CBQ

Criminal Bar Quarterly Issue 3: June 2008

INSIDE NEWGATE — Prue Keely-Davies on 18th century penal reform

Also in this issue:

- His Honour Judge Chapman provides some invaluable advice on case management
- David Ormerod on expert evidence
- Colin Wells on another public funding problem
- And an obituary for Tony Jennings Q.C.

The Editor

We have gone back into history for this edition of the CBQ, with a timely reminder of what the Penal system was like over 200 years ago. It marks the origins and work of The Sheriff's and Recorder's Fund, which marks its two hundred years of work for the rehabilitation of ex-offenders and support for their families.

I know from speaking to those who devote a significant amount of their time into this very important work, how much the Criminal Bar has contributed to this cause, which only goes to re-emphasise the valuable and entirely voluntary work that has always been a hallmark of our profession, and one often overlooked by those who prefer to vilify our role and who should know better.

Our Chair will bring you up to date on the work the committee have been doing of late, but I have to say that I was recently taken aback by what I thought was the latest LSC charm offensive, a road show, consisting of a white van with the large red logo, LSC, parked outside Bedford Row, analogies to television detector van's exposing licence evaders came to mind, but this time trying to isolate those who had taken decisions not to sign " the Contract". Closer examination revealed that L S C did not stand for Legal Services Commission, but the more wholesome London Sandwich Company. Nevertheless, perhaps someone should tell the Sandwich Company with whom many at the Bar will associate them!

Finally, there seems to be a growing concern in the Court of Appeal that there have been a number of cases in which there has been criticism of decisions taken by trial counsel in the exercise of their professional discretion. There is a distinction between acting "on instructions" and exercising a proper professional judgment which it is in counsel's discretion to make. A recent Court of Appeal decision on the point is *R. v Ulcay* [2007] EWCA Crim 2379 and particularly para.27 which resonates that counsel should not be "a tinkling echo or mouthpiece spouting whatever his client instructs him to say".

We have been warned.

John Cooper

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

Letter to the Editor

Dear Editor,

I feel that you are too young to remember the days of the dock brief. I am not. May I therefore respectfully correct you when you state in your editorial in the April issue of CBQ that the dock brief was "the name given to the practice whereby a judge would ask a lawyer sitting in court to appear without a fee on behalf of an accused who would otherwise be unrepresented".

In fact it was the accused himself who chose his (dock) brief, and the accused himself paid a fee to his brief, and paid it up-front in cash.

By the time that I had finished my pupilage in 1964 there was public funding for trials, but not for guilty pleas or committals for sentence. The practice was that on the first day of Assizes or Quarter Sessions the clerk of the court in number one court would enquire of the dock officer as to whether any of the prisoners wanted to apply for a dock brief. At the busier courts, e.g. London Sessions, there always were such prisoners. Thus the dock officer would lead a procession of prisoners from the dock into the well of the court where they would be lined up facing the judge. The clerk of the court would then ask them, one by one, to turn round and choose any barrister seated in court to represent them. By that time the well briefed barristers who had cases listed in that court would have made their exits, leaving the briefless greenhorns to be picked out.

The selection process would necessarily be performed on the basis of looks alone. The young barrister hoping to be chosen for a dock brief would try and look fresh, keen and eager — a situation akin (as readers of CBQ will readily appreciate) to a courtesan in a New Orleans bordello doing her best to be chosen by a prospective client.

The fee on a dock brief was not generous at two guineas plus half a crown clerk's fee (for which, of course, the clerk did absolutely nothing), and had not been increased for years (*plus ca change...*). The fee was handed over in the cells from the prisoner's property. If, sadly, there was less than the required fee in the prisoner's property the barrister had to decline to represent his would-be client.
Your sincerely,

Jonah Walker-Smith
De Montfort Chambers, Leicester

Cover photo produced with kind permission of Real Life Television — "The Real Dick Turpin".

A Message from the Chairman

"Defending the children of the poor and punish the wrongdoer". These words are inscribed over the entrance to the Old Bailey, a court where I spend a great deal of my time. I hadn't really been aware of having noticed them beforehand until they were the subject of a question on University Challenge recently and I realised I knew the answer. At least that demonstrates what many of us have always thought was the case, that it is possible to absorb information without consciously reading it!

The site of the CCC is the site of the principal west gate of the Roman City of Londonium. It began to be used a prison at the time of the Norman Conquest and was renamed New Gate in the 12th century. The prison was rebuilt in 1423 in accordance with the wishes of Richard Whittington and Newgate continued to serve as a prison until 1767. Since then it has been rebuilt twice, most recently in 1907.

The reason for this brief history lesson is to reflect on how prisons and courts were considered in those days and how much we would like to think they have changed now. Newgate was considered to be a symbol of the harsh criminal law at that time. A person sent there was said to have "gone west" and carts set out from Newgate for Tyburn and the gallows. In 1777, Mary Jones, aged 19 and mother of two children, was convicted at the Old Bailey of shoplifting. She was breastfeeding one of those children as she was taken from Newgate to Tyburn to be hanged. Newgate was the place from which, over a period of 200 years, thousands began their transportation to the colonies for periods of between seven years and life. In 1835, a 10 year old child was transported for life for a petty larceny.

When Elizabeth Fry visited Newgate in 1813, she found 300 women and children, tried and untried, in the same cell. She went on to spend a great deal of her time and money in assisting in the re-modelling of the prisons, enabling men and women to be separated and improving the welfare of the prisoners. I fear she would be greatly unimpressed with the conditions of prisons in the UK in 2008. The age of those imprisoned, the numbers imprisoned, the length of time imprisoned, the conditions of imprisonment, prisoners with psychiatric problems, the prevalence of drug abuse, the widespread availability of drugs, the lack of training facilities. They would all have had a depressingly familiar ring to them.

Prisons are a constant topic of great interest both to the media and to politicians. The political response to the unacceptable and ever-increasing level of overcrowding in our prisons is to announce the building of "Titan" prisons, prisons which will house in excess of 2000 prisoners, a project which will require considerable resources. It is obvious that such establishments can do little more than house prisoners. Any faint hope of educating, rehabilitating or training must disappear with that quantity of prisoners under one roof. The media are naturally anxious that the public is made aware of all failures in the prison system, including those who are released early and re-offend, those who are on bail and re-offend and just those who are released and re-offend.

The combination of these factors is leading inevitably to a culture where more and more people are imprisoned for longer and longer periods or remanded in custody in more and more circumstances. The number of young people in custody in this country is considered by many to be a complete disgrace. A case reported recently of a 15 year old who committed suicide in a young offenders' establishment having been sentenced to a short sentence for breach of a supervision order should have, of itself, sent out a clarion call of warning that some grave errors have developed in the way our sentencing policy has developed and the way it is being shaped. The introduction of mandatory sentences has been coupled with a relentless determination to inhibit judicial discretion in sentencing at all levels. The results are obvious and inevitable to all save those who have the power to change it.

The ability of those of us at the Criminal Bar who do publically funded work and wish to continue to do so, is being constantly eroded by the challenges we face, both to the way we do our work and what we are paid for it. Whilst the sentiment engraved above the Old Bailey, at first blush, may seem out of touch with life in 2008, in reality it shouldn't be. It seems to me that protecting the children of the poor and punishing the wrongdoer are still proper aspirations for the Criminal Bar. By prosecuting and defending to the highest standards, that is exactly what we are doing. We should be very slow indeed to let our ability and willingness to do so be curtailed by political objectives and media influence however much we feel forced to concentrate on those that concern fees and fee structures although they are very important issues which need clear resolution. We need to be positive in pushing for an overhaul of the prison system and resolute in resisting further unnecessary and complex changes to sentencing provisions and sentencing powers which make longer prison sentences almost inevitable. The proposal for a Sentencing Commission is likely to have appalled all those who feel the sentencing discretion of judges has already been too eroded and is over-prescribed.

We can only influence these matters if we continue to engage and contribute to the processes of consultation of all matters that affect the criminal justice system. We are in a unique position to do so and are listened to when we do. Only by so doing can we try to maintain the balance between defending the accused and convicting the wrongdoer.

Sally O'Neill Q.C.
Chair CBA

His Honour Judge Frank Chapman

Case Management — Back to the Future?

His Honour Judge Frank Chapman stresses the importance of this discipline.

Case Management is not spoken of in polite circles after dark. It is not sexy; it is not fun; it is not even clever; but we ignore it at our peril. The number- crunchers in the Treasury and the mandarins at the Ministry of Justice understand it—or think that they do. We cannot go back to the days when resources for criminal justice were treated as limitless because no price could be placed on justice. We only have to look at the restraints on the health service—a far more popular provision than criminal justice—to see that reality. The trick for the future will be to make the new fee structure work to the best advantage of everyone. I believe this can be done and that despair is misplaced.

A new priority

When I came to the Bar in 1969 the most successful criminal advocates were those with the wit to expose the liar, cheat and braggart by cross-examination, and the skill to present a client's case to the judge or jury in a way which made it acceptable. His clerk would be able to negotiate on a daily basis with the Clerk of Assizes or the Clerk of the Peace at Quarter Sessions to list his work when it best suited him. He would be able to maximise his time in court and would return the least.

Such a system suited the high-flyers and their clerks but was unfair on others, especially the witnesses who might be kept waiting for months for a trial date and then be given virtually no notice when the case was actually listed. Nowadays, it will be the advocate who case manages his cases and therefore his practice who will earn the most and return the least.

In about 1999, together with Mr Justice David Clarke when he was still the Recorder of Liverpool, and His Honour Judge Michael Mettyear, the Resident Judge at Kingston on Hull, I was asked to assist a group of civil servants who had been given the task of "Transforming the Crown Court". They were non-lawyers from a mixture of disciplines. They approached the problem without the benefits or handicaps of actually working with the existing system. Some of their proposals were alarming—indeed we found some of the laughable. "Why is it that Defendants change their minds and plead guilty at a late stage? Why do they not plead guilty at the outset? Why do cases last longer than the estimate? Why do you not make every case a fixture? Why cannot Plea and Case Management hearings and sentences be staggered by an appointment system?"

This "blue sky" thinking was a bit of a shock and we had to work hard to keep the group restrained by the practicalities of our work. If we were designing a new system from scratch we might be able to go further and faster but we start from an existing and on going system, so changes have to be step by step. Some of what seemed laughable in 1999 now has attractions and was merely many years ahead of its time. I believe that the Criminal Procedure Rules, the Case Management Framework protocol and the new fee structure have moved that time forward.

The early years

Even before the "Transforming the Crown Court", group had Reported, the Effective Trial management pilots were created. I was then Resident Judge at Wolverhampton and we were selected as a pilot court. The Effective Trial Management Pilot team proposed that all hearings apart from trials and sentences should be avoided with the interlocutory work to be dealt with on paper. We created our own Plea and Case Management form (still called a PDH form in those days). Counsel were expected to complete the form with the information that would otherwise be put on the form at a Plea and Directions hearing. (They were paid as if there had been an oral hearing.) A judge would then check the form and direct that the case be listed for trial or sentence as the case may have been. More or less concurrently at Manchester Minshull Street they were trying out electronic PDH forms again filled in as if there had been an oral hearing. After a few months we found at Wolverhampton that our cracked trial rate had more than doubled and was running at about 60 per cent. It was the second worst cracked trial rate in the country, second only to Manchester Minshull Street. Oral hearings were soon re-introduced at both Courts.

Looking back I do not think these schemes failed because they were inherently flawed but because the Bar had no incentive to make them work. At that time the Bar was not paid for holding a conference and most relied on the conference at court before the PDH to discuss the case with the client and give the necessary advice about the strength of the prosecution case or the improbability of the defendant's explanation being accepted. Instead of that conference taking place before the PCMH it was taking place on the morning of trial

and very many defendants then pleaded guilty. There were many drawbacks to such a system because it meant a high volume of cases being managed by the Listing Office as trials; meant hundreds of witnesses being brought to court unnecessarily with all the back up work by the witness warning teams; encouraged Listing Officers to list backer trials and floats with the risk that they might not get on and was a huge waste of public money.

Reduce hearings

How would these paper or electronic only schemes work now? In the past an advocate was paid for each and every court appearance and for some this was an incentive to create as many appearances as possible. It was always noticeable that Silks and busy Juniors would always try to keep a trial date and avoid adjournments whereas others were only too keen to seek an adjournment for the flimsiest of reasons. Now we have a fee structure which basically pays one fee for the case, it will be in the interests of every practitioner to complete the case with as few appearances as possible. The more oral hearings a case needs the less efficient it will be for the advocate. By extra hearings he reduces his earning potential and so pressure will now come from the Bar to reduce the number of oral hearings. I do not think this penny has yet dropped with everyone and old habits die hard. In the past it has been the court trying to drag a reluctant Bar kicking and screaming towards effective case management but in the near future the complaints may be that the Court Service are impeding your earning power and costing you money.

It will no longer be as attractive to attend a PCMH at which the defendant pleads guilty and then adjourn for a pre-sentence report. In most cases (when a short format report or a stand-down report will not suffice) this adjournment will involve a second oral hearing. This may turn out to be inconvenient to you. Why not hold a conference well before the PCMH to determine the plea and if it is to be a plea of guilty inform the court and ask for the case to be adjourned until the report is available.

At Birmingham we will do this and fix a sentence date convenient to the advocates. If you hold a conference in a case but you are not going to be available on the date set for the PCMH we will change the date provided your clerk negotiates an agreed date with all other advocates involved. I have no problem with changing the date provided the alternative is not too remote but do not think it is right or fair to expect the Listing Office to broker a new date between the parties.

Identify guilty pleas early

Obviously, adjourning a trial will now be costly to the advocates and so I expect to see less applications to do so. If a case pleads guilty at trial it might also be costly to the advocate. If the trial was expected to last say a week, there may be little or no return work available to fill the gap. Increasingly more cases will be fixed and most clerks will be able to arrange work so that the barrister moves from case to case with only small gaps in between. It means that it is important to weed out those cases which are likely to plead guilty and not leave matters to the last moment. The risks of being left without work are even higher with the much longer cases and I foresee a reluctance to take on very long cases for that reason. There will always be some cases where you cannot be sure what the defendant will in the event decide to do . If you are in that position a Pre-Trial review may be helpful. I do not think we should be listing every case for PTR and under the new fee structure it may be a waste of your time and money but if there is some suspicion that the case may still crack you should ask the Listing Office to list for PTR and preferably offer them a date your clerk has brokered with the clerks of the other advocates involved.

Accurate time estimates

It also means that we need accurate time estimates for your clerks to be able to plan a seamless progression from one case to the next. I can also see complaints arising if you begin a five day case in front of a judge on Monday and he then announces that he has a seminar or magistrates meeting or some other quasi-judicial event to attend so that your time estimate is shattered.

Replace the oral PCMH

If the preparatory work has all been done and the case is a certain trial do we need an oral PCMH? I do not think so, provided the forms have been completed and both sides know what further work needs to be done. I expect in such a case a conference will already have taken place so that there has been a proper opportunity to discuss pleas and give advice where necessary. I am prepared to accept such forms and cancel a PCMH. The forms are available electronically *www.hncourt-service.gov.uk*

In the past I have been told "we cannot sort out pleas before the PCMH because we do not know who our opponent is and it might turn out to be a Higher Court Advocate employed by the Crown Prosecution Service". This was a real problem but a court can insist that it is notified who the instructed advocates are in any case 14 days before the PCMH (see the Case Management Framework protocol). At Birmingham I created such lists partly to enable parties to be able to discuss pleas or necessary directions well before the PCMH and partly to prevent CPS allocating work to their HCAs at the last moment. I hoped to make this list one which was electronically filled in by the parties and electronically available to anyone who needed to know but we have not yet overcome access and password problems. The list is available but not yet electronically. It should also mean that we can avoid adjournments whilst the Prosecution decide whether to accept partial pleas or bases of plea which they had not been told about before the PCMH.

In the not too distant future I think it will be the norm to submit PCMH forms electronically and there will only be an oral hearing where the court or one of the parties calls for it. It will not lead to a rise in the cracked trial rate this time because it will be in everyone's interests to make this scheme work properly.

The risks

The new structure also creates some increased risks for advocates. In the past each advocate has been responsible for but only responsible for what happened as a result of hearings at which he was briefed and attended. If he returned the case for an interim hearing it was difficult to make him personally responsible for what happened when he was not present. We now have the concept of the "instructed advocate" who carries responsibility for management of the case throughout it's life whether he appeared at the relevant hearing or not. If directions are given, it seems to me that he now has a professional and legal responsibility to see that the orders are complied with. In the past it has often been difficult to make a wasted costs order when some-

thing has plainly gone wrong because it was too difficult to determine which of two or more advocates was at fault. This may no longer be true.

Fair remuneration

There is also another sensitive issue the Bar needs to deal with. It is now much more likely that the instructed advocate will be a senior practitioner who will hold the brief even though he will not have the time to carry out all the preparation of the case. He may need to ask for help in editing video interviews or in looking through all the unused material. In the past such work would be paid for according to the number of hours involved and applying the relevant scale. That part of the fee was usually identifiable but in future it will not be. How are pupils or junior tenants going to be paid for this work? They cannot expect to be paid at the same rate as a senior advocate because their lack of experience will mean they do not work as quickly but it would be equally wrong to create a situation where a barrister profited from work carried out by others. Each chambers needs to set up its own set of rules which in my view need to be approved either by the Bar Council or at least by the Circuit Leaders. There are still a few sets where one senior advocate is so dominant that the others could be treated unfairly but yet feel unable to complain.

In this same vein what is to prevent a barrister paying for help from other unqualified people to undertake some of the preparatory work. If they do are such people subject to the same rules of conduct as the barrister? Some developments along these lines may have already taken place but the general effect of this and the responsibility now placed upon the instructed advocate is taking us ever closer to partnerships. Most sets of chambers are already a loss sharing partnership but the long term effect of the new fee structure may lead to full partnership.

Hope for the future

Back in 1969 trials at Quarter Sessions and Assizes were robust and brisk. Witnesses were challenged and cross-examined about matters but never more than once; advocates took good points and did not bury them beneath other marginal material. A summing-up covered the burden and standard of proof, together with a description of the elements of the offence, but little else. It was a system which was economic but sometimes flawed. It left too much room for unscrupulous police officers. Our present system is better at carrying out our primary function namely to convict the guilty and acquit the innocent but we will have to find ways of doing it more efficiently than has been true for the last 20 years or so. The new fee structure can be made to work to achieve just that.

Making this new structure work will create new pressures and problems. One problem is to find a way of enabling advocates to visit prisoners on remand so that conferences can take place. Another will be to prevent delays in trials caused by the judge having to take other cases or attend other places, which disrupt time estimates. We need to make sure defendants are brought on time and perhaps most of all overcome the prolonged and important problems thrown up by late or inadequate disclosure. Trials are much more complex than they used to be with CCTV, cell site analysis, DNA, and much better record keeping by the police and others. The consequence is that trials take longer than before. However, dare we hope that in the near future we will escape the frustrations of pointless hearings and adjournments and look forward to a time when the hard working busy advocate can enjoy the rewards of his labours.

His Honour Judge Frank Chapman is the Recorder of Birmingham.

Queen Elizebeth Law Courts, Birmingham

Expert Evidence — The Future

David Ormerod eloquently brings us up to date in this increasingly significant area

David Ormerod

The admissibility of expert opinion evidence has come under increased scrutiny in recent years, and pressure for reform is unabated.[1] Expert evidence features ever more frequently in criminal trials as technologies develop and jurors increasingly expect some scientific proof in even routine cases. Accompanying this is an increased risk that jurors will too readily defer to experts whose evidence is perceived to be more complex and technical. In combination, this suggests a greater need than ever to be confident of the reliability of opinion evidence. At present it is arguable that five crucial issues relating to the admissibility of expert opinion evidence would benefit from reform:

1. Whether a person qualifies as an expert;
2. On what subject matter expert evidence ought to be admitted;
3. Whether novel techniques are sufficiently reliable to be admitted;
4. Whether the expert's method in an individual case is sufficiently reliable;
5. How much trust to place in the jury, and what form of direction they need.

1. Qualifying as an expert?

At present the test of expertise is undemanding: the party calling the expert must satisfy the court that he has sufficient knowledge of the area of expertise whether by formal training or practical experience. A more rigorous test of an expert's competence seems desirable for several reasons:

- It will be more likely to prevent the charlatan with no true expertise or qualification from appearing. News reports reveal a surprising number who manage to dupe the system.
- Where the subject matter is not exposed to any formal regulation process, establishing whether expertise is especially difficult. Undue reliance placed on others working in what is by definition a narrow unregulated field.
- Greater rigour in establishing precisely what the witness's expertise is will assist in ensuring that he stays within his defined field of expertise. The importance of this requirement hardly needs emphasising in light of the recent high profile cases on sudden infant deaths. In *R. v Harris*[2] the Court of Appeal recommended that an expert should always make it clear to the court when a particular question or issue fell outside his field of expertise. Further, in *R. v Bowman*[3] among the matters identified by the Court as being necessary ingredients of an expert's report were details of the range and extent of the expertise possessed and any limitations upon that expertise. See also Crim L.R. 33.
- A test which obliges the expert to reveal the nature and degree of expertise also helps assess what weight ought to attach to his *opinion*—and it must not be forgotten that experts are privileged in being permitted to give opinion evidence.
- The current law too readily admits evidence from the "ad hoc" expert: the witness who has secured his "special knowledge" only through analysis of the evidence in the instant case. The problem is most acute with police officers who, after a few hours of "studying" the CCTV images of the offender and the suspect, are allowed to appear as expert witnesses. See recently, e.g. *R. v Abnett*.[4] Do we want this to constitute "expert" evidence? Counter-intuitively, the answer might be that we do. Treating such individuals as experts would expose them to a more searching inquiry as to the reliability of their technique/science and their methodology (see below). The judgment of Gage L.J. in *Flynn et al*[5] on the problem of voice recognition by police officers is well worth considering.

The Solution

Enacting new legislation might provide a sufficiently clear and workable test of who qualifies as an expert, but is unlikely to resolve all the problems. Legislative reform needs to be supplemented by experts' professional bodies encouraging their members to join accreditation schemes. This in turn should promote greater awareness of the expert's obligations in preparing reports and when testifying.

2. Subject matter calling for expert evidence?

The English courts continue to apply the principle declared in *R. v Turner*:[6]

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience or knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary…"

While in relation to technical or scientific matters this creates few problems, it is an ambiguous test and its limits are constantly being tested. Expert knowledge is today acquired on ever more diverse subject matter, particularly relating to social and behavioural sciences (the so called "soft" science as opposed to "hard" sciences such as medicine, toxicology, etc). This calls into question the effectiveness of the *Turner* test as a measure of admissibility. Asking whether something is within the knowledge of the jury has become somewhat meaningless when on almost any subject matter it seems possible to find an expert willing to provide some information which was not "generally" known. The availability of ever more esoteric information poses dangers that the court will be subjected to so called "junk science" in the form of expert evidence about "syndromes".

1 See the House of Commons Science and Technology Committee's report on the use of forensic science in criminal proceedings: *Forensic Science* on Trial (2005) HC 96-I. See G. Cooke, [2005] 8 *Archbold News*, 5.
2 [2006]1 Cr.App.R. 5. *R. v Clark (Sally)* [2004] EWCA Crim 1020; [2004] 2 FCR 447. See also *R. v Cannings (Angela)* [2004] EWCA Crim 1; [2004] 2 Cr. App. R. 7; *R v Harris* [2005] EWCA 1980.
3 [2006] EWCA Crim 417.
4 [2006] All E.R. (D) 244 (Nov).
5 [2008] EWCA Crim 970.
6 [1975] Q.B. 834, at p.841.

Arguably, the English courts have demonstrated a more liberal approach to the *Turner* test. For example, in *R. v Blackburn*[7] the court permitted expert evidence relating to "situational factors", rather than the mental attributes of the suspect, which might have a bearing on the reliability of confession evidence. The suitability of the *Turner* test is also called into doubt by those seeking to adduce more social framework evidence in criminal trials—that is evidence which will provide a jury with an appropriate backcloth against which to make a decision about an issue at trial without providing evidence on the particular facts. One controversial example currently being considered by government is whether to allow expert evidence to debunk stereotypical myths about the behaviour of those subject tot sexual assaults.[8] (Note that some judge's are assisting the jury on related matters, for example on delay in reporting. In *R. v MM* [9] the Court of Appeal endorsed a trial judge's decision to offer the jury some advice as to why this might be.)

The Solution

Once again it is doubtful whether a legislative response alone can resolve these problems.[10] The aim of this aspect of the admissibility criteria might is to secure the best expert evidence capable of helping a jury with material on which they are lacking in knowledge or understanding. If so, the solution seems to lie in ensuring that all those involved in the criminal justice system have a better appreciation of what the jury's needs are. Legislation could therefore be supplemented with requirement for judges and the legal profession to be better trained on matters of expertise. Experts also need to take responsibility if jurors are to be assisted effectively rather than left confused.

3. The reliability of new techniques

Science and technology develop at alarming rates, producing ever more techniques with potential forensic application. In England, the courts' approach to reliability of new techniques and disciplines is rather vague and inadequately articulated. It stands in marked contrast to other jurisdictions with more rigorous, structured tests of admissibility. The two most influential schemes for assessing the reliability of novel techniques emanate from the USA. In *Frye v US*,[11] the test adopted was of "acceptance by the general scientific community". That was criticised for abdicating responsibility to the expert's themselves: the courts relied on the community of practitioners in the putative expert's field as to determine reliability. Subsequently in *Daubert v Merrell Dow Pharmaceuticals Inc*,[12] the Supreme Court found that the Frye test had been superseded by the Federal Rules of Evidence Rule 702. Reliability was now to be evaluated by the trial judge, having regard to a number of factors which might be relevant:

(i) whether the expert's technique or theory can be or has been tested, that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(ii) whether the technique or theory has been subject to peer review and publication;

(iii) the known or potential rate of error of the technique or theory when applied;

(iv) the existence and maintenance of standards and controls; and

(iv) whether the technique or theory has been generally accepted in the scientific community.

(Although these are not the basis of a rule of admissibility in English law, they might usefully be used to formulate questions to an expert to attack the weight or his testimony.[13])

The English courts persistently reject calls for an 'enhanced test' of reliability and have avoided the choice between *Frye* and *Daubert* by relying on the South Australian case of *Bonython*.[14] The English courts' pragmatism produces inconsistent and confusing case law, and may be too lax. It has rendered admissible such evidence as:

- "ear print" evidence. See *Dallagher*,[15] and *Kempster (No.2)*[16] in both of which the convictions were quashed but the technique was not in any way proscribed;
- voice identification based on auditory techniques, despite these being so vastly inferior to acoustic techniques that, e.g. the Northern Ireland CA held that no prosecution ought to proceed in which the Crown proposed to rely predominantly on auditory analysis of voice samples.[17] In *R v Flynn* the Court of Appeal declined to go so far as the NICA.[18]
- facial mapping evidence which in *R v Gray*[19] was accepted to be reliable although the court noted the absence of any: "database or agreed formula. In their absence any estimate of probabilities and any expression of the degree of support provided by particular facial characteristics or combinations of characteristics must be only the subjective opinion of the facial imaging or mapping witness."

In addition to this list there are the more recent challenges which arose in relation to LCN DNA. In the High Court in Northern Ireland, in *Hoey*[20] Weir J. expressly called for adoption of a *Daubert* type test. Weir J.'s conclusions that the LCN DNA was insufficiently reliable have subsequently been rejected by the Home Office in the Caddy Review(see below).[21]

The Solution

The House of Commons Science and Technology Committee explicitly recommended the development of a "gate-keeping" test for expert evidence based on the *Daubert* approach. The absence of such a test was regarded as "an entirely unsatisfactory".[22] As the Committee implied, this should not necessarily amount to a straightforward assimilation into English law of the *Daubert* criteria. Specific reform proposals ought to draw upon the abundance of empirical research concerning judges' application and understanding of the criteria, and on the effects that *Daubert* has had on the reception of expert testimony in the United States. *Daubert*, or an English adaptation, alone will not solve the problem. It must be part of a package of measures to reduce the shortcomings of the system which is failing at present.

7 [2005] EWCA Crim 1349.
8 *Convicting Rapists and Protecting Victims–Justice for Victims of Rape*, (2006: Office for Criminal Justice Reform).
9 [2007] EWCA Crim 1558.
10 More judicial training on matters relating to expert evidence was called for in the Forensic Science on Trial Report: para.182.
11 (1923) 293 F. 1013.
12 (1993) 509 US 579.
13 How would the officer in *Abnett* (if called as an expert which it was not clear he was) have fared? If ad hoc experts want to be treated as such they should be able to deal with some of these questions at least.
14 That is itself problematical since the *Bonython* test is argued by some to be a Frye test in disguise: see A. Roberts, 'Drawing on Expertise' [2008] Crim L.R. 443.
15 [2002] EWCA Crim 1903; *R. v Kempster (No.1)* [2003] EWCA Crim 3555. See also *State v Kunze* 988 P.2d 977 (1999).
16 [2008] EWCA Crim 975.
17 See *R. v O'Doherty* [2003] 1 Cr. App. R. 77, CA.
18 [2008] EWCA Crim 970.
19 [2003] EWCA Crim 1001.
20 [2007] NICC 47.
21 *http://police.homeoffice.gov.uk/publications/operational-policing/Review_of_Low_Template_DNA_1.pdf?view=Standard&pubID=545826*
22 Para.173.

4. Was the method reliably applied in the instant case?

Assuming we have a valid expert, practising in his given field, providing opinion evidence on matters which are outside the knowledge of the jury and that the discipline or technique involved is recognised to be reliable, there remains the issue of the relaibility of the method applied in the given case. Again, *Hoey* serves as a topical and controvesial reminder of the problem. Even if LCN DNA is accepted as a reliable science, as *Caddy Report* concludes that it may be, problems remain. Can the Crown satisfy the court that the LCN DNA in any given case is contamination free? Can the Crown satisfy the court that the methodology used in applying the LCN science *in this particular case* was reliable? In *Hoey* Weir J. noted [23] the "seemingly thoughtless and slapdash approach of police and SOCO officers to the collection, storage and transmission of what must obviously have been potential exhibits in a possible future criminal trial ...." His lordship found it[24] "extraordinary... that, knowing that these items had not been collected or preserved using methods designed to ensure the high degree of integrity needed not merely for DNA examination but for the more exacting requirements of LCN DNA, examinations were performed ... with a view to using them for evidential rather than solely intelligence gathering purposes." He condemned the "mendacious attempts to retrospectively alter the ... evidence so as to falsely make it appear that appropriate DNA protective precautions had been taken at that scene." Evidence is only ever as reliable as its source.

Solutions

The obligation on experts to be clear and honest in explaining the methods they have adopted and the potential weaknesses in their methodology must be made clear in every case. Hooper L.J. emphasised in *R. v Puaca*[25] that the duties fall on an expert from the moment that he starts work.[26] Similarly, the Court of Appeal in *Bowman* emphasised the continuing duty on experts to disclose developments in scientific thinking and techniques even if the developments are only at the stage of a hypothesis.[27]

23 [59].
24 [60].
25 [2006] Crim L.R. 341, CA.

5. Trusting the Jury

The Lord Chief Justice seems keen to trust juries to use their common sense with hearsay, bad character, inferences from silence etc. English law's inadequacies in ensuring the reliability of experts and their evidence are striking, suggest that with expert evidence there will always be a need for careful guidance[28] against placing too much emphasis on the expert's opinion.[29]

Conclusion

Expert evidence is an area of growing significance in criminal cases and seems set to remain so. The law reformers face a difficult task in creating a scheme of admissibility which will protect against unreliable evidence whilst not closing the court room door to the valuable advances in science and technology which can greatly assist in the forensic process. At the same time, the regime for admissibility must provide for continuing scrutiny of the reliability and validity of what may seem to be accepted practices. As Latham L.J. stated in a case decided only last week:

> "As knowledge increases, today's orthodoxy may become tomorrow's outdated learning. Special caution is ... needed where expert opinion evidence is not just relied upon as additional material to support a prosecution but is fundamental to it." [30]

David Ormerod is a barrister at 18 Red Lion Court.

26 [32].
27 *R. v Bowman* [2006] EWCA Crim 417, CA. See also *R v Clarke (RL)* [1995] 2 Cr. App. Rep. 425, CA.
28 See *Campbell* [2007] EWCA Crim 1472 and his Kalisher Lecture (2007).
29 *R. v Cannings* [2004] 1 All E.R. 725; [2005] Crim LR 126 and commentary.
30 *Holdsworth* [2008] EWCA Crim 971.

BOOK REVIEW

HEARSAY EVIDENCE IN CRIMINAL PROCEEDINGS

Following on from the highly successful book on Bad Character, Professor J.R. Spencer has written an invaluable text on this developing and vital area of law.

A critical approach to the subject makes it clear what is and what is not working with the new hearsay provisions from an author who was, at least in the beginning, a consultant on the Law Commission's work on the subject, but left after not seeing "eye to eye about the way in which the law ought to be reformed".

The book begins with a list of difficulties which the Law Commission perceived as being problematic in the old hearsay regime; these included excessive complexity, a tendency to exclude cogent evidence and making it harder for witnesses to give evidence. Spencer concludes that the most serious criticism, that of the exclusion of cogent evidence, has been solved by the reform, but that the problem of complexity still remains.

There is a welcome chapter on practical issues, including guidance upon the taking of statements, where hitherto there has been little help and advice on the requirement to give notice of hearsay, with helpful bullet point guidance on admissibility.

The appendices are also useful, with the JSB Specimen Directions reproduced and another section on leading cases.

This book is essential reading for any criminal practitioner who needs to be on top of their game in this complex and increasingly important area of law.

Published by Hart Publishing.

J.C.

The Newgate Legacy

Prue Keely-Davies discusses the origins of the Sheriff's and Recorder's Fund

The Sheriffs' and Recorder's Fund started out as just the Sheriffs' Fund, founded by the two City of London Sheriffs of the year 1807–1808. One of their duties was to visit prisons, including Newgate, the most notorious gaol in London then, and still a synonym for the worst sort of imprisonment. It shocked them, as it did many others.

Newgate

Newgate had dominated the area now covered by the Old Bailey for nearly seven hundred years, cheek by jowl with the courthouse from which its inmates emerged; sharing its walls with those of the old Roman city, destroyed and rebuilt several times over the centuries.

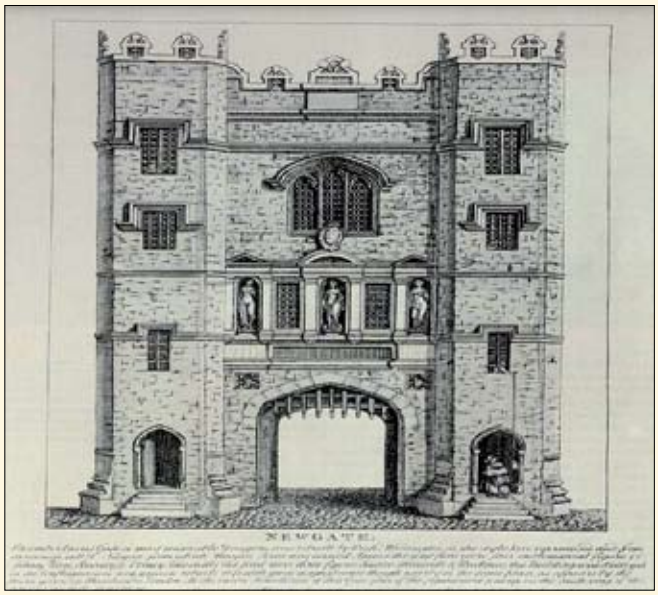

Fig.1 Old Newgate Prison, replaced in the 18th century.

After the Gordon Riots of 1780, when it was burnt down by the London mob, Newgate was rebuilt to a new design, specially designed to an "Architecture Terrible" intended to discourage law-breaking. The building was laid out around a central courtyard, and was divided into two sections: a "Common" area for poor prisoners and a "State area" for those able to afford more comfortable accommodation. Each section was further sub-divided to accommodate felons and debtors, in those days, families of the prisoners. They had to pay the gaolers and buy their food. A quick look at the plan (fig.3) of the place easily conjures up the filth, rowdiness and noise which must have made it the hell that literature records.

Fig.2 The second Newgate in a 19th-century print: A West View of Newgate by George Shepherd.

To make matters even more gruesome, public executions were a regular part of the life of the prison. In 1783, the site of London's gallows was moved from Tyburn to Newgate. Public executions outside the prison—London's largest—drew large crowds.

The founders of the Sheriffs' Fund must have been a rather ill-assorted couple. The son of a farmer, Sir Richard Phillips (1767–1840) was a most unconventional and energetic man; he became a book seller and publisher, a republican, a vegetarian and himself a former gaolbird (he was imprisoned for selling Tom Paine's *The Rights of Man*), he was quite well-known in his day for his outrageous views, an irascible temper and a series of totally unfounded scientific views, such as the conviction that the theory of gravity had no foundation. His publishing business was prosperous, operated out of St Paul's Churchyard and then in Blackfriars, and he used his magazines to attack the government. He clearly irritated as many of his contemporaries as he attracted. But he was prominent and prosperous enough to be elected Sheriff of London in 1807 and he was knighted in 1808. Later, perhaps his temper got the better of him too often, Sir Richard retired to Brighton and died in reduced circumstances.

Sir Christopher Smith seems to have been a rather more sedate and conventionally successful man, though with the same reforming zeal. Like Phillips he was of farming stock—this was the time of the Industrial Revolution and Enclosure, when

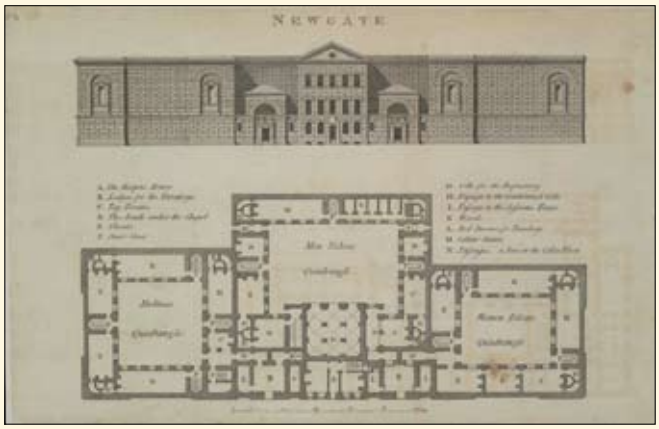

Fig.3.

many thousands of young men and women had to gravitate to the cities to survive the decline in agriculture. He leaves fewer traces than his fellow Sheriff, but by 1787 he was a member of the Worshipful Company of Drapers and a freeman of the City of London, in 1817, ten years after his term as Sheriff, he was Lord Mayor of London. It was perhaps a lucky coincidence that that was the year that Elizabeth Fry produced her rules for the better running of Newgate. He was the Lord Mayor who agreed that he, the Sheriffs and the Aldermen, should visit the prison on a typical day, to see how her system had improved things. They were duly impressed, the Corporation contributed £20 and a system was adopted—which included cells and female warders to look after women.

However different their temperaments and ambitions, the two Sheriffs, one of whose duties was inspecting prisons, clearly shared a radical attitude to the monster at the corner of Old Bailey and its inmates. They were not, of course, the first prison reformers: John Howard (for whom the Howard League was named) and John Hanway had already been active though ultimately unsuccessful prophets of change in the 1770s and 80s: it was already an age of reform.

"Repugnant to every principle of justice"

Nevertheless, Sir Richard's "letter to the livery of London relative to the views of the writer in executing the office of sheriff", of September 1808 is remarkable. And still sounds relevant. On the subject of his job and dealing with prisons he wrote: "Hence arose a question in my own breast between the feelings of humanity and the obligation of duty. Newgate could not be speedily enlarged yet it was repugnant to every principle of justice to permit the continuance of commitment before trial to any prison, all the regulations of which had a view only to the punishment of its prisoners and by which also they were denied the intercourse of their friends". He went on to criticise the state of prisons generally and what he had tried to do alleviate the problems. A particular complaint he had concerned overcrowding and conditions, fees charged to prisoners (which he thought should be abolished), the use of irons, and the transportation of prisoners for short periods.

He pestered politicians, for example lobbying Lord Hawkesbury, to stop transportation; somewhat optimistically one might since the future Prime Minister, Lord Liverpool, was a well known opponent of the abolition of slavery.

In the end, the philanthropic Sheriffs had to invent their own way of helping the prisoners of Newgate. They arranged for Poor Boxes to be placed in all prisons and the Sheriffs' Fund was founded to assist prisoners and their families.

The early objectives

According to the first records we have the Sheriffs' Fund's objectives were:

1. The temporary relief of the distressed families and dependents of persons in confinement.
2. A temporary provision for persons who, on being discharged from confinement, have no means of present subsistence or habitation.
3. the purchase of such tools, implements and materials as may be conducive to habits of industry in debtors and criminals.

These are remarkably similar to the Rules of the Fund now.

In 1827 it was decided at a public meeting of friends and supporters of the society that it should be established as a "regular institution".

Fundraising was an early preoccupation. The oldest document of the Fund which still exists is the 1846 annual report, which pleads that, if only the Fund were better known, surely the public would help more (a cry that later fundraisers would surely emulate!):

> "the important benefits it confers, alleviating the mass of human misery and wretchedness which is daily brought under the official notice of the sheriffs, and in preventing the increase of crime, need only to be more generally known to ensure for it a warmer interest in the minds of the benevolent, and more extensive means of usefulness."

Of the applications they received, the trustees wrote "the frequency of these claims renders it impossible for the Sheriffs themselves to bear them entirely, and they therefore call on the public, whose almoners they will gladly be, to assist them in this work of benevolence".

Prison reform in the 19th century

The Sheriffs' Fund played a minor but significant role in the prison reform movement of the mid-nineteenth century. Since 1827, the Fund had wanted to establish an Asylum "where those who are willing to reform may have a home and shelter afforded to them and to remove from them their former sources of temptation". In 1845, a large public dinner was held at the Mansion House, over which His Royal Highness the Duke of Cambridge presided. £1300 was raised for the proposed asylum. However, at the same time, admirers of Elizabeth Fry had decided to establish an Asylum in her honour for the reception of female prisoners discharged from the metropolitan gaols. Since such a plan was so close to that proposed by the Sheriffs Fund, the Fund decided to sponsor this scheme rather than creating their own. As a result, the Fund made a large founding donation of £500 towards the Elizabeth Fry Refuge, and continued to support it thereafter. The Elizabeth Fry Refuge became an important part of the drive to improve treatment of prisoners during the 19th century.

In 1891 the wording of the aims of the charity changed in order to emphasise the incorporation of all the Metropolitan Prisons of London, but it wasn't until 1931, when the Fund absorbed the Recorder's fund for Metropolitan Probation Officers that significant changes took place. For the first time the aims of the fund referred to "assistance of the work of the Probation Officers at the Central Criminal Court". This broadened both the funds available to the society but also the scope of its charitable efforts.

Today

During the year to March 31, 2007, a Fund gave £618,000 to individuals, including grants to enable ex-offenders to purchase clothing on their release from prison, equipment for setting up home independently, and finally grants for tools of the trade.

The Fund, now looking to the future, provides an extremely valuable service, meeting the most urgent needs of offenders seeking to rebuild their lives.

Prue Keely-Davies is Chair of the Sheriff's and Recorder's Fund, which can be contacted on tel: (020) 7248 3277 or by email, paola.galley@cityoflondon.gov.uk

Colin Wells

The failure to secure competent counsel — the latest public funding problem

Colin Wells dissects another ground-breaking case

The recent media headline of "Drugs offender keeps £4.5 m after 30 barristers refuse to take case" (in *The Times*, May 6, 2008) brought to the public's attention the representation-funding difficulties that offenders face when contesting complex and draconian confiscation proceedings following conviction.

The headline related to H.H.J. Mole Q.C.'s decision in *R v P*, on March 18, 2008, at Harrow Crown Court to stay Proceeds of Crime Act confiscation proceedings on indictment number T20047083, as an abuse of process.

The POCA confiscation proceedings were stayed because the offender P could not be adequately represented as (a) statutory provision prevents him paying for his representation himself and (b) legal aid did not provide sufficient state funding to pay for the necessary representation.

Procedural and factual background

(a) Guilty plea

P had pleaded guilty to aiding and abetting the wilful misconduct of a person in his office as a constable and one count of conspiracy to supply cannabis committed between January and March, 2004.

(b) Restraint Order and Confiscation

A restraint order was made against P on September 3, 2004. P was sentenced on October 29, 2004 to imprisonment, when confiscation proceedings were initiated. At that stage P was paying his lawyers privately. In 2005 he applied to the Legal Services Commission for a representation order for the confiscation proceedings, which was granted on November 7, 2005. That was transferred to his present solicitors in 2006.

(c) Basis for variation

In March 2007 P's solicitor, Jansen Versfeld set out the basis for P's claim to release money from the restraint funds:

> "There was now extensive documentation, amounting to some 6,586 pages. Because the Crown was alleging that the appellant had a criminal lifestyle the appellant was, effectively, having to justify the movement of all money through his bank accounts which involved, it would appear, some 4,548 individual transactions. The size and complexion of the confiscation hearing had become such that experienced senior counsel would be necessary in order to be able to put the proceedings into a manageable form. The estimated length of the confiscation hearing was said to be six weeks."

The justification for the request for the variation which, prima facie, was precluded by s.41(4) of POCA was that the representation order had been granted at a time when the funding regime had changed so that the provision of fees for counsel was governed by the graduated fee regime. This restricted payment to counsel to £178.25 per day or £99.50 per half day, unless counsel were able to persuade those determining his claim after the event that the case required "special preparation"; payment for which could not be guaranteed on taxation.

The consequence was that no barrister of remotely appropriate experience and ability had been prepared to take on the case from any of the chambers that the appellant's solicitors had contacted.

(d) Application to vary

H.H.J. Mole Q.C. heard the application to vary the restraint order on April 4, 2007, accepting that the proceedings were unusually complex and justified the employment of counsel of substantial experience to (a) allow P to have proper representation and (b) to enable the Court to deal with the matter in a reasonable period of time.

H.H.J. Mole Q.C. found as a matter of fact that:

> "P will not be able to find counsel of the necessary skill and experience to represent him effectively, if that counsel is expected to be paid from public funds by a graduated fee of £178.25 day."
>
> "Putting it bluntly, if he must rely on public funding, he would not be adequately represented; that is, not adequately represented unless he is able to pay for his own representation because P, I am told, is happy, indeed, anxious to pay his own legal fees and, hence, the application that I amend the restraint order to permit him to do so. The answer to the application is, indeed, that I cannot do so. That is because of s.41."

H.H.J. Mole Q.C. considered that he was bound by the decision of this court in *S (In Re S Restraint Order; Release of Assets* [2005] 1 W.L.R. 1338) which held that the prohibition applied fairly and squarely to restraint proceedings such as the present, and that there was no escape from the prohibition.

P appealed to the Court of Appeal, who refused to vary the Restraint Order.

P appealed to the House of Lords.

House of Lords

The House of Lords considered the following:

> "Has the defendant any redress and if so what if the judge hearing the confiscation proceedings concludes that the defendant is inadequately represented, because the level of public funding available to him for instruction of counsel does not permit the instruction of counsel of sufficient experience to handle the proceedings effectively on his behalf, having regard to their length and complexity?"

The respondents (Prosecution) central answer was:

> "The remedy for the petitioner's complaint lies not in a declaration of incompatibility, but instead in the Crown Courts' inherent power to ensure its proceedings are fair and not an abuse of process…. It is open to the petitioner to argue before the learned judge that, by reason of the inadequacy of his representation, he cannot have a fair hearing and that the proceedings should, therefore, be stayed as an abuse of process."

Crown Court stay

P took up the Prosecution suggested remedy and applied to Harrow Crown Court to the stay the POCA confiscation as an abuse of process.

P represented himself, with the assistance of a solicitor, making submissions and giving evidence on oath.

P argued that he could not receive a fair confiscation hearing as he did not have sufficient advocate representation.

18 sets of barristers' chambers in London, Leeds and Sheffield were contacted on P's behalf, to see whether or not there would be the possibility of instructing barristers for this case at a daily rate of £178.25. No chambers were able to put forward counsel of sufficient experience, in accordance with para.603 of Pt VI of the Bar Code of Conduct.

Having heard P, on oath, H.H.J. Mole Q.C., accepted at the stay hearing:

(1) P was anxious to have his own representation if he could, and would be able to find the cost from funds that had been restrained by the Prosecution;

(2) There was no serious prospect that the cost of a five to six week confiscation hearing would be found by friends and family, who had been prepared to fund P;

(3) If P had to rely upon the legal aid fund, there is no prospect of him getting properly qualified counsel.

Legal representation

The significance of legal representation, H.H.J. Mole Q.C. observed:

> "has to be judged in the context of the particular proceeding. It has been recognised by the courts that confiscation proceedings, employing as they do harsh or draconian assumptions for a justifiable and proper purpose, are a considerable, if necessary, imposition upon the person who faces them.
>
> The burden will be upon P to displace the assumptions throughout and to prove both that assets do not represent benefit and to prove whether or not they are truly realizable or not".

The Australian High Court case of *Dietrich v The Queen* [1992] 177 C.L.R. page 292 was considered on the issue as to whether or not representation by counsel is essential to a fair trial and whether, in the absence of it, the court should stay proceedings.

H.H.J. Mole Q.C. cited a passage in the joint judgment of Mason C.J. and McHugh J. in *Dietrich* in which they expressed the importance of representation by counsel:

> "The advantages of representation by counsel are even more clear today than they were in the nineteenth century. It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious. Lord Devlin stressed the importance of representation by counsel when he wrote "Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down." (The Judge, 1979, p.67)

An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown. The hallowed response that in cases where the accused is unrepresented the judge becomes counsel for him or her, extending a 'helping hand' to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems.

As Sutherland J. stated in *Powell v Alabama* when delivering the judgment of the United States Supreme Court:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defence, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

The Australian judges in Dietrich then make the point that the right to retain counsel and the right to have counsel provided at the expense of the state are two different things. As a matter of fact H.H.J. Mole Q.C., found that P will have neither and went on to comment:

> "I would simply add to what Sutherland J said about the judge's ability to help out my comment that how much more difficult, indeed impossible, is it for the judge to take on the role of defence counsel when it is the judge and not the jury who has to determine the facts, as in confiscation proceedings? It would be particularly difficult in such circumstances for the judge to extend any real "helping hand" to the accused."

Conditional stay?

In resisting the abuse application the prosecution relied upon *R v Rowbotham* (1988) 41 C.C.C. (3d) 1, a decision of the Ontario Court of Appeal, to suggest the possibility of a conditional stay; relying upon the following passage (at p.69):

> "In our view a trial judge confronted with an exceptional case where legal aid has been refused and who is of the opinion that representation of the accused by counsel is essential to a fair trial may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided."

Conditional stay a satisfactory result?

In principle, H.H.J. Mole Q.C. more doubtful about the prediction of a satisfactory result.

The prosecution in P argued that there is nothing to stop the Lord Chancellor and Minister of Justice drawing on some contingency fund to make a payment if that was thought the right think to do; for example, through reg.22(a) of the Access to Justice Act 1999, which contemplates that payments may, in some circumstances, be made by the Lord Chancellor.

H.H.J. Mole Q.C. responded to this submission by stating:

> "I think that would be a surprising result. Tempting though it is, I am not going to make an order that would not only be unheard of in this jurisdiction but may very well be wasted effort and do nothing but create more uncertainty for the parties. It seems to me that if the prosecution believes that I have wrongly excluded the possibility of a Rowbotham or Fisher order from consideration, then the remedy lies with the Court of Appeal."

Confiscation stayed

H.H.J. Mole Q.C. stayed the confiscation proceedings stating that:

> "this is not a conclusion I reach with any satisfaction. I have to say that I certainly reach it without much sympathy for P. He has been convicted of serious offences and I entirely understand why it is alleged that he has a criminal lifestyle. I fully appreciate the statutory purpose behind the confiscation legislation and I fully understand the public interest in it. I know perfectly well from my years in the Crown Court that to those who make a living from their crimes the loss of some of the material property and the comfort that their criminal profits have brought them may be a much greater punishment and a much greater deterrent to them than the, perhaps not very long prison sentences they serve. In other words, the principle underlying confiscation is a just one so long as the confiscation is carried out justly. The overriding principle is, in my judgment, that for these serious matters, the defendant must be able to have a fair trial and in this case I am confident that he cannot, unrepresented by

counsel. I, therefore, stay these proceedings as an abuse of the process of the Court."

Conclusion

The decision in *R v P* highlights the increasing difficulties faced by offenders in obtaining sufficient legal representation in confiscation proceedings. Offenders are prohibited from using restrained funds to pay privately for representation. Whilst Legal Aid rates of £175.25 per day (with the possibility of being paid £33 per hour for "special" preparation) has stopped advocates of sufficient experience from taking such cases on.

One possible solution is to allow offenders to use restrained funds to pay for such representation. The hourly rates charged by the offenders lawyers could be "capped" so as to avoid the complete dissipation of restrained assets.

R v P also highlights the ever-evolving nature of the abuse of process remedy which Lord Lloyd remarked upon in *R v Martin (Alan)*[1]: 'the categories of abuse of process like the categories of negligence are never closed'.

Colin Wells is a barrister at 25 Bedford Row and author of "Abuse of Process" published by the Legal Action Group.

1 [1998] 2 W.L.R. 1 at 6.

ANTHONY FRANCIS JENNINGS Q.C.

1960–2008

Anthony Francis Jennings Q.C.

The death of Tony Jennings Q.C. at the cruelly young age of 47 has robbed his family of a loving father and brother and left the criminal bar to mourn the loss of a great trial lawyer.

The eldest of five children, Tony was brought up in the Short Strand area of East Belfast by two powerful women, his mother and grandmother, and never forgot where he came from. Tony's great friend and former colleague from Garden Court chambers, Courtenay Griffiths, commented at the packed memorial service in Grays Inn hall last April that he and Tony shared a common identity as working class boys which made them both feel like outsiders in the homogenous world of the Bar. But it was this background which gave Tony an edge and, with it, a unique advantage in a criminal court. Jurors felt he was someone they recognised and understood. And he made them laugh, as many prosecutors and judges would find to their cost and occasional embarrassment.

Tony was a man completely devoid of pretension but never slow to mock, more or less gently, those of us he perceived to be less down to earth than he was. That included pretty much all his professional colleagues and certainly one or two of us at Matrix chambers which he joined as a founding member in 2000 after 14 hugely successful, happy years at Garden Court.

But aside from being a great jury advocate, Tony was someone who cared a great deal about the development of the criminal law as much as he cared about the craft of criminal law advocacy. In the days before Casetrack and Lawtel, he would ferret out unreported cases that would eventually find their way into Archbold, for which he was a contributing editor between 1995 and 2004. He also read widely beyond the strict confines of the criminal law and deployed his scholarship effectively whether before a sceptical circuit judge with a slight anti-intellectual bias (and who doubted that much assistance would be derived from Strasbourg or the Canadian Supreme Court) or before a Court of Appeal presided over by Lord Bingham or before the Privy Council in one of the pro bono capital murder appeals in which he appeared.

Tony was always a wonderful person to bounce problems and ideas off. He was generous with his time and wise with his advice. The combination of street fighting jury trial lawyer and criminal law scholar was simply unbeatable. He knew a hopeless argument when he saw it. But he could also make something promising of what appeared at first to be hopeless.

Called in 1983 and beginning his professional life in the chambers of Sighbat Kadri QC (after a pupillage with another outsider, Rudy Narayan), Tony attracted high profile, demanding, criminal work almost from the start, beginning with the Unilever animal rights trial in 1986. He played a notable role in the six month Risley riot trial in Liverpool IN 1990 which resulted in not guilty verdicts for all 20 defendants. It's fair to say that these acquittals were slightly against the weight of the evidence. Maurice Kay Q.C., who led for the prosecution, played hour upon hour of video evidence showing the defendants, and especially Tony's client, smashing the prison to bits over a 3 day period of roof top protests, hurling roof tiles and verbal abuse at prison officers and anyone else who was in the vicinity. Intending to run a defence that the appalling conditions of detention at Risley justified the prisoners in launching a violent protest (until H.H.J. Wickham withdrew the defence), Tony's moment came when the Crown called the Governor of Risley to give evidence. Foolishly claiming that the prisoners were not justified in complaining about the fact that they were forced to eat their evening meal at 5pm, with nothing further to eat till 8.00 am the next morning, the Governor boasted of the radical change he had made to Risley's austere regime by introducing the 9pm "supper bun". The supper bun was a rock hard, pink, starchy, inedible ball of

dough which was shoved through the cell flap to keep the starving prisoners happy. It was promptly thrown from cell windows to join the "shit parcels" in the yard below (this was in the days before "integrated sanitation"). Tony mercilessly tortured the Governor about the joy of anticipating the arrival of the supper bun and reminded the jury at every opportunity never to forget what a difference it must have made to life at Risley. I'm sure it was a major factor in the decision to acquit.

After Risley there were more animal rights trials, heavy drug and robbery trials, and a famous case in 1991 when Tony successfully defended an animal rights activist who was charged with masturbating a dolphin in Morecambe Bay. In 1993 he defended one of a group of Welsh nationalists charged with a bombing campaign. He appeared in the Harrods bombing and the Warrington gasworks IRA trials, as counsel in the North Wales child abuse tribunal and took on some harrowing, difficult child abuse cases. He defended in the Whitemoor prison escape trial in 1997, his acquaintance renewed with (now) Mr Justice Maurice Kay as trial judge and who bore him no grudges from the Risley riot trial. This was another difficult case, the CCTV evidence showing the defendants climbing over three internal prison walls from the Special Secure Unit in Whitemoor prison before they legged it across the blasted Fenlands at dead of night. In the end the case was stayed as a result of unfortunate publicity given in the Evening Standard, revealing the IRA convictions of one of the accused.

Tony took Silk in 2001 and was appointed a Recorder the following year. In 2003 he was granted a "sex ticket" authorising him to try serious sexual offences, the youngest Recorder to achieve this. He remained a regular, popular fixture at the Bailey, always appearing for the defence in major trials. As a result of his writing on entrapment in Archbold, he was instructed in a multi-handed arms dealing case where his client had been inveighled (without, it appears, too much much pressure) by a couple of under cover officers to think that he was selling Serbian guns to the IRA. For some 20 minutes prosecutor John Bevan played a tape of Tony's client telling the undercover officers that if they were in fact undercover cops he would make sure he got a very clever lawyer and argue entrapment. Tony was of course a clever lawyer and the case was dropped as a result of his submissions on disclosure.

In the last five years he appeared in a number of difficult, distressing murder trials in which parents were charged with shaking their baby children to death. Tony's mastery of the complex expert evidence leaps out from the transcripts. In 2004 he defended Mr Zardad, an Afghan war lord charged with conspiracy to torture and hostage taking in Afghanistan in the 1990s, with AG Peter Goldsmith QC leading for the Crown. It would be hard to conjure up two more different styles than Tony Jennings and Lord Goldsmith. Bearing in mind that Mr Zardad's case was that he was the victim of a political prosecution, Tony took great delight in telling the jury that the last time the Attorney General had prosecuted a criminal trial it resulted in one of the greatest miscarriages of justice in English criminal history with the wrongful conviction of the Guildford 4. But on this rare occasion, not even Tony's wit could defeat the evidence and Zardad was convicted.

Tony's greatest intellectual contribution to the criminal law arose from Michael Howard's attack on the right of silence. The Criminal Justice and Public Order Act 1994 provided a good deal of work for lawyers and judges and Tony's skills were well deployed in ensuring that a potentially unfair, unnecessary dilution of a key due process protection did not occur. In 1998, in the case of *Birchall*, led by Roy Amlot Q.C., he introduced to a court presided over by Lord Bingham some of the Convention case law on the right to silence, to emphasise that the judicial direction on the failure to give evidence was incompatible with Article 6 because the judge had failed to emphasise that the jury had to be satisfied that there was a case to answer before drawing an adverse inference against the defendant for his failure to give evidence at trial.

In *Condron v UK*, Tony appeared with Ben Emmerson QC before the European Court to establish that an adverse inference could only be drawn against a defendant if it was clear that the jury had taken into account the countervailing possibility that the suspect had simply adhered to legal advice. The court also emphasised that the use of adverse inferences would only be justified if the matter in question properly called for an answer at the time. *Condron* and the subsequent case of *Beckles*, which Tony argued when the matter was referred back to the Court of Appeal, led to important changes in the standard JSB directions on section 34 and 35, changes which Tony helped to draft.

Tony's work in court and as a contributing editor to Archbold were crucial to civilising the potentially unfair features of the CJPOA 1994. Sections 34-35 of the CJPOA 1994 had been lifted from the original Northern Ireland Emergency provisions which were first introduced to apply only to terrorist suspects. Tony had seen that provisions can be introduced by one Government in one year under the rubric of being exceptional provisions for exceptional times only for them to become the norm a few years later and this experience drove him to oppose what he saw as an attack on an ancient, treasured fair trial right.

In addition to his trial and appellate work, Tony made many other contributions to the development and administration of the criminal law. From the time he edited *Justice Under Fire: the Abuse of Civil Liberties in Northern Ireland* in 1990, through to his role as a contributing editor on Chs 15 and 28 of Archbold, he built up a formidable expertise in the law of criminal due process. He wrote articles for the Criminal Law Review, Archbold News, the New Law Journal as well as giving CBA lectures on covert policing, the admissibility of evidence, and the attack on the right of silence. He was a contributing author to the Blackstone publication on criminal justice, police powers and human rights. He wrote the Bar Council and CBA response to sections of Lord Justice Auld's Report on the criminal justice system and the Justice response to the Law Commission's report on non-accidental injuries to children. He was a regular lecturer on issues of crime, human rights and covert policing whether to the CBA, Inn weekends at Cumberland Lodge, Bar Council/CBA and JSB training courses. Always witty and down to earth, Tony was incapable of being boring on a subject he loved.

Away from the court room, Tony lived life to the full and in the last few years his work life balance was both unfashionable and contrary to Government guidelines. He loved everything about Italy and knew more about Italian wine than anyone I have met, revealing a hectare by hectare knowledge of the various super Tuscan wine growers. Always the last to leave a party, he was the person you hoped would turn up first. At his memorial service, his former pupil David Emmanuel, conjured up a wonderful image of Tony Jennings the pupil master, ever generous with Italian deli take aways en route home from a day in court, ever enthusiastic about the practice of criminal law, someone who inspired a love for the art of advocacy. He will be greatly missed by his colleagues and many friends. He is survived by his wife, Louise, their children Caolan and Niamh, and by his brother, Marc, and three sisters, Jackie, Donna and Sharon

Anthony Francis Jennings Q.C. Born May 11, 1960, died January 21, 2008.

Written by Tim Owen Q.C.

Life at the criminal Bar is changing more profoundly than ever before. HCA's are here to stay both at the CPS and increasingly for the defence. Solicitors are being squeezed on every front and so naturally look to the Crown Court for more income.

Rates of pay for legally aided Crown Court work are being pegged back to the point whereby many barristers do not believe they can go on.

The Government seems to be after a fused profession. That would be a great shame. It may be too late when they realise that we provide a highly professional and flexible service bearing all our own overheads and risk at a true cost per case that institutions like the CPS can only dream of. If it did not exist, some bright spark at the Ministry of Justice would get a knighthood for inventing the Independent Bar.

What will competitive tendering mean and when will it come in? We don't know for sure, but the LSC seems set on a path. Carter said Crown Court fees should be ring fenced to protect the Bar. Let us hope that is the case. The Government is determined to get best value for the tax payer, but only has fairly crude macro-management tools with which to try to achieve that. The Bar must fight changes which cause unfairness to practitioners and which threaten the quality of the service provided. Without able and committed advocates the whole system falls into disrepute. Meanwhile, we all have to adapt or die.

It may well be that large and extremely efficient chambers will be one survival model. But even then, every existing pre-conception about what a chambers should involve and how it should be run will have to be held up to the light and scrutinised. Every single item of cost will have to justify its existence. Big machines are tough to manage and notoriously resistant to change.

Tensions between the old world and the new will inevitably mire the process and cause interminable politicking - never mind the dreaded divisions in mixed criminal and civil sets.

For my part, I had a re-think. Gone is the expensive building my criminal clients were rarely able to visit. I am happy to see my clients at the solicitors' offices.

Solicitors tend to have better things to do with their time than travelling to see me. And when they too are subject to a form of graduated fee, solicitors will want to drive down costs and drive up efficiency even further. Gone too are the layers of administration and management, the one size fits all overblown IT, library, promotion. Even the heating, telephone, post and couriering – all gone.

Have you ever looked at the detail of the expenditure in your chambers? Well you can look, but you try to control it. Virtually impossible.

I am now independent of chambers but supported by a first class clerking and administration service called **seniorclerk.com.** The head clerk is a man of thirty years experience. The IT support is state of the art. I am able to practice from home with full back-up. Being liberated from a chambers has allowed me to strengthen my contacts with instructing solicitors. I can be hands-on with my practice and my diary as much or as little as I want to be. For barristers who have their own following, it works. The internet and the mobile telephone has stripped away the need for a more traditional set-up. My total levy is a maximum of 10% - and probably closer to 7%.

We all believe in the independent Bar. I believe that with **seniorclerk.com** I have found a way to adapt to the newly competitive environment. I hope you find your way too.

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