The Appeal of Summary Jurisdiction - Why do they exist?

CBQ

CRIMINAL BAR QUARTERLY

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Provocation

The new partial defence

PLEA NEGOTIATION

Under the Attorney General's Guidelines

BAD CHARACTER APPLICATIONS

Counting the pages

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

This is the first edition of a new look *CBQ*

EDITOR
John Cooper QC

I am thrilled to welcome LexisNexis as our new publishers. You will see some changes in layout and presentation, although the high quality and content will remain the same, making the combination of professional and general interest writing unique in any criminal law publication.

LexisNexis will also include with every copy of *CBQ*, the latest edition of *Criminal Law and Justice Weekly*, the weekly criminal law magazine. The *CBQ* has come a long way since the CBA newsheets of a few years ago and is fast becoming an important point of reference for practitioners and Judges. Long may it continue.

In this edition we have our usual range of topical subjects ranging from the vexed issue of plea negotiations under the Attorney General's Guidelines, the complex legal considerations relating to loss of control to the very practical matter of page counts and fee's. In future editions we will be investigating the pressure upon courts to hear trials quickly and efficiently and we will be asking the question as to whether justice is being compromised. I would like to hear your views on this.

Recently, I have been hearing of Judges insisting that counsel give exact time estimates as to the length of defence cross examination [not, as yet prosecution cross examination], and final speeches. Indeed, there is some information coming forward that Judges have stopped counsel in mid flow if they over run their estimate. What is clear is that civil procedure as to case conduct is creeping into the criminal arena. Maybe this is a good thing, there is no doubt that everyone is expected to use the legal budget wisely. But imposing time limits upon counsel and strictly enforcing them may work in the pleading driven world of civil litigation, but it is potentially a threat to fair trial rights in the criminal courts.

The length of cross examination often depends upon the answers given, something which all practitioners will agree is very unpredictable. It will be interesting to see how this plays out.

I particularly commend the Chairman's column in this edition. The forthcoming protocols which are about to be placed upon criminal advocates will be significant. Christopher Kinch lays out the issues in a powerfully argued piece. I would add simply this, whatever strictures are to be applied, they must be applied equally to the prosecution and the defence. Whilst there are profound arguments against these measures, it will at least be interesting to see judges curtailing cross examination by the Crown of the defendant. After all, fairs fair … isn't it? ■

Timed Out

CHAIRMANS COLUMN

Christopher Kinch QC

I encountered a Senior Circuit Judge the other day, proudly sporting a set of cufflinks - yellow for the left wrist and red for the right. I suspect these cufflinks will soon be considered an important part of the judicial kit. There was no need to ask what these were for: so much more convenient than scrabbling around in the judicial robes for the yellow card when an advocate runs over their allotted time and so much more dignified simply to flick the judicial wrist in counsel's direction to warn them their time is running out.

If you need an explanation for what I am talking about this month, here it is. The amendments in October 2010 to the Criminal Procedure Rules, made it clear that the court must consider setting a timetable that takes account of the issues proposed by the parties and may limit the duration of any stage of the hearing. This is an idea that clearly has the backing of the Lord Chief Justice. He mentioned the new rules in his Mansion House speech at the Lord Mayor's dinner for the Judiciary and in October he wrote to Judges encouraging the use of the new rules.

"... the efficient use of time is not a new idea. The Royal Commission on Criminal Justice in 1993 concluded that Judges should have greater power to control the actions of the parties during trials, including the length of time taken to examine and cross-examine witnesses. The Criminal Procedure Rules have emphasized the responsibility of Judges to take charge of the trial process itself.

I urge you to consider the setting of a timetable in every case, and in particular in any case where the time estimate offered by the parties is longer than three working days. I have the impression that once the parties have given their estimate for the trial, they rather assume that that time will be made available, and indeed that there is no urgent need to complete the trial before that period has elapsed. That is not how I see it."

Judging from the reports filtering in to the CBA Committee from certain Circuits, some Judges are taking up the LCJ's message and running with it hard … very hard. There have been no reported sightings of actual yellow or red cards yet but there is anecdotal evidence of heavy handed interventions from case management obsessives. Now case management obsession is a judicial malady that might justify an article to itself but just how should we respond to the present judicial enthusiasm for timetabling. I have no mandate to make policy but with the space permitted by the editor I can offer some personal views.

First, and in principle, it seems to me that there is nothing to fear from sensible and flexible timetabling. It helps everyone including the advocates to have a clear idea of how long each stage of the case is going to take. If (and it is a big if) we have been properly briefed, with full disclosure, we should be able to identify the important issues and give helpful estimates of how long witnesses are likely to take. We should also be able to justify those estimates if challenged by a Judge. There is nothing wrong with sensible attempts to curb irrelevance and prolixity.

Secondly, I want to emphasise the need for sensitivity and flexibility in the approach to timetabling. Judges in the Crown Court need to remember that timetabling is an import from the commercial and family jurisdictions where, for example, evidence in chief is almost always in written form. Everyone there knows in advance what witnesses are going to say. That should help advocates in those courts to be reasonably accurate in their estimates. In the Crown Court, witnesses still usually give their evidence in chief orally. Most cases will throw up one or more of the "usual problems" with witnesses - hostile witness, forgetful witness, timid witness, inconsistent witness … Late appearing evidence or disclosure may also add to the issues that need to be dealt with by a witness. All these things are day to day events that can damage a rigid timetable but need to be accommodated by a fair and sensitive one. Like any transplant, timetabling will need sensitive handling and some modification if it is to take root in the criminal courts.

Thirdly, Judges need to bear in mind who has given the estimate and at what stage. Was it the instructed advocate? Were they ever likely to conduct the trial? Were they in possession of sufficient material to provide a fully informed assessment of the times different parts of the trial would take? These things may mean that we have to be alert to provide adjusted estimates as soon as we can. That is not to say that Judges should feel they can hold trial counsel to over optimistic estimates. A properly justified revised estimate should not result in as much as a raised judicial eyebrow. Bear in mind, there may well be occasions when trial counsel can shorten some estimates. I dare say there will be no problem over that.

Fourthly, timetabling needs to be operated fairly. Reports already circulate of (defence) cross examination being curtailed. What of the case where prosecution counsel has to tease the evidence out of a reluctant and timid witness? The time estimate may pass without the key incident having been dealt with. Will the Judge intervene? Of course he will not, nor should he. The same sensitivity needs to be displayed all round.

I can claim strong support for my approach. Let me quote from the evidence given by the Lord Chief Justice to the Justice Committee of the House of Commons on October 26, 2010.

"Now, no timetable can be fixed. It is not a train timetable. Obviously a witness may turn up with, for example, a stutter. A witness may turn up who … has difficulties with concentration. All this you build in and you allow flexibility for. But I am very keen for Judges in the Crown Court and the advocates appearing in the Crown Court to understand that there has to be a timetable for many cases."

The emphasis is mine and the sentiments may be obvious to

practitioners. Judges in the Crown Court need to understand the need for sensitivity and flexibility. We will be watching them. Next time we tackle: No PCMH without a Defence Statement? Your views please.

The copy deadline means that I am writing this well in advance of the February 14, closing date for responses to the "cuts" Green Paper. I hope you have all communicated your views to the Ministry of Justice one way or another. We will soon be engaging with the fundamental proposals for reform of legal aid procurement. Please keep an eye on the CBA website and for email alerts, information and events. ■

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

SENTENCING

Plea Negotiation – Dead or Alive?

The Attorney General guidelines on plea discussions in cases of serious or complex fraud

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In an interesting article in the *CBQ* in October 2010, John Edwards and Richard Gibbs discuss the subject of "sentence indications" with particular reference to the well-known case of *R. v. Goodyear* [2005] EWCA Crim 888. In this article we discuss the related but separate topic of "plea negotiation" under the Attorney General's Guidelines on Plea Discussions in cases of Serious or Complex Fraud.

Sentencing Guidelines Council – Reductions in Sentence for a guilty plea

Elements of "plea negotiation" have long existed in the UK. For example, prosecutors have always had the power to accept pleas to a lesser offence if they consider that it is in the public interest to do so. In addition, it has long been the practice of the courts to recognize the benefits to the criminal justice system which result from a defendant entering a timely guilty plea by reducing the sentence imposed. In 2000 this was formalized by statute (s.152 of the Powers of Criminal Courts Sentencing Act) and it has since been reflected in guidance from the Sentencing Guidelines Council on reductions in sentence for a guilty plea (revised in July 2007). As the Council stated: "A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence."

Serious Organized Crime and Police Act 2005, s.71 - 73

Defendants have been able to "negotiate pleas" by offering assistance to the prosecution. Sections 71 – 73 of the Serious and Organized Crime and Police Act 2005 ("SOCPA") created a statutory framework which formalized these arrangements. The framework is intended to encourage defendants to give assistance by introducing a transparent system of co-operation agreements between the prosecution and defence. Sections 71 and 72 both make provision for a form of immunity to be given and s.73 provides for a reduction in sentence where a defendant has, pursuant to a written agreement made with a specified prosecutor, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence. The reduction in sentence is not mandatory. Rather, s.73(2) provides that, in determining what sentence to pass on the defendant the court "may"take into account the extent and nature of the assistance given or offered. In practice, sentencing discounts where assistance has been offered or given are well established (see *R. v. P; R. v. Blackburn* [2008] 2 Cr App R (S) 5.)

Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise

Increasingly the prosecutor also has a role in the sentencing exercise (an aspect of the criminal justice system which has long been regarded as the sole preserve of the Judge). This includes drawing the Judge's attention to any aggravating or mitigating factors and in complex or unusual cases, providing a written note containing, *inter alia*, the names of relevant sentencing authorities and guidelines (see the Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise, as revised December 1, 2009).

Attorney General's Guidelines on Plea Discussions in cases of Serious or Complex Fraud

The Attorney General Guidelines on Plea Discussions in cases of Serious or Complex Fraud, issued on March 18, 2009, built

on these pre-existing elements. They were intended to be evolutionary, rather than a revolutionary. One of the most significant developments is that they permit plea discussions to take place prior to charge and prior to the investigation being completed. It is to be noted that legal aid is, in principle, available for such discussions: see the Criminal Defence Service (General) (No.2) (Amendment) Regulations 2009.

Under the Guidelines, fraud may be serious or complex if at least two of a number of factors are present, such as that the amount of money obtained or attempted to be obtained is alleged to amount to at least £500,000, or that there is a significant international dimension etc. The prosecutor may initiate plea discussions with any person who is being prosecuted, or investigated with a view to prosecution, in connection with a serious or complex fraud and who is being legally represented. The prosecutor and the investigating officer must be satisfied that the suspect's criminality is known, although it is acknowledged that the investigation may not be complete.

The fact that the defendant has taken part in plea discussions, and any information provided by the defence in the course of plea discussions, is to be treated as confidential, subject to the general law as to disclosure. The fact that the defendant has taken part in plea discussions, and any information provided by the defence in the course of plea discussions, will not be relied on in a prosecution of the defendant in relation to the offence in question if the discussions fail.

Where agreement is reached as to pleas, the parties should discuss the appropriate sentence with a view to presenting a joint written submission to the court. This document should list the aggravating and mitigating features arising from the agreed facts, set out any personal mitigation available to the defendant, and refer to any relevant sentencing guidelines or authorities. In the light of all of these factors, it should make submissions as to the applicable sentencing range in the relevant guideline. The prosecutor must ensure that the submissions are realistic, taking full account of all relevant material and considerations.

Practice Direction (Criminal Proceedings: Consolidation) IV.45.18 – 28

The Plea Negotiation Guidelines were endorsed by the Judiciary in the above Practice Direction in which the following appears:

> "Sentencing submissions should draw the court's attention to any applicable range in any relevant guideline, and to any ancillary orders that may be applicable. Sentencing submissions should not include a specific sentence or agreed range other than the ranges set out in sentencing guidelines or authorities."

Increased use of "plea negotiation"

The Serious Fraud Office (SFO) has been vocal in its enthusiasm for negotiating pleas, thereby avoiding costly and risky criminal litigation (the Director has commented "I am keen to take what we can from the American experience"). This has been most audible in its approach to corruption. The SFO's guidance *Approach to Dealing with Overseas Corruption* emphasizes its willingness to enter into plea negotiations in accordance with the AG's Guidelines on Plea Discussions and, where the offender has self-referred, to agree a civil settlement and thereby avoid criminal proceedings altogether. The SFO has enjoyed some initial success in this regard:

- In October 2008, Balfour Beatty agreed to a civil settlement of £2.25m for "books and records" offences after the SFO elected to use its civil recovery powers under Pt.8 of the Proceeds of Crime Act 2002 instead of prosecuting. In its press release, the SFO states, "the use of these powers should be seen as an important example of how the SFO will use the new tools at its disposal to enhance the criminal justice process."
- In July 2009, Mabey & Johnson pleaded guilty to 10 counts of violating sanctions and was sentenced to a fine of £6.6m. Whilst the Mabey & Johnson investigation largely pre-dated the AG's Guidelines, it is the first case in substance to have followed the new procedures. The Director of the SFO noted, "These are significant offences and it is significant that Mabey & Johnson has co-operated with us to get to this landmark point … it has enabled this case to be dealt with in just over a year and is a model for other companies who want to self report corruption and have it dealt with quickly and fairly by the SFO."
- In October 2009, Amec plc agreed to pay a civil recovery order of almost £5m having self-referred to the SFO following an internal investigation into receipt of irregular payments.
- In October 2010, Julian Messent, the former CEO of reinsurance broker PWS Holdings, entered into a plea agreement with the SFO, in accordance with the Attorney General's Guidelines, which was approved by Southwark Crown Court. He was jailed for 21 months, after pleading guilty to paying £1.2m of bribes to Costa Rican state officials between 1999 and 2002.

However, a number of recent decisions may dampen the SFO's enthusiasm for plea negotiation and call into question the utility of the AG's Guidelines.

R. v. Innospec Ltd (2010) Crim LR 665 (Southwark Crown Court, March 26, 2010 before Thomas LJ)

Innospec Ltd is a UK subsidiary of a US NASDAQ listed company (Innospec Inc). Both entities were implicated in systemic and large scale corruption in Indodesia and Iraq and were keen to settle. The problem was that the fines and other penalties which could properly be imposed in the US and UK would exceed by many times what Innospec was able to pay (a 'modest' $40m) and the SFO and the DOJ agreed that, in light of Innospec's full admission and co-operation, they should not seek to impose a penalty which would drive the company out of business. In March 2010, Innospec entered into a global settlement with the SFO and various regulatory agencies in the US whereby it was agreed that the SFO would seek a penalty of no more than $12.7m. In effect, the $40m pot was divided equally between the SFO, DOJ and the SEC. It was on this basis that Innospec Ltd pleaded guilty. The sentencing Judge, Thomas LJ, considered that $12.7m was wholly inadequate as a fine to reflect the criminality displayed by Innospec Ltd. Moreover, he was highly critical of the scope and content of the agreement reached by the SFO which, on one reading, suggested a penalty had in fact been agreed. The sums suggested had not been the subject of judicial determination in either the UK or the US (save that inherent in the Federal District Court's approval of the relevant plea agreement). Nor

was the division agreed one which on the facts of the case accorded with principles. He concluded that the Director had no power to enter into the arrangements made and that no such arrangements should be made again. The court commented that as in *R. v. Whittle & Others* [2008] EWCA Crim 2560, it was placed in a position where it had little alternative but to agree to the suggested financial penalties if it was to avoid injustice. However, the court warned that the circumstances of Innospec were unique and that it would not consider its powers restricted by future agreements.

Thomas LJ observed at para.27 of the sentencing remarks:

> "The Practice Direction reflects the constitutional principle that, save in minor matters such as motoring offences, the imposition of a sentence is a matter for the judiciary. Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinize in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest."

R. v. Innospec may also signal some limitations upon the SFO's strategy of seeking civil settlements instead of prosecuting. Thomas LJ indicated that the only room for a civil recovery order in serious corruption cases was as a means of compensation in addition to a punishment. He stated, at para.38: "Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of cooperation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction."

R. v. Dougall [2010] EWCA Crim 1048 (The Lord Chief Justice, David Clarke J, Lloyd Jones J)

Robert Dougall, a mid-level executive with DePuy International, co-operated with the SFO in its investigation of DePuy's corruption in Greece, pleading guilty and signing an agreement in accordance with s.73, SOCPA and with the AG's Guidelines on plea discussions. Under the terms of the agreement, Mr Dougall provided a witness statement setting out an account of his activities and others involved in the corruption. He further agreed to provide full co-operation to any foreign competent judicial authority investigating the affairs of the businesses involved and their employees, and in particular agreed to assist the United States Department of Justice and the Securities and Exchange Commission. In exchange, the SFO, in effect, agreed to invite the court to impose a suspended sentence of imprisonment. The Lord Chief Justice, giving the judgment of the court, heavily criticized this approach (prosecuting counsel conceded, in argument, that the terms of the plea agreement had gone further than they should). The Lord Chief endorsed the observations of Thomas LJ in *Innospec* and added the following comments at paras.19 and 20:

> "In this jurisdiction a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle. That applies to cases of this kind, as it does to others. No such agreement is envisaged in the "Guidelines on Plea Discussions" issued by the Attorney General. These guidelines, which are said to have governed the plea agreement with which this case is concerned, are framed in unequivocal language."

R. v. BAE Systems PLC (Southwark Crown Court, December 21, 2010, Bean J)

In this case the company had pleaded guilty to failing to keep appropriate accounting records contrary to s.221 of the Companies Act 1985. There had been an agreement with the SFO incorporating a basis of plea. The company had agreed to make an *ex gratia* payment for the benefit of the people of Tanzania amounting to £30m less any financial orders imposed by the court. It was also agreed that there would be no further investigation or prosecution of any member of the BAE Systems Group for any conduct preceding the date of the agreement. Bean J observed that it was surprising that a blanket immunity had been granted for all offences committed in the past, whether disclosed or otherwise. He also declined to accept an interpretation of the basis of plea under which the relevant accounting records, which in fact suggested that payments of some $12m had been made to a particular individual for the "provision of technical services", had been so framed for purely innocent reasons, and stated that he would impose sentence on the basis that by such records the defendant were concealing from the auditors and ultimately the public the fact that the payments were being made in order to facilitate the securing of a contract which the defendant wished to secure. The fine imposed was £500,000.

Conclusion

It is submitted that the principles underlying the Attorney General's approach to plea negotiation are sound and deserve support, and perhaps even to be applied in other types of significant criminal litigation. In an era when resources are scarce, it is essential to encourage the prosecution and defence to co-operate in a transparent way to resolve those cases which can be consensually resolved, allowing resources to be concentrated on those heavy cases in which a trial is inevitable. Those concerned must be aware at all times that the decision as to sentence is for the court and that the plea negotiation process can create no expectation as to what that decision will be. ■

[*The authors were members of the Attorney General's working group on plea negotiation.*]

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Counting The Pages

Remuneration of graduated fees

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Criminal practitioners in graduated fee cases are remunerated on a fixed basis whereby the fee is calculated from a number of variables. One of the important variables is the page count. This is the total number of pages of evidence - statements and exhibits that are served by the Crown in support of its case.

In advance of a trial in which I was instructed last year the Crown supplied the defence with what purported to be a bad character application. The application was on a standard form which was headed so as to make clear that it was an application to adduce evidence of bad character pursuant to Criminal Justice Act 2003 s.101.

The application was accompanied by a bundle of documents. These consisted of a selection of case papers from a prior case in which a serious allegation had been levelled against the defendant and in respect of which he had been convicted. The material ran to around 100 pages but was not paginated and was not covered by any front sheet suggesting that it was a notice of additional evidence (NAE).

This was not the first time that I had encountered such a form of "service". There has been an acceptance by the Bar that bad character evidence can be put into the evidential arena without being formally served in the usual way.

The point will not be lost on the readership. The Crown Prosecution Service remunerates prosecution counsel on a basis that is critically influenced by the total evidence page count. The lower the page count, the lower the fee. Any material that can be put "in play" without having to include it within the umbrella of the overall evidential page count, is by definition outside the scope of payment.

Counsel on both sides in graduated fee cases are regularly required to consider a volume of material for which there is no provision for remuneration under the graduated fee scheme. This will include all defence generated material including witness statements as to fact and character and from experts. It will also frequently include material generated by the prosecution – most usually unused material. In many types of case there will also be the potential for third party disclosed material – social service records in sexual abuse cases by way of example.

The only recourse counsel has in such situations is to make an application for special preparation. My experience of such applications is not such as to imbue me with optimism. I see no possibility of succeeding on such a claim in respect of evidence of bad character.

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The merits of the graduated fee scheme are beyond the scope of this article. It does have at least the merit of a degree of clarity. It is, however, in general unyielding and inherently deaf to claims that a particular case should be remunerated outside the fixed scale of fees. On any view an application in relation to bad character whether made or resisted increases the burden on the advocates in a case. The extent of this is variable but is usually at least linked to the volume of material that is to be considered.

I have therefore questioned why evidence of bad character is routinely being considered where it has not been served as part of the paginated evidential material in the case.

Section 101(1) of the CJA 2003 begins: "In criminal proceedings evidence of the defendant's bad character … ". Thus it is a condition precedent to the making of the application that the prosecution are in possession of "evidence of the defendant's bad character". That section and those that follow which amplify the gateways, refer to the "evidence" of bad character about 12 times. Never once is it suggested that anything other than "evidence" is within the contemplation of the legislature. If the material is not "evidence of the defendant's bad character" then it is by definition excluded from the ambit of s.101.

In the case last summer, I therefore provided a written response to the bad character application in which I declined to consider it until it had been served under cover of a paginated notice of additional evidence.

Since the purpose of this article is to alert others to this course I set out, only by way of a possible guide, the salient passages of the response that I served on the court and CPS.

The defence has received what is stated to be a bad character application in respect of the above defendant. This is provided under cover of a letter dated April 20, 2010.

The defence will of course consider this material and provide a response. However, this will not occur, until such time as the material is served under cover of a Notice of Additional Evidence.

The material is by definition not unused. It is the Crown's position that it amounts to evidence that is probative of the guilt of the defendant. In those circumstances the material can only come into the evidential arena by way of formal service as NAE.

The application by the CPS states in terms that: "I want to introduce evidence of bad character etc …". The word "evidence" occurs repeatedly in the application.

Unless the defence agree to some form of summary of the "evidence", the various witnesses will have to be called by the prosecution as part of its case. If they are called they will inevitably be giving "evidence".

If the material is put into some form of summary that will be read to the court by way of admission; this will be agreed "evidence".

The court has no power to receive anything that is not "evidence" as "evidence". If inadvertently this happens the jury may be discharged or at least directed to ignore it. The jury are expressly directed by the trial Judge in summing up to consider the "evidence". They are reminded that (for example) the speeches of counsel are not "evidence". The jury will be given a direction about how to approach the "evidence" of bad character if any has been adduced. The specimen direction setting out what has to be said refers to the material as "evidence". The oath that is taken by the jury at the outset of the case is to "try the defendant in accordance with the evidence".

There is therefore no basis for providing this material other than by way of NAE with the usual cover page setting out the pages of material that are attached by way of evidence.

Unless otherwise directed by the court the defence will provide no further response to this application until the material in support is properly served.

Since the application is not supported by served evidence the defence position is that time is not running for a response.

This drew a response from the CPS to the effect that the material was not going to be served as NAE. The application remained in place.

At the plea and case management hearing the trial Judge, His HJ Ralls QC inquired as to the state of the bad character application. I indicated that I had not responded to it and that unless the court ordered me to do so I was not intending to respond until such time as the application had been served together with the evidence to which it related. I further indicated that as of the PCMH date the Crown's position was that the bad character evidence had been supplied and that it was not going to be formally served.

His HJ Ralls QC had seen my written representations and turning to prosecution counsel observed that the defence submission appeared to be "unanswerable". Prosecution counsel agreed with this. The court then ordered that the evidence of bad character to which the application related should be served as NAE within a set period of time. Further, that in the absence of such service the application would be taken to have been withdrawn.

In due course the evidence of bad character was duly paginated and served with an NAE front cover sheet. The evidence was therefore included in the total page count for the purposes of fee calculation.

I encourage those called upon to deal with bad character applications under s.101, CJA 2003, to take note of what occurred in this case. While in this case the served evidence was voluminous such that the bad character evidence was a slight relative addition, that is not always the position. It is not difficult to envisage a case where the bad character evidence could comfortably outweigh the served evidence that is directly probative of the instant allegation. If criminal practitioners are to count pages for their fee it is important to ensure that claims are not made based on significant and routine undercounting. This is particularly important as bad character evidence is invariably contentious and thus has a routine tendency to give rise to legal argument. Even where the defence concede that some evidence of bad character is admissible there will usually be dispute about the extent of this and the form in which it is to be advanced.

The requirement on the prosecution to serve evidence of bad character by way of formal NAE, may achieve a benefit beyond that of proper remuneration for counsel. I may not be alone in detecting a creeping tendency towards service of bad character applications that lack any discernable merit or hope of success. There are occasions where it appears that the Crown Prosecution Service, having noted that the defendant has a criminal conviction(s) or other less decisive form of bad character, simply serve a bad character application on the basis that it will at least be within time and the merits can be sorted out later. As long as evidence of bad character can be put forward without formal paginated service this approach does not come with any cost. Once it is recognized that a s.101 application must be accompanied by the evidence to which it relates, properly served as NAE and therefore within the scope of payable pages, such routine levelling of bad character applications may diminish.

On a practical note it is my view that if a non-response is to be provided by the defence this should be done within the applicable time limit for a response to a bad character application. It would be deleterious to the administration of justice to wait until trial to put forward a non-response. The CPS should be given timely notice of the defence position so as to enable them to serve the evidence of bad character in proper form. Practitioners should work on the basis that there could be differing views on the point articulated in this article, and in order to protect the interests of defendants I consider that the non-response position should be advanced well ahead of trial (if that is possible given the timing of prosecution provision of the application), so that the Court can adjudicate as it sees fit.

(*Caveat.* It would in my view be putting it too high to regard the case referred to above as a definitive Crown Court ruling. The Crown did not resist the application and thus no competing argument was advanced. There was therefore no attempt to deflect the court from the initial and firm view formed by reading the defence written submission). ■

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The Appeal of Summary Jurisdiction

Closing of magistrate's courts and the possible implications

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In June 2010, the Ministry of Justice announced the proposed closure of 103 magistrates' courts in England & Wales and after undertaking a consultation exercise, on December 14, 2010 the Justice Minister Jonathan Djanogly published a list of 93 magistrates' courts now set for oblivion, stating "substantial savings will be made from not having to maintain so many buildings". The figures mean that approximately one-third of all magistrates courts will close and the move is said to be beneficial by focussing the attendance of justice agencies at a single accessible location within a community. With this in mind, practitioners at the Criminal Bar may wish to consider why courts of Summary Jurisdiction exist, and the possible implications for the administration of justice without there being so many of them.

History and Function

The power exercised by justices of the peace to conduct a trial without a jury in lesser specified offences is known as "summary jurisdiction" and has a long history that developed through the enactment of various statutes, codified in the Summary Jurisdiction Acts of 1848 (11 & 12 Vict. C. 42) and 1879 (42 & 43 Vict. C.49) see Stephen: *A History of the Criminal Law of England*[1]. What we now know as "magistrates courts" have been created since 1972 by the Courts Act 1971 and were developed from "Petty Sessions", themselves courts of Summary Jurisdiction stemming from the late 19th Century, empowered to deal with the minor criminal cases and the overspill of matters from the "Quarter Sessions" (courts having criminal jurisdiction in England, together with Assizes, since 1388, but later replaced by the Crown Court by the 1971 Act). Quarter Sessions were local courts traditionally held at four set times each year and sat in each county and county borough, whereas the main Petty Sessions were held in divisions and based on the historic "hundreds" (groups of parishes).

It has thus been the case for many hundreds of years, and now into the 21st century, that most petty offences punishable by imprisonment for less than six months may be tried summarily by justices of the peace, with Indictments being referred up to the Crown Court if jurisdiction is declined, although all criminal cases must pass through the justices, to determine what mode of trial is appropriate. The ancient principle, observed throughout the common law world, is that common law "is a stranger to trial without a jury"

Procedure, Evidence and Victims

A trial in the magistrates court by its summary jurisdiction, or "summary trial" may be presided over by two, or three lay justices and their legal advisor, or a District Judge. A typical afternoon session may involve the hearing of several witnesses to determine whether a complainant has made a genuine accusation of assault and hear from the defendant to examine any claims they were acting in self-defence. On the other hand, the range of summary, and either-way offences that magistrates are empowered to hear are also broad, and in many cases so technical that expert evidence is needed, a week or longer may be spent for example, hearing whether the treatment of an abandoned dog amounted to cruelty within the meaning of the Animal Welfare Act 2006, or from company directors as to whether the sewage discharge from their golf course had breached the Environmental Protection Act 1980 and even if did, whether there was "reasonable excuse" or they had used "best practical means" within the meaning of the act, so as to not be liable

> "The move is said to be beneficial by focussing the attendance of justice agencies at a single accessible location within a community."

Today, magistrates' courts may impose fines of up to £5,000 and when given the choice, many a defendant will opt to elect the right to trial by jury, as statistically speaking, there is a greater possibility that they will receive an acquittal by this means through their ordinary fellow citizens, rather than by a summary trial. However, the purpose and benefit of summary jurisdiction is that many thousands of offences can be efficiently processed and tried openly in public, with a level of expertise, yet without the often over-whelming formalities of the Crown Court and include the involvement of interested individuals from the local community.

Re-action to Closures

The concern already raised by the Magistrate's Association is that the closure of their courts means the principle of community justice will be diminished:

"Magistrates have expressed grave concern about the impact of court closures and their responses to the consultation have provided clear evidence that closures will adversely impact on court users and easy access to justice. For those areas this is a shattering blow to community summary justice ..."

1 (1883) 3 Volumes reprinted by Routledge/Thoemmes 1996

What has transpired is that the government proposal means that victims and witnesses will be expected to travel further to attend courts, with the impact on offenders (and lawyers) finding little sympathy. Campaigners say crime victims have spoken out about the importance of local magistrates' courts and how having to travel to an unfamiliar area to give evidence would make such an experience more daunting. The closures will have particular impact in rural areas and parts of Wales[2], where drives have been begun to fight their demise.

Conclusion

The Government's decision to so drastically reduce the number of magistrates' courts that exist (and thereby dramatically increase the number of cases the remaining courts will hear) is set to undoubtedly have a profound impact on summary trials. The summary jurisdiction of magistrates enables them to conduct short trials, or longer if necessary, recognize wrong-doing and impose punishments in local communities. As the un-relenting impact of the cuts in public spending continues, the closure of magistrates' courts affects the ability of justices of the peace to deal with lesser offences in many given localities, a legal customary practice that has a history in England going back centuries.

In time, there may be yet further pressures upon magistrates' courts to reduce their trials, as the Justice Secretary Ken Clarke has now proposed the implementation of reductions in sentences of 50% for early guilty pleas to do just this: offering a justice system that seems ever more akin to that from the other side of the Atlantic, quite accustomed to massive court-houses that process pleas and hand down hundreds rehabilitative orders in a single morning[3].

With inevitable pressure being put on the surviving magistrates' courts to take on work-loads from other courts, the dilemmas they will likely often face will be as to how many trials they can realistically hear on a given day, then how much time can be allocated to a particular case, whether to conduct trials without crucial witnesses, the victim, or the defendant themselves. There is no overt threat to the power of the magistrates court to conduct trials, yet without primary legislation and a statutory footing, the Government's latest cost-saving measure to close and consolidate so many courts, may go so far as to create a new form of lower criminal court, with little encouragement that they should be conducting trials at all. ■

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2 http://www.bbc.co.uk/news/10677982

3 http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2009.pdf

OFFENCES

Loss of Control

Comparisons and anomalies

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The new partial defence of "loss of control" which came into force on October 4, 2010 (Coroners and Justice Act 2009) is more restrictive than the old law of provocation, which will continue to govern offences of murder committed before that date.

In this article we try to set out the comparisons and anomalies that arise as a result of Parliament's intention to limit the circumstances where defendants can successfully claim they were provoked and highlight some of the practical difficulties which may arise in a criminal trial.

Background

The law of provocation was seen as too lenient on those who kill out of anger and too severe on those who kill out of fear of violence. The new law of loss of control will make it easier

for victims of domestic violence to establish manslaughter but harder for those who go looking for violence or claim their reaction was to marital infidelity. Cases such as *Ahluwalia* and *Sara Thornton* (No.2 – heard in December 1995) led to a development of the law of provocation so that those who killed as a result of a slow burn reaction, rather than an immediate loss of control, could rely upon the defence of provocation (ie, sudden did not mean immediate) but despite these developments, the law was nonetheless perceived to be biased against those who had suffered from long term repeated domestic violence particularly where (as is commonly the case) incidents were not reported. The new legislation will more readily allow the "slow-burn" defence in circumstances where a defendant has been subject to abuse over a long period of time, where a final small act triggers the killing.

Provocation (Offences Before 4/10/10)

The defence of provocation is set out in s.3, Homicide Act 1957. Murder is reduced to manslaughter if the defendant is provoked by things said and/or done to lose his self-control in circumstances where the provocation was enough to make a reasonable man do as he did. It is for the prosecution to disprove the defence once evidence has been adduced, from whatever source, which is sufficient for the issue of provocation to be left to the jury. The "reasonable man" is a uniform objective standard in that a jury should first take the defendant as they find him, warts and all in deciding whether the defendant was in fact provoked, ie, a subjective element, and then evaluate his conduct as against what is to be expected of a person of his age and sex with ordinary powers of self control, the objective element. In cases involving abused women the consequence of the common law developments was that a jury might more easily find a sudden loss of self-control triggered even by a minor incident if the defendant had endured abuse over a period of time, on a last straw basis.

Loss of Control (Offences on or After 4/10/10)

The new defence of "Loss of Control" has been created by CAJA 2009 ss.54 and 55. It is deliberately designed to be a much narrower defence. Section 54 provides that what the prosecution have otherwise proved would be murder is reduced to manslaughter if the killing resulted from the defendant's loss of control, that loss of control had a qualifying trigger and a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or a similar way. There are five qualifying provisions in ss.54(2) to (6)

(a) The loss of control does not have to be sudden It must still be temporary otherwise it would amount to insanity. The length of time between what triggers the killing and the killing itself will be important but need not be short. Much will turn in any trial involving a gap in time on whether the loss of control is continuing or whether the defendant had time to cool off.

(b) The circumstances which relate solely to D's capacity for tolerance or self-restraint are irrelevant and to be ignored. In other words, if D is known to have a short and violent temper, that is not to be considered by the jury when they determine how a person of D's sex and age etc might have reacted. It is notable that the phrase "might have reacted" is much wider than the old phrase "enough to make a reasonable man do …". The change is effectively from "would have" to "might have".

(c) The defence is not available if the D was acting out of a considered desire for revenge. A familiar notion but one now enshrined in statute

(d) If sufficient evidence is adduced to raise the issue of loss of control, the jury must assume that the defence is satisfied unless the P proves to the contrary. A new rebuttable presumption has been created albeit in accordance with the burden of proof as before.

(e) In the context of the above, "sufficient evidence" means evidence on which, in the opinion of the trial Judge, a properly directed jury could reasonably conclude that the defence might apply. In other words, the Judge will not be, as under the old law, obliged to leave the defence to the jury simply because an evidential basis has been raised only if there is sufficient evidence in the opinion of the trial Judge a jury properly directed could reasonably conclude that the defence might apply

Qualifying Trigger

The new phrase "qualifying trigger" is defined in s.55. It means a loss of control attributable to:

- D's fear of serious violence from V against D or another identified person
- Things said and/or done constituting circumstances of an extremely grave character and causing D to have a justifiable sense of being seriously wronged
- Or a combination of the above.

These three criteria are themselves further qualified as the defendant's fear of serious violence is to be disregarded if it was incited by something done by him to provide an excuse to use violence, ie, there cannot be a self-induced trigger. Similarly, D's sense of grievance is not justifiable if it was incited by something done by D to provide an excuse to use violence and the fact that a thing said or done constituted sexual infidelity is to be disregarded. This is clearly a significant departure from the old law.

Tolerance and Self Restraint

This is an objective standard with some limited subjective considerations. The test is not what a reasonable man would do in the circumstances but whether a person of D's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of the defendant(as defined in s.54(3), might have reacted in the same or a similar way. Thus, the overall concept of the new defence is recognisable as what used to be called provocation but there are differences and it is generally more restrictive.

Practical Examples:

(i) In analyzing the effects of the new legislation, it is worth looking at some practical examples, some of which are set out in the explanatory notes to the Act:

(ii) H comes home unexpectedly and finds W in bed with the milkman. H loses control and kills them

both. Under the old law, the defence of provocation is available in relation to H killing W and to H killing the third party. However, under the new law, the defence of loss of control is only available in relation to the milkman because sexual infidelity is to be disregarded in relation to things said and done.

(iii) A, a student, goes to the flat of his girlfriend B, also a student. They have been going out and involved in a sexual relationship for about six months. A finds B in bed having sex with C. He loses control and kills B. Under the old law, the defence of provocation is available but, under the new law is the relationship between A and B sufficiently solid to view B's conduct in terms of sexual infidelity? How long or how solid does such a relationship have to be? If B's conduct is viewed as sexual infidelity, then A has no defence under the CAJA.

> It should be noted that it is the fact of sexual infidelity that must be disregarded

(iv) W comes home to find H in bed having sex with their 15-year-old daughter. She loses control, picks up the nearest thing, a heavy lamp base and strikes him over the head killing him. She claims that it is not the sexual infidelity that provoked her, rather the fact that he had seduced and defiled their own daughter. Under the old law, the defence of provocation is available but under the new law, is the loss of control defence precluded by the statutory provision that sexual infidelity is to be disregarded? It should be noted that it is the fact of sexual infidelity that must be disregarded under this provision, however something connected to sexual infidelity may still count as a qualifying trigger so the act of incest/child abuse may be argued to be the qualifying trigger, on the basis that it constitutes circumstances of an extremely grave character causing the defendant to have a justifiable sense of being seriously wronged etc.

(v) H comes home drunk and slaps W about as he has done countless times before over a period of several years. She finally snaps and picks up a carving knife and stabs him to death. Under the old law, evidence of an abusive relationship is admissible to place the latest incident in context. Under the new law, the defence of loss of control is also available. A qualifying trigger exists potentially in her fear of serious violence against her and as things said and/or done of an extremely grave character causing her to have a justifiable sense of being seriously wronged. Where W waits six hours before stabbing H whilst he slept, the courts have interpreted provocation generously in circumstances of domestic violence. Under the new law although there is an argument that D is acting out of a desire for revenge, we suspect that the courts will continue to leave this type of defence to the jury in a domestic violence context as that was after all the intention of the legislation. Equally, where, as well as assaulting W, H threatens to kill their daughter who will be returning home in 12 hours and six hours later she stabs H to death when he has fallen asleep. Provocation is available and under the new law, there is a qualifying trigger in combination of things said and done of an extremely grave character etc and also fear of serious violence from H directed against the daughter. Note that the fear of serious violence does not have to be imminent [as with the defence of self defence].

(vi) A, a young Asian woman, is due to marry B as arranged by her parents. She is in love with C and runs away with him. They have a sexual relationship. Her family track her down. She is killed by P, Q and R, her father, uncle and brother in a so called "honour killing". They claim to have been provoked by her conduct in bringing shame and humiliation on the family. Acting out of a considered desire for revenge is neither provocation nor loss of control.

Conclusion

The defence of loss of control is more restrictive than the law of provocation as the new law removes a defence in certain circumstances. Parliament has evidently decided that "sexual infidelity" is to be disregarded as a qualifying trigger for a loss of self control regardless of how many times it occurs. This differs to the defence of provocation, where the defence was available to a defendant who had been provoked by his wife's adultery. The law of provocation had allowed a defendant to rely on the defence even though his unpleasant behaviour led to the attack that provoked him. The new law does not appear to afford a defence in this type of situation; it states that a defendant's "fear of serious violence is to be disregarded if it was caused by a thing which the D incited to be done or said for the purpose of providing an excuse to use violence" [s.55 (6) (a)]. Both s.55 (6) (a) and (b) remove a defence where the defendant's purpose was to provide himself with an excuse to use violence.

Finally, the new legislation is more restrictive as it requires the thing said or done to be of "extreme gravity" when considering whether or not the D had a justifiable sense of being seriously wronged – which is presumably an objective test. Thus, the intention is to set a very high threshold for the circumstances in which a partial defence is available where a person loses self-control in response to words or actions. The effect is to substantially narrow the potential availability of a partial defence in cases where a loss of control is attributable to things done or said compared to the partial defence of provocation (where no threshold exists in relation to the provoking circumstances). It will be for the trial Judge to withdraw a loss of control claim from the jury if he/she concludes that no reasonable jury would accept it. In practice, this high threshold should prevent typically unmeritorious claims from resulting in a verdict of manslaughter (either because the defence is withdrawn from the jury or by the jury's verdict), although it looks as though summing up will be far from straight forward" ■

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Reflections on the American Bar Association Annual Meeting

Held in San Francisco, California: 5th -10th August 2010

The ABA annual meeting is a big event. The various sections, divisions and forums of the ABA offered such a broad range of seminars to discuss the contemporary and controversial legal issues in America, covering the likes of Same-Sex Marriage, Marijuana regulation, Anticipatory self-defence in International law and Facebook, that the choice of which seminars to attend and navigating through the 288 page programme to the appropriate venue was quite a task in itself. There were apparently 8,000 lawyers in attendance from throughout the 50 States and many other countries, 6 days of talks and a host of other well organized dinners, receptions and committee meetings. My report sums up the issues and themes that were discussed at the various seminars that I attended.

Thursday, 5th August

Same-Sex Marriage –moving beyond state courts

My arrival in San Francisco on Wednesday 4th August happened to coincide with the judgment handed down by Chief Judge Vaughn R. Walker of a 9th Circuit Federal District Court overturning "Proposition 8" of Californian state law, his determination being that it is unconstitutional. Proposition 8 (or the California Marriage Protection Act) was a ballot proposition and constitutional amendment passed by popular vote in the November 2008 California state elections. The measure added a new provision to the California Constitution, which provides that "only marriage between a man and a woman is valid or recognized in California".

However, this measure had long caused resentment among same-sex couples wishing to marry in California (as well as in other states) and resulted in litigation. In fact, across the 50 states, a myriad of differing legislative approaches as well as state constitutional claims exist and the issue of same-sex marriage, has for some time, provided a number of complicated legal, Federal and constitutional questions.

Judge Walker's conclusion was that proposition 8 was discriminatory and impeded the fundamental right of willing individuals to marry and must be struck down as the American Constitution is said to give "equal protection" to all its citizens. Celebrations on the streets of San Francisco, as well as demands for Marriage licences, resulted as the proponents of same-sex marriage will not settle for civil-partnerships, which they deem as being afforded an inferior legal right, and as like the African-Americans in the 1950's barred from attending prestigious law schools or military academies (*Brown v Board of Education*) were not content with being made "separate but equal". Furthermore, his finding was that the main thrust of the opposition to their right to marry was found in moral conviction and not on account of legal or rational purposes, and therefore not sustainable according to judicial scrutiny and line of constitutional authorities. However, the case (*Perry v Schwarzenegger*) is likely to be appealed all the way to the US Supreme Court which may, or may not, uphold the judgment. The ABA and many represented State Bar Associations were supportive of the civil right of same-sex couples to marry. A resolution was passed calling for the elimination of legal barriers, such as proposition 8, to be removed "between two persons of the same sex who are otherwise eligible to marry".

Friday, 6th August

Shaping the Law: A Solicitor Generals' Roundtable

In the United States, the Solicitor General refers to the Federal government's primary advocate when it deems it has an interest in a particular case. The incumbent is therefore tasked with a very varied brief and achieves his position being regarded as a formidable advocate before the US Supreme Court.

In a roundtable format, several former Solicitor Generals had a discussion on several legal developments and shared reflections on their time in office, including the task of supervising the position taken in court by lawyers across the country. The current incumbent, nominated by President Obama, comes from an Indian Hindu background and is Neal Katyal, with his predecessor Elena Kagan (conservative Jewish), leaving to be sworn as an Associate Justice of the Supreme Court of the United States, on 7th August (the next day). Kagan is the Court's 112th and its fourth female justice.

It is common practice in the US to comment and speculate on the political views held by the Supreme Court Justices. Those I spoke to, see Justice Kagan, along with her female colleague, and fellow Obama appointee, Sonia Sotomayor (its recently appointed first Justice of Hispanic origin) as meaning the court will take an inevitable slide to left-leaning tendencies in its rulings.

Of particular interest, is what the court will make of Arizona's recent immigration law, generally regarded as the broadest and strictest anti-illegal immigration measure in decades, requiring immigrants to have registration documents in their possession at all times and a crime if they do not. Interest groups argue such measures are not compatible with the US Constitution and the power vested in the Supreme Court enables it to strike down the State statute, if they agree.

Debunking the Myth of a Post Racial Society

With the election of President Barrack Obama, many heralded it as a sign of a post racial society. A panel of legal, legislative and public policy experts discussed the most recent legal and political developments that have occurred since the election. Despite the election of the first African American President, it was suggested that significant issues in education, police brutality, racial profiling and immigration, show examples of how ethnic prejudice can still impact upon the legal and political systems in the United States.

A number of the above matters and in particular the immigration law of the State of Arizona, had seemed to cause a great deal of hurt and feeling of regress in the minority lawyer community. The purpose of the seminar was as its title suggested: to debunk the myth that America is now a post-racial society. It was also apparent that in America, the notions of campaigning, grass-roots activism and legal action, remain available to those that disagree with the law. Thus, according to the doctrine of pre-emption (in that US Federal law remains supreme) a number of legal actions, including that by the American Civil Liberties Union and the Federal government itself, have sought to challenge the constitutionality of Arizona's statute.

Saturday, 7th August

New Standards in International Law: Anticipatory Self Defense and WMD Programs –The Use of Lethal Force

A panel composing of academics and senior government officials came together to discuss some very real issues developing in national (and international) security. Among them: is a new standard emerging for justifying pre-emptive strikes and what are the obligations under the UN Charter?

It is well established that under art.51, ch.VII of the UN Charter, states may legally engage in collective security and resort to the use of lethal force, in order to prevent an armed attack upon themselves (and others). According to the "bush doctrine" the pre-emptive strike on Iraq could be justified as an attack from that state (or harbouring terrorists), although never having occurred, was to be regarded as "imminent" by the particular threat posed by WMD. Although that position now seems widely discredited and many leading scholars have actually deemed that the attack on Iraq could not be justified in international law, there was talk of the US making a future "preventive strike" to counter the potential threat of WMD from elsewhere (Iran).

It was argued that what makes the situation different now is the immense harm that a nuclear weapon could cause in such a short space of time. The traditional approach in the legal standard on the justification of a pre-emptive strike is set out in the Caroline case, discussing hostilities between Britain and failed Canadian rebels who were seeking to establish a republic in Ontario in 1837. Many "Hawkish" Americans remain dissatisfied with the UN Framework and continue to argue that an attack in the future could still be justified, according to a new understanding of the law of the UN Charter. However, what was made clear under the new "Obama doctrine" is opaque –all options remain open.

It was apparent that the controversy surrounding the Iraq and Afghanistan wars that America has engaged in runs deep. Many in the audience wished to give varying and personal contributions from the floor and could have carried the (early morning) session on well into the afternoon. Many of the issues and comments would also be relevant and cause a stir in the UK. There was much public and policy contribution surrounding the debate on the law underpinning the Use of Force. Hopefully, we may also see many meaningful and thoughtful contributions from lawyers from around the world in the years to come, on these highly theoretical and important issues on the legality of war.

Marijuana Regulation and Federalism: A Clash of State and Federal Policy

De-Federalize policy/local control?

The number of states which have enacted Marijuana control laws which conflict with Federal laws is on the increase. Federal law can pre-empt state laws, but pre-emption is not self-enforcing, and the lack of standardized enforcement has resulted in confusion for legislatures, executive branches, courts, doctors and patients. The practices allowed under state laws, including possession for medical purposes, have been tolerated by the Federal Drug Enforcement Agency in some jurisdictions while there have been prosecutions in others. The seminar speakers discussed the variety of state laws which are currently in effect, the results encountered since there implementation, and the scope of the exception created by the Justice Department's announcement that medical dispensaries complying with state law will not be targeted for federal prosecution, and the growing interest of many additional jurisdictions in establishing medical marijuana distribution schemes.

California has an upcoming popular ballot on allowing the full-blown legalisation of Marijuana. A debate in the seminar ensued discussing the general advantages and disadvantages of Marijuana legalisation, the analogies drawn with 1930's prohibition and possible economic benefits from its regulation and taxation. In a similar vain to Arizona's immigration law, the clash of state and Federal policy was also apparent, and again the commentators I spoke to, predicted that an "Obama" Supreme Court would inevitably opt for a pro-liberal, yet strong Federal government approach in construing the constitutionality of the state regulations.

Hot Ethics Issues for Young Trial Lawyers

There are a variety of new ethical issues that engulf young US trial lawyers, in particular the use of "facebook". For example, in using the social networking site, can an investigator pose as a "friend" and elicit a defendant to boast about alleged crimes? Is it proper for a lawyer to do so? (Many Attorneys were quick to boast of their higher professional standards and unanimously agreed that the former could and the latter definitely should not –does this mean disciplinary action should be brought against lawyers using Facebook to gather evidence in a case?)

Actually, the Facebook phenomena, as well as the video-clip player site "you tube", have indeed been used as valuable sources of evidence in criminal and civil proceedings across America. For example, Judges have been ready to take Judicial Notice when gang members display their distinctive signs and boast of their affiliations online, and hand down hefty

jail terms. Similarly, injunctions have been known to be made against those "stalking" online. The dilemma is this: someone at one point chatting, or tweeting what might constitute libellous remarks then stops and the evidence disappears. Websites may be quickly taken down and the harm done does not pose that as would be by a negligently published newspaper article.

International Law Section Chair's Dinner, City Club of San Francisco

A warm welcome was given and a splendid dinner put on, at a prestigious Club in the heart of the Financial District of San Francisco. The City Club is strong in the Art Deco style and its interior is considered the best thereof in San Francisco. The dinner also provided a functional basis in that the ABA's International Law Section is all inclusive body that a willing lawyer can easily network and find their way onto sitting on one of its many committees, be it in assisting to catalogue International Tax law, or suggesting reform of the legal procedures of the United Nations. The International Committee plans to hold its Autumn Meeting in Paris in November 2010 and to host a trip to the UN headquarters in New York City in April 2011.

The lawyers in attendance represented many varied backgrounds and the ABA International Law Section cannot be said to be too American in its outlook for one from another nationality to participate in meaningfully. This is very interesting, because to sit on a committee affords the opportunity to engage in policy making decisions and in certain debates in International law, such as the legality of engaging in pre-emptive warfare, the difference in American and the rest of the World in outlook is stark (as the morning's seminar suggested).

Monday, 9th August

Visit to the Superior Court of California

With some time to spare before flying back to London I took the opportunity to visit some courts in California. My interest had initially been to attend the Federal court (having jurisdiction for crimes taking place across states, or civil suits claiming above $75,000 between citizens of differing states) although without having a form of photographic ID in my possession, a US Marshall sternly told me I could not enter the Federal building.

I headed to the California state court of general jurisdiction, called the Superior court (somewhat confusing as it is actually inferior to the California Court of Appeal and California Supreme Court). Nevertheless, all the court rooms were open to the public and I was able to feely move in and out and observe what was taking place on an average day. Some things seemed similar, others quite foreign: civil trials (Jury included) and proceedings to select which people were selected, being examined on their views and whether or not they could be deemed as suitable to be jurors (after all, in the State of California they will have the power to sentence someone to death). From a previous visit to New York, California's court rooms also appeared modern and better in organized, but I could only imagine how some of the issues discussed at the conference would to be applied in practice and affect the lives of everyday Americans.

Many exhibitors, such as the parent US companies of Westlaw and LexisNexis had been present to market their products and it was apparent that a great deal of electronic legal materials are now more commonly used in the US. However, the court's Attorney's library was made available to me and felt just a court library would be in England.

I also considered the differing basis on which US and English lawyers achieve qualification and their resulting skills demonstrated in the court-room. After finishing law school and achieving a J.D. (comparable to our LL.B.) an American need only pass a state bar exam (the tuition course is not compulsory) in order to become licensed to practice law. This means that for many US Attorneys, there has been no formal (academic) training in advocacy or drafting, let alone completing a training contract, or pupillage before commencing practice, and their learning of civil procedure is done at the same time as studying for substantive law subjects.

I thought the result was that many cases took a longer time to complete than they could be done in. It is common practice in American court rooms, for an Attorney to embark upon a line of questioning, before his opponent stands up and shouts "Objection – Your Honour, the Attorney is leading the witness". If this goes on, the Judge usually calls the lawyers into his Chambers, or to approach the bench to hold a "side bar" and may give a good telling off. If there had was greater adherence to learning the rules of witness handling, perhaps a rule would not have to be broken before a Judge has to constantly intervene to correct an Attorney's approach.

Tuesday, 10th August

Visit to the 9th Circuit US Federal Court

Before catching my flight home in the evening, I decided to go to the Federal court again, this time with my passport so to ensure I would be allowed in. The Federal court is housed in a slightly grander building and its cases invariably more complicated, involving parties and state actors from a number of jurisdictions and the application of the Federal rules of evidence. Nevertheless, my impression was that the proceedings were certainly less formal than would be the case in the English High Court. The advocacy by the Attorneys seemed to be colloquial and there was indeed little difference between an American court room, as can be seen on television, and that in real life. On the other hand, I did not find the fact there were no wigs and gowns was so detrimental, everyone got on with what they were doing without them.

I would certainly recommend attending the ABA Annual Meeting to others, particularly if they are able to obtain funding under the International Committee of the Bar Council International Legal Development Grant Programme. A mid-year meeting takes place in Orlando, Florida and the next full conference is set to take place in Toronto, Canada. With the pace of social change, enormous number of licensed Attorneys and weight of litigation in existence, I can imagine there will be a whole host of new interesting issues and seminars to discuss. ■

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This article is taken from his report to the International Committee of the Bar Council and London Common Law and Commercial Bar Association, to whom he thanks for kindly providing funding for his trip.

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