CBQ

Criminal Bar Quarterly Issue 1: March 2009

The truth about false confessions

Also on the inside:

Remembering John Mortimer
Financial reporting orders
Protecting disabled defendants and
The future of expert evidence

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The Editor

In the first CBQ of the year, there is a variety of articles which should tempt a broad range of interests.

We have a fascinating piece by Dr Georgina Smith on the controversial issue of false confessions, which have blighted the criminal justice system for many years; her close analysis of the problem is one of the highlights in this issue.

Another deals with the sad loss of one of the great names of the Criminal Bar. Geoffrey Robertson Q.C. writes a moving tribute to the creator of probably the most influential fictional barristers of our time, but reveals much more about its creator, John Mortimer. Also Louise Curtis reminds us that the modern criminal barristers need to think laterally!

With the introduction of more and more forms to fill out, tasks lists to complete or protocols to comply with, the bureaucratising of practice has encroached upon most barristers' lives, but it is when we remember people like John Mortimer and other colleagues of talent and charisma that we realise that whatever the bureaucrats come up with next, the Criminal Bar is about the people who work within it and no "form" will ever change that.

John Cooper

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

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CHAIRMAN'S COLUMN

Peter Lodder Q.C.

It may be significant that February 2, the day chosen for the meeting to discuss the VHCC consultation paper, turned out to be the very day upon which much of the country was paralysed by snow. Even the weather seemed to be conspiring against us. Across the country some employees took advantage of an extra day to the weekend and did not turn up for work. The criminal bar was not so faint hearted; although a little low on numbers, the meeting in London went ahead with video links to Birmingham, Bristol, Liverpool and Manchester. It was an important opportunity to express feelings of mistrust and frustration at the latest proposals but also to show a determination yet again to try and get it right.

VHCC

We all know that VHCCs are the more complex cases. Preparation may take years and at trial they take many months of court time. It is vital that experienced high quality counsel are instructed. These cases can attract significant publicity – if they are not conducted properly and efficiently they may bring disproportionate disrepute upon the Criminal Justice System.

There are many concerns about the VHCC regime but principally they turn on poor rates of remuneration and the "micro–management" of counsel's time by the contract managers. The history explains much of the disenchantment: since introduction in 2001 there has been a steady erosion of the rates – a reduction of the order of 25 per cent in some categories. The stories of the behaviour of some contract managers, the requirement for permission to undertake any work, however obvious and necessary it is to do it, and the haggling over how long may be taken to conduct it, are legion.

Last year the Bar made clear it had had enough; the new contract first introduced in January was widely rejected. The consequences of that rejection became apparent from September onwards and drew considerable media attention. In October and November 2008 it was clear that a series of high profile cases would be adversely affected by a lack of proper representation (the Rhys-Jones murder trial was but one example). With the direct intervention of the Ministry of Justice a modest "improvement" was put forward. The immediate problem was resolved, but it was with the clear understanding on the part of the Bar that this was on an interim basis and a longer term solution would be available by July 2009. That solution was to involve a more graduated fee based scheme.

In order to keep to this timetable the LSC were required to publish this consultation paper by early December. This they did, but the paper bears all the hallmarks of haste: it is difficult to follow, badly written and insufficiently thought through. It must be noted that the final draft was prepared by the LSC, the barrister members of the steering group were not consulted. There have been a series of "road shows" (Manchester, Birmingham and London) in which the LSC have sought to present the proposal in a favourable light. In fact, at each event the scheme and the LSC have been roundly criticised. I attended the London meeting and it seemed to me that they continued to be surprised by the strength of feeling. One is tempted to think that the LSC do not know how to deal with the problem and so are clinging blindly to the wreckage. However, it is vital that we keep in mind that whatever scheme is eventually adopted it is likely to be with us for many years. Although there is deep criticism of the paper as it stands we must recognise the importance of negotiation as the way forward and press hard for a scheme that is satisfactory and works.

It is of the greatest importance that members read the paper and engage in the consultation process, I summarise some of the issues that have to be addressed. The paper introduces a new unit of account named a unit. The value of the unit for advocacy has been calculated by averaging out the payments made in a sample consisting of 88 completed cases. The data relating to these cases was only disclosed on February 6. Some of the cases went short — pleas of guilty etc. As the figure used for the calculation is a mean of all of the cases, it is reduced from a typical trial level. There is a strong suspicion that there is a flaw in this analysis and that it cuts rates significantly. Alternative computations are being circulated which fuel these suspicions. As this calculation lies at the heart of the scheme the problem must be addressed. We are seeking further analysis of this data.

The consultation purports to break away from hourly rates for advocates. It attempts to introduce a fixed (or graduated) fee element. To this end there is a distinction between core and non core tasks. Core tasks are those tasks common to every case: statements, exhibits, etc. The proposal is that the fee for this work will be calculated by a simple arithmetic process of multiplying the quantity of papers by the appropriate unit rate. That fee is payable regardless of the amount of time taken to complete the work. Whilst this does break away from the yoke of hourly rates it will only work if the definitions are clear and the payment reflects the work which will be required.

The definition of core tasks appears at Annex 2. These definitions were drawn up by the LSC without consulting the steering group. Words such as perusal, reading and cross referring are used interchangeably. It is not made clear whether this will be the only paid time available for reading and if preparation for cross-examination is included or not. At the London "road show" it was stated that returning to statements to prepare cross-examination is a non-core task, but it is not listed amongst the non-core tasks on page 19. Initially there was considerable enthusiasm for placing as much as possible into the core tasks category so as to avoid negotiation with contract managers. But the disenchantment with the definitions (and the rates) is causing some members of the bar reluctantly to re-consider this aspect of the old system as the only way in which they may be remunerated, albeit still inadequately. If the core/non-core task concept is to succeed these definitions will need to be more precise.

Hitherto there have been four categories of VHCC. The paper proposes one category alone. For some the higher rates of categories 1 and 2 are the only reason to conduct this work. Others complain that if all cases are paid at the same rate then there will be no reflection of the particular burden of the more demanding trials.

It is not clear if that difference will be made up by an allocation of non-core units by a contract manager. However most cases fall into categories 3 and 4 and so for many practitioners the single rate would be higher than they would otherwise expect.

I cannot stress too highly the importance of members of the association informing us of their views on these issues. Please send your comments to Aaron Dolan.

Other business

In the meantime, and particularly in the last month, there has been a torrent of other demands placed upon the CBA.

We have set up working groups on the Policing and Crime Bill and the Coroners and Justice Bill. These bills cover a wide range of important issues with implications for the Criminal Justice System. Those groups have provided briefing notes for the second readings of both bills. We have attended meetings with Ministers and with individual MPs. With the assistance and support of Martin Evans and Richard Matthews, I have given evidence to each of the parliamentary scrutiny committees examining these bills. We are grateful for the close personal interest of Desmond Browne Q.C. and for the industry of Mark Stratton at the Bar Council in these matters.

In addition, with the welcome support of Tom Little, I gave evidence to the Justice Select Committee investigating the work of the CPS. This was a useful opportunity to bring focus to bear on what we all see on a day to day basis in the courts. The questioning was robust and the committee plainly expected a protectionist view to be expressed. My message was a simple one: there is no objection to cases being conducted by good and competent advocates operating on a level playing field. We considered the rate of increase in the use of in-house advocates, and the levels of performance. The committee was aware of these issues but has not turned a critical eye to CPS claims that it is cheaper than using the self-employed bar. Following the hearing we will be assisting in the preparation of questions designed to establish the true position.

Strong responses have been prepared to the recent consultation papers on means testing and proposed changes to orders for defence costs. These are detailed and well argued documents and I am grateful to those who contributed to them. I am grateful also to the Northern Circuit and the Midland Circuit for their hospitality on my recent visits to Manchester and Birmingham. It is always good to meet members of the association in a convivial setting and dinner on each occasion has been excellent. I look forward to visiting other areas soon.

Finally a few reminders: the Spring Conference will start with dinner on the evening of April 24 and run throughout the day of April 25 in Manchester. Full details appear on a notice within this edition, I encourage all members to attend. The annual dinner will be on May 15 in the Great Hall at Lincoln's Inn, as Bob Marshall-Andrews Q.C. is the guest speaker I suspect encouragement to attend will not be necessary.

Again there is much to look forward to and, despite the snow, and the LSC, we battle on.

Peter Lodder Q.C.
Chairman

"Financial reporting orders and Article 7 of the ECHR"

Mark Sutherland Williams and James Chegwidden breakdown the intricacies of the requirements upon defendants to provide written details of financial activities.

Financial Reporting Orders are not "penalties"

In December 2008, the Court of Appeal in *R. v Wright*[1] considered the question of the imposition of Financial Reporting Orders ("FRO"s) in the Crown Court under s.76 of the Serious Organised Crime and Police Act 2005 ("SOCPA"). Its judgment confirms views expressed by the Court previously that a FRO does not constitute a "penalty" under art.7 of the European Convention on Human Rights (ECHR).

The case concerned an appeal by a major drugs-dealer against whom, following convictions for drugs offences on a massive scale between 1995 and 1999, a 10-year long FRO had been ordered alongside a 30-year prison sentence. Silber J. had originally granted leave on two points, the first being that a FRO constituted a "penalty" for the purposes of ECHR art.7, and that therefore it could not lawfully be imposed for offences committed before the commencement of SOCPA without offending art.7(1)[2] (SOCPA was enacted five years after the Appellant's capture).

In written submissions filed in the appeal, the Appellant formally abandoned his contentions on art.7, accepting that, when applied in appropriate circumstances and for appropriate purposes, the making of an FRO does not constitute a "penalty". Although the Court therefore was not required to decide the question, Hughes L.J., having the benefit of written submissions from both parties, observed in his judgment that in the recent case of R. v Adams [2008] EWCA Crim 914, Latham L.J. had had "no hesitation in saying that a financial reporting order was not a penalty for the purposes of [Article 7]". He thus concluded that he was in "no doubt" that the Appel-

1 Unreported, EWCA Crim, December 18, 2008, per Hughes L.J., Davis J. and Judge Scott-Gall.

2 "Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".

lant's advisors were correct to abandon the point as "unarguable".

FROs: what are they?

The Financial Reporting Order is a relatively recent addition to the powers of Crown Courts, coming into effect by virtue of the Serious Organised Crime and Police Act 2005. Essentially, the Order requires a defendant to provide written details of his financial activity to the Serious Organised Crime Agency on a regular basis.

The making of a FRO is subject to two conditions. The first is that the defendant has been convicted of an offence mentioned in SOCPA s.76(3). These are essentially Theft Act 1968 offences and the so-called "lifestyle offences" identified in Sch.2 to the Proceeds of Crime Act 2002, mainly drug-trafficking, money laundering, terrorism, people trafficking, arms trafficking and counterfeiting. The second condition relates to the risk of future offending by the defendant. In order to make a FRO, the Court must be satisfied that the risk of the defendant's committing another specified offence is sufficiently high (SOCPA s.76(2)).

Article 7's requirements

Article 7(1) of the ECHR is as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The article is directed to ensure that, within the jurisdiction of parties to the Convention, no person is made subject to a conviction for an offence which, at the time that the relevant activity occurred, was not a crime (thus giving effect to the international criminal law principle "*nullum crimen sine lege*"); and secondly, to ensure that the penalties imposed for offences committed do not exceed those penalties available at the time of the offending. To engage the protection of art.7(1), one must establish that a "penalty", within the meaning of the Article, has been imposed.

The interpretation of the term "penalty" was considered by the European Court of Human Rights in *Welch v United Kingdom* [1995] 20 E.H.R.R. 247, in particular paras 27–30, outlining the considerations a court should have in mind when considering whether a measure amounts to a penalty. The test set out at para.28 of *Welch* was helpfully distilled in *R. v Field; R v Young* [2002] EWCA Crim 2913; [2003] 2 Cr.App.R. 38 at para.20 as follows:

(a) the starting point is whether the measure is imposed following a criminal conviction;
(b) the nature and purpose of the measure are also relevant;
(c) its characterisation under national law is relevant;
(d) the procedures involved in the making and implementation of the measure are relevant;
(e) its severity is relevant; and
(f) the court will look at the substance, rather than the form, in determining whether the measure forms part of a "regime of punishment".

Whether a measure is in fact a "penalty" is thus a matter of judgment for the national court deciding the question, looking at the criteria above to assist it in its interpretation. It is therefore important to look at each element of the test.

(a) Is the FRO imposed only following conviction for a "criminal offence"?

Pursuant to s.76(1) of SOCPA, a FRO can only be made against a person who has been convicted of an offence. This was confirmed by their Lordships in *Adams* (at para.24) who found that "it is an order made on conviction".

However, whilst a FRO can only be imposed following a conviction for a criminal offence, not all measures following convictions will automatically be held to be a "penalty" (see *Ibbotson v UK* (1998) 27 E.H.R.R. CD 332 (at 334)—registration on the sex offenders register not a penalty, but independent; *Gough v Chief Constable of Derbyshire Constabulary* (2001) EWHC 554 (Admin) (para.40)—football banning orders not a penalty, but preventative).

(b) The nature and purpose of the FRO

The aim of the FRO is the prevention of further crime. It seeks to ensure that the future risk of criminal offending (in this case money laundering) is minimised and "to enable the courts to keep control over those in respect of whom there is the risk that they may indulge in criminal activity" (see para.25, *Adams*). To that extent, its primary purpose is preventative and not penal in the sense normally entailed in a criminal sanction.

The Explanatory Notes that accompany SOCPA state:

> "Chapter 3 provides for the making of financial reporting orders. Such orders may be imposed as ancillary orders for certain trigger offences and would enable the financial affairs of serious acquisitive criminals to be monitored from the point of sentence."[3]

Simply put, it is a useful device to allow law enforcement officers to monitor the financial affairs of a convicted defendant. In such circumstances, it can be argued that it is both proportionate and in the public interest (art.1 Protocol 1 para.1).

There is no requirement that a confiscation order be in place for a FRO to be made and, unlike a confiscation order, where statute requires the order to be treated as a fine (see e.g. s.9(1) of the Drug Trafficking Act 1994 ("DTA") and s.35 of POCA), such considerations do not apply here.

The measure is directed towards the possibility of *future* offending. To that extent it does not have retrospective effect. This objective is consistent with the overall purpose of SOCPA, the history of which is set out in part at para.34 of the Explanatory Notes. The current legislation stems from a White Paper entitled *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* published in March 2004. That White Paper set out the Government's three-pronged strategy for tackling organised crime, namely *reducing the profit incentive, disrupting the activities of criminal enterprises and increasing the risk to the major players of being caught and convicted*. The Explanatory Notes confirm that Pts 1 and 2 of SOCPA are intended to give effect to those provisions of the White Paper that require legislation.

(c) The characterisation of the FRO under national law

The Court of Appeal has already found that a FRO is part of the sentencing process (para.24 of *Adams*) and it was on that basis that the case of *R. v Wright* proceeded as an "appeal against sentence". SOCPA is, however, silent as to whether the application for a FRO should be categorised as criminal or civil proceedings; upon whom the burden lies; and the standard of proof.

3 para.7, Explanatory Notes, SOCPA.

There does not appear to be any statutory requirement for the Crown to make the application, and it follows (presumably) that a court would be entitled to make such an order of its own motion.

In deciding whether to make a FRO, the Court must conduct a balancing exercise, assessing from the information with which it has been provided whether or not the conditions in s.76(1) and (2) are made out and, if so, determining which conditions are appropriate in the defendant's case. The starting point for determining civil or criminal proceedings in set out in *Engel v The Netherlands (No.1)* (1976) 1 E.H.R.R. 647)

(d) The procedures involved in the making and implementation of the FRO

There is no fresh "charge" in relation to the making of a FRO. There is no new arrest, no indictment and no verdict. There is no reference to FROs in the Criminal Procedure Rules. The procedure the Crown follows is by either paper or oral application to the Court, with both parties present and entitled to make submissions.

The effect of the FRO is to require a defendant to submit a report (a proforma, which is supplied to him), which requires him to give details of his financial affairs (see SOCPA s.79). If he has had no dealings, then the exercise should, on one view, be both brief and straightforward. To that extent it could be argued that it is no more a "penalty" than being asked to fill out an application for a passport or a television licence. It becomes, twice a year, part of the Appellant's "paperwork". In some cases, of course, it will be a more onerous responsibility than in others.

Should a defendant have cause to challenge the FRO, SOCPA makes allowance for him or her to do so, on whatever grounds appear relevant at the time (see s.80). To that extent, the Court retains a supervisory role and the defendant is entitled to seek the discharge of the FRO upon application.

It is important that the Crown should be able to monitor the financial dealings of defendants where there is a risk that further crime will be committed. This is reflected in s.81 of SOCPA, which confirms that the Financial Reporting Officer will be at liberty to check the accuracy of the defendant's reports and attempt to discover the true position (see s.81(4)). For example, in the case of *Wright*, as per Hughes L.J., the Appellant had been a career criminal on an enormous scale and had lived outside the system in such a manner that there was no recorded trace of his existence. He had lived on cash and was able to put his hands on six-figure sums with the assistance of others as and when he needed to, leading a lavish lifestyle and surrounded by a close and loyal clique. When the police got near to his associates he fled to North Cyprus, where there were no extradition rights, in a private jet. He was arrested several years later in Spain. The extent of his wealth and assets were unknown as he had adopted a position of blanket non-compliance throughout the prosecution. At the application stage, the judge at first instance had found that there was a risk that the Appellant would commit different specified offences, involving money laundering. The Court of Appeal held that the judge was justified in arriving at the conclusion that there was a high risk that the Appellant would commit further specified offences. The Court proceeded on the assumption that he would make some compliance with the order, and that something could emerge of value which could also deter the Appellant from committing other offences or help them to be detected. In, what the Court of Appeal described as the "highly exceptional circumstances of the case", the judge was entitled to reach the conclusion he did and make the order that he did.

(e) The FRO's "severity" and "regime of punishment"

Providing that a defendant properly complies with the requirements of the FRO, he will not be in jeopardy of being committed for a further term of imprisonment. Even if he were to fail to comply, whether he would be subject to a further punishment would be a matter for a Magistrates' Court to determine, and only after hearing submissions on the surrounding circumstances (see s.79(10): "A person who without reasonable excuse includes false or misleading information in a report, or otherwise fails to comply with any requirement of this section, is guilty of an offence").

Whilst s.79(10) creates a summary criminal offence, committed if the subject of the FRO fails to comply with the requirements of the FRO (punishable by a term of imprisonment of up to 51 weeks and/or a fine), that offence remains distinct from the making of the FRO itself. The purpose of the possibility of a default sentence is in part to ensure compliance with the Court's order and, presumably, Parliament's intentions.

Conclusion

The above considerations point clearly to a FRO not constituting a penalty for the purposes of the test in *Welch*, a conclusion with which the Court of Appeal has agreed in two separate cases. It thus appears that FROs have now passed the test of ECHR compliance and may safely be imposed, in appropriate cases and for appropriate purposes, in Crown Courts dealing with the serious offences which the legislative regime established by SOCPA was designed to help prevent.

Mark Sutherland Williams is the co-author of *The Proceeds of Crime: Law and Practice of Restraint, Confiscation, Condemnation and Forfeiture*, 2nd edn (OUP) and the Head of the Asset Forfeiture Group at 3 Paper Buildings.

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The Psychology of False Confessions

Dr Georgina Smith provides a fascinating paper on this concerning phenomena

Introduction

In criminal law, the confession is frequently regarded as the most unequivocal evidence of guilt and the most damaging form of evidence produced at a trial (Wrightsman & Kassin, 1993). Obtaining a confession is one of the most important aims of police interrogation (Underwager & Wakefield, 1992). If a confession is treated as a compelling indication of guilt then a false confession is an exceptionally dangerous piece of evidence to put before anyone adjudicating a case. According to Leo & Ofshe (1998), "In a criminal justice system whose formal rules are designed to minimise the frequency of unwarranted arrest, unjustified prosecution, and wrongful conviction, police-induced false confessions rank amongst the most fateful of all official errors".

Recognition of the problems caused by false confessions has resulted in the discovery and documentation of numerous case examples by social science researchers, legal scholars and journalists. Despite an influx of research in this area over recent years, it remains difficult to determine how often false confessions occur, how frequently false confessions lead to wrongful convictions or how much personal and social harm false confessions cause. Leo (1998) attributes the difficulty in establishing a baseline on the incidence and prevalence of false confessions to three factors: police interrogations are conducted in secrecy and are usually not recorded; law enforcement agencies do not keep records on the number of interrogations conducted and it is difficult to establish what actually occurred to elicit a confession, especially if the confession resulted in a conviction.

Although it is difficult to estimate the number of false confessions, a review of one decade's worth of murder cases in a single Illinois county found 247 instances in which the defendants' self-incriminating statements were thrown out by the court or found by a jury to be insufficiently convincing for conviction. Bedau and Radelet (1987) reported that a false confession generated by coercive questioning was the primary cause for the conviction of 49 of the 350 instances of miscarriages of justice in the US this century. Further to this, Wrightsman & Kassin (1993) cited Lloyd-Bostock's report (1989) that in Great Britain, false confessions ranked second only to mistaken identifications as a cause of wrongful conviction among cases referred to the Court of Appeal.

Interestingly, institutional and cultural factors impact upon the rates of confession in different countries. According to Kassin & Gudjonsson (2005), suspects detained for questioning in the United States confess at a rate around 42 per cent compared to 60 per cent in England. In Japan, however, where fewer restraints are placed on police interrogations and where social norms favour confession as a response to the shame of transgression, more than 90 per cent of suspects confess. This is indicative of the significance of psychological factors and police interrogation procedures in influencing an individual's inclination to confess to a crime. The question of what factors compel innocent suspects to give false statements and confess to crimes they did not commit has been the subject of much interest in the psychological literature over the past two decades.

Types of false confessions

Analysis of the anecdotal literature (Reik, 1959; Schafer, 1968; Zimbardo, 1967) led Kassin and Wrightsman (1985) to describe three psychologically distinct types of false confession.

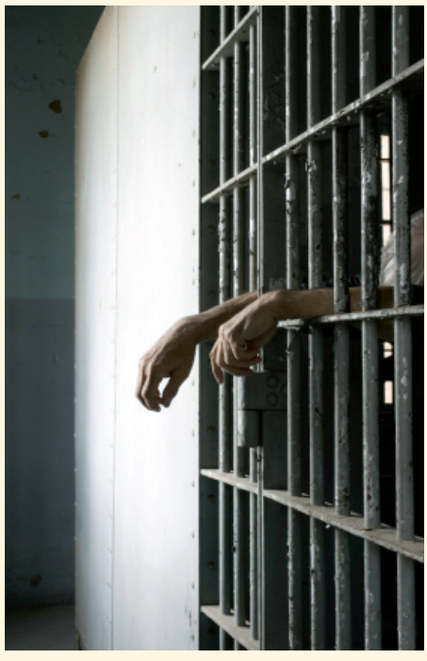
Voluntary false confessions

A voluntary false confession is a self-incriminating statement that is offered in the absence of pressure by the police (Wrightsman & Kassin, 1993). High profile case examples include the kidnap of Charles Lindbergh's baby in 1932, resulting in over two hundred people coming forward to confess and Henry Lee Lucas in the 1980s falsely confessing to over six hundred unsolved murders, making him the most prolific "serial confessor" in history. One reason proposed as to why people might voluntarily confess to a crime they did not commit is a pathological need for fame and recognition (Radelet, Bedau & Putnam, 1992); described by Note (1953) as a "morbid desire for notoriety". Gudjonsson (1999) conducted an extensive psychological assessment of Henry Lee Lucas and reported that Lucas "would say and do things for immediate gain, attention and reaction ... he was eager to please and impress people ... the notoriety aspect of the confessions was appealing to him and fed into his psychopathology" (p.423). Henry Lee Lucas, not surprisingly, had a troubled childhood reportedly involving severe physical violence at the hands of his parents, inappropriate exposure to his mother's sexual activities and being dressed as a girl for a significant portion of his childhood (Taylor La Brode, 2007). Thus the aetiology of his psychopathology (and subsequent need to volunteer false confessions) appeared to involve a severe and complex history of abuse.

Other suggested motives for voluntary confession include an "unconscious need to expiate guilt over previous transgressions through self-punishment" (Kassin & Wrightsman, 1985, p.77). Gudjonsson (1992) elaborates by stating that previous transgressions can be either real or imagined and that the transgression does not necessarily have to be identifiable: some individuals have a high level of generalised guilt, not directly related to a specific transgression, which may influence a range of different behaviours including the need to volunteer a false confession. It is interesting to consider that disorders such as Obsessive Compulsive Disorder (OCD) are characterised by an inflated perception of responsibility for harm (e.g. Foa et al., 2002). An inflated sense of responsibility is not considered to be intrinsically pathological since there is far more responsibility than there is OCD; however, extensive and inap-

propriate appraisals of responsibility can in certain circumstances lead to such extreme behaviour as voluntary false confessions. People who are prone to inflated responsibility may be inclined to experience considerable guilt, not only for their own actions but also for those of other people (Salkovskis, Shafran, Rachman & Freeston, 1999).

It has also been suggested that individuals who volunteer false confessions may have an inability to distinguish fact from fantasy (Kassin & Gudjonsson, 2005). In the most recent Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), a delusion is defined as "A false belief based on incorrect inference about external reality that is firmly sustained despite what almost everybody else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary". Delusions have been found to occur in the context of many pathological states (both physical and mental) but are of particular diagnostic importance to psychotic disorders. Given the tendency of people in psychiatric prisons to experience delusional and false memories, many studies have focussed on forensic psychiatry and schizophrenia with particular attention paid to false confessions (e.g. Smith & Gudjonsson, 1995). Some voluntary false confessions have been shown to have a basis in psychopathology and are thought to occur typically in the context of mental disorder (schizophrenia but also psychotic depression and personality disorder). In addition to having a delusional belief in their own guilt, people also develop strong false memories of having committed the offence (Cohen & Conway, 2008). Gudjonsson (1992) reports the case of Miss S, a woman with a diagnosis of paranoid schizophrenia who confessed to committing a well-publicised local murder. Miss S was receiving psychiatric treatment and her doctor was able to provide an incontrovertible alibi proving she was not involved. Miss S's false confession was believed to have resulted from impaired "reality monitoring" (Johnson & Raye, 1981): a delusional belief that others were conspiring to harm her and a belief that she needed to exert violence as a method of self-protection.



Coerced compliant false confessions

Coerced-compliant confessions occur when suspects confess, despite believing that they are innocent, due to extreme methods of police interrogation (Gudjonsson, 1991, 1992). False confessions, elicited through the use of torture, threats and promises are considered to be of the coerced-compliant type and suspects are believed to confess in order to escape an aversive situation, to avoid a real or implied threat or to gain a real or implied reward. "Brainwashing" falls under the category of a coerced-compliant false confession; a technique used on POWs in the Korean War to force them to make a confession, with the intention of making deep and permanent behavioural changes. A more contemporary example being the military trainers who went to Guantánamo Bay in December 2002 and were reported to have based an entire interrogation class on a chart showing the effects of "coercive management techniques" for possible use on prisoners, including "sleep deprivation", "prolonged constraint", and "exposure".

Authorities, researchers and the media have focused a growing awareness of incidences of coerced false confessions, as well as the associated personal and legal implications involved. The Innocence Project, a national litigation and public policy organisation dedicated to exonerating wrongly convicted people, claims that 8 per cent of wrongful convictions are due to forced confessions prompted by police. According to Leo & Ofshe (1998), police-induced false confessions arise when a suspect's resistance to confession is broken down as a result of poor police practice, overzealousness, criminal misconduct and/or misdirected training.

Severe interrogation is not always necessary. Human beings have a strong drive to comply with the instructions of those they see as being in authority and to "fit in", even to the extent of being willing to harm others (Milgram, 1963; Zimbardo, 1972). People vary considerably in their compliance levels and some may give false confessions simply as a response to the social pressure of interrogation.

Coerced internalised false confessions

Coerced-internalised confessions occur when suspects who are innocent, but anxious, fatigued, pressured or confused, and then subjected to highly suggestive methods of police interrogation, come to believe that they committed the crime in question (Kassin, 1997). According to Conti (1999), what is frightening about this type of confession is that innocent suspect's memory of their own actions may be altered making its "original contents potentially irretrievable" (p.23). One of the most notorious polygraph-induced false confessions is that of Peter Reilly, from whom, at the age of 18, the Connecticut State Police extracted a false confession to the brutal murder of his mother but was exonerated some three years later when it was proven that he was elsewhere at the time of the murder. According to accounts, after hours of police interrogation, Reilly underwent a chilling transformation from denial to confusion, self-doubt, conversion and finally a full confession ("I remember slashing once at my mother's throat with a straight razor..."). The police inter-

rogation process has been compared to hypnosis; Foster (1969) proposed that police questioning "can produce a trance-like state of heightened suggestibility in the suspect so that truth and falsehood become hopelessly confused in the suspect's mind" (p.690). Gudjonsson and Clark (1986) introduced the concept of "interrogative suggestibility" to account for differences in responses to police questioning. Similarly, Eysenck (1964) stated that certain personality characteristics of innocent suspects (such as introversion) made them more prone to suggestibility and therefore more likely to confess to crimes they did not commit.

Schacter (1999) considers suggestibility to be one of the "Seven Sins of Memory" and states that suggestibility in memory refers to the tendency to incorporate information provided by others, such as misleading questions, into one's own recollections. False memory syndrome is a term used to describe the belief that one remembers events, especially traumatic ones that have not actually occurred. This remains a controversial concept among psychiatrists and psychologists due to the suggestion that it is poor therapy which is implanting or contributing to the "memories", leading to false accusations of sexual abuse. Kassin (1997) draws parallels between the "false memory syndrome patient" and a suspect who makes a coerced-internalised false confession, stating that they both share a heightened state of vulnerability regarding their memories and that in both cases, the "expert" convinces the individual to accept a negative and painful insight.

Conclusion

It seems that the criminal justice system has not yet developed adequate safeguards to prevent police-induced false confessions from leading to unjust deprivations of liberty and miscarriages of justice. More attention should be paid to the psychological and social factors that can influence innocent suspects to falsely confess to crimes they did not commit, such as high levels of guilt or suggestibility, an inflated sense of responsibility for harm or an inability to distinguish fact from fantasy. Awareness of the circumstances under which the confession is obtained is also needed, especially where questionable and inappropriate police interrogation procedures are suspected. As with *good* psychological therapy; the aim of a police interrogation should be to elicit the truth … rather than to secure a confession.

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EXPERT EVIDENCE

Neil Baki lays out the future for expert evidence in the criminal courts

The earliest known use of expert evidence in English law came in 1782 when the Court heard from John Smeaton, a prominent civil engineer on the silting-up of Wells Harbour in Norfolk. The use of expert witnesses in many civil and criminal law cases was up until recently an unusual feature in Court, when in 1957 Lord Justice Devlin described in a murder case at the Old Bailey, "a most curious situation, perhaps unique in these Court, that the act of murder has to be proved by expert evidence".

Times have changed to such an extent that the Council for the Registration of Forensic Practitioners, established in 1999 to give the Court a single point of reference on the competence of forensic practitioners has well over 1,600 names on it in and up to 18 specialist areas ranging from anthropology to road traffic examiners. Expert witnesses can be found in almost any discipline from DNA profiling, fingerprints, ear-prints, accountancy and engineering to name but a few.

Recent problems

However, although the use of expert witnesses is to be welcomed in many instances, two major problems have arisen over recent years. The first is the adversarial system itself discourage co-operation and can promote style over substance and secondly, the use of untested science has led to substantial miscarriages of justice.

As a general rule, matters not immediately within the knowledge of the witness either seen or heard, is not admissible evidence in Court. This rule excludes such evidence as hearsay or simply a persons' belief or opinion. As with every rule, exceptions apply.

Sally Clark & Angela Cannings

In recent years the spotlight has fallen on the use of expert evidence in Court, triggered no doubt by the wrongful convictions of Sally Clark and Angela Cannings for murdering their babies. In both cases a paediatrician of many years experience, gave evidence at the original trials which included flawed statistical calculations. These cases were preceded by other famous miscarriages of justice such as the "Birmingham Six" who were freed in 1991 having served 16 years in prison.

The use of expert reports

Section 30 of The Criminal Justice Act 1991 allows for expert reports to be used in Criminal trials, whether or not the person making it attends to give oral evidence or not. Subsection (5) states that "expert report" means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) *qualified* to give expert evidence [emphasis added].

It is for the Judge to decide if a witness is competent to give evidence as an expert. In *R. v Bonython*, a two tier test was adopted. Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:

(a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and

(b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the Court.

The second question is whether the expert has acquired "by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the Court".[1]

Unbiased

The overriding objective of any expert is to give unbiased and objective opinion on matters within his or competence. This duty overrides any obligation from whom he or she receives their instructions or who pays their fee.

Competency

The purpose of using expert evidence is to provide the Court with information based on scientific results, the interpretation of which is outside the experience and knowledge of a Judge and Jury. It is for the Court to decide whether there is a need for expert evidence and also satisfy itself of the competency of the expert. An expert is allowed to give his opinion on the "ultimate issue" in cases, but the Judge must make it clear to the Jury that it is for them to decide if they accept or reject that opinion.

However, even with that clear direction in mind perhaps the controversy over expert evidence lies in a readiness to simply accept the ultimate opinion of the expert. In clear cases where the evidence is contradicted by any other evidence, the jury would be safe to rely on it. If the evidence is not clear or if the "the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore, unsafe to proceed".[2]

Style over Substance

Research has shown that the weight ultimately attached to expert evidence by Juries is determined in significant part by the way in which the evidence is presented.[3] As with any adversarial system of justice the greater presence and ability in Court performance

1 *R. v Bonython* (1984) 38 S.A.S.R. 45.
2 *R. v Cannings* [2004] 2 Cr.App.R. 7, CA.
3 Select Committee on Science and Technology, Seventh Report.

will often hold great sway for people. These points were put to Nimesh Jani, a Policy Advisor for the CPS and his response was bleak, "That may be true of any evidence that Juries will hear, and it is probably true whether it be the defence lawyer or the prosecution lawyer, if they have the charisma to entertain juries properly. At the end of the day, Juries are there to Judge the facts and that includes how people come across — inappropriately of course not, but appropriately yes". This is a disappointing response which appears to acknowledge the influence that the charisma of the expert can have over a Jury's response to their testimony.

"Saxophones"

Further, the lack of impartiality of expert witnesses has shown to be a major problem. The slang term for expert witnesses in the United States is "saxophones": the lawyers hums the tune and the expert witness plays it like a musical instrument. The problem with the adversarial system is that it does not by itself encourage parties to agree upon a single expert who would act on the instructions of all parties and be cross-examined by al l parties. Instead, each party tends to engage its own expert.

Joint Experts

In civil courts Pt 35 of the Civil Procedure Rules states that where two or more parties wish to submit expert evidence on a particular issue, the Court may direct that the evidence on that issue is to be given by one expert only. Single joint experts on behalf of the crown and the defence are generally not used in criminal cases in the UK. However, such an approach may not be easy to achieve in many criminal cases if agreement of who to instruct between the Crown and defence cannot be reached. Indeed, many experts may be reluctant to undertake such instructions because of increased workload.

However, the use of single joint experts should be encouraged and may ameliorate the second of the problems surrounding expert evidence.

New Science

Establishing the validity of new scientific techniques and theories, and the basis for their interpretation, is essential before evidence derived from them can be used in Court. It is not always straightforward for Judges to decide whether to admit forensic evidence. The Court of Appeal has recently considered earprint, lip-reading and facial mapping evidence. Indeed, polygraph tests are currently being used in criminal trials in many other countries including Canada and the United States.

Sir Alec Jeffreys has expressed his concern about the lack of protocol in the UK for deciding whether to admit scientific evidence, in relation to the validation of new scientific techniques. The results of this lack of clarity can be seen in the case of Mark Dallagher, the first man in the UK who was convicted of murdering an 84 year old woman by using an ear-print. His Counsel, James Sturman Q.C. told the Court, "This is another example of the dangers of the police following scientists too closely when the scientists are building a science, not following a science". English court have used this technique and obtained convictions in three other cases even though it has been widely discredited mainland Europe and the United States.

Daubert Principles

The UK Court should be more rigorous in its approach to new scientific techniques. Most states in the US follow well defined procedures to establish whether evidence from a particular scientific technique should be admitted. According to the Frye Test (named after a defendant in a murder case in 1923), Court can only admit evidence derived from a novel scientific method once it has gained general acceptance I within the scientific community to which it belongs. This test was further developed in the Daubert Test[4] which has four criteria:

(i) whether the theory or technique can be (and has) been tested);

(ii) whether it has been subjected to peer review and publications;

(iii) in the case of a particular technique, what the known or potential rate of error is or has been;

(iv) whether the evidence has gained widespread acceptance within the scientific community.

The introduction of a similar such test in the UK may serve as a gate-keeping test and act as an early warning sign, particularly in the context of our adversarial system.

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4 *Daubert v Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579.

John Mortimer: Thanks for the memories

John Mortimer was a man for all the seasons that touched his Chilterns garden, where he lived as profusely as he wrote, in a spirit of unjudgmental generosity. His greatest achievement was to create, in Rumpole of the Bailey, a lawyer the world would love.

John grew up in the house at Turville, near Henley, that he never really left. His father was an irascible, blind barrister, the Mortimer of *Mortimer on Wills, Probate and Divorce*. His mother, devoted and stoic, read aloud the sad, true stories of cruelty and passion between the wars contained in his father's briefs for the divorce court.

John — an only child — was sent away to the Dragon School at Oxford, in a class with historian EP Thompson and a "sour faced boy who wouldn't share his tuck" (who grew up to become a severe circuit judge at St Albans and model for Rumpole's adversary, Judge Bullingdon). Home from Harrow, the teenager wracked his imagination to stage theatricals that his father might "see" — his contribution to the stiff-upper-lipped family pretence that Clifford Mortimer was not blind. In Henley, he encountered with interest the bookshop-owning lesbians who had taken opium with Cocteau, and a prim elderly lady who had, in her youth, urinated regularly upon the sexologist Havelock Ellis.

He determined to be a writer, and joined the Crown Film Unit upon leaving school. But his father had other ideas:

"Father: . . . if you were only a writer, who would you rub shoulders with? (with contempt) Other writers? You'll be far better off in the law.

Son: I don't know.

Father: No brilliance is needed in the law. Nothing but common sense, and relatively clean fingernails. Another thing, if you were a writer, think of your poor, unfortunate wife . . .

Son: What?

Father: She'd have you at home every day!

In carpet slippers . . . Drinking tea and stumped for words! You'd be far better off down the tube each morning, and off to the Law Courts . . . the law of husband and wife may seem idiotic at first sight but when you get to know it, you'll find it can exercise a vague medieval charm. Learn a little law, won't you? Just to please me.

Son: It was my father's way to offer the law to me — the great stone column of authority which has been dragged by an adulterous, careless, negligent and half-criminal humanity down the ages — as if it were a small mechanical toy which might occupy half an hour an hour on a rainy afternoon."

When Britain's 1960s playwrights examined their fathers — Peter Nicholls despairingly in *Forget-Me-Not Lane*, David Mercer bitterly in *After Heggarty*, John's *A Voyage Round My Father* stood out for the unquestioning love distilled in its lines for this man who had refused to show any to his son. Many young people ruin what would otherwise be talented and useful lives by devoting themselves to law, and John at the time felt himself to be one of them (he was always remarking on the irony of leaving the artificial atmosphere of the court at 4.30pm for the real life of theatre rehearsals). Yet practice of law, although it sapped the early development of his writing skills, eventually gave him the experience which produced his greatest character.

After Brasenose College, Oxford, and at war's end, love and law came hand in hand. He married Penelope Fletcher in 1949, taking on her four existing children and adding two of their own. They wrote a travel book together, and novels separately, as he struggled to develop a practice at the Bar. He soon discovered a real talent for divorcing people (in those barbaric, fault-finding days before divorce reform), and for the arcane Chancery world in which one's time and talent is expended in deciding the validity of a will written on a duck-egg, or the charitable status of a legacy to Trappist nuns.

The autobiographical *A Voyage Round My Father* did not come until 1963, initially as a series of half-hour BBC radio plays before John adapted it for television, then the stage and then back into a film for television, its various incarnations starring such luminaries as Sir Laurence Olivier, Sir Alec Guinness, Ian Richardson, Alan Bates and Derek Jacobi. However, John's first real stage success was 1958's *A Dock Brief* — set in the cells, where an incompetent barrister counsels himself and his convicted client. It was rooted in his own nervousness about failure and his permanent terror at having responsibility for another's fate. For this reason, he avoided the criminal law until reform dried up his contested divorce work, and he had no alternative but to go "down the Bailey".

By the end of the 60s he had a considerable reputation as a novelist and playwright, and had played an important role in the abolition of the death penalty and the passage of the Theatres Act, which abolished that bane of the British stage, the Lord Chamberlain's power of censorship — not that his own work had ever been in danger from this quarter.

An irony of his leadership of the anti-censorship movement was his profound belief that anything at all should be capable of being said about sex, coupled with his own reluctance to deal in his work with anything other than its consequence. Sex was an amusing but bemusing fact of life, not to be taken entirely seriously: "The whole business has been overestimated by the poets".

This was not, one feels, an attitude shared by Penelope. Theirs was, in fact, a remarkable marriage, which raised six children at the same time as innumerable books and plays and contested legal cases. Its final stages were somewhat bitterly reflected by Penelope in her novel *The Home*. John, typically, celebrated more of the fun and laughter in his play *Collaborators* (1973), in which the couple metamorphosed into characters played by Glenda Jackson and John Wood.

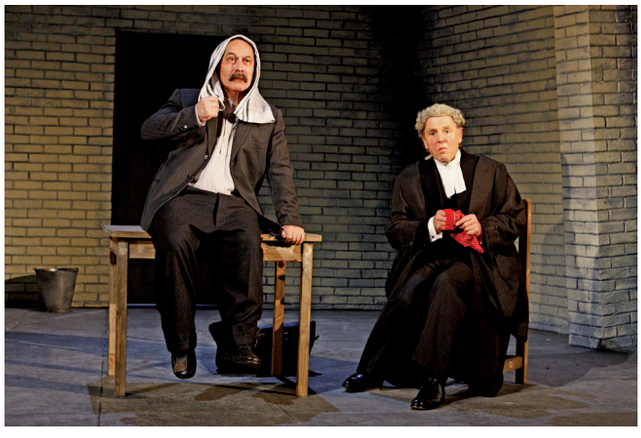
By 1971, John was a successful silk, having reinvented himself as an advocate in murder trials. He found a macabre fascination in the pattern of bloodstains, and acquired a singular ability to charm expert prosecution witnesses out of their preconceptions.

But nothing in the training of the English Bar and bench had equipped it for the underground press, and when a largely unreadable magazine called Oz published a cartoon strip featuring Rupert Bear with an erection, its editors were treated as if they had committed treason. QCs, their cab-rank principles forgotten, fled from the proffered defence brief.

A few days before the trial — for conspiracy to corrupt public morals, an offence carrying a maximum of life imprisonment — Richard Neville and I showed John the offending publication while he was lunching a young woman, also named Penelope. They both giggled. We begged him to take the case.

"Goody," was his response, as he excused himself to complete a cross-examination about bloodstains in a murder trial.

Thus began his second life, as defender of the apparently indefensible, as creator of Rumpole and much else besides, and, as husband of Penny the second and father of Emily and Rosie. His first marriage had been dissolved in 1972, and his first wife died in 1999. This period includes by the publication in 1982 of his first autobiography, *Clinging to the Wreckage*, and in 1994 his second, *Murderers and Other Friends*. They speak for themselves of a life anchored in family, yet lived in a daily dramatic jumble of court cases, plays and television series, sharply observing the vanities of the world through the blur of diminishing eyesight.



John retired from the Bar in 1981. Rumpole was the barrister he wanted to be, but wasn't. He was too nervous — petrified before a big case, and diffident about his own abilities. Yet he was a great cross-examiner of expert witnesses ("the art of cross-examination is not to examine crossly") and many alleged murderers owed their liberty to his ability to draw out a doubt in the apparently closed mind of a prosecution expert. With increasing weariness, he had stood up for the principle of tolerance against Mary Whitehouse and her supporters in the judiciary (and there were many), most notably in the defence of *Gay News* at a time (1977) when support among barristers — even gay barristers — for fighting this kind of homophobia was negligible.

His final speeches, meticulously handwritten, were minor works of literature. He could laugh a case out of court — had he stayed, he would have made a fortune in libel defences. His forensic contribution was effectively to end censorship for the written word, first for literature, by arguing the appeal which freed *Last Exit to Brooklyn* (the 1964 novel by American author Hubert Selby Jr that was prosecuted under obscenity laws for its treatment of sex, durgs and violence), then by persuading the Oz jury to reject the moral corruption charge, and going on to demolish, at the appeal, Judge Argyle's directions on obscenity.

The Williams Committee on Obscenity, reporting in 1980, agreed with Kenneth Tynan in crediting him with achieving a de facto freedom for the written word by his victorious defence of *Inside Linda Lovelace*, a shabby little book which would have gone unnoticed had the DPP's office not decided to dignify it with a prosecution, after which it sold a million copies.

From dawn each day John would be at work on his supreme creation, Rumpole of the Bailey. Horace Rumpole had, like all great fictional characters, been composed from fragments of the real people John had worked with, his father, and James Burge (a mercurial Old Bailey junior who never quite recovered from the professional consequences of defending Stephen Ward during the Profumo scandal) and Jeremy Hutchinson, the mighty defence silk married at the time to Peggy Ashcroft.

In the hands of Leo McKern, and in novels that continued until his death, Rumpole achieved international acclaim (there are Rumpole societies of lawyers basking undeservedly in his popularity from Los Angeles to Perth). Rumpole is, perhaps, the first truly Dickensian character to emerge from the medium of television. There remains one great virtue about him (his independence) along with much that has, for good reason, passed away. If Rumpole returned today, he would still not be made a silk: (the new appointments board displays a marked bias towards appointing prosecutors rather than defenders to the rank of Queens Counsel) and would probably be bankrupted by wasted costs orders.

Rumpole of the Bailey first appeared as a popular series on Thames Television in 1978, and had a particular impact on the reception by juries of police evidence. It came at a time when the Vaudeville routine of the police "verbal" was still in vogue. Hardened villains, immediately on their arrest, would always say "It's a fair cop, guv" or "You've got me bang to rights this time" or make other incriminating remarks. At least, police would tell this to juries as they read from their concocted

notes. Juries would believe them, having been led by television fare like *Dixon of Dock Green*.

Rumpole of the Bailey presented a different picture. It showed how bent or overzealous police could secure convictions by forensic trickery. I remember the talk at the defence bar at the Bailey during the first series of Rumpole: we credited the series with the new willingness of juries to acquit in such cases. In due course the law was changed and all police interviews had to be tape recorded or video taped.

Rumpole can also be credited with helping to change the culture of the bar. John was always amused at the prejudice against criminal law amongst the legal establishment — as Lord Reid had put it, "the Old Bailey is hardly the SW3 of the legal profession". Lawyers who practiced in crime were looked down on and students who showed any interest in human rights (then called civil liberties) were warned that they might ruin their career. Rumpole helped the public — and the bar — to understand that the need to protect the liberty of the subject an important justification for the profession, and certainly for its independence.

John worked on, long after leaving the Bar, meticulous as ever: he came to the European court of human rights in Strasbourg with us in 1995 to research the law and the restaurants that feature in *Rumpole and the Rights of Man*, and more recent volumes had the bewildered barrister grappling with Asbos and terrorism control orders. Too full of ideas to sleep, he started work on a new film or novel or play — or all at the same time — at 5am, ending in time for long gossipy lunches with friends and family, followed by theatre and parties in London. In his garden a few weeks before his death, we were discussing how a new Rumpole book might picture the old darling doing battle with changes to the provocation, defence to murder currently being proposed for no better reason than to put more men in prison.

In the capital, John has served as culture's Queen Mother, gracing the National Theatre, the Royal Opera, the Royal Ivy and the Royal Court with his comfortingly unchanging, beaming presence. It is a sorry reflection on his political friends that he was never made Lord Mortimer of Turville, although he was knighted in 1998. Later works included tales of the opportunist Thatcherite politician Leslie Titmuss, *Paradise Postponed* (1985, televised 1986) and *Titmuss Regained* (1990, televised 1991); *Summer's Lease* (1988, televised 1989), set in Tuscany; and *Dunster* (1992), about an adversarial friendship that culminates in a court case. For Covent Garden he translated *Die Fledermaus* (1989) and for the RSC adapted *A Christmas Carol*. A book of famous trials, and *The Oxford Book of Villains* (1992), and 18 collected Rumpole' books, are among the achievements of his last quarter century.

The older he became, the more determined he was to cudgel his mind for any idea that might amuse a reader, while continuing to champion the causes for which he cared — the Howard League for Penal Reform, the Royal Court Theatre, and a holiday home for deprived children that he and Penny helped to establish in Turville.

Politically, his faith in liberal socialism wavered at the end. He had emerged from his one-member Communist cell at Harrow to a postwar Labour party he supported with increasing conviction as the Thatcher years changed Britain for the worse. Once the joker jotting his contributions to the satrical BBC TV comedy *That Was The Week That Was* during idle afternoons in court, he and Penny teamed up with Harold Pinter and Antonia Fraser to found the 20th of June Group — reviled almost as viciously in the Tory press as it was by those on the left who were not invited to join. Although saddened by the 1992 election loss — Neil and Glenys Kinnock had become good friends — he was increasingly uncertain about Tony Blair and his talent for turning the Labour party into the war party. In 2005 he broke the habit of a lifetime, and voted Liberal Democrat.

In 2004 an unauthorised biography produced a delightful result. It stirred some embers, from which emerged, fully-formed, a lost son, the hidden fruit of a 60s affair with actress Wendy Craig. It was a happy discovery for both men, and later a proper biography, *A Voyage Round John Mortimer* (2007) by Valerie Grove did her subject justice, capturing some of the pleasures of the Mortimer caravanserai: the long Sunday lunches at Turville in winter, the bluebell picnics in Chiltern woods every spring; the summer idylls in that part of Italy he dubbed Chiantishire.

In the last years, age wearied everything except his mind: his rotund face collapsed, his limbs and bladder gave up, bedtime became a ritual of excruciating pain, yet he continued writing and performing, as if for dear life. *Mortimer's Miscellany* ran for a month at the Kings Head in 2007. A doctor's warning that the run might kill him only excited him at the prospect of dying like Dickens. He strove to keep his jokes up to date, although (like the law) they lagged by a decade. (Judge comes into Court confessing he has left the judgment he is meant to read in his country cottage. "Fax it up, m'lord" says Counsel. "Yes it does, rather".)

His last year brought reminders of his permanent contribution to the English stage, with a much praised production of *Voyage* with Derek Jacobi, followed this year by Edward Fox in *Dock Brief* and *Edwin*. His house in Turville Heath had acquired a conservatory, for Laurence Olivier to pot earwigs in the television version of *A Voyage Round My Father*. Every weekend until his death it became a place of laughter and gossip and gumboots and children, with friends who felt privileged (although they were never made to feel privileged) to inspect the garden and walk in the wood and sip tea and champagne and talk of everything except Michelangelo, with the Renaissance man who had been saved from terminal decadence by his Reformation wife.

Much of his work in the last half of his life, and much of his continuing happiness, was inspired by "Penny II" — whose enormous strengths of decency and determination creatively challenged his own vacillation and reluctance to make moral judgments.

He died at dawn on Friday January 16, 2009, with a smile on his face, thinking no doubt of the next performance of *Mortimer's Miscellany* on Monday at the Middle Temple, in which he and two accomplished actresses were preparing to enlighten and enliven a new generation of young barristers.

Instead, others performed for him at his funeral service at Turville Church. He had described himself, the minister reminded us, as "an atheist for Christ" who had absolutely no belief in the after life. "I hope he's had a pleasant surprise".

Geoffrey Robertson Q.C. author of "The Justice Game" was John Mortimer's junior in many of his notable cases.

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