Anonymous Till Charged? Reviews

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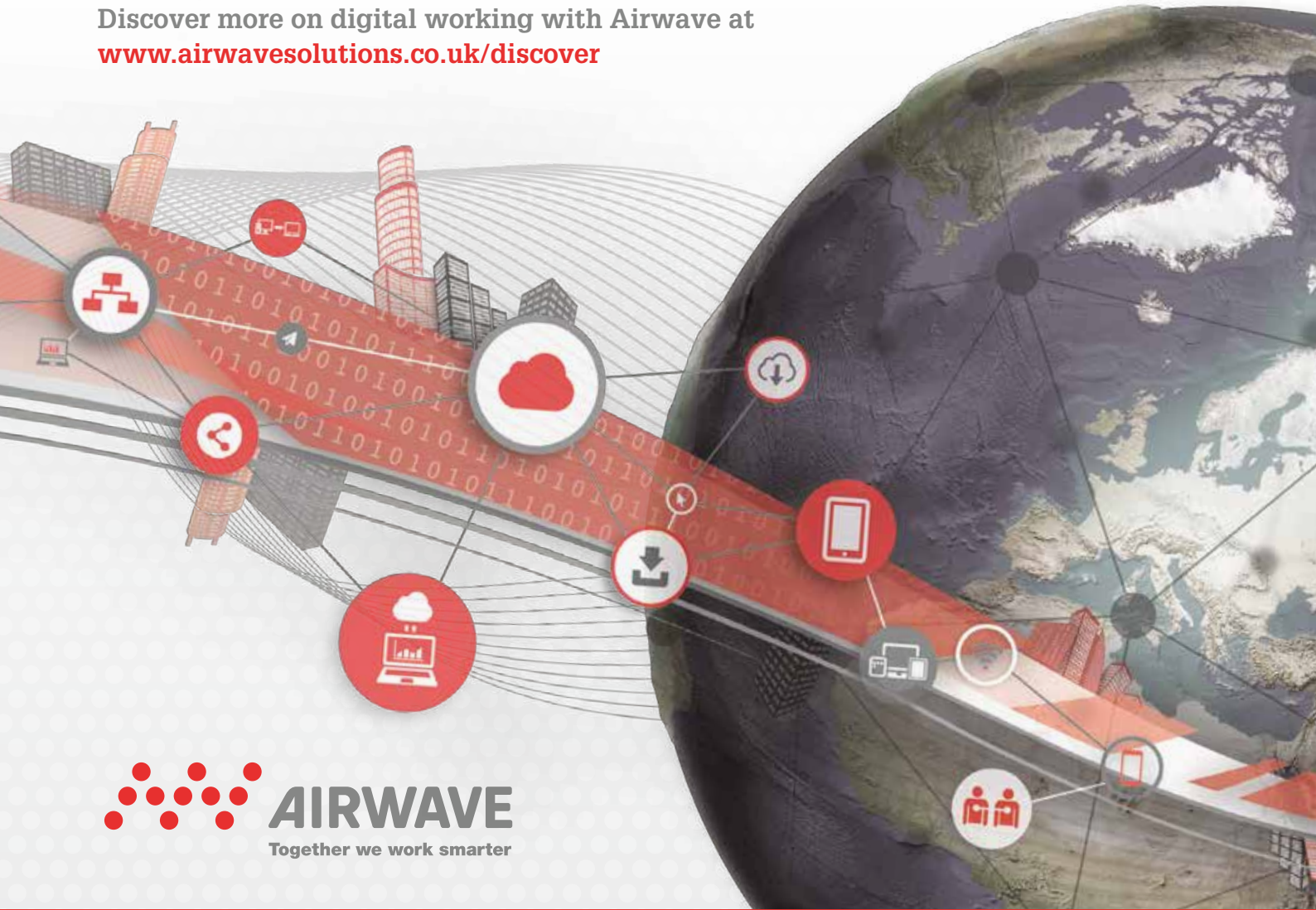

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Unnecessary Risks

EDITOR **John Cooper QC**

Earlier last month there was yet another Report from a "Think Tank" into the workings of the criminal justice system.

This time it was about the Crown Court and how user friendly the process was for members of the public. The contributors to the findings, mostly supplied by "victims" groups were not very complimentary about how things are done, with all the usual criticisms being wheeled out, delays, lack of communication and inadequate explanation and support for victims.

Of course, there is no room for complacency and it is always important to improve wherever it is necessary, but many of the criticisms made in this most recent document simply do not match the work of the Crown Courts up and down the country. It reads as if many of the necessary reforms concerning the support of vulnerable witnesses simply did not happen and fails to properly reflect the care and determination of the courts to ensure, that within the particular environment of the criminal justice system, the public have confidence about what is being done on their behalf.

For my part I am fed up with the continued use of the barrister as the butt for those who view the process with a somewhat negative perspective and we should take every opportunity to explain what really goes on in the Crown Court.

What really does go on is that within a system that has at its centre, human interaction, of itself unpredictable, the process is administered by a professional group of highly trained people who recognize the importance of best evidence and the requirement that complainants and witnesses from all sides are treated with dignity and respect, but who also acknowledge that the criminal court model is that of testing evidence presented by the state against the citizen, the overriding imperative of what the criminal court is about.

The Crown Court is also a place where people should feel safe. Again, public attention has been drawn to the tragic deaths of a defendant in a court cell and a prison officer at Blackfriars, highlighting the need for improvements and vigilance about a working environment which can be as dangerous and volatile as any place of work. The Bar also place themselves at risk and it is perhaps a timely reminder that we should all take what reasonable precautions we can when at work. One thing should stop immediately. Lawyers should never be locked in conference rooms in court. There are enough prison officers in very close proximity to maintain order and in any event, the risk of flight in that environment is minimal. It is utterly out of proportion to expose lawyers to unnecessary risks by locking them into court conference rooms and we should make that clear without delay before something serious happens. We do not need a "Think Tank" for that. ■

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

Focus on the Future

CHAIRMAN'S COLUMN
Mark Fenhalls QC

It is always tempting at this time of year to indulge oneself by reflecting on the past year and dreaming of what might come to pass in the next. All readers will be only too familiar with the consequences of the change of government and the arrival of a new Lord Chancellor and the struggle we all face with the most recent Spending Review announced on November 25, All readers will be only too familiar with the consequences of the change of government and the arrival of a new Lord Chancellor.

After years of severe cuts and damage to the CJS it is to be hoped that the Spending Review means the immediate outlook is perhaps not quite so harsh as we had feared.

So, what needs to be done to achieve a sustainable and affordable Criminal Justice System fit for the 21st Century? Some things are already in train. *Better Case Management and the Digital Case System* being rolled out across the country from January will make a considerable difference so long as the Police, CPS and Courts Service put sufficient resources in to "getting it right first time and on time".

We await the outcome of the Government's consultation on *Preserving and Enhancing the Quality of Advocacy,* and, by the date of publication will I suspect be in the midst of the debate about the proposals to replace the Human Rights Act. I have little wish to retread this ground here and so will focus on two things which may have received slightly less public attention and debate recently but without which the future of quality advocacy in publicly funded work is in peril.

First – Future Training

The problems associated with the current system are easy to identify and widely accepted across the profession. The current vocational stage is far too expensive and it is an appalling situation that so many students are completing this course when the numbers of available pupillages are so small by comparison. The huge numbers and very mixed range of ability of students on the course makes the task of teaching far more complex and damages the quality of the training delivered to the more able students. The cost of the course is an enormous barrier to a thriving and diverse profession and deters students from poorer backgrounds who cannot afford the fees. If they borrow against future income, the hangover will last for years, especially in publicly funded work, which needs people from diverse backgrounds. Even the most ambitious and talented who persist and go on to practise in this area soon lose heart as their continued debts drive them out of the profession. The vast and unjustified cost damages the public interest by threatening to choke off the supply of lawyers from all but moneyed backgrounds. The course is probably three times more expensive than it should be and requires people to spend a whole year of living expenses just to complete it, when anecdotal evidence from recent graduates suggests that the course could be taught in two-three months. Sorting this out could take £25,000 of debt away from future candidates for the Bar and this would be a staggering and valuable achievement for any regulator on behalf of society that it serves.

The solutions must include (i) a far more rigorous assessment or aptitude test that reduces the number of candidates on the course and (ii) changes in the way the content of the professional training is delivered resulting in a significant reduction in the price of the course. Sensible reform of this process by the BSB is, we hope, afoot, and we look forward to such proposals as emerge early in the New Year. It may, for example, be possible to consider different ways in which the second stage of skills training could be delivered by appropriately trained educators (whether practising barristers or not) in modules or chunks built in to pupillage or around other employment. This might have the advantage that development and training continues during a period when pupils have the best opportunity to learn from colleagues in chambers and are able to practise what they have been observing. These are the sort of tasks that suitably accredited barrister-led entities would be well placed to deliver around the country. The content and structure of such an option would of course have to open to detailed scrutiny by the BSB. Whatever ideas emerge the CBA will play its part in continuing to engage and influence the proposals for the good of society and future students.

There has been a sea change in the approach of the Council of the Inns of Court ("COIC") in the last year or so which the CBA welcomes wholeheartedly. The Inns have together been looking afresh at the allocation of their resources and reflecting on the sustainability of the profession. Any practitioner who has not yet looked at the work done by the Advocacy Training Council http://www.advocacytrainingcouncil.org/ should do so over the holiday break. In the spring next year COIC is setting up "The Inns of Court Advocacy College" which many of us hope will become a focal point and crucial part of future training for all barristers.

So having imagined a world in which young barristers emerge from professional training with far less debt than currently is the case, what then is their future at the publicly funded Bar? Across the country we have seen that the number of pupillages being offered by many criminal sets has fallen in recent

years. We think the problem is magnified in smaller sets, whether in London or across the rest of the country. We must make sure that any proposed changes suggested by the BSB do not increase bureaucracy and act as a further disincentive to offering pupillage. But even more than this there is one thing that the CJS inflicts on the public that damages the public interest and must change. If we can abolish warned lists this will be the single greatest reform achievement making the system fit for modern use.

Second – Warned Lists

I do not know why some parts of the country do not use warned lists and other feel it is essential. Whatever is operating on or in the minds of list officers struggling with outmoded "performance indicators," this approach must change. I have said this before, but it bears repeating.

Warned lists damage the efficiency of the CJS, have a negative impact on witnesses and victims and are the single largest bar to proper client choice. Human nature and the uncertainty inherent in warned lists mean that witnesses, police officers, lawyers and defendants are all less likely to focus on a case in a warned list that might not be listed, or that they may or may not conduct.

In many (but not all) parts of the country, warned lists for bail cases is the norm. In some areas even serious cases and sex cases now appear in such warned lists, where the defendant is on bail. The length of the warned list varies from 1 week, through to two to three weeks (many areas) to perpetual rolling warned lists in other areas eg, Cambridge. Cases will frequently not come in for trial on their first three occasions in the warned list. Delays of over a year are commonplace. I am told of examples of cases having come in 14 months after having been listed into a perpetual rolling warned list. Put to one side for a moment client choice, modern standards of case management and Leveson's "duty of engagement" and focus for a moment on complainants and civilian witnesses. What on earth does the Court Service think that the effect of such uncertainty and distress creates in the lives of the witnesses who are seeking justice as the complainants in assaults, burglaries and sexual offences…? This is a scandal that needs to be addressed.

We have to flush out the delayed plea wherever possible and free up our court lists for the cases which need a trial. We must move whatever mountains need moving to pursue the goal that all trials should have a fixed date.

Sir Brian Leveson was correct to conclude in his *Review on Efficiency in Criminal Proceedings*, [at para.144]… "[I] recommend that steps are taken to enable the courts to move towards single/fixed listing."

Witnesses would know where they stand and make plans accordingly. Police officers would know that cases had to be in tip top shape by a fixed date and they would be held accountable if not. Lawyers conducting the case on each side would have all the incentive in the world to make sure cases were ready and effective. Defendants would know there was a fixed date when they would have to stand trial rather than stick their heads in the sand hoping a case is not called on... "Case ownership" would become a meaningful term and so drive up efficiency. Clients would be far more likely to have their preferred advocate and if s/he is not available choose someone else far in advance of the actual trial date.

And last, but by no means least when one comes to consider the sustainability of the young junior Bar, consider this. Our anecdotal evidence is that the use of warned lists in the Crown Court is a significant barrier to parents of young children who wish to return to practice. By way of illustration should a parent returning to practice be instructed in a case where s/he knows that the PTPH will be adjusted to allow him/ her to attend and then that case is given a fixed date, then s/he can make the appropriate child care arrangements that will probably make all the difference as to whether or not that case is economic. Without such steps the sheer uncertainty is a huge barrier to returners and there will be substantial damage done to the diversity of our cadre of advocates and the pool from which future Judges are often chosen. If we are serious about sustaining quality advocacy in the face of such low rates in criminal work, then this change is absolutely essential.

Finally

All readers will be familiar with the refreshing and imaginative approach shown by the new Lord Chancellor to many parts of the Criminal Justice System. By way of example this new Government has shown itself willing to imagine new approaches to prisons and the court charge.

Far less happily we began this year with our sister profession in litigation with the MoJ and we end in it a similar situation. The CBA will continue to strive to persuade all key players that the "two tier" system is flawed and bad for the justice system and will lend its support to any quality based "plan B" that can achieve a consensus of support across the solicitors' profession and in the corridors of Whitehall. ■

Privacy and Gender

Preface

Transgender deception and confusion

Contributor

Matthew Scott

There has been widespread concern expressed at the eight-year prison sentence passed on Gayle Newland, the 25-year-old Chester University student who was recently convicted of assaulting her sexual partner by penetration.

From shortly after Newland was dragged to the cells, screaming "I'm scared!" press comment has been almost universally critical of HHJ Dutton's sentence (even though he was faithfully following the Sentencing Guidelines). An entirely unscientific online poll by the *Daily Telegraph* found that 72% of respondents thought the sentence was too severe, and a similar poll for the Chester Chronicle produced nearly identical results.

The facts of the case will have struck many as bizarre: Miss Newland and the complainant (identified only as Ms X in the reports) were close friends at Chester University. Unknown to X, Newland had an online male alter ego called "Kye". "Kye" contacted X, who believed him to be a real person. Eventually, they arranged to meet. When they did so, Newland played the part of Kye, using bandages to bind up her breasts and instructing X to wear a blindfold at all times. Without realising that he was in fact her close friend, X engaged in sexual activity on up to ten occasions with "Kye". She believed she was having sex with a man, not least because Newland penetrated her with a strap-on dildo. Eventually she became suspicious, removed her blindfold and realised that she had been deceived. She then complained to the police.

In his sentencing remarks, Judge Dutton spelt out in some detail how Newland had perpetrated a complex deception in preparation for Kye's eventual meeting with Newland.

"To successfully pass off a deception of this complexity was a major undertaking involving dedicated mobile phone lines as well as regular texts from you purporting to be Kye's relatives.

This went on for many months. X believed she was in an on line relationship with a boy that she liked very much. You made regular excuses as to why you couldn't meet in the flesh. This involved a complex story about Kye having suffered a disfiguring injury and him being embarrassed at being seen. All the time you were successfully convincing X that Kye was a man. You began controlling X's movements persuading her to give up a job telling her that she loved the job more than Kye. You then stepped in as her best friend Gayle to console her in her disappointment at not being able to meet Kye. As Kye you were telling X that the injuries could prove fatal. As Gayle you offered her consolation but then as Kye you sent her a ring to wear thus taking this cruel and wicked deception to a higher level still."

None of these preparatory deceptions – "cruel and wicked" though they were said to be – were criminal in themselves, but they eventually led to X consenting to sexual activity with Newland in the belief that she was having sex with a man, rather than a woman. Although not all sexual consent

obtained by deception is invalid, since the case of *McNally* [2013] EWCA Crim 1051 it has been clear that deceiving a sexual partner about your sex is capable of doing so. It was this principle that led to Miss Newland's conviction.

The Court of Appeal based its decision squarely on the definition of consent contained in s.74 of the Sexual Offences Act 2003:

"For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

A person who conceals his sexual identity, in the view of the Court of Appeal, denies his partner the freedom to choose to consent. Any consent to sexual activity that is given while the deception is operative is therefore invalid.

The law on consent obtained by deception is now in a state of near incoherence.

Judges have at least resisted the seductive blandishments of Jonathan Herring, who has argued with cold clarity that *all* deceptions or even deliberate silences that lead to sex should negate consent:

"For A to engage in sexual activities with B knowing that B would not be consenting if A revealed facts about himself amounts to a fundamental lack of respect for B's sexual autonomy."

But the price of rejecting Professor Herring's absolutism has been to produce a smorgasbord of anomalies, provisos and exceptions. Failure to disclose that you are infected with a sexually transmitted disease, for example, has been held not to vitiate consent, although it is possible that an active deception could do so. When consent to intercourse was granted on condition that ejaculation would take place outside the body, it was held that concealing an intention to ejaculate inside can invalidate consent, as can not wearing a condom when consent was granted on condition that one would be used. A deception as to wealth has been described as "obviously" not sufficient to vitiate consent, and nor does an insincere promise to pay £25 to a prostitute invalidate her consent to sexual activity. On the other hand pretending to be a police officer and thereby putting pressure on a woman to have intercourse is capable of doing so.

It seems unlikely that a deception as to ethnicity would be capable of vitiating consent, although in a notorious Israeli case just such a deception by a Palestinian man pretending to be Jewish led to a rape conviction and a prison sentence.

Where does this leave transsexual and transgender people? The answer is that (certainly up to the point that they legally change sex) that it leaves them in a very difficult position. If they want to avoid conviction for sexual offences they would be well-advised to be entirely open about their gender identities. Yet for very understandable reasons, concealing those identities is exactly what some of them might wish to do.

Of course, in a perfect world no-one would feel any need to conceal their gender or sexual identity. Unfortunately the world is far from perfect. Trans people are already quite likely to live in a state of confusion and distress as a direct result of their gender dysphoria. According to HHJ Dutton, Miss Newland had a history of "blurred gender lines" (whatever that may mean) "as well as social anxiety disorder, personality disorder, depression and OCD".

If she is properly to be described as transgender, she is certainly not alone in suffering mental health difficulties. A survey conducted by the mental health charity PACE, 48% of transgender people under the age of 26 said that they had attempted suicide. And it gets little easier once they reach mature adulthood, as demonstrated by the suicide of Lucy Meadows, a transgender teacher, who killed herself after being (in the words of the coroner) "ridiculed" in the national press shortly after she had started to live as a woman. And it is not just ridicule. Hate crimes against trans people are a serious (and according to the CPS often an under-reported) problem. It is all very well to say that they should be open and unembarrassed, but many trans people would much prefer to keep their gender identity as a private matter. Given the ridicule and violence to which they can be subject if they reveal the truth, who can blame them.

Simple binary distinctions about gender break down where transgender people are concerned. A trans person may be anatomically male, female or ambiguous. He or she may appear different to his or her perceived gender and may be straight or gay. Thus (for example) a person might appear and act as a male but be anatomically female. He (or of course, she) might act in the "acquired" sex all, or just some of the time. It is possible that he is awaiting surgery, or he may have decided to live in the acquired sex but not to have surgery; the majority of transgender people do not in fact choose to undergo surgery at all, and because female to male surgery is generally less successful than male to female, female to male transsexuals are generally less likely to have surgery.

Newland's case involved the use of a prosthetic penis, as did *McNally*, but the law requires that a person should reveal their anatomic gender before engaging in *any* sexual activity. As Leveson LJ put it in *McNally* (at para.26):

"M [the complainant] chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception."

A trans man who kisses somebody he has just met on the dance floor is thus – on Leveson LJ's analysis – committing a sexual offence if he does not reveal the fact that he is (or at least was once) anatomically female before their lips touch. This seems to be both wholly unrealistic and deeply discriminatory to transsexual people. It is true that His Lordship purported to identify a way through these difficulties: Judges, he said, should adopt a "broad common-sense" approach. It would be hard to think of a less helpful injunction.

Nowhere in *McNally* was any consideration given to the delicate human rights issues that the prosecution raised. When the Law Commission considered the question in 2000 it regarded is as "likely" that prosecutions of transsexuals for sexual acts procured by deception as to sex would be in breach of the defendant's art.8 right to privacy.

Somewhat different issues arise in the case of a trans person who has "officially" changed sex and acquired a Gender Recognition Certificate under the Gender Recognition Act 2004. s.9 of provides:

"Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

Although there does not seem to be any authority on the

point, if a person is "for all purposes" his acquired gender, then behaving as a man or claiming to be a man (or, mutatis mutandis, a woman) would not be a deception at all, and any consent given would presumably be valid even if he had told "cruel and wicked lies" about his past.

Yet his legal gender and the existence of a gender recognition certificate might be a matter of indifference to any prospective partner. The ratio of *McNally* is that a person has a right to know whether their sexual partner is a boy or a girl. Why should that person not have the same right to know if their partner has *changed* sex, something that many people would be keen to know before embarking on a sexual relationship? The answer is that in the case of a legal sex change the law would probably deem the right to privacy of the transsexual as being more worthy of protection than the consenting partner's right to make an informed choice.

Yet if the right to privacy of someone who has legally changed his gender is recognized, this leaves transsexuals who have not done so in a still more anomalous position. Precisely the same act and the same factual deceptions would either not be criminal at all, or would lead to a lengthy prison sentence, depending on whether the accused had obtained a Gender Recognition Certificate.

The diseased can happily conceal their disease; the poverty stricken can claim to be wealthy; the law supports the right of confidence tricksters to bamboozle their victims into bed, and steps in only if they try to steal their property. Yet the transsexual who has not legally changed sex is not just required to reveal the most intimate and private aspects of his life before he has intercourse: he must do so even if he wishes to kiss someone.

The CPS has guidelines on the prosecution of transgender suspects for sexual offences. Prosecutors are told to pay particular attention to public interest factors in deciding whether to prosecute, such as:

- Whether the offending occurred as a result of the suspects uncertainty or ambivalence about his/her gender identity;
- The nature and level of the relevant sexual activity;
- The nature and duration of any relationship between the suspect and complainant;
- Where the suspect has made an admission, whether an out-of-court disposal might take the place of a prosecution and provide an appropriate response to the offender and/or the seriousness and consequences of the offending.

No doubt sensible CPS charging decisions do much to ameliorate the harshness of the law. But even if prosecutions are unusual it is deeply unsatisfactory that the law criminalises most transsexual sex unless it is preceded by the sort of personal disclosure that many would find it almost impossible to make.

No-one pretends that this is an easy area of the law. But the public reaction to Gayle Newland's sentence suggests that, on this issue at least, the law is out of touch with public opinion and even, with the greatest of respect to Lord Justice Leveson, out of touch with common-sense. ■

Barrister, Pump Court Chambers

Joint Enterprise – Guilt by Association?

Preface

The need to redefine the law on joint enterprise

Contributors

Felicity Gerry QC and Catarina Sjölin

In October 2015 the Supreme Court and Privy Council sat together, for the first time, to hear the appeals in *R. v. Jogee* and *R. v. Ruddock*. We were fortunate enough to be part of the team representing Mr Jogee and argue that clear-eyed assessment of the law by the Supreme Court is long overdue. The law of "joint enterprise" strikes fear into the heart of undergraduates. The phrase is conceptually nebulous. For the legal practitioner it is either accommodatingly broad (when prosecuting) or distressingly lacking in justice (when defending). For the person caught up in the process it can be bewilderingly harsh and illogical. This is not just because the law is poorly applied but because it is, we suggest, an erroneous tangent of law. We hope that the Supreme Court and Privy Council will use this opportunity to put right this judicially-created injustice. The two and half days of argument can be viewed online via the Supreme Court's website (currently listed under "current cases"). This article focuses on what the law is currently and how it can, and we argue should, be changed.

What is the Law on Joint Enterprise?

As a defendant does not necessarily commit an offence entirely alone, the law has had to decide how to deal with others with varying levels of involvement in the offence. So far, so obvious. English criminal law traditionally puts participants initially into one of two categories: principals and accessories. The principal has the guilty mind (*mens rea*) and does the external elements of the offence (the *actus reus*). More than one person can be a principal in which case they are joint principals. For instance, A and B both kick a man on the ground, causing injuries which, taken together, amount to actual bodily harm. A and B are joint principals as they both did the external elements of the offence (assaulting the victim and occasioning him actual bodily harm) and if they both did this with the requisite guilty mind (intending or being subjectively reckless as to the assault) they are both guilty of the same offence (here, assault occasioning actual bodily harm) by the same route. Sometimes, this – joint principals – is labelled joint enterprise but is more properly referred to as joint principal or shared intention cases.

But it may be that A and B are not joint principals, even though they are jointly committing the offence. Taking a different scenario, where B goes into a house to burgle it and A stands lookout outside, A has not done the external element of burglary (entering as a trespasser) although she is playing a pivotal role in its execution. A cannot be a principal, but is closely connected to the offence; she is an accessory. In this situation A has abetted B in B's commission of the burglary. This is a form of basic accessorial liability ("BAL"). Traditionally courts would look

for evidence that A aided, abetted, counselled or procured B's offence or evidence of a common plan. This is now often loosely explained as "you were in it together" and has developed to overlap with the doctrine of "common purpose": A is liable for B's actions which were in pursuance of their common purpose.

The "common purpose" strand of liability grew out of poaching and riot cases where A and B were both members of a group which acted with a common purpose (rioting or poaching) during which B killed someone who tried to stop the group. A would be convicted on the basis that the act of one of the group was the act of all. Although reasoning is rather lacking in these cases from the 16th to the 18th century, the common thread appears to be that the poachers or rioters shared a common intention to resist all opposition. The killing of someone trying to oppose them was therefore within their common purpose. The use of the word "contemplation" or "foresight" in such cases was to identify the scope of the plan, not to identify the mental element. A may, however, be far removed from B's crime; there are a range of roles as accessory can play. For instance, if B goes to A and asks to be supplied with a gun to kill V, which A duly supplies and B then uses to kill V, A has not pulled the trigger and caused V's death (the external elements of this murder) but is involved in the killing by supplying the gun. Again, A is an accessory, this time before the offence takes place rather than while it is going on: A provides the gun knowing that B is later going to use it to kill V. This is basic accessorial liability by aiding B.

A could be further removed either counselling the offence – that is advising, soliciting or encouraging – or procuring it – that is endeavouring to produce the commission of the offence by B. These are the other two ways of being an accessory by means of BAL. These two routes do not currently concern us. All of them, on the current state of the law and practice get called "joint enterprise".

So far, so straightforward (if loose with the term "joint enterprise"), but of course life is often more complicated and messy than our examples so far. What if B does not tell A what he has planned? Or if B suddenly does something which was no part of the original plan, explained or not? How does the law determine A's liability in this situation?

Imagine that A supplies B with some oxygen cutting equipment. A believes that B is going to do something illegal, perhaps cutting up stolen goods with it. In fact, B uses it to break into and steal from a bank. Here A does not know what B is going to do, so should A be an accessory to the bank burglary? These were the facts in a case called *Bainbridge* [1960] 1 QB 124, in which the Court of Appeal held that what mattered was whether A knew the *type* of offence which B was going to commit. It was not enough that A knew that B intended an illegal venture. It would also not be enough merely to suspect the type of offence. A must *know* the essential matters, that is that B has possession of cutting equipment which he intends to use to commit a dishonest offence, and A has acted in a way that indicates she *intends* B to carry out such an offence (even if she does not know the precise details). Bainbridge's conviction as an accessory to the bank burglary was upheld. He aided the principal's commission of the bank burglary.

In common purpose cases B's actions going beyond the common purpose or intention did not make A liable as an accessory for that offence. A would be liable for B killing a police officer who attempted to stop their riot, but would not be liable for B killing a bystander who shouts at him. However, A might be liable for a lesser offence.

We can see, from these examples, the importance of both A's connection to the crime and her mental culpability. If she has insufficient knowledge of the essential matters, or only suspects them, she is not an accessory to B's crime. There is a clear scope to A's liability; she is not liable for all of B's actions, only those she knowingly authorises by both her acts and her intention which can be inferred from all the circumstances. This strikes the balance between prohibiting the aiding of others' crimes with criminalising suspicion or mere connection with a crime.

We now come to the most troublesome and troubling use of the term "joint enterprise": parasitic accessorial liability ("PAL"). Sadly the inelegant name is far from the greatest problem with this strand of "joint enterprise". PAL developed ostensibly as a policy reaction to group violence cases to cover the situation where B does something outside of any plan, express or implied, sometimes referred to as "departure from common purpose". The "parasitic" element of the name is due to this liability which is supposed to only come into existence when A and B were already jointly involved in offence 1, from which B then departs to commit offence 2. The common purpose doctrine we considered above does not make A liable as B's actions are *outside* the common purpose. PAL makes A liable merely for what she foresaw, as a mental element without any acts done with the intention to assist B in B's departure from the common purpose, or indeed any real connection with the outcome at all.

PAL does not require knowledge of the essential matters, such as in the bank burglary example, the possession of equipment and an intention by B to use them for crime 2, and does not require acts which demonstrate A's intention to assist B in crime 2. In their place is inserted foresight; suspicion or contemplation of a possibility by A which is taken to provide sufficient mental culpability to justify criminalisation of A for B's actions, which, by definition, fall outside A and B's common purpose in relation to offence 1. The references to crime 1 and crime 2 is confusing for juries and lawyers alike and, we argued, fails to have regard to the burden of proof or the very root of criminal law based on criminal culpability. The low mental element of mere foresight that B might do something is far less than is required to convict B who actually commits the offence. It works at its starkest in cases of murder where B must be proved to have intended to kill or cause really serious harm whereas in the formulation created by PAL, A need only have foreseen the possibility that B might intentionally cause grievous bodily harm risking a life sentence for a moment's thought and no actual acts contributing to the death. The development of the law conflated contemplation with authorisation so that only the former remained; association with someone who might do something becomes liability for whatever they might do – guilt by association.

The Problems with PAL

The conflation of foresight with authorisation is a fundamental flaw in the reasoning in the cases on PAL. This strand of liability developed in cases from the 1950s, taking a particularly sharp wrong turn in *Chan Wing-Sui* [1985] AC 168. Even following *Chan Wing-Sui,* PAL and the low *mens rea* requirement of foresight alone did not really take hold until *R. v .Powell and Daniels; R. v. English* [1999] 1 AC 1, in England and *McAuliffe* [1995] HCA 37; (1995) 183 CLR 108 in Australia. From the way the cases developed the concept of PAL it is clear that there was no unifying principle at work. Instead the driver appears to have been the fear of group crime going beyond its intended scope and how to make it as easy as possible to prosecute the group. In addition, whilst *Chan Wing-Sui* and the following cases significantly changed the law there is no evidence of change in society The result of this erroneous tangent in the law is that when prosecuting in reliance upon PAL the prosecution does not need to particularise what A has done, just the fact of being with B, B's crime and A's foresight of the possibility that it might happen. Evidence of that foresight will almost inevitably be inferences from the result where inferences in other cases are usually preserved for deciding intention based on all the circumstances.

The result has given the prosecution wide and easy scope resulting in those on the very periphery of an incident being convicted of serious crimes including murder without regard to foundational principles of knowledge and intention. In practice, PAL has effectively trampled over BAL as it is so much easier for a prosecution to put their case on broad PAL grounds rather than the legal framework of BAL. PAL has become joint enterprise. Justice has not flowed from this development. Dr Matthew Dyson who has assisted in our appeal has called the judicially created changes a legal "race to the bottom". The Supreme Court was asked to consider the overcriminalizing effect of PAL: young people convicted of murder despite being only tenuously connected to the killing. The arguments put forward in *R. v. Jogee* did not challenge the fact of murder by the principal but raised the important question of how prosecutions can be fairly brought so that the case against each defendant is considered, evaluated and particularised against solid, justified legal principle.

PAL has, unsurprisingly, become a much-criticised doctrine, both academically and more widely in the Justice Committee's 2012 and 2014 reports, the activities of campaign groups (like Joint Enterprise Not Guilty by Association "JENGbA") and even documentaries and dramas on television. In *Gnango* [2012] 1 AC 827, the Supreme Court dealt with what looked very like a PAL case. They decided it was not and thus missed the opportunity to deal decisively with PAL. We gave the court a number of options to consider but one primary solution – a return to foundational principles of law.

The Solution

We urged the court to put right this erroneous tangent of law and return to the foundational law encapsulated in *Johnson v. Youden* [1950] 1 KB 544, and applied, in a common sense manner, in *Anderson v. Morris* [1966] 2 QB 110, where Geoffrey Lane QC (as he then was) appeared for the appellant. In judgments he gave as Lord Chief Justice, he kept the matter as essentially one for the jury, until his retirement in 1992. In our view the jury needs proper direction and we submitted that *the true test for accessorial liability is knowledge of the essential matters of that offence or that type of offence and acts which demonstrate an intention to assist or encourage that offence or that type of offence.* Such a formulation can adapt to individuals assisting each other or cases where there is evidence of a common plan. This does not mean all cases would have to be revisited as most reached a justifiable conclusion by the wrong route – the classic example is the joint knife attack in *Chan Wing-Sui* itself.

A lot of effort in the cases has been expended on discussing and fixing the level of foresight/probability. The focus, however, should be on what the defendant *knew,* rather than weighing to a nicety the chances of a particular event or circumstance occurring. Did the defendant *know* the *essential matters* of the offence which the principal commits? In Mr Jogee's case the question would be "did he know that the principal had a knife and would use it to stab the victim, intending to kill or cause really serious harm?" The question of whether we can "know" the future was raised in argument. Our response was that knowledge is just a justified true belief, but in any event the court should not get involved in debating the semantics of the word and should look at how the word "know" is used. People (even lawyers) speak of "knowing" what is going to happen and it is that, readily understood and common used, meaning of the term "knowledge" which we submitted the court could and should use. It all depends on the facts in a given case. The mental element is intention to assist whilst in possession of the requisite knowledge.

The prosecution should be required to identify the "essential matters" as should the Judge when considering a submission of no case to answer or when s/he directs the jury. As the authorities show, this can range from publishing a book, to selling a house, to group violence with weapons.

The second question is whether the secondary party, with that knowledge, intentionally *assisted or encouraged* the principal. What the secondary party knew and intended are questions of fact for a properly directed jury.

Judgment was reserved by the Supreme Court and we hope that 2016 will bring with it a change to the law of "joint enterprise" by expunging PAL altogether. Other alternatives such as restoring a concept of "authorisation" or a probability test are before the court but have less utility in practice than our primary submission of a return to first principles of law.

Versions of this article have previously appeared in CL&J *and on the Nottingham Law School Blog.* ■

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Anonymous Till Charged?

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Preface

Disclose or not – high profile cases

Contributor

Dan Bunting

Time it was that prosecutors were seen but not heard, out of court at least. Over the last few years the CPS have been far less reticent, and are now regularly giving press statements and conferences after a charge or a conviction in a high profile case. This is an issue that is not without controversy of itself, but the recent high profile investigations into historical sexual abuse throws up many wider questions relating to the CPS and the police, both of those organizations relationship with politicians, as well as the nature of the recent high profile inquiries into historical sexual offences.

The police, however, have always been more forthcoming, both in briefing journalists off the record and in dealing with the media. The limits of what they could properly say have been pushed in the last year in relation to "Operation Midland", part of a wider operation, "Operation Fairbank". Operation Midland concerned the allegation that there was a "Westminster Paedophile Ring" – a group of high profile politicians and other public figures, centred on Dolphin Square, who are alleged to have sexually abused boys and girls, mainly in the 70s and 80s.

In December 2014, when Kenny McDonald, a Met Police Detective Superintendent, stood in front of the cameras to discuss allegations made by a man in his 40s referred to as "Nick". This was not only that Nick had been sexually abused, but that he had also witnessed three murders.

DS McDonald said:

> *"Nick has been spoken to by experienced officers from child abuse teams and experienced officers from murder investigations ...They and I believe what Nick is saying is credible and true."*

This was an unheard of statement for a police officer to make. Calling an allegation "credible" is bad enough. Of course the police believed it to be credible (an allegation that they have no faith in is unlikely to be prosecuted), but it is one thing to believe it, and quite another to say it out loud.

It could be argued that "credible" does not of itself imply truth. After all, an allegation can be credible but mistaken, or

otherwise incorrect. But this was compounded by what was said afterwards. Calling an account "true" is a value judgment that the police should not be making and broadcasting to the world at large, including potential jurors. Again, the police will obviously have their own views on the matter, but the potential impact of this on a jury could be huge.

It could be taken by some potential jurors that the police have other information that the jury are not privy to. Even if they don't fall into this trap, what of the allegation which has not received the ring of truthfulness from the police? Would a juror think that this is a witness that even the police haven't got faith in, and therefore why should they?

The Police are not the only group open to criticism. Exaro Media, a relatively new player in the news world, are also under scrutiny for the way that they have conducted themselves. In November 2014 they broadcast an interview with "Nick" who, along with the murder allegations, had made various allegations against MPs and other celebrities of sexual abuse in the 70s and 80s. The interview covered much ground, including a lot of details of the allegations. For obvious reasons, whether or not this account is accurate or not, this may have caused problems for any future trial.

It is unclear whether this was before or after a formal police ABE interview (or even, as been suggested, that Exaro was granted permission to sit in on the ABE). It appears to be reckless in the extreme for the police to allow this to happen to one of their key witnesses.

The situation in relation to Nick has got more complicated as his story has been probed following DS McDonald's utterings last year, with some sources casting doubt on his account. Whether the full truth will ever be known is doubtful, but this is a good example of the dangers of playing a police investigation out in the media rather than in Court.

A further example was given by a BBC *Panorama* documentary in October. This related to allegations made by someone anonymised as "David" of a historical paedophile ring. The programme claimed (amongst other things) that David may have originally given the name of Leon Brittain, the former Tory MP and peer (who was also a QC) as a "joke". The Met strongly criticized the BBC for the programme, saying that it, "*could compromise the evidential chain should a case ever proceed to court*", which may be a somewhat ironic statement.

A further question is raised in relation to the question of political involvement in the prosecutorial process. MPs of course have every right to campaign on any issue that they want, and this should properly include holding policing bodies to account for their previous failure to investigate crime.

There is a concern when matters go beyond this though. For example, criticisms have been levelled at Jim Hood, the former Labour MP for Lanark and Hamilton East, for using Parliamentary Privilege last year to accuse Lord Brittain of "improper conduct with children". The fact that these occurred, very tangentially, in a debate about "coalfield communities", gave credence to the view that this was not a proper use of the protection against libel.

MPs (mis)using Parliamentary Privilege does have a long history, and it would be naïve to suggest that this would be the last time. Of greater concern is the part played by Tom Watson, the now Deputy Leader of the Labour Party.

An allegation of rape dating back to 1967 was made against Lord Brittan, the former Tory Home Secretary. In 2013, this was investigated and it was decided in August of that year that there was not a sufficiently compelling case to even interview him. That decision was later reversed, and Lord Brittan was interviewed in June 2014. This reversal only occurred however after Mr Watson had lobbied Alison Saunders, the DPP, on the issue. This is still a matter of some controversy for obvious reasons.

We don't know the full details of course, and an MP is entitled to raise matters of prosecutorial policy with the DPP, and seek to persuade her that they should be more rigorous in pursuing certain cases or so forth. But if they go beyond that and begin to discuss an individual case, and potentially try to use the influence of an MP on an independent prosecutor (if that is what happened), then this would be quite wrong.

Nine months after being interviewed by the police (albeit as a volunteer rather than whilst under arrest), Lord Brittan went to the grave in January 2015. At that point, as far as he was concerned, he was still under the cloud of suspicion. At the time of his death, however, it seems that the police had already decided that their initial view was correct and that no prosecution would follow even if he had been healthy. It took them some six months or so to inform his widow that he would not have faced charges had he lived, a level of inaction which is hard to defend. It doesn't escape notice that although the Met have not been shy in broadcasting or leaking the arrests and charges of celebrities, they are somewhat more reticent about admitting that they may have made a mistake.

After the "Saville revelations", the police (and the "establishment" generally) were rightly criticized for their historic inaction over sexual abuse. Is it the case that the Police, in trying to right the wrongs of the past, are committing fresh ones? The risk run here is that there will be a fresh backlash against the police as innocent people get caught up in the net. And all it will take is one high profile miscarriage of justice to undo much of the good work on prosecuting historical sexual offences.

One of the people investigated, the former Tory MP Harvey Proctor, gave a dramatic press conference in August, where he set out the allegations that the police had interviewed him about, along with his response to them. This appeared to be well received in the media, and may be seen one day as a turning point. It was a useful reminder of the agony that can be suffered by the wrongly accused, especially when their name gets in to the media.

There was no legal obligation on the police to name Lord Brittain, or any of the others people arrested and charged. Although it is something that is of massive interest to the public, it is less clear that it is in the public interest for such people to be identified.

It may be that we have to revisit the thorny question of whether people who are arrested should remain anonymous until charge, or even conviction. The irony, of course, may be that the actions of the police in these cases makes the case for pre-charge anonymity all the stronger. ■

Barrister, 2drj Chambers

This year's BFI London Film Festival screened a total of 238 fiction and documentary features, including 16 World Premiers, eight International Premiers, 40 European Premiers and 11 Archive films including five Restoration World Premiers.

Now in its 59th year, the BFI London Film Festival is one of the World's oldest film festivals and provides a platform for movies which are predicted to have significant success over the next 12 months. But enough of the stats.

Already, the film which graced the Opening Gala, *SUFFRAGETTE* has hit the multiplexes, telling the story of so called ordinary British women at the turn of the last century who risked everything in the fight for equality and the right to vote. The film makes the interesting decision to side line the Suffragette Superstars such as Emily Pankhurst, who is most associated in the public mind with the fight for women's sufferage and other campaigners who came from more privileged backgrounds and focus, rather, upon the rank and file of women from a social status, which over 100 years ago was virtually living in servitude to men.

Of course the First World War changed everything as to how women were perceived and this compelling film made by British women about British women is long overdue. It is startling to think that hardly any mainstream movie has been made about this seminal moment in British history which ranks up there in importance with seismic political changes such as the abolition of the slave trade. Apparently, the reason given by the film industry for its ignorance of the Suffragette movement as a topic for a film was that they thought it would not have wide appeal.

This film is set to prove them wrong and whilst it does have its flaws, the very fact that it was made makes it a significant moment in movie history and a film to catch, now on circuit.

Another film, showcased at the London Festival and soon to arrive around the country is *THE PROGRAM*. This is director Stephen Frears' take on the Lance Armstrong story which the more you learn of it, the more it takes the form of a latter day Greek Tragedy, complete with heavy moral lessons at the end [see Icarus]. There are some superb performances here, not least of which the two central players, Ben Foster, looking the spitting image of Armstrong and Chris O'Dowd as his nemesis, the Sunday Times reporter David Walsh, who tenaciously fought to reveal the extent of Armstrong's fall from grace. Lance Armstrong's rise to almost canonisation in the 1990's is plotted with hypnotic accuracy in the film and his iron determination which not only enabled him to defeat cancer is also searingly portrayed by Ben Foster in his drive to become a world-class athlete.

Frears attempts to present a balanced picture of the man, who could have easily been demonized, but some scenes, particularly those in a children's cancer ward are touchingly handled and remind us that there was and still is a positive passion in the man, which, ultimately, unbridled, led to his downfall.

We are reminded in the film that when the going got tough for Armstrong, his inclination was to go on the attack through the law courts and there is a particularly revealing sequence in the film when Frears creates a montage of legal cases, vindicating Armstrong, only to be overruled as his empire unravelled. This is a movie about raw ambition and Faustian in how it plays out.

Watch out for *RATTER*. Taking its name from a term denoting someone who hacks into a computer system to take control of its functions, it is the story of a young woman and her obsessive cyber stalker who hijacks technology to watch her every movement. The film highlights how many potential surveillance devices impact upon our lives, a particularly topical subject, recently exposed by Channel 4 in their compelling real time series *The Hunted*. This creepy thriller questions the notion of privacy in a society obsessed with developing technology and self documentation. After watching this movie, you may come to the conclusion that the right to be forgotten is but a pipe dream. **JCQC**

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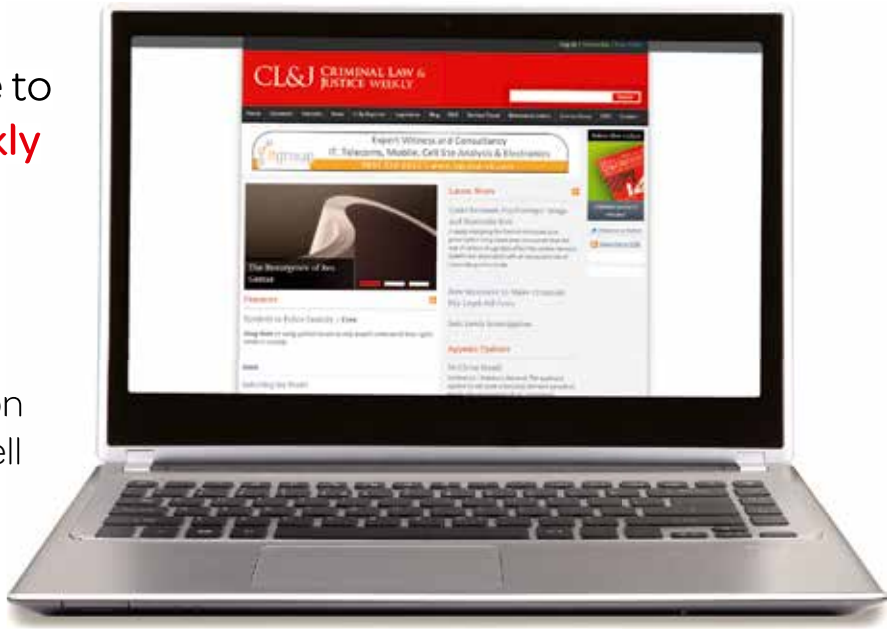

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