjust and disproportionate if a company whose assets should never have been made subject to receivership (as they were not, even arguably, "realisable property"), could be expropriated (or confiscated) in payment of the Receiver's fees and expenses, rather than such fees and expenses being paid by the party who had (wrongly) sought his appointment. Underhill J made an Order to the effect that the Receiver's fees and expenses should be paid by the Crown Prosecution Service on the basis that the 2002 Act could be "read down" so as to make the provisions of that statute compatible with art.1, 1st Protocol of the European Convention on Human Rights by requiring the party who had caused the fees and expenses to be incurred, to pay them. More properly it may have been that the common law should be developed to meet the justice of the situation.

He regarded such an outcome as the least that was necessary for doing justice between the parties involved. As Underhill J put it : "As I have already noted, the companies rely to a considerable extent on the effect of art. 1, and it is apparent from the cases cited above that the Court of Appeal has recognized that art.1 may have a role to play in the construction and/or application of the statutory provisions governing the Receiver's right to recover his costs and expenses. It accordingly makes sense to start by considering the submission that to make the companies liable for the Receiver's costs involves a breach of their art.1 rights; and to consider the specific statutory provisions in the light of my conclusion on that issue … In my view it would be a breach of the companies' rights under art.1 if they had ultimately to bear the burden of the Receiver's costs and expenses. Although *Hughes* establishes that the legitimate objects of the confiscation provisions may justify the adverse effects of a receivership order on third parties – see para.19 (2) above – that was in the context of an order which had been properly made, notwithstanding the eventual acquittal (or non-prosecution) of the alleged offender, and where the adverse effects on the third party were the consequence of his having the misfortune to share an interest in property with someone reasonably suspected of involvement in serious crime. But the situation seems to me fundamentally different where the adverse effect on the third party is the result not of his sharing property rights with the alleged offender but of his property being treated, wrongly and without sufficient evidence, as property in which the alleged offender has an interest. It does not seem to me that the public interest justification endorsed in *Hughes* has any application to such a case: the third party's assets are simply confiscated to fund the execution of an order that should not have been made in the first place." Underhill J's judgment examined the jurisprudence concerning the payment of receivers' remuneration in detail, starting with *Re Andrews* [1999] 1 WLR 1236 where Ward LJ reviewed the principal common law authorities relating to such remuneration, which the court found applied equally to the regime under the 1988 Act. The head note summarized the decision as follows:

"… that a receiver appointed by the court was an officer of the court, and was entitled to recover his remuneration and expenses from the assets under the court's control; that, by seeking the appointment of a receiver, a party did not thereby become liable for his remuneration, and the court had no power before the issues in an action had been determined to order either party to pay the receiver's remuneration; that a receiver's lien gave him a continuing right to possession of the assets even after the discharge of the receivership order, and he was entitled

to an order charging all the assets available to him during the currency of his receivership with the amount of his costs and remuneration …".

In that, case art.1, 1st Protocol had not been argued.

Underhill J also referred to the decision of the Court of Appeal in *Hughes v. Customs and Excise Commissioners* [2003] 1 WLR 177 (decided in May 2002, shortly before POCA was enacted) where restraint and receivership orders were made over the assets of a defendant under the 1988 Act. Those assets included assets held by a company of which the defendant was a 50% shareholder; the other shareholder being his brother, who was never charged. The defendant, and – it appears – his brother, sought to have deleted from the order the provision which entitled the receiver to reimbursement of his remuneration and expenses from the assets in question. Hooper J granted the application. The Court of Appeal allowed the receiver's appeal. The issues which had been discussed obiter in Andrews were considered more fully and as a matter of ratio. The Court of Appeal held that on the true construction of the relevant provisions (which were less explicit than those of POCA) the receiver enjoyed his common law right to recover his remuneration and expenses from the assets of the receivership notwithstanding the defendant's eventual acquittal. Simon Brown LJ said, at para.50 (p. 192 D-E): "… persuasive though at first blush the respondents' arguments appeared, and readily though I acknowledge the principle urged by [counsel] that any doubt as to the proper construction of expropriatory legislation of this nature must be resolved in favour of the defendant, I have come to the clear conclusion that the respondents' approach can be seen to misunderstand the scheme of the legislation and to be unsustainable. Statutory receivers are to be treated precisely as their common law counterparts save to the extent that the legislation expressly provides otherwise. The statute is not to be regarded as an entirely self-contained code incorporating nothing from the common law. The fact that, unusually (although not uniquely: consider such cases as *F Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry* [1975] AC 295 and *Attorney General v. Wright* [1988] 1 WLR 164) the prosecutor cannot be required to give a cross-undertaking in damages (see RSC O.115, r.4 (1)) does not constitute so fundamental a difference between statutory and common law receivers as to give rise to wholly discrete schemes for their remuneration."

Safeguard

In *Hughes,* Simon Brown LJ referred to safeguards said to be sufficient to make the expropriation of Hughes' funds towards the receiver's remuneration proportionate and within the margin of appreciation of domestic law. Simon Brown LJ opined that it was difficult to regard "the legislation is riding roughshod over the rights of innocent third parties;" failing to note that it was the application of the common law that achieved an unjust result. The writers suggest that any "safeguards" are more imaginary than real and that any result other than that reached in this case most certainly rides roughshod over the rights of a bystander. Arden LJ went some way to recognizing this by noting one possible lacuna in the 1988 legislation when she said, at para.68 (p. 196 F-G):

"A discrete issue arises about the absence of a right to compensation for defendants who were never charged and third parties who are affected by a receivership order where the defendant was never charged. Such persons have no right to compensation because s.89 (1) only applies if proceedings have been instituted but the defendant has been acquitted (or pardoned). It is not clear why these third parties and defendants are excluded from s.89 (1). The point has not been argued, but I would reserve for argument in a future case the question whether in a situation where there is a serious default by the prosecutor there would be a violation of Convention rights if compensation were not available for this group of persons." That particular lacuna has been closed by s.72 of POCA, but it is significant that Arden LJ contemplated that it might involve a breach of the rights of the defendant or a third party under art.1. In *Capewell v. Revenue and Customs Commissioners* [2007] 1 WLR 386 the issue, again, was whether a receiver appointed under the 1988 Act was entitled to a *lien* for his remuneration and expenses. The House of Lords held that he was, but the case was argued on a very narrow ground, namely whether the position as established in *Hughes* had been changed by the terms of r.69.7 of the Criminal Procedure Rules: it was not contended that *Hughes* was wrongly decided. Lord Walker, who delivered the only substantive speech, did, however, make some more general observations. He specifically endorsed the reasoning in *Andrews* and *Hughes* as to the applicability of the common law rules about receivership to the regime under the 1988 Act. He said, at para.26 (p. 395 E-H): "[The scheme of the 1998 Act] is for the receiver's remuneration and expenses to be paid out of the receivership assets, but in a way which counts towards satisfaction of any confiscation order, … If an individual subject to a restraint order is not ultimately convicted and made subject to a confiscation order, s.89 of the 1988 Act gives a statutory right to compensation in some circumstances. But Parliament has deliberately framed the right to compensation in narrow terms. That is an aggrieved individual's only right to compensation as such. He would not normally have the benefit of an undertaking in damages since (as Simon Brown LJ observed in *Hughes*' case, at para.50) a prosecutor cannot be required to give an undertaking in damages as a condition of obtaining the appointment of a receiver. An aggrieved individual's only other recourse would be to challenge the amount of the receiver's remuneration … . There is a similar scheme under the 2002 Act … but in these new provisions it is made perfectly clear that receivership expenses and remuneration are to come out of the assets subject to the receivership."

In para.27 (at p. 396 B-C) he observed: "A receiver takes on heavy responsibilities when he accepts appointment, and he is entitled to the security of knowing that the terms of his appointment will not be changed retrospectively – even if an appellate court later decides that the receivership should have been terminated at an earlier date."

Lord Walker ignored the fact that there is significant commercial competition amongst large accountancy firms to act as Receivers because of the substantial fees and business to be generated from such appointments. The court gave no consideration to where the burden of commercial risk should fall: that is, against the person seeking the appointment of the Receiver; the receiver himself; or a bystander whose assets might wrongly become "receivership assets".

The Court of Appeal (Criminal Division), [2012] EWCA Crim 2436, has now confirmed Mr Justice Underhill's judgment

(by a majority) on the basis that such a deprivation of property would not be "subject to the conditions provided for by law". The Judges in the majority did not expressly deal with whether such deprivation would offend the principle that any such deprivation can only take place if it is in "the public interest", but it should be observed that neither Judge in the majority indicated any dissent to the conclusion reached by Underhill J to the effect that such confiscatory deprivation would so obviously not be in the public interest that it would render it incompatible with art.1, 1st Protocol ECHR. Indeed, that would seem to flow from the fundamental proposition that no fair minded person could entertain the idea that it could be fair or just for a bystander whose assets wrongly become included in or referred to as "receivership assets", to have such assets expropriated towards the Receiver's costs and expenses simply to avoid the State having to meet such costs.

Important points to note are that :

The rule that a Receiver has a lien over receivership property, is a common law rule and has no foundation in statute.

Accordingly s.6 of the Human Rights Act 1998 provides no impediment to a court ensuring that the common law rules concerning liens enjoyed by Receivers are applied so as to be Convention compliant.

The court also indicated that in construing the contract between the Crown Prosecution Service (a public body) and the Receiver, the contractual provisions should the construed having in mind the requirement that a public body should act in a Convention compliant manner and thus, in this case, by reference to art.1, 1st Protocol ECHR.

The court decided (by a majority) that it could not sanction payment of the Receiver's fees and expenses from E's money because that would offend art.1, 1st Protocol ECHR. The Court could not sanction a breach of E's human rights (s.6(1) Human Rights Act 1998). The majority decided that it would amount to a breach of art.1, 1st Protocol, because depriving E of its money would not be "subject to the conditions provided for by law", as there had been no cause to believe that the alleged offenders had benefitted from any crime and there had been no case for treating E's assets as realisable property.

The Judges in the majority did not consider it necessary expressly to consider whether it would be "in the public interest" (within the meaning of art.1, 1st Protocol) to deprive a bystander of its property so as to satisfy a Receiver's lien. It had been argued that such deprivation would be so obviously unfair that if such was the law of England and Wales, the common law provisions relating to Receivers' costs would offend, and must yield to, art.1, 1st Protocol. That argument was unreservedly accepted by Underhill J at first instance. The majority in the Court of Appeal did not consider it necessary to deal with that issue expressly because they had decided that any such deprivation of property would not be "subject to the conditions provided for by law." However, that was on the implicit basis that they agreed with Underhill J that such confiscation (the expression used by Underhill J) of assets was so obviously unfair as to be outside any possible concept of proportionality. Only Lord Justice Laws (dissenting) dealt specifically with the issue and opined that it would be proportionate and "in the public interest" for the CPS, an organ of the State, to be protected by having a liability which any fair-minded person would regard as properly lying at its door, cast upon a bystander.

The writers suggest that the proposition that it is manifestly unjust and disproportionate to impose such a liability upon a bystander, which has the effect of expropriating or confiscating his property, has only to be stated for its merit to be acknowledged by any fair-minded individual.

All three Judges in the Court of Appeal nonetheless agreed that within the current statutory framework, even applying a generous "reading down" approach, the court could not go the extra mile, so as to achieve a just outcome, by upholding the order made by Underhill J which required the CPS to meet the fees and disbursements incurred by the Receiver. The significance of this for accountancy firms who agree what they believe to be lucrative contracts to act as Receivers is that if a bystander's property which ought never to have been categorized as part of the receivership property or estate, is improperly included within it, no lien will attach to that property. There can be little doubt that such an outcome is just. The surprising aspect of the case is that the State, through the agency of the Crown Prosecution Service: saw fit to argue for such a manifestly unjust outcome, to protect its own financial interest.

Was the only party asserting that expropriating a bystanders' property to pay the Receiver's fees and expenses was not manifestly unjust and/or a flagrant breach of art.1, 1st Protocol ECHR. The Receiver had taken the stance (as had Underhill J) that the case involved looking at two potential injustices but, surprisingly, in the Court of Appeal the Receiver aimed most of his fire at persuading the court to uphold the lien against E, rather than upholding the order made by Underhill J requiring the CPS to meet his fees and expenses.

Asserted that if the outcome was manifestly unjust, that was a better outcome than making it (the CPS) responsible for such costs and expenses notwithstanding that its originally misconceived application and failure in litigation had caused those fees and expenses to be incurred.

The practical effect for those eager or willing to act as Receivers is that they can no longer assume that property over which a Receiver is initially appointed will necessarily remain available to satisfy fees and expenses or attract a lien. This means that an intending Receiver needs to undertake substantial due diligence concerning the true nature and extent of the assets that might be available to cover his fees and expenses or seek, in effect, to revert to the position as it was under the 1998 Act by contracting specifically for the person seeking his appointment to be responsible for any shortfall in respect of fees and expenses incurred. This may be done through an express contractual term with the party seeking his appointment (usually the Crown Prosecution Service). That a potential Receiver should need to protect his own interests by contract is fair and reasonable when seen against the background of such contracts being sought after because they are a profitable aspect of the business undertaken by many accountancy firms. Thus such firms now need to undertake due diligence or risk management to the same extent as they would upon entering into any other kind of commercial arrangement. Or else, let the Receiver beware. ■

Tanfield Chambers,
2-5 Warwick Court,
London,

The Umbrella Condition

Preface

The legal issues for suspects and defendants with Asperger Syndrome

Contributor

Penny Cooper

In October 2012, after a 10-year legal battle, Gary McKinnon and his tirelessly campaigning mother finally learnt that he would not be extradited to the United States to stand trial for computer hacking offences. In December 2012 the CPS announced that he will not face charges in this country either. As everyone now knows, Gary McKinnon has Asperger Syndrome. He was diagnosed in 2008, six years after he was first arrested. The main legal issue in his case was extradition but, had he stood trial in this country, one of the legal issues might have been the provision (or lack of it) for suspects and defendants with Asperger Syndrome.

Asperger Syndrome is a type of autism and comes under the umbrella term "Autism Spectrum Disorder" or, less pejoratively, "Autism Spectrum Condition". As explained by world-leading expert Professor Simon Baron-Cohen in his 2008 book *Autism and Asperger Syndrome*, those with 'classic autism' and Asperger Syndrome will show social and communication difficulties, narrow interests and repetitive actions, however the person with Asperger Syndrome has an IQ that is at least average and there was no language delay when they were a child. In classic autism IQ can be anywhere on the scale and there was language delay.

Although Asperger Syndrome was first described by Professor Hans Asperger in 1944 it was Dr Lorna Wing who, as Baron-Cohen says, "brought Asperger's ideas to the English-speaking world in 1981". As was the case with McKinnon, those with this particular type of autism are not always diagnosed at an early stage. This may be, at least in part, due to their average or above average IQ. IQ is often seen as a reliable indicator of intellectual ability but as Dr Simon Whittaker's research has revealed we should guard against placing too much reliance on IQ results; IQ scores are not a good predictor of a person's ability to cope and should be considered alongside other factors.

Those with Asperger Syndrome ("Aspergers" for short) are often regarded as very bright in that they are extraordinarily knowledgeable on "their" particular subject areas and their vocabulary is impressive. However, this can mask the fact that they struggle when communicating with people who do not adapt to their social and communication needs. A common trait in a person with Aspergers is that they lack "theory of mind". Put rather broadly, they do not have the

neuro-typical ability to guess what someone else is thinking and have difficulty reading intentions implied by body language, facial expressions, tone of voice etc. Words may also be taken literally; idioms often have to be learnt, like a foreign language, rather than intuited from the context.

This obviously creates significant communication challenges at a police interview and at court as the defendant attempts to follow what's going on, give instructions to his lawyer and give his evidence. In a suspect interview "You did it then?" could be understood as a statement rather than an implied question. The use of the word 'then' might add a further layer of complexity if the suspect understands that to be a literal reference to time. At court "I put it to you…" might be confusing because nothing is actually, physically being put. "Can you go on?" might elicit bemusement and the response "On what?"

Those with Aspergers may be particularly sensitive to sensory information for example bright lights, certain smells, touch or loud noise. They may be more anxious, more easily confused even more easily duped. They may also be eager to please and compliant to requests for assistance (North et al 2008). Stressful situations, and there can be few that are on a par with being interviewed as a suspect or being tried for a crime, can exacerbate their communication difficulties; they might become so confused or distressed that they have what is commonly referred to as a 'meltdown'. It is easy to see that Aspergers makes a person vulnerable, particularly in the criminal justice system.

The now well established role of the intermediary exists to assist police officers, lawyers and others to communicate with children and vulnerable adults. The role was created by the Youth Justice and Criminal Evidence Act 1999. The then government policy behind the legislation was aimed at "rebalancing justice for victims and witnesses". The accused was specifically excluded from benefitting from an intermediary.

At the police station, under PACE code C, the suspect with Aspergers might be allowed an "appropriate adult" to accompany them if their difficulties are identified, but the appropriate adult role is significantly different from that of the intermediary. The safeguards of an intermediary and of an appropriate adult are not the same and further, the appropriate adult does not usually have expertise in assessing and advising on communication difficulties. Contrast this with the position for vulnerable witnesses who may be appointed a Ministry of Justice accredited Registered Intermediary. The Registered Intermediary is matched according to the witness's communication needs. After the Registered Intermediary assesses the witness they facilitate communication at the ABE interview and at trial.

Section 33BA (3) of the 1999 Act, inserted by s.104 Coroners and Justice Act 2009, allows for 'examination of the accused to be conducted through an interpreter or other person approved by the court for the purposes of this section ("an intermediary")'. But this is not yet in force and Ministers have no immediate plans to make it so. Therefore the Ministry of Justice Registered Intermediary scheme is not available to suspects and defendants. Even if it were, the legislation is designed to cover the defendant when giving testimony, not to assist him to effectively participate in the rest of the trial.

In the meantime the common law allows the use of intermediaries for defendants at trial. For example see *R (on the application of AS) v. Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin). The defendant had Attention Deficit Hyperactivity Disorder and the intermediary report showed that he would struggle with complex vocabulary which would cause him to "feel frustrated and, for example, not to answer questions that are being asked of him, but to concentrate on those previously asked and so perhaps to appear not to be engaging properly with proper questions." On appeal Mitting J concluded that '[t]here was a right, which might in certain circumstances amount to a duty, to appoint a registered intermediary to assist the defendant to follow the proceedings and give evidence if without assistance he would not be able to have a fair trial.' The magistrates' court decision to refuse to allow the defendant a registered intermediary was quashed. It was directed that that decision be taken afresh by the court.

Defence lawyers seeking an intermediary for their client must rely on the court's inherent jurisdiction to ensure that the defendant has a fair trial, pursuant to art.6 of the European Convention on Human Rights. This is far from ideal in a number of respects; without access to a Registered Intermediary scheme finding an available and suitably trained intermediary can be like whistling in the wind. Practitioners who have tried will also know that funding is problematic.

In the absence of a statutory framework, the Consolidated Criminal Practice Direction of October 2011 provides the criteria for appointing a defendant intermediary. In part III.30 concerning "Treatment of Vulnerable Defendants", the overriding principle is:

"A defendant may be young and immature or may have a mental disorder within the meaning of the Mental Health Act 1983 or some other significant impairment of intelligence and social function such as to inhibit his understanding of and participation in the proceedings … All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends." [30.3]

Note the overriding principle says "participate in those proceedings". It would be better if it read "effectively participate in those proceedings". The defendant's "ability to participate effectively" is vital for a fair hearing hence those words appear in s.33BA of the 1999 Act and in the mirror Northern Irish legislation (art.21BA Criminal Evidence (NI) Order 1999). The defendant with Aspergers might appear to be able to understand or participate to an extent, but *effective* participation could be contingent on the sort of assistance an intermediary could give.

In Northern Ireland, defendant intermediaries will come into operation in 2013. A cohort of Northern Ireland Department of Justice accredited Registered Intermediaries has been trained and will operate under a pilot scheme in Belfast from spring 2013. A report on the Northern Ireland Registered Intermediary pilot scheme will be available in June 2014. This will be the first evaluation of a Registered Intermediary scheme for suspects and defendants. Will police officers readily identify suspect vulnerability and seek

the services of a Registered Intermediary? What impact, if any, will their involvement have on custody times, interview procedure, police investigations and the trials?

In April 2011, the Advocacy Training Council (ATC) published their report *Raising the Bar.* It accepted that the handling and questioning of vulnerable witnesses, victims and defendants is a specialist skill. There is a paucity of easily accessible guidance and training for criminal justice practitioners who need to effectively communicate with the vulnerable.

Researchers Joyce Plotnikoff and Richard Woolfson have collaboratively developed a series of toolkits for *The Advocate's Gateway* (founded with the author). The ATC is now helping to develop this as a fully functioning website to provide free access to relevant law and guidance relating to vulnerable witnesses and defendants. Numerous toolkits are already available online including *Planning to Question Someone with Autism Spectrum Disorder including Asperger Syndrome.* The next to be added *is Effective participation of young defendants*, which deals with the common law position of defendant intermediaries.

For now, in England and Wales, there is no statutory provision for the appointment of an intermediary for suspects or defendants. PACE codes don't mention intermediaries (the "appropriate adult" is not an equivalent). Police officers are not trained as standard to recognize when to seek the assistance of an intermediary for a suspect nor for that matter on how to appropriately challenge discrepancies in the account provided by a vulnerable suspect (O'Mahony *et al* 2012).

Legislation is required to provide intermediaries for suspects and for defendants including throughout the whole trial where necessary. Specifically trained Ministry of Justice Registered Intermediaries should be available. If all this had been in place ten years ago Gary McKinnon's case would probably have been handled differently. Until these things are in place the system remains unfair to those with Aspergers. This may mean more work for the Criminal Cases Review Commission in future but right now that is likely to be of little comfort to these vulnerable suspects and defendants and their families. ■

For a legal discussion on the lack of a defendant intermediary scheme, see Cooper and Wurtzel (2013), "A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants", *Criminal Law Review* (1), pp.4 – 22

With thanks to Brendan O'Mahony and Sue Thurman. The usual caveat applies.

REVIEW

Archbold: Criminal Pleading, Evidence and Practice 2013

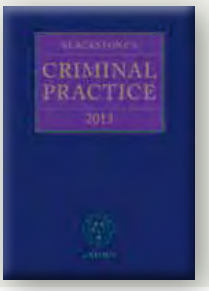
61st Edition, includes Supplements
Editor: James Richardson, QC
Published by: Sweet & Maxwell
Format: Hardback, eBook -ProView
ISBN 9780414027381
Price £605.00

Archbold

This year, *Archbold* has had to consider the considerable impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which is described by authors as exemplifying "the worst features of criminal legislation". Indeed, *Archbold* has strong feelings when it comes to virtually every part of the Act, even down to its long title, which it describes as "a disgrace". In fact, they make a perfectly valid point in that the diverse subject matter contained in the Act, have little to do with legal aid or sentencing and " what is the punishment of offenders if not an aspect of sentencing?" the author adds. It does make you wonder who actually drafts legislation at a time when we have a Lord Chancellor who gets his legal knowledge from a "Nutshell Guide to the Law", but as usual the Learned Editors of *Archbold*, extract the essential features and present them to the practitioner for easy consumption.

The availability of the book in other form continues to be popular at the coal face, with more practitioners taking to their I-Pads in court, by the year and *Archbold* continues to recognize the importance of a multi media approach to dissemination.

Quite simply, indispensable.



Blackstone's Criminal Practice 2013

Professor David Ormerod and The Right Honourable Sir Anthony Hooper
Published by: Oxford University Press
3,360 pages
ISBN: 978-0-19-965893-0 11
Price £342.47 + VAT

Blackstone's

As you would expect, *Blackstone's* also recognizes the importance of the 2012 Act but also highlights the Protection of Freedoms Act 2012 as another significant piece of legislation to impact upon 2013. The book also, rightly broadens its range to take in the influential provisions of the Criminal Procedure Rules, which in practice, have just as much sway in day to day criminal cases as any statute, if not more so. Given the extensive work undertaken by one of its general editors, Sir Anthony Hooper, as he now is again, one expects and gets, a quality consideration of the rules.

The book also considers the contributions from the Sentencing Council over the last 12 months on matters including Burglary, Drugs, Totality and Dangerous Dogs.

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• ISBN: 978 1 84766 943 8 • Publication Dec 2012 • Format: Paperback • Extent: 414pp • Price: £78

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Tom Wainwright, Anna Morris, Katharine Craig and Owen Greenhall

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The Current Law on Self-Defence

Preface

Proposed reforms of the law on self-defence aim to fix something that is not broken

Contributor

Richard Gibbs

If it is possible to be misunderstood, misreported and "misreformed" all at the same time, the law governing what can and cannot count as self-defence ticks all three boxes. Reform in this area has long been advocated by those who have taken a particular interest in the widely publicized cases of homeowners using force against burglars or intruders (illustrative cases include *R. v. Martin* [2001] EWCA Crim 2245, and those of *Munir* and *Tokeer Hussain*, *Omari Roberts, and Andy and Tracey Ferrie*). The last 10 years in particular seem to have seen a surge in calls from Parliamentarians, reacting to wide media coverage, for the replacement of the current test of "reasonable force" with a test under which householders are not to be prosecuted unless their actions are "grossly disproportionate".

The Current Law

The law covering this topic as it currently stands is to be found in a variety of sources. Defence of the person is regulated by common law, defence of property by the Criminal Damage Act 1971, and arrest and the prevention of crime by s.3 of the Criminal Law Act 1967. The law in this area does contain some anomalies as a result of haphazard development over time; for example, the common law plea of self-defence overlaps with the plea under s.3 of the Criminal Law Act 1967. Primarily, however, s.76 of the Criminal Justice and Immigration Act 2008 is the most relevant area of the law covering self-defence.

In general terms, the defences can be categorized as trigger and response, the trigger being the belief of the individual that the circumstances make the use of force reasonable and the response being the amount of force which is then applied (see *R. v. Wilson* [2005] Crim LR 108). It is worth emphasizing that the law as it stands allows such force to be used as was *reasonable* in the circumstances as the defendant believed them to be, whether this was reasonable or not. If the defendant is being subjected to an attack with a deadly weapon and he employed such force as was reasonable to resist the attack, then he has a defence to any charge which arises from this use of force. It may be that those who currently propose to alter the fundamental test in self-defence have not fully appreciated the inherent elasticity of this concept and so it is worth emphasizing the current allowance that the law does make for

actions taken by a householder in such circumstances. If a greater harm results from the use of force in self-defence, such as death of the attacker, this does not necessarily alter the defence available. If the use of force was reasonable to cause any harm which could reasonably have been foreseen, it is justified even if it results in some greater harm.

Section 76 of the Criminal Justice and Immigration Act 2008 makes clear that the reasonableness of the force used is to be assessed subjectively on the facts and circumstances as the individual genuinely believed them to be. If his belief as to the circumstances was mistaken and unreasonable, this still applies. Where the defence of self-defence is raised in relation to defence of property, the individual will generally, under the current law, be acting in the prevention of crime and, as in defence of the person, s.3 of the Criminal Law Act is likely to help provide the criterion. It was following a number of well publicized cases, starting with the conviction for murder of Norfolk farmer Anthony Martin in 1999, that there has been considerable debate around this area of law and it was in ultimate response to Mr Martin's case at the Court of Appeal that s.76 of the Criminal Justice and Immigration Act 2008 was enacted.

This states that the question as to whether the degree of force used was reasonable in the circumstances is to be decided by reference to the circumstances as the defendant thought them to be. The defendant is not required to "weigh to a nicety" the exact measure of force used, and evidence of having done only what they honestly and instinctively thought was necessary constitutes strong evidence that only reasonable action was taken. This remains the case even if they are wrong in their assessment of the circumstances. The restrictions on self-defence in a burglary-style scenario are where the belief in the need for self-defence on the part of the defendant is attributable to voluntarily induced intoxication (s.76(5)) or where the degree of force used was

disproportionate to the circumstances that the defendant believed them to be (s.76(6)). The reasonableness of force used and the amount of force is assessed objectively by reference to the facts as the defendant perceives them to have been. It is for the prosecution to show beyond doubt that what the defendant did was not by way of self-defence. There is CPS guidance on when prosecutions in such cases may be appropriate (see www.cps.gov.uk/news/pressreleases/archive/2005/106_05.html).

The Proposed Reforms

The Crime and Courts Bill, when initially introduced in the House of Lords on May 10, 2010, did not include any provisions relating to self-defence. It was during the report stage of the Bill in December of that year that the Government added a new clause to amend the law on self-defence as it applies to householders (HL Deb, December 10, 2012, c.879). Clause 30 of the Bill would serve to amend s.76 of the Criminal Justice and Immigration Act 2008 to state that in a "householder case" (defined as where a person defends themselves or others from intruders in their home) the degree of force used by the householder would not be regarded as reasonable if it was "grossly disproportionate" in the circumstances as the householder believed them to be. As the Explanatory Notes to the Bill go on to explain, "in other words, it could be reasonable for householders to use disproportionate force to defend themselves from burglars in their homes". The amendment would be limited to those defending themselves or others in dwellings, meaning that, in other circumstances where people might be required to defend themselves – if attacked in public or defending property or preventing crime – the current law would still apply.

The law has long contained a deference toward proportionate action and, as a concept, it understandably permeates most areas of the common law. Equally, the adage that an Englishman's home is his castle is one of long standing but, for the first time, the law would actively enshrine the notion that we should always act with reason in public but should feel free to use a degree of force that would be considered beyond the pale on the other side of the front door. It is as easy to see the potential difficulties with this arrangement as it is to see why the Government has felt the need to bring pressure to bear in this area, but, as can be gleaned from an overview of the law as it stands, there is clear provision for the use of force, not measured to a nicety.

Governments, by their nature, will always seek to respond to populist concern and will always want to be seen "on the side of victims". But in this case can it honestly be said that such a change is actually needed? Despite the oft-repeated media criticism of the current law, perhaps if the *status quo* were more widely known – and more pertinently, known to our legislators – we could comfortably reach the conclusion that the proposed reforms are an attempt to fix something that is not actually broken. ■

Richard Gibbs is in his second six at St Ives Chambers

Contempt in the News

Preface

Reforming the law of contempt by publication

Contributor

Daniella Waddoup

In 2011, the Law Commission began reviewing the law of contempt of court. Since then, various high-profile cases have underscored the pressing need for reform in this area. 2011 saw the first case of contempt by internet publication when, during a murder trial, *The Mail* and *The Sun* posted a photograph of the defendant with a pistol on their web sites. Less than a year later, juror Dallas was sentenced to six months' imprisonment for contempt having ignored the judge's order and carried out internet research into the case she was trying. These cases bring into sharp focus new and difficult questions raised by the increasingly pervasive reach of the internet. How much reporting of legal proceedings is needed in the interests of freedom of expression and how much brings the right to a fair trial into jeopardy? If media giants such as *The Mail* and *The Sun* fall foul of contempt laws, what hope is there for the citizen journalist? And with a world of information at our fingertips, can and should the law of contempt rein in the instinct of jurors to harness it?

We consider these and other questions in our consultation paper (CP), published on November 28, 2012.Since the law of contempt is vast, we have focused on four areas which pose specific, practical problems. These are contempt by jurors, contempt in the face of the court, and contempt by publication, including in the world of new media.

Contempt by Publication

In this article I focus on the issue of contempt by publication. This has both statutory and common law incarnations, though the latter (requiring proof of intention to prejudice legal proceedings) is rarely invoked. Statutory contempt by publication is more common and is a strict liability offence: s.2 of the Contempt of Court Act 1981 provides that a publication which occurs when civil or criminal proceedings are active, and which creates a substantial risk of seriously prejudicing or impeding those proceedings, a contempt irrespective of whether the publisher was aware of the risk. The strict liability rule is tempered by s.3 which provides a defence of innocent publication if the publisher shows they did "not know and ha[d] no reason to suspect that relevant proceedings are active."

The rationale for the offence is clear. A defendant has the right to be tried on the evidence properly placed before the court. This evidence alone is seen by all the participants to the case and this evidence alone is subject to the rigorous scrutiny of the court process.

The publication of prejudicial material creates the risk that incorrect or irrelevant information may factor into the decision-making of jurors.

In our CP, we consider whether the two threshold tests of s.2 – "active proceedings" and "substantial risk of serious prejudice or impediment" – strike the correct balance between respecting freedom of expression and securing the right to a fair trial.

"Active Proceedings"

Under sch.1 of the 1981 Act, criminal proceedings are deemed active from the point of arrest without a warrant,

issue of a warrant for arrest or of a summons, service of an indictment, or oral charge (whichever occurs first). Our preliminary discussions with media organizations revealed that publishers often face difficulties finding out whether an arrest warrant has been issued or a person has been arrested. One possible solution would be to change the trigger of "active proceedings" from arrest to charge. We consider, however, that enhancing clarity in this way would come at the cost of increasing the risk of serious prejudice or impediment to proceedings. Particularly in notorious cases, a torrent of prejudicial material may be unleashed in the period between arrest and charge. We have therefore suggested that the Association of Chief Police Officers issue clear guidance to police forces to improve consistency of decision-making.

We propose that as a general rule, the names of arrestees should be released where the media make a specific request for confirmation of the name of an arrestee, subject to certain exceptions such as where the arrestee is a youth or where an ongoing investigation may be hampered by releasing the name.

Concerns have also been raised about the point at which proceedings cease to be active. We propose that the law should be amended so that the relevant point is the delivery of verdict rather than the passing of sentence. This would give publishers increased leeway in reporting verdicts immediately and bring the law into line with current practice. We consider that the risk of serious prejudice is limited by the fact that sentence is passed by a Judge alone or by magistrates (though they too are only human so the risk of some influence – and the perception of such influence – may remain).

A further difficulty is that an article published *before* proceedings are active may subsequently become prejudicial to a defendant once proceedings begin. This scenario is likely to arise more frequently in future as the rise of Internet journalism contributes to an ever-expanding body of archived online material. Though the "fade factor" means that Judges and jurors are less likely to see or remember such material, prejudicial information is nonetheless only a Google search away. We therefore propose that the courts be provided with a power, when proceedings are active, to order the temporary removal of historic or archived publications which pose a substantial risk of serious prejudice.

We consider this "take-down power" to be a proportionate response to the problem of archived material: the order would relate to specific publications for a limited duration of time and provide assurance to the defendant that prejudicial material is not freely available on the Internet.

"Substantial Risk of Serious Prejudice or Impediment"

The second factor under s.2 raises definitional issues which are yet to be fully resolved. *A-G v. News Group Newspapers Ltd* (1986) interpreted substantial as "not insubstantial", but this provides little guidance to publishers and practitioners. Equally, the relationship between "prejudice" and "impediment" is unclear, with the two concepts frequently being referred to interchangeably.

A further and perhaps more deep-rooted problem is the question of whether the two benchmarks in s.2 are set correctly. It has been argued that the threshold of serious prejudice or impediment is too high since the right to a fair trial is eroded by any such prejudice or impediment. The requirement of substantial risk is a little more complex. Without radically restricting the freedom of publishers, it will never be possible to remove the risk of prejudice or impediment entirely. The question, then, is how much risk is too much? In the CP we asked consultees how best to elucidate the gravity of prejudice and degree of risk which s.2(2) should proscribe.

Procedure

Contempt by publication is currently tried before the Divisional Court under Civil Procedure Rule 81. In a journalistic landscape which embraces citizen bloggers and tweeters alongside corporate media organizations, there is a strong argument for prosecuting contempt as a normal criminal offence. Individuals on trial for contempt should be able to avail themselves of the orthodox criminal processes designed to protect arts.5 and 6 ECHR. Adopting trial on indictment in this context, however, may raise a novel difficulty. Research shows that the phenomenon of the errant juror (consider *Dallas*) is by no means a rare one. Given that such jurors thereby signal a lack of respect for rules of evidence and the need to remain unbiased, there is a concern that they will be less likely to convict a publisher of prejudicial material.

An alternative to trial by jury would therefore be to adopt a hybrid trial "as if on indictment", encompassing the protections of the criminal investigative and trial process, but presided over by a Judge alone.

Consultation

In relation to contempt by jurors, we consider various ways in which to tackle the problem of jurors conducting research. These include better education in order to enhance jurors' understanding of (and therefore respect for) their obligations, rules for possession of jurors' personal electronic devices in court, and the introduction of a specific criminal offence designed to deter jurors intentionally seeking information. We also propose narrowing the scope of the offence of soliciting or disclosing the details of jury deliberations; this would allow for disclosure believed necessary to uncover a miscarriage of justice, as well as academic research into juries. Our chapter on contempt in the face of the court deals with disruptive conduct in the course of court proceedings. Here we propose the introduction of a statutory power designed to render the law more clear, fair and practical.

Our CP is available at http://lawcommission.justice.gov.uk/consultations/contempt.htm.

The consultation is now closed and we aim to produce our final report in Spring 2014. ■

Research Assistant at the Law Commission

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