From Abuse to Abuse Driving Force

CBQ

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Modern Slavery Act

Landmark legislation

Brief Encounter?

Cyber crime implications

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Innocent until Proven Guilty

EDITOR **John Cooper QC**

The recent recommendations contained in the JUSTICE Report on the abolition of the Dock in criminal cases merits serious consideration.

In fact, our jurisdiction is one of the few across the World which still uses the "cage" approach to the layout of a courtroom.

The suggestions made in this Report that the general rule that a defendant be placed in a confined Dock area should be abolished is both sensible and in line with fair trial principles.

We should remind ourselves that we still work within a system that proclaims innocence unless proven guilty, but the appearance of a defendant, confined in a dock, often divided from the court by security glass and surrounded by prison offices is hardly conducive to that fundamental principle. A moment's thought as to the impression the image has upon jurors as they see the confined accused, separated from the court, facing an indictment surely emphasizes the point that from the moment a jury set eyes upon an accused, a potential prejudice is being created.

On a practical level, the taking of instructions and receiving intelligible communications, privately between lawyer and client is often impossible.

Some Docks, such as one in Inner London Crown Court, are so raised above the well of the court that the tallest of counsel on tip toe finds it almost impossible to speak to a client during the process, one notoriously having the scramble, rock climber style up the sheer face of the Dock to get his ear to the defendants mouth.

We see images of international proceedings from America to South Africa of defendants seated next to their counsel with little disruption. Of course, there may be exceptional reasons to have an individual confined, but let us make that the exception to the general rule and consign the Dock to history. ■

QC, 25 Bedford Row

The comments made are not necessarily those of the CBA

Driving Force

CHAIRMAN'S COLUMN

Mark Fenhalls QC

In 1997 the late Michael Hill QC wrote a short history of the Criminal Bar Association. As I contemplate the situation we face today many of his thoughts resonate through the years. I make no apology for quoting Michael's words in full, not least because he would be very cross with me if I did not.

Born of frustration and anger, the Criminal Bar Association (CBA) of 1997 is unrecognisable from the body of about 100 which met in 1969 to form it. The seedsmen were Barry Hudson and Dick Lowry; the cultivators were our first two great leaders, Jeremy Hutchinson and Basil Wigoder, who were chairman and vice-chairman from 1969 to 1975. Even they could not have anticipated how events would provide the Association with its first great opportunity to make its mark on the public: but the llth Report of the Criminal Law Revision Committee provided that chance. The "Yellow Book" - the CBA's response - was remarkable for a number of reasons: its decisive impact on the debate, obviously; more than that, it demonstrated that the criminal Bar could pull together and that, when it does, what it has to say is of great weight and worth. It demonstrated, also, that the Bar is most influential when it eschews shouting and slogans and concentrates on substance.

The 1970s saw extraordinary - and potentially very damaging - events with regard to the criminal Bar: two stand out in my mind - the reduction in publicly-funded fee rates and the growing concern about the length of criminal trials. The CBA's impact on the resolution of the first of these is not always recognised; the way in which the Association dealt with the second points to another lesson the establishment is wont to ignore - that this is a radical Association with positive and practical suggestions to make. The CBA was the driving force in the discussions which led to the Central Criminal Court Practice Directions Rules. If that lesson was not learnt, the publication in 1980 of the three Discussion Papers on Shortening Criminal Trials should have made it clear. If it did not, the fault lay with those who were determined to perpetuate the myth that criminal practitioners are second grade barristers.

If the 1970s had been a decade of constant pressure, the 1980s were even worse: the Philips Royal Commission, leading to PACE and the establishment of the Crown Prosecution Service; Roskill; fees; codification; Mackay. Bearing in mind the present government's attitude to the CPS, it is somewhat ironic that Neil Denison and I spent several hours trying to persuade an interdepartmental meeting that a single CPS was a fundamental mistake and that what was needed was a regionalised service. Roskill revived the argument about juries: fees led to negotiations, the judicial review of the then Lord Chancellor for not negotiating and more negotiations. And Mackay ... well, that story is still without its ending.

Others are better equipped than I to tell the story of the last 11 years since I retired as chairman in 1986 but nothing has happened since then to diminish the importance of the Association: indeed, the contrary is true - and this is even more important now that the government is talking about a public defender system.

We are now the largest specialist Bar association, numbering about 2,600 members over the country as a whole; the credit for all that we have done since 1969 really belongs to the members; the principal officers have been privileged and honoured to be the flag bearers. This one is enormously grateful for the opportunity to carry the flag for a while.

So what has changed? Everything and nothing it would seem. The names of the Reports have changed and we have to grapple now with Leveson, Jeffrey and Rivlin, but the most potent sentences in Michael's note are surely these.

… the CBA's response - was remarkable for a number of reasons: its decisive impact on the debate, obviously; more than that, it demonstrated that the criminal Bar could pull together and that, when it does, what it has to say is of great weight and worth. It demonstrated, also, that the Bar is most influential when it eschews shouting and slogans and concentrates on substance.

I have recently had the great pleasure of reading of Thomas Grant's book *Jeremy Hutchinson's Case Histories*. Tom has done us all a great service in persuading Jeremy to contribute to this book, which was published in the spring of this year not long after Jeremy celebrated his 100th birthday. If you have not yet bought this for yourself or put it on your next birthday/Christmas present list, I urge you to do so. If any of your friends or family members is looking for a present for a barrister, this should be on the shortlist. If you need any further persuading, track down the episode when he appeared on *Desert Island Discs*.

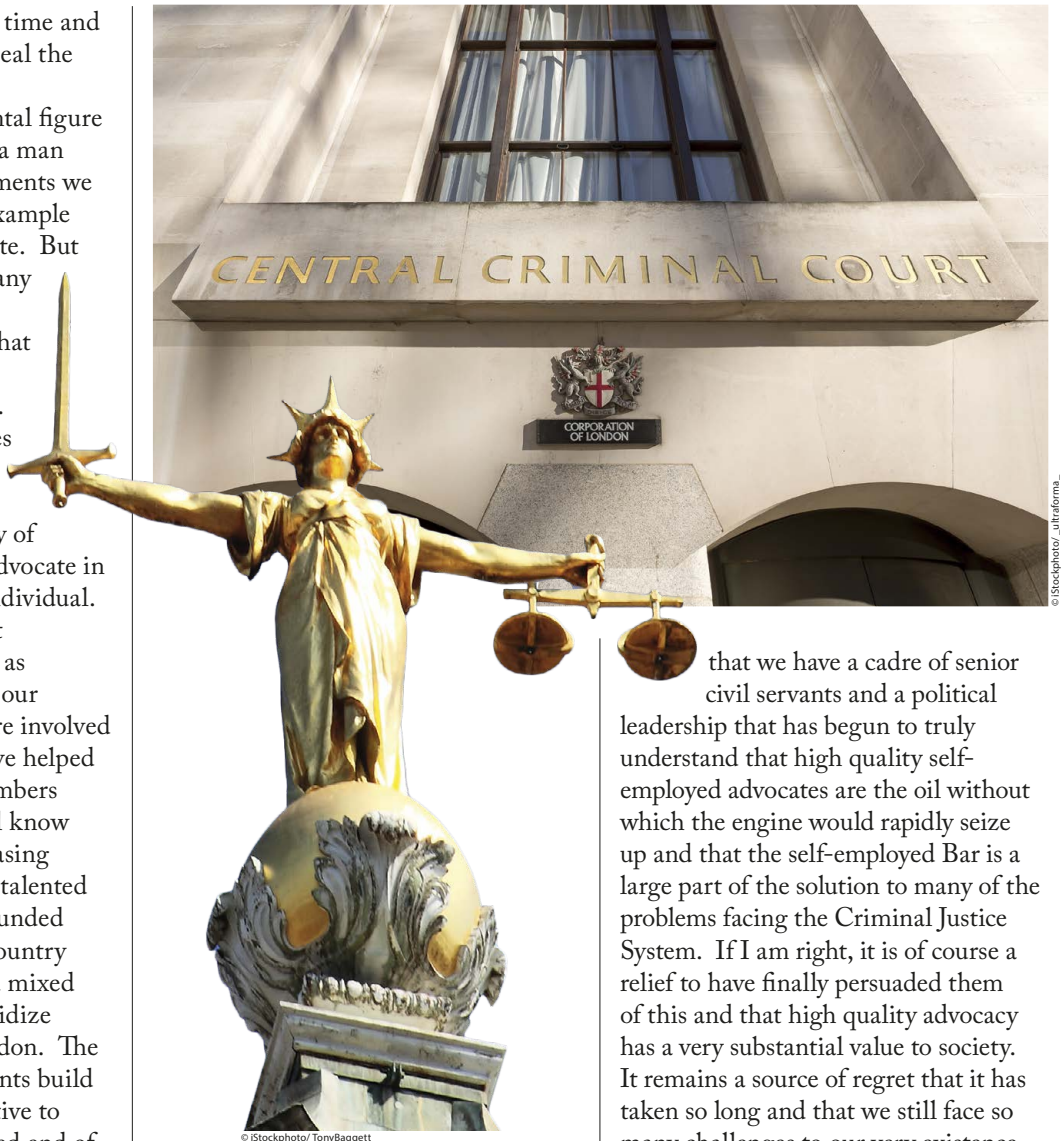
The names of Jeremy's cases will be well known to many of you, but deserve re-visiting for many reasons. The history is of course fascinating and, in spite of the subject matter, often entertaining. The exploration of the greatest social issues of the day, in the crucible of the criminal courts is remarkable. It describes a series of cases covering cold war spies, the brutal treatment of homosexuals and the overbearing approach of the Government and is hugely thought provoking. It should cause every enlightened reader to reaffirm their belief in the European Convention on Human Rights and to wonder why any Government could possibly think it a

sensible use of Parliamentary time and political capital to seek to repeal the Human Rights Act.

Jeremy truly is a monumental figure in the history of the Bar and a man whose character and achievements we should celebrate. His is an example none of us can hope to emulate. But within this book there are many occasions on which we are reminded of the essence of what is best about our profession and to what we should aspire. Above all perhaps what shines through every paragraph of the book is the critical importance in any just society of the role of the independent advocate in defending the rights of the individual.

This brings me to a subject of overwhelming importance as we contemplate the future of our profession. All of you who are involved in pupillage selection and have helped train young advocates in chambers over the last decade or so will know only too well about the increasing struggle to attract and retain talented young advocates to publicly funded work. In some parts of the country it may be easier to maintain a mixed practice which can cross subsidize criminal work; not so in London. The huge levels of debt that students build up are an enormous disincentive to practicing in the poorly funded end of the profession. All too often when a young barrister has struggled through pupillage and obtained tenancy, s/he stays in the criminal courts for only a few years before slipping away to other areas of work, or employment outside the criminal law. Decades of social progress are going to be reversed as our profession is going to again become the preserve of the economically privileged. All of us must strive to find ways to nurture our replacements.

There are of course many areas of the Criminal Justice System that are crying out for reform and capital expenditure. We all know how the fabric of court buildings are crumbling as lifts fail to function, pipes burst, photocopiers break or have no paper. Experienced staff in the Courts Service who knew how to make the ageing IT system work are encouraged to leave to lower wage bills, with the inevitable result that there is no one left who can help



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when it breaks. It brings to mind what happened in London all those years ago when Routemaster buses were first phased out, no doubt encouraged by some mandarin who was charged with halving the wage bill by removing conductors. For several years afterwards (before the advent of Oyster cards of course) it was hard to move in London without seeing a red bus parked at bus stop with a long queue of people waiting to board and pay. Behind the bus on the road would be the cars and other vehicles now parked up in what should and could have been a free flowing road. No doubt the person in charge of the wage budget got a pat on the head. But then no one was measuring the congestion or the frustration or the lost economic activity.

I confess to some optimism about our future. I do so having sat in many meetings over the last couple of years. I believe for the first time in my career that we have a cadre of senior civil servants and a political leadership that has begun to truly understand that high quality self-employed advocates are the oil without which the engine would rapidly seize up and that the self-employed Bar is a large part of the solution to many of the problems facing the Criminal Justice System. If I am right, it is of course a relief to have finally persuaded them of this and that high quality advocacy has a very substantial value to society. It remains a source of regret that it has taken so long and that we still face so many challenges to our very existence. The challenge of this year is to turn this positive sentiment into concrete steps that permit an exposed referral profession to survive and to compete fairly for work. But let there be no doubt. The Bar has no right to exist without a constant focus on quality, the highest possible ethical standards and a willingness to contemplate reform and change. The clock cannot stop at 20 to nine.

I suspect most past leaders of the CBA, the Bar and the Circuits have approached their term of office with a mixture of quiet pride in their new found position, real concern about the responsibility they carry – perhaps it would be more accurate to say horror about what they have taken on - and real doubts as to whether or not they can achieve anything beyond bar survival. I am no different. Like those who have gone before me I shall do my best. ■

Poacher Turned Gamekeeper?

Preface

The Role of Modern Policing Under The Modern Slavery Act 2015

Contributor

Paramjit Ahluwalia

Theresa May cited the Modern Slavery Act as being a historic milestone and that this "landmark legislation sends the strongest possible signal to criminals that if you are involved in this vile trade you will be prosecuted and you will be locked up. And it says to victims, you are not alone – we are here to help you."

As well as consolidating offences into a single Act, the Modern Slavery Act introduces a statutory defence for victims of trafficking or slavery forced to commit a criminal offence (only applicable to certain offences though), increases the maximum sentences to life imprisonment (s.5), and introduces Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders (Part 2 of the Act) to restrict the activity of those who pose a risk of causing harm.

Key parts of the Modern Slavery Act 2015 came into force on the July 31, 2015, and to coincide with the new legislation, the College of Policing has published new national guidance.

For the real thrust of this legislative change to take effect, the investigation and identification of individuals at risk of being victims of trafficking or forced labour needs to have as much impetus on the ground, for the Modern Slavery Act to become anything more than rhetoric, or a consolidation exercise. And this is where the key role in identification in my view lies with the police.

Perhaps what has been fascinating to watch in the swift run up to the royal assent of the Act on March 26, 2015 has been the cross party political support that resonates and the absolute abhorrence of modern slavery and forced labour.

Further has been the explicit reference and support of the definitions of s.1 of the Modern Slavery Act to be tied up with those of Strasbourg and the future evolution of art.4 of the European Convention on Human Rights, when defining "holding a person in slavery or servitude' or 'a person to perform forced or compulsory labour."

Article 4 of the European Convention on Human Rights (as incorporated by the Human Rights Act 1998) provides that:

"(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this Article the term 'forced or compulsory labour'

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(4) shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of art.5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in the case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations."

Such quoting of art.4 may be seen as a small stream ripple, but the real sea change that may flow can be seen in the College of Policing Guidance on Modern Slavery published at the same date the Act came into force.

Section 52 of the Modern Slavery Act sets out that, "if a public authority to which this section applies has reasonable grounds to believe that a person may be a victim of slavery or human trafficking it must notify (a) the Secretary of State ... ."

This duty is set out further by the College of Policing as being, "the duty of a local police force (the primary legislative agency) to begin an investigation as soon as they believe a modern slavery crime may have been committed, regardless of whether a victim makes an allegation, whether a report is made, or whether consent to be entered into the national referral mechanism is provided or refused. A modern day slavery crime MUST NOT be approached as an employment or immigration issue at this stage."

> "Criminal matters take precedence over immigration issues and officers should not treat potential victims as suspects of immigration offences"

(The national referral mechanism is the gateway for locating victims of modern slavery and to ensure they receive appropriate protection, support and accommodation. Any potential child victim must be referred into the national referral mechanism automatically, but any potential adult victim must sign their consent before they can be referred).

Finally there appears to be some recognition of why the obstacles have been present before on combating this complex arena.

In terms of "children," when it comes to questions as to age, there is now a presumption invoked by s.51 of the Modern Slavery Act, that where a public authority is not certain of the person's age, but has reasonable grounds to believe that the person may be under the age of 18, that the public authority must assume that the person is under 18 (until a Merton compliant age assessment is carried out by a local authority).

The guidance by the College of Policing is that a child should be taken to private, child friendly surroundings with an appropriate adult or child advocate in attendance. It is stressed that a member of the person's family, friends or peers should not be used an interpreters.

And further that the powers under s.46 of the Children Act 1989 to take a child into emergency care should be considered where the child is at significant risk of harm. In addition interviewing of those individuals are to take place in line with Achieving Best Evidence in criminal proceedings guidelines.

The emphasis on understanding the intricate and international dimensions of these offences isn't limited to the guidance applicable for children only.

The College of Policing guidance recognizes that adult victims may fear disclosure for fear of being re-trafficked, not believed, attachment to the traffickers and a fear that potentially illegal activities in which they were involved might well be discovered.

Fascinating and perhaps at odds with what we are used to having seen in the arena of migration crime (the cross over between immigration and crime issues) is that the guidance by the College of Policing outlines to police officers at a crime scene that "criminal matters take precedence over immigration issues and officers should not treat potential victims as suspects of immigration offences."

One of the largest obstacles in bringing forward successful investigations in this area has been the stranglehold of immigration status and documents – so many situations arise where individuals have had their immigration documents withheld by abusers, or are reluctant to go to the police for fear of being found out for not having appropriate immigration status. If officers are now asked to look beyond that, perhaps a new era in combatting this difficult multi-dimensional crime can emerge.

One example within the guidance from the College of Policing is that early applications for discretionary leave to remain should be made on behalf of any victim reporting or assisting with an investigation.

Utilization and understanding of the statutory defence created by s.45 of the Modern Slavery Act 2015 becomes key. And not key simply for defence practitioners, but to have any worth, to be key and instrumental at the times of the police investigation.

Section 45 provides a defence for certain offences (not those within sch.4 of the Act – some examples are GBH s.18 and s.20 of the Offences Against the Person Act 1861, and ss.1-19 of the Sexual Offences Act 2003) if it can be evidenced that a person was compelled to commit the offence as a result of the exploitation. There are also definitions that appear adapted from duress, such as a "reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act."

The College of Policing outline that if a "person is arrested and so enters the criminal justice system as a perpetrator, and officers discover during the PACE interview that the person committed a modern slavery offence through coercion and may also be a victim, the interview should continue and evidence be obtained. On conclusion of the interview the person should be referred into the National Referral Mechanism if they consent."

The College of Policing note aptly in their guidance to officers that they should "be aware that the role of victim, witness and suspect is interchangeable – one person can fulfil all three roles."

And here is the true and stark reality of why the Modern Slavery Act really does require a modern approach to policing, poacher turned gamekeeper to really get to the root of Modern Slavery crimes. ■

Garden Court Chambers

Brief Encounter?

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Preface

Cyber crime implications of the Ashley Madison hack

Contributor

Matthew Richardson

What offence have the hackers committed by capturing and releasing account details associated with the Ashley Madison site?

It is clear that, given the business model of Ashley Madison, privacy is key to their clientele. It is safe to assume that the massive breach of data that occurred recently was not an authorized use of the Ashley Madison system.

The most obvious offences committed by the Ashley Madison hackers are offences under the Computer Misuse Act 1990, ss.1-3 (CMA 1990). These offences primarily concern the unauthorised access to a computer system although they differ slightly in their scope.

Section 1

CMA 1990, s.1 creates the statutory offence of unauthorised access to a computer system. The *actus reus* of the offence under CMA 1990, s.1 is substantiated by causing a computer to perform "any function" in order to secure access to it. In practice, therefore, the *actus reus* can be substantiated by relatively innocuous acts. The interpretive provisions under CMA 1990, s.17 provide that, "A person secures access to any program or data held in a computer if by causing a computer to perform any function he" uses the data, copies it from one medium to another or outputs it.

A person convicted of the CMA 1990, s.1 offence could expect two years at Her Majesty's Pleasure on indictment– there are currently sentencing guidelines for this offence but it is likely that, given the scope and damage caused, this would be at the higher end of the scale.

Section 2

CMA 1990, s.2 (unauthorized access with intent to commit or facilitate further offences) is the cyber equivalent of "going equipped". The offence is basically the same as the CMA 1990, s.1 offence but with the additional mental element of intention to commit further offences.

It is likely that this offence was not a single breach event and planning and previous access is likely to have been involved– therefore, CMA 1990, s.2 is likely to be engaged. This offence carries a maximum sentence of five years in jail. There are no guidelines but this offence is likely to be at the top end.

Section 3

CMA 1990, s.3 (unauthorized acts with intent to impair, or recklessness as to the impairment, of a computer) is, as it sounds, an offence which adds in the additional mental element of impairing the function of a computer system.

It is clear that the Ashley Madison hack caused significant impairment of the system and it is likely it is still broken. This offence carries with it a far more severe penalty of 10 years in jail.

It has long been argued by many senior law enforcement and legal commentators, including Adrian Leppard, commissioner of the City of London Police, that offences like the Ashley Madison hack should be considered as terrorism offences under the Terrorism Acts 2000 and 2006 (TA 2000 and TA 2006). The elements of the offence are such that they would probably fall under the ambit of TA 2006.

TA 2000, s.1 creates an offence of terrorism in which a person interferes with or disrupts an electronic system for the purposes of intimidating a section of the public for the advancement of a political, religious or ideological cause. In the case of Ashley Madison it could be argued that these provisions are met as the perpetrator has publicly sought to shame and intimidate these people into halting their use of the site, as they believe that extramarital affairs are wrong.

Additionally, there are offences under the Protection from Harassment Act 1997 and fraud offences – not to mention potential offences relating to the deaths of those people who have killed themselves since their names were exposed.

What are the Challenges in Identifying Hackers?

The hackers themselves, given the sophistication of the hack, are likely to be very capable and will have taken many steps to hide their identities. This will mean using multiple proxy servers in multiple, unhelpful, jurisdictions, using hijacked, zombie computers or "botnets" and doing everything they can to avoid being caught.

Given the level of planning that goes into a hack like this, the hackers will have had to use bots (zombie computers) and there will have been some record of this hack and multiple people will know about it.

It is unlikely to have been a state-sponsored attack and so the perpetrators may be identifiable not by the hack itself but by the preparatory steps, and dissemination of the hacked material.

If found to be located outside of the jurisdiction, could prosecuting authorities of different jurisdictions work together to bring a case against the hacker(s)?

There has of late been much more co-ordination between cyber crime forces in the UK and abroad. A number of treaties and conventions govern the policing of cross border crime and world leading cyber crime detection and monitoring like that of the City of London Police is exported to other jurisdictions through a series of training programs.

If the perpetrators are found to be in a jurisdiction that is friendly or signatory to a convention or treaty to extradite them, it is possible that they will be brought to justice. If they are in a country like Korea, Syria, Iran or other unfriendly country, they will likely escape justice.

Could Individuals Who Have Signed up to the Site Face Criminal Prosecutions in any Jurisdictions?

Not in most jurisdictions, but it is possible that they may find themselves on the wrong end of a divorce settlement.

Have there Been any Examples of Successful Prosecution of Hackers?

The law and detection method are still catching up with the online criminals, but slowly and surely the number of prosecutions of these kinds of cases is on the rise. As courts, lawyers and police start to understand these types of crimes better there will be more and more prosecutions. It is possible that the lack of understanding within the police, Crown Prosecution Service (CPS) and judiciary has allowed hackers who should have been prosecuted and convicted to walk away.

How is the Criminal Law Developing in This Area?

Given the seriousness of the hack and that several people have reportedly taken their lives as a result, it is possible that the hackers could be the first to face the brand new offence under CMA 1990, s.3ZA (unauthorised acts causing, or creating risk of, serious damage) which was added by the Serious Crime Act 2015 in May 2015.

A person is guilty of an offence if:

- The person does any unauthorised act in relation to a computer;
- at the time of doing the act the person knows that it is unauthorized;
- the act causes, or creates a significant risk of, serious damage of a material kind, and;
- the person intends by doing the act to cause serious damage of a material kind or is reckless as to whether such damage is caused.

Damage is of a "material kind" if it is damage to human welfare, the environment, the economy of any country or the national security of any country.

Serious damage to human welfare can be:

- Loss to human life;
- human illness or injury;
- disruption of a supply of money, food, water, energy or fuel;
- disruption of a system of communication;
- disruption of facilities for transport, or
- disruption of services relating to health.

This is an indictable only offence and can result in up to 14 years in jail.

The new offence created has not yet been prosecuted and, given that the other new offence in CMA 1990, s.3A (inserted by the Police and Justice Act 2006), has only been prosecuted once, it is possible that the lack of understanding of the CPS and police in this field has led to an offence which is often breached but rarely prosecuted.

Legislators seem to be keeping up with the times in the creation and definition of these offences and one hopes that the enforcement side of the equation can keep up too. ■

This article has been repurposed from LexisPSL®In-house Advisor.

Barrister at Henderson Chambers

From Abuse to Abuse


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Preface

Challenging the legality of Lord Janner's prosecution

Contributors

David Wolchover and **Anthony Heaton-Armstrong**

As self-appointed leader of the baying pack calling for the prosecution of 86-year old Lord (Greville) Janner of Braunstone, Mr Simon Danczuk – an MP with no legal qualifications whatsoever – might perhaps be forgiven for having missed the niceties of statutory intent. Not so such luminaries as former DPP Lord Ken Macdonald QC, the "sexual offences expert" Eleanor Laws QC, and the amiable David Perry QC. But lest it be supposed that we knew any better it has to be admitted that in our article "Senile Dementia and Unfitness to Plead" ((2015) 179 JPN 299-302, April 25; www.criminallawandjustice.co.uk/features/Senile-Dementia-and-Unfitness-Plead) we suggested that in cases like that of Lord Janner – non-dangerous defendants suffering from an untreatable and incurable mental incapacity – the two-stage process laid down by ss.4 and 5 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 might have in contemplation as a purpose in its own right the provision of a procedural platform on which alleged victims of the defendant could air their grievances in public. The two-stage process involves (a) a Judge determining on medical evidence whether the defendant is fit or otherwise to stand trial in the normal way and then (b) if the defendant is deemed not fit to stand trial, swearing a jury to determine, through what is termed a trial of the issue, if the prosecution have proved to the criminal standard that the defendant did the act or made the omission alleged.

We subsequently conceded that we were incorrect and that it was not in fact lawful in the Janner sort of case to use the process purely for the purpose of ventilating grievances ("Senile Dementia and Unfitness to Plead: A Postscript": (2015) 179 JPN 329-330, May 2).

The DPP's Decision not to Prosecute

In April, Mrs Alison Saunders, the Director of Public Prosecutions, decided that Lord Janner should not be prosecuted for multiple historic instances of sexual abuse of children allegedly committed between 1969 and 1988 when he was an MP (see diverse media reports, April 17 and 18). In 2009 he had been diagnosed with Alzheimer's disease and in the opinion of four distinguished psychiatrists (two engaged by Janner's solicitors and two by the prosecution) he was now suffering from such severe dementia that he was no longer fit to stand trial – in the archaic language of the law he was "unfit to plead." Furthermore, he was now helpless to such an extent that the idea that he might constitute a danger to anyone was fanciful.

The Decision Criticized

Mrs Saunders was roundly traduced for her decision with a barrage of criticism from victims and their representatives,

pundits, politicians and government ministers alike. (For a useful review see, eg, Martin Bentham, *Evening Standard*, April 23, 2015; and see almost every edition of *The Guardian* between the original decision, April 16, and Saturday, April 25, for daily developments). Even *The Times* resorted to an ignoble and utterly ludicrous exercise in digging the dirt (Sean O'Neill, "Revealed: link between DPP and Janner's son," April 20).

The Decision Reviewed and Reversed

Shortly after Mrs Saunders's decision lawyers representing a group of complainants in the Janner case formally requested the Crown Prosecution Service to undertake a review of the decision in accordance with the CPS Victims' Right to Review Scheme (see eg, http://www.bbc. co.uk/news/uk-32506624). The distinguished QC David Perry was duly instructed to conduct the review and recommended that "in the interests of allowing the evidence to be aired in court" the DPP's decision should be reversed. On learning of Perry's recommendation the baying pack's howls of synthetic rage in renewing their calls for Mrs Saunders to resign entirely overlooked the fact that it was she who had invited use of the review process in the first place (see Sean O'Neill, "Law chief refuses to stand down as ruling on Janner is overturned," *The Times*, June 30 2015, and see the newspaper's leader "Poor Judgment," a phrase which says more about the quality of the article's analysis than it did about Mrs Saunders' competence).

Janner Required to Appear in Court

The inevitable farce to which prosecuting Lord Janner was bound to lead unfolded last week at Westminster magistrates' court, when Chief Metropolitan District Judge Howard Riddle ruled that Janner would be required as a matter of strict law to attend court in person on August 14, (see The Guardian, and the Evening Standard, August 7, 2015). This was in the face of expert opinion that Janner would not be able to understand that he was in court or the purpose of being in court and that as a consequence he was highly likely to become distressed, a reaction which could become "catastrophic." Prosecuting counsel Clare Montgomery QC argued that the court could make any "necessary adjustments" to minimize distress and, agreeing, Mr Riddle asked the parties to consider arrangements for the "novel position" in which the court had found itself, including the possibility of holding the hearing elsewhere, potentially including Janner's home. He accepted that Janner might become intolerant of the legal process and could even attempt to leave the court, but he noted that one of the experts had pointed out that there was unlikely to be any long-term psychological damage as a result of a court appearance. However, Mr Riddle pointed out, his appearance was essential for a comparatively short time. It could probably be achieved in less than a minute, but his presence was required nonetheless. (Crown Court jurisdiction could of course always be achieved by circumventing appearance in the magistrates' court through the voluntary bill procedure.) On August 13 at a hearing before the Divisional Court at which Lord Janner's pathetic condition was described in graphic detail two Judges sternly held that he had to appear "or face arrest"! So perfectly healthy people can be tried for driving offences without ever appearing in court but an ailing old man with dementia, who can never be criminally tried, must be paraded for a media feeding frenzy.

The fact that Mr Riddle acknowledged the novelty of the situation in which the law required the brief attendance in court of the virtual shell of a man, with very little mind remaining and no conceivable danger to anyone only underscores not merely the wrongheadedness but the fundamental illegality of this absurd prosecution.

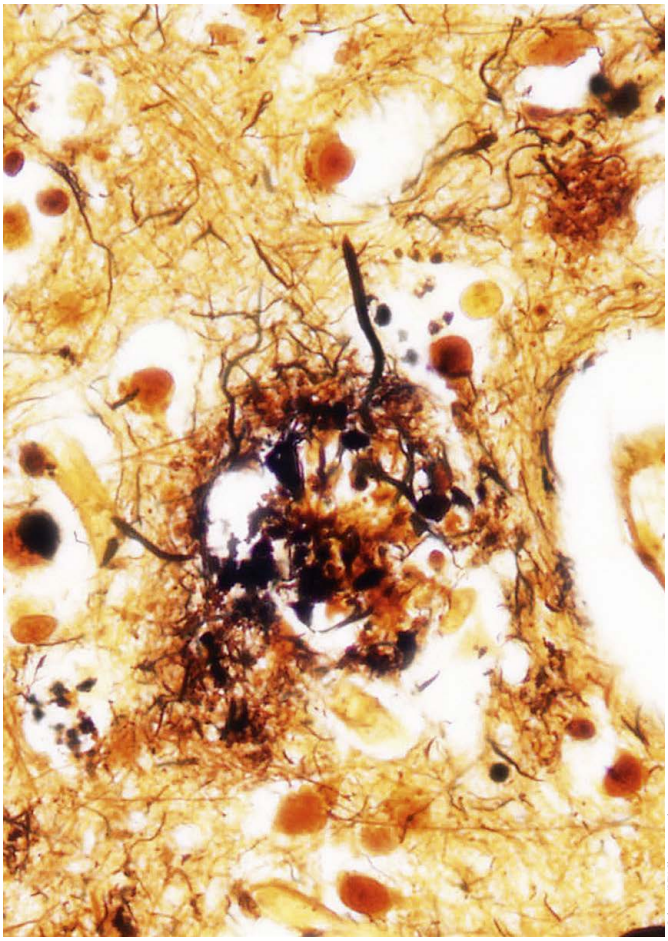
The DPP's Original Decision Compelled by Law

We would not venture to comment on whether Mrs Saunders's original decision was courageous, as some of her defenders in the legal profession have asserted. In the light of the four unanimous medical opinions in the case she had little choice but to take no action against Lord Janner: quite simply, she was compelled by law from charging him. For all his experience and authority David Perry QC demonstrated a remarkably misconceived understanding of the nature of the legislation for dealing with unfitness to plead and, we would contend, got sidetracked by perceived considerations which have nothing to do with the relevant legislative purpose.

Legislative Purpose of the Trial of the Issue Procedure

In order to understand why the trial of the issue procedure is unlawful in the Janner case we need to examine its essential objective. Persons who may have committed a crime or who at least were the physical instruments of injury or harm (without necessarily having the mental capacity to make their actions criminal) but who in any event now lack the mental capacity to participate in proceedings against them, have long posed a problem for the courts.

If such persons have demonstrated a predisposition to carry out dangerous acts society must have at its command a coherent and workable process for determining how to dispose of such cases. If they are mentally ill it may be necessary to confine them in a secure hospital for treatment, certainly if they are likely to be dangerous to others or themselves and the risk cannot be met by supervision in the community in conjunction with outpatient arrangements and a carefully monitored medication regime. By contrast, dangerous offenders with a "diagnosed" psychopathic personality deemed to be untreatable would normally and properly be imprisoned for an indeterminate period. (On the other hand it is arguable that even so-called "untreatable psychopaths" are actually potentially treatable if only an effective treatment or medication programme, at present elusive, could be devised for them.) But what is to be done with "untreatable psychopaths" who, unusually perhaps through some current incapacity of mind not necessarily connected with their psychopathy as such, lack the mental wherewithal to participate in a conventional criminal trial? Under our system they cannot *ipso facto* be proved to have committed a crime, as such, and so properly cannot be confined in prison (a penal institution for "offenders"). Since their current condition may well be treatable as a separate issue from their general psychopathy it may be proper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Alzheimer's disease, neuritic plaques

to make a hospital order for treatment of that particular condition, though not for treating their psychopathy, otherwise deemed "untreatable."

The difficult question of untreatable psychopaths apart, it is generally acknowledged to be oppressive and inconsistent with the fundamental precepts of a free society to confine a mentally ill person in a secure environment for medical or psychiatric treatment unless there is reliable evidence that he or she may actually have been the physical instrument of the injury or harm to another. It is true that limited machinery is available under mental health legislation for "sectioning" mental patients irrespective of their proven conduct but the power is used sparingly; many will recall Soviet era psychiatric pretexts for locking up dissidents. The potentially very restrictive measures which are open to a court where mental patients have actually demonstrated their dangerousness by serious violence or other socially harmful behaviour places them in a special category.

The problem is to determine how we go about establishing with sufficient cogency that the alleged unfit-to-plead "perpetrator" was indeed the person who inflicted the injury or harm. If the subject cannot participate in the inquiry the tribunal is deprived of input from a potentially important witness, perhaps the most important witness in the case. Again, inability to give instructions may well impose constraints on the capacity of the defending advocate to cross-examine or the defence team to seek appropriate exculpatory witnesses. The classic difficulty is shown in identification cases. The evidence of identification may be reasonable and potentially cogent, albeit short of conclusive, and whereas a defendant of sound mind might well be able to give an account which offsets the identification evidence adduced by the prosecution sufficient to warrant an acquittal, this would not be feasible in the case of a defendant who was unable to participate through mental incapacity (see eg, Robert Rhodes QC, letter, *The Times*, April 20, 2015). Again, while a defence of self-defence must be raised in a normal trial in order for it to be considered this would not be feasible in a trial of the issue if there were no prima facie evidence pointing to the possibility of self-defence, eg, no classically defensive injuries or nothing suggested by the defendant in interview before his state of unfitness to plead was recognized. In the absence of such pointers it would not be possible for the court to consider a defence typically run in a normal trial and real injustice might be the result. (Other examples are mistake, accident and the issue of consent in rape, discussed in our original article at pp.300-301.)

The lack of input from the defendant is a real conundrum for the administration of justice in such cases. Yet so important is the need to find an open and transparent process by which to protect the community from mentally ill persons who have evinced a predisposition to perform dangerous and harmful actions that Parliament has been constrained to resort to the unhappy compromise of the "trial of the issue" in respect of persons who are unfit to stand trial, are presumptively dangerous and are potentially susceptible to treatment. The procedure is termed a trial of the issue – or of the "facts" – to distinguish it from a trial of the defendant. It is not the defendant who is on trial but the facts. Because the defendant is not being tried for an offence the burden in practicable terms of establishing that he or she was the instrument of the injury or harm is necessarily and effectively lower than the burden of proving what would otherwise be charged as a crime, though the jury who make the decision as to whether the defendant "did the act" (or made the omission) are enjoined to apply the usual criminal standard of proof.

It must be stressed, then, that the clearly constrained and narrow purpose of the legislation is to determine whether there is a legitimate basis in terms of the defendant's provable and proven conduct for decreeing (a) the need for treatment and (b) the degree to which the patient should be subject to preventive measures whilst being so treated. It is only because of the vital importance of determining the need for treatment in conjunction with what may need to be severely preventive measures that Parliament has reluctantly conceded a resort to a procedure which civil libertarians – and in particular Common lawyers – would otherwise disavow as anathema. In other words the trial of the issue is an expedient procedure which although providing transparency is barely tolerated and must not be abused by harnessing it for purposes other than its narrow objective: determining a basis for treatment under restrictive conditions. In short, as a matter of self-evident principle it is fundamentally unavailable as a means of providing a platform for the public ventilation of victim grievances exclusive of the objective contemplated by the statute.

It follows that the procedure cannot have been intended to

deal with a person who is already conclusively known not to be susceptible to treatment and is manifestly not dangerous. Lord Janner has untreatable dementia caused by Alzheimer's disease. It is irreversible and terminal. He is apparently physically so incompetent that he now needs constant care and would be unable to leave his secure domestic environment without close supervision. We do not know whether he even remains mobile. To suggest that he remains at risk of going out and inflicting acts of sexual abuse on children would be pure fantasy and indeed nobody is sensibly making such suggestion.

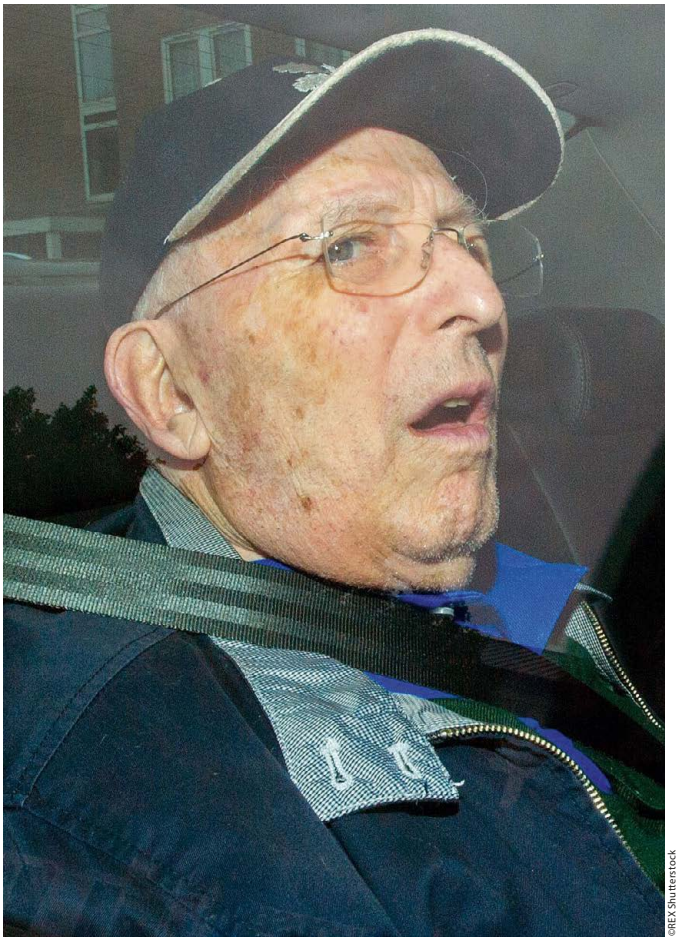
Absolute Discharge

Against the background of the foregoing we now need to look at the options provided by s.5(2) of the 1964 Act as amended. It lays down three possible modes of disposing of a case in which a defendant who is deemed unfit to stand trial has been proved to have done the act in question or made the relevant omission. The first two are a hospital order and a supervision order. The third mode of disposal – the absolute discharge – must necessarily be invoked where the defendant poses no risk of harm to the public and, being untreatable, will gain no benefit from confinement in a psychiatric hospital or a supervision order for medical purposes.

Since non-risk and non-treatability will usually have been identified in the initial unfitness to plead medical opinions, secure treatment will clearly not be the objective of a trial of the issue. It would always be open to the prosecution in such a case to offer no evidence where proceedings had already commenced against a defendant, or, in such a case as that of Lord Janner, not to start proceedings in the first place. As we have already noted, in our original article we suggested that in contrast with an early termination of the proceedings in that way, the absolute discharge option under s.5 might arguably sanction the continuation and completion of the proceedings for some non-containment, non-supervisory, non-treatment purpose, namely the provision of a convenient public platform on which victims could articulate their grievances against the defendant. At first blush this might have seemed plausible but on reflection there is something inherently artificial, strained and almost Delphic about seeking to infer such an important purpose from the disposal cul-de-sac of an absolute discharge.

Strictly Limited Purpose of the Absolute Discharge Option

There must be a more mundane and altogether more feasible explanation of the purpose of the s.5 absolute discharge. What must surely have been intended by Parliament was that it was to be available solely as a long-stop or fall-back option in the following sort of case. The nature of the defendant's incapacity of mind rendering him unfit to plead is such that he is initially assessed as potentially treatable. (Clearly this would not be the case in the non-reversible Alzheimer's situation). Having then been found in the second stage of the usual process to have "done the act" the question of a s.5 order is adjourned for further observation and assessment. After a time it is found, perhaps unexpectedly, that he has made a more or less full recovery from what has proved to be a transient disability. In the opinion of the experts he does



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not require out-patient medical treatment under a formal supervision order.

Should there then be a normal trial? The offence is not regarded as particularly serious and conducting such a trial is considered unlikely to lead to any disposal other than a token penalty or a community order involving perhaps the continuation of informal psychiatric monitoring of a kind which may previously have been in place. The witnesses will have given their evidence and it is considered a waste of court time and resources for them to go through it all again when there is little to be gained. In such a case it would be perfectly fitting to grant an absolute discharge under s.5. It is a convenient means of disposing of a case which has so to speak run out of steam.

Grievance-Ventilation Function not Presupposed by Absolute Discharge Option

By contrast it can surely not be the purpose of embarking on the two-stage purpose knowing that the ultimate result, if the defendant is found to have done the act, will inevitably be an absolute discharge. That might be in proper contemplation if a legitimate purpose of the procedure could be restricted to allowing the airing of victim grievances. But, as we have already argued, it is unambiguously not the legislative function of the trial of the issue to provide a platform for victims to gain solace or "closure" from denouncing their alleged abuser in public; it would be entirely inappropriate in principle to enlist a legally restricted measure purely in order (a) to satisfy their emotional needs or (b) to make a public demonstration of

transparency. To that extent the suggestion by former DPP Lord (Ken) Macdonald that it would have been better to have concluded the case "in the full public glare of a courtroom" (*The Times*, April 20) was ill-considered. As we wrote in the article there are other suitable forums available for victims to air their grievances and we noted (at p.302) that Justice Lowell Goddard, the New Zealand Judge appointed to chair the wide-ranging public inquiry into sexual abuse of children, had declared that there would be a truth and reconciliation element to her inquiry. We predicted that the Goddard inquiry would cover the Janner case allegations and, indeed, on April 29 it was confirmed that she would be considering all aspects of the case including the factual basis for the allegations, evidence from alleged victims and witnesses and the allegations of improper influence by public figures on the decision-making process (http://www.bbc. co.uk /bnews/ uk-32515196, and see *The Times* April 30, 2015).

Aspirations Accompanying the CPS Review Request

It may be noted that the lawyers who sought the CPS review were reported to be seeking (a) clarification of the reasoning behind the DPP's decision, (b) disclosure of the medical reports which supported it, and (c) CPS agreement to obtain their own report on Lord Janner's mental capacity.

As to (a) it may be asked what more Mrs Saunders could have said to make the reasoning behind her decision clearer. Not only did she spell it out in detail in the original decision but she has gone to some pains to expand on her reasoning, albeit she did not analyse the purpose of the legislation as we have now done. Provided the medical opinions were sound, and there seems to be no reason to doubt this, she was, as we have already pointed out, legally obliged not to prefer authorize charges.

As to (b) the media had repeatedly stressed the fact that Lord Janner had relatively recently made written application to the House of Lords for his attendance stipend. It may be noted that it would not be difficult for some unidentified person to have written a letter and to have caused Lord Janner to sign it. It is hardly unknown for some people suffering from quite advanced dementia to retain an ability under direction to apply what may pass as their signature to a document. It has recently been reported that there are inadequate controls preventing dementia sufferers from continuing to drive. (The first of us recalls his aunt doing so many years ago well after she was diagnosed with dementia and writing off a whole line of cars at Tesco's.) The ostensible thinking behind pointing out that Lord Janner had put in a claim for attendance remuneration is that he may be faking his current condition. The evident implication of the request for sight of the four medical opinions – two obtained by the defence and two by the prosecution – is that the practitioners may have been incompetent and in particular may have been "taken in" by Lord Janner. (One would hope and assume that it is not being suggested that they were corrupt or that in reaching her decision the DPP corruptly misrepresented their opinions or incompetently misinterpreted them.)

In a previous article, we stressed that over many years psychiatry has developed tried and tested protocols and techniques for detecting whether the subject is feigning mental illness, incapacity or handicap. No doubt the four psychiatrists in question were well versed in the indicators of pretence and we mentioned that they had unanimously and explicitly ruled out dissimulation. It is likely that the challengers had in mind the fact that sceptics have nonetheless pointed out that the Guinness case defendant Ernest Saunders notoriously escaped a gaol sentence after being belatedly diagnosed with Alzheimers disease, yet is still alive over a quarter of a century later. Drawing attention to this, Joshua Rozenberg noted that when he last saw Janner in public two or three years ago he could no longer remember anybody's name and a colleague who had seen Janner at about the same time thought he was "away with the fairies" ("Critics of Lord Janner decision misunderstand Justice system," *Guardian* April 22, 2015; and see His Honour Barrington Black, letter, *The Times*, April 25, 2015). It should be pointed out, additionally, that neurological procedures for diagnosing Alzheimers disease have come a long way in 25 years.

As to (c), the request, not for a second opinion on Lord Janner's condition, but for a fifth one, was surely a "try-on." If the defence-instructed psychiatrists had an axe to grind (a proposition which seems untenable), then so equally might a psychiatrist instructed on behalf of the angry victims. As to the psychiatrists enlisted by the CPS, what is the suggestion with regard to them? That in continued pursuance of an Establishment cover-up they were under instructions to make a false diagnosis?

In a statement issued on behalf of Justice Lowell Goddard confirming that she would be reviewing all aspects of the allegations against Lord Janner it was announced that this would include consideration of: "the medical evidence that has been provided to the [DPP] … before deciding whether it is medically appropriate and/ or whether there is any useful purpose to be served by seeking to interview him further" and that "[s]he may wish to commission her own expert advice on this matter." With respect to the Judge this was surely going through the motions of thoroughness. It is almost inconceivable that there would be any question of challenging the opinions of the four distinguished psychiatrists who provided unequivocal reports.

Conclusion: The Janner Prosecution is an Abuse of Process

Lord Janner is accused of multiple acts of sexual abuse of children. We are not privy to the strategy being planned by his defence team but would venture to suggest that based on the reasoning set out in this article there is a clear case for arguing that the proceedings under s.5 are unlawful. In other words, we have seen the story going from alleged abuse of children to conclusive abuse of process. The proceedings should be stopped. We trust that his lawyers will pursue that option. ■

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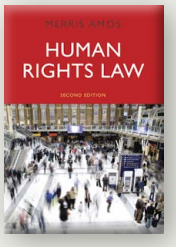

Human Rights Law (2nd Edition)

Author: Merris Amos
Publisher: Hart Publishing;
ISBN: 9781849463805;
Price: £35.00

The Human Rights Act 1998 has had a profound impact on the law of England and Wales. It has led to an astonishing amount of litigation across all areas of law and is invoked in many, if not most, of the cases determined by the Supreme Court. It has occupied and strained judicial minds at the highest level from the moment it came into force in October 2000. And there is no sign of litigation involving the Act relenting any time soon.

Well-structured and informative

It is perhaps surprising, therefore, that there are so few textbooks covering the law generated in relation to the Human Rights Act. Two major textbooks, *The Law of Human Rights* (Clayton and Tomlinson) and *Human rights and practice* (Lester, Pannick & Herberg) may vie for the title of the most authoritative textbook in the area. *Human Rights Law* by Merris Amos does not compete in that territory. What Amos has produced is a very much more affordable textbook which focuses on the Human Rights Act and certain convention rights. The result is a book which is well structured and informative, the emphasis being on guiding the reader to the relevant cases with pithy summaries of the relevant law.

The book will thus be a great help to students new to the Act and to practitioners who do not rely on the Act on a day-to-day basis. The book is simply laid out and easy to navigate as a result. It falls into two sections, the first on the Act and the second on the Convention rights (not all of them so that, for instance, there is no discussion of art.3 of protocol 1, the right to free elections).

Key issues

In the first section, the author gives herself the task of covering the key issues such as how the Act works, what is meant by a public authority, who qualifies as a victim, the acts to which the Act applies, and determining incompatibility. Amos has done well to compress the case law on the Act into 178 pages without omitting reference to all of the key cases. At the same time, she has not made the footnotes overly long. That is a good thing given the book is most useful for a relative newcomer to the application of the Act in practice.

In the second section, the book tackles the convention rights in turn. The first Convention right to be addressed is art.2. The book addresses the content of the positive duty to protect life, a thorny issue given the mixed case law nationally and from the European Court of Human Rights, albeit in fairly summary form. The section on the application of art.2 is more detailed and likely to be more valuable to practitioners. There is a short but helpful analysis of the relationship between art.2 and common law negligence. This is another area where the case law does not lead to straightforward answers as the Judges continue to grapple with the ramifications of developing the common law in line with Convention rights. Amos then tackles the duty to investigate, inherent in art.2. This is done by careful selection of sub-headings which serve very effectively to break up what could otherwise be an amorphous mass of case law. Again, this is followed by a section on the application of the duty to investigate in practice.

Most effective

The focus of the book is on English case law with reference to European Court of Human Rights cases where they have shaped the English law. In this way, the book complements nicely *The Law of the European Convention on Human Rights* (Harris, O'Boyle and Warbrick) which is similarly priced and which, as the title suggests, draws entirely on the European jurisprudence. Amos has performed a valuable task in collecting together the mass of English case law addressing both the mechanics of the Act and the substance of the convention rights. It is most effective in setting out in clear terms the ways in which, to date, the Convention rights have been applied by the courts. It should serve as a very useful book for students and practitioners alike. ■

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