

Reconsidering how we talk about legal professional privilege

The Law Society announced last November its intention to intervene in *Serious Fraud Office v Eurasian Natural Resources Corporation (SFO v ENRC)* as it seeks to protect the right of clients to communicate confidentially with their lawyers.

The gradual erosion of a right

Earlier in (2017) alarm bells rang throughout the legal sector at the latest assault on one of the foundations of our justice system – legal professional privilege (LPP).

That was because on 8 May 2017 the High Court ruled the Serious Fraud Office could access materials gathered by lawyers during internal investigations into allegations of corruption, taking a narrow view of the scope of legal advice and litigation privilege. The perverse effect of this ruling is that companies could be discouraged from

self-investigating problems thoroughly.

Privilege is the route through which clients can be sure their communications with legal advisers are kept confidential. It matters whether you are a member of the public making a will or going through a divorce – who wants their private affairs aired in public? It also matters greatly in commercial situations.

The ruling in *SFO v ENRC* dilutes the protection of privilege for sensitive communications and could



Joe Egan, Law Society president

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Criminal justice post-Brexit: could the UK be left out in the cold?

The Government's recently published policy paper: "Security, law enforcement and criminal justice - a future partnership paper" would have been a reassuring read for most criminal justice practitioners. Although light on technical detail it is a welcome statement of support for EU Justice and Home Affairs (JHA) measures which, it is stated without qualification, make up "a comprehensive and sophisticated suite of mutually reinforcing arrangements that help protect citizens and the continent". The European Arrest Warrant (EAW) is the best-known JHA measure but others such as Europol, the Schengen Information System (SIS 2), and the newly-minted European Investigation Order are also singled out for approval.

There is a slight whiff of sophistry here, because in December 2014 the Government chose to opt-out of most other EU JHA arrangements, only opting back in piecemeal to those it considered to be most valuable.

So, praising the EU for "developing a package of measures that support a streamlined end-to-end process of cooperation" rather glosses over the Government's previous equivocation. Nevertheless, what is significant is the support not just for the practical benefits of cooperation, but also the underpinning principles. The document is peppered throughout with language that could have been lifted directly from Remain campaign literature: "uniquely aligned", "shared priorities", "mutually reinforcing", "closest and most co-operative of partnerships", "pooling expertise and resources", "inter-connected", culminating in the proposition that "cooperation produces cumulative shared benefits that extend well beyond an ad hoc collection of capabilities". For the most part it reads like an argument to remain in the EU.

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Bar Pro Bono Award 2017 Winner



Tanya Murshed of 1MCB Chambers was the winner of the 2017 Sydney Elland Goldsmith Bar Pro Bono Award for her outstanding commitment to assisting vulnerable individuals convicted of capital offences in Uganda over four and a half years on a pro bono basis.

Initially, Tanya's work in Uganda began through the Centre for Capital Punishment Studies, assisting individuals convicted of capital offences with their sentencing hearings. Tanya wrote submissions for approximately 60 individuals potentially facing the death penalty, and no death sentences were passed in any of these cases.

Since then Tanya's key focus in Uganda has been the landmark Supreme Court case of Attorney General v Susan Kigula and 416 others, which held that the automatic death sentence was unconstitutional. As a result, the individuals that were previously subject to the mandatory death sentence were entitled to go back to the High Court and be re-sentenced.

Tanya took a sabbatical from her chambers to volunteer in Uganda in 2013, advocating for these cases to be resented. She trained law students in Uganda to collect mitigating evidence, organised training sessions with judges and lawyers on sentencing

and international law, and much more.

In 2014 Tanya launched Evolve – Foundation for International Legal Assistance to continue her work. Travelling back to Uganda every few months to continue running the project, she is estimated to spend a quarter of every year doing full time pro bono work. Since then, 243 individuals who were previously subject to the automatic death sentences have received sentences other than death and many have been released as a result of Tanya's work.

Lord Goldsmith QC, the Bar Pro Bono Unit Founder and President, and Chair of the Award judging panel, said:



"Tanya has shown outstanding commitment to a specific issue within a specific region, and has used her legal skills and networks to tackle the challenges within the Ugandan criminal justice system head-on. This is an excellent model for pro bono, and one that deserves recognition in as many ways as possible."

"The statistics used in support of her application – supporting approximately

500 people facing the death penalty; and training 90 members of the legal profession on sentencing and mitigation ... are exceptional."

Highly Commended:

Kirsty Brimelow QC, Bar Human Rights Committee and Doughty Street Chambers

A special commendation was also awarded to Kirsty Brimelow QC, Chair of the Bar Human Rights Committee, in recognition of her outstanding long-term contribution to assisting on human rights issues around the world. This has included interventions on death penalty cases in the Middle East, North Africa and the USA; mediating peace talks between the Colombian Government and the San José de Apartadó peace community and prosecuting cases of child rights abuses in Nigeria.

Lord Goldsmith QC said of Kirsty:

"The breadth and depth of the pro bono work undertaken by Kirsty Brimelow QC, best illustrated by the diversity of the supporting references, demonstrates a career-long commitment spanning continents. Her role at the helm of the Bar Human Rights Committee enables her to nurture an environment that supports pro bono on a global scale, an opportunity she has grasped with both hands."

Lord Goldsmith QC also noted the high calibre of nominations across the board.

"Reading through the submissions assures me that the Bar is still an exciting and inspiring place to be. This year has been an exceptionally difficult year to choose an overall winner and I, together with my fellow judges, continue to be humbled by the commitment of the nominees to tackling injustice."



New ethics and practice website launched for barristers

A new website devoted entirely to helping barristers with ethical and practice queries has been launched by the Bar Council to support its members.

The new online tool, the Ethics & Practice Hub, which can be used on a mobile phone or tablet, provides guidance on ethical issues faced by barristers in meeting their regulatory obligations as set out in the Bar Standards Board's Handbook. In

addition, the site offers barristers and their chambers guidance materials on IT, equality and diversity, international practice and remuneration issues in relation to practising at the Bar.

The new site www.barcouncil.ethics.co.uk has been designed to enable barristers to access the Bar Council's guidance documents quickly and more easily, and is there to supplement the Bar Council's Ethical Enquiries Service.

This is a confidential service, by phone and email, for the benefit and assistance of barristers (and, where appropriate, their clerks and other staff connected with barristers' professional practices) to help them to identify, interpret and comply with their professional obligations under the BSB Handbook.

Currently, the Bar Council's ethics and practice guides sit on the Bar Council's main website. Barristers and chambers will now be directed to the new, stand-alone ethics hub from the main Bar Council site. The site will be updated regularly by the Ethical Enquiries Team in the Bar Council, with support from the Bar Council's Ethics Committee and other committee

BSB publishes updated disciplinary tribunal regulations and rules on parental leave in new BSB Handbook

A new rule clarifying how vulnerable witnesses give evidence is one of a set of new and updated disciplinary tribunal regulations published today in the new version of the BSB handbook. The revised Handbook also contains new rules about shared parental leave, in addition to some minor amendments to provide additional clarity.

The Bar Standards Board has updated eight areas overall in the disciplinary tribunal regulations, including rules concerning:

- The publication of reasons for the Tribunal Decision where charges have been dismissed;
- The handling of evidence and documents that are not submitted in line with directions of the Tribunal;
- Specific provisions to clarify the measures that can be put in place to help vulnerable witnesses give evidence;
- The removal of deferred sentences and an express power to postpone some suspensions in exceptional circumstances; and
- The removal of the Tribunal's ability to remove a barrister's "rights and privileges" as a member of their Inn.

The revised regulations seek to modernise and streamline existing regulations and were approved by the Legal Services Board (LSB) in June 2017.

These regulation and rule changes have been implemented following a public consultation.

The change to the parental leave rules also follows a public consultation and will require all chambers to have a policy that allows any member who becomes the carer of a child to take parental leave. Though the precise details of such policies are for individual chambers to decide, the new rule will require that flexible working

arrangements must be available to members during their parental leave. Both the BSB and the Bar Council will be producing additional guidance on this change, and chambers that have not already done so will to update their current policies.

The BSB's Director of Professional Conduct Sara Jagger said: "We are very grateful to all those who responded to these consultations. Thanks to them, we are now proposing fair, transparent and efficient changes to the disciplinary tribunal rules. We are committed to modernising and streamlining our disciplinary processes and ensuring that they operate as fairly and as efficiently as possible, for the benefit of all concerned."

The BSB's Director of Strategy and Policy Ewen MacLeod said: "The BSB is pleased to introduce a fair and progressive parental leave rule and we hope that it will be of real benefit to barristers in seeking to balance caring responsibilities with their professional practice. We are going to produce additional guidance so that chambers can adopt this rule change appropriately in their updated policies. We look forward to working with Chambers to make this happen."

You can download the new version of the BSB Handbook from the BSB website.

You can read the revised Disciplinary Tribunal Regulations on the BSB website

Court Room Science Primers Launched

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Unique partnership between the judiciary and science academies produces plain English primers relaying core scientific evidence to judges

Easy-to-understand guides or primers on scientific evidence have been introduced in UK courts as a working tool for judges. The first two primers in the series, which cover

DNA fingerprinting and techniques identifying people from the way they walk from CCTV, were launched on (22 November 2017). The primers – Forensic DNA analysis and Forensic gait analysis – are designed to assist the judiciary when handling forensic scientific evidence in the courtroom. The project is a collaboration between the judiciary, the Royal Society and the Royal Society of Edinburgh.

Each primer is a concise document presenting a plain English, authoritative account of the technique in question, as well as considering its limitations and the challenges associated with its application. They have been written by leading scientists and working judges and peer reviewed by legal practitioners, all of whom have volunteered their time to the project.

Supreme court justice, Lord Anthony Hughes, Chair of the Primers Steering Group says, "These are the first in a series of primers designed to be working tools for judges. They aim to tackle the agreed and uncontroversial basis underlying scientific topics, which crop up from time to time in courts. The objective is to provide a judge with the scientific baseline from which any expert dispute in a particular case can begin.

"We have been very privileged to have

the co-operation in preparing them of the two Royal Societies of London and Edinburgh. We are very grateful to their eminent scientists for taking the time to put complex science into a form which addresses practical trial-related questions from judges."

Dr Julie Maxton, Executive Director of the Royal Society, says, "We are very pleased to be playing a leading role in bringing together scientists and the judiciary to ensure that we get the best possible scientific guidance into the courts – rigorous, accessible science matters to the justice system and society."

Professor Dame Jocelyn Bell Burnell, President of the Royal Society of Edinburgh says, "We owe a lot to Professors Sue Black and Niamh Nic Daéid, from the University of Dundee for this initiative. The Royal Society of Edinburgh is delighted to support two of its Fellows in this project."

Professor Dame Sue Black, one of the world's foremost experts in forensic anthropology, and Crown court judge, Judge Mark Wall QC, led the primer on gait analysis. The primer on DNA analysis was led by Professor Niamh Nic Daéid, a professor of forensic science at the University of Dundee, and Lady Justice Anne Rafferty of the Court of Appeal. The development

of the DNA primer also drew on the expertise of Sir Alec Jeffreys, the inventor of genetic fingerprinting who in 1984 discovered a method of showing the variation in the DNA of individuals, and Nobel Prize-winning scientist Sir Paul Nurse.



Whilst the Forensic DNA analysis primer covers an established scientific technique used widely as

evidence in UK courts and many courts around the world, the Forensic gait analysis primer considers a young, relatively new form of evidence in the UK criminal courts and advises that the scientific evidence supporting gait analysis is "extremely limited".

Future primers on the topics of statistics and the physics of vehicle collisions are planned.

Hard copies of the primers will be distributed to courts in England and Wales, Scotland and Northern Ireland through the Judicial College, the Judicial Institute, and the Judicial Studies Board for Northern Ireland. The primers are available to download from the Royal Society website.



Less formal wills should still hold up in court

Courts should have the power to recognise and give legal effect to a deceased person's final wishes even where the formalities of a valid will are not present, the Law Society of England and Wales said.

The wills process is still largely based on the Wills Act of 1837 and the rules around capacity to make a will stem from 1870.

Law Society president Joe Egan said: "When 40% of people die without making a will – intestate – we know there is more we can do to make the process accessible to the public. "The lack of a formal will should not restrict a court from respecting someone's final wishes when those can be proven - with appropriate safeguards against fraud.

"We support efforts to simplify the process of making a will and we acknowledge the need to start looking

at technology to support existing practice. There are issues we will need to work through to ensure wills made online can be proven valid, but it is an area for further debate."

The Law Society also agreed the legal age to make a will should be lowered to 16.

"There are many reasons someone may choose not to make a will, but lowering the legal age to make a will is one more way we can remove barriers," Joe Egan said.

The Law Commission also proposed updating laws governing testamentary capacity.

Joe Egan added: "We are very supportive of the proposal to adopt the definition of capacity from the Mental Capacity Act 2005. It will bring clarity to courts and protect the rights of the most vulnerable people in our society."

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p.1 leave companies unable to communicate confidentially with their lawyers in the context of serious issues.

Last May the Law Society described the decision and its narrow definition of legal professional privilege - particularly litigation privilege - as deeply concerning. It came on the back of a string of rulings over the past fifteen years which have challenged common understanding of privilege, who it protects and when it applies. We are pleased it is being taken to the Court of Appeal - and hopeful of making a meaningful intervention in the case.

Legal professional privilege has existed in some form since the reign of Elizabeth I. In earlier landmark cases, privilege was reaffirmed and acknowledged by judges as a fundamental part of the rule of law in England and Wales. More recent cases have tended to restrict that right, putting the jurisdiction at a potential disadvantage compared with others such as the USA and Singapore.

In 2004, in the *Three Rivers No 5* case, the definition of the client to whom privilege applied was restricted to certain categories of employee in a company and, more recently, the Law Society and Bar Council had to argue fiercely to ensure privilege protections were enshrined in the Investigatory Powers Bill. Although its inclusion as a protected right in the final Bill was eventually achieved, the willingness of the government to incorporate legislative exceptions was disheartening.

As these challenges have arisen there has been a deafening silence as one of the oldest legal rights has been gradually eroded. The lack of public engagement with an issue that profoundly affects us all might be explained by a lack of effective communication.

The challenges to overcome

There are three main obstacles which the legal profession needs to overcome to engage more public support.

The first challenge is the language used by the profession, and the phrase legal professional privilege itself.

Although privilege is a right of clients, the phrase focuses on lawyers and ignores the client completely. To most people it is as meaningless a piece of jargon as computational geometry.

By contrast, the American term 'attorney-client privilege' highlights the fundamental importance of the client

and the relationship between lawyers and their clients. Public knowledge of attorney-client privilege also benefits from regular pop culture references in American legal dramas.

Other countries use more accessible language. In Canada, you will often find reference to 'solicitor-client privilege' and in Australia, the Australian Law Reform Commission encourages the use of the phrase 'client legal privilege', to emphasise the privilege is owned by the client rather than the lawyer.

If we need the support of the public and decision-makers in government to protect privilege, we need to be clear what we are talking about and how we talk about it.

The second challenge is around making privilege relevant.

In a society where the large majority of the public have limited interaction with lawyers, it can be hard to engage them on defending a legal right. Those who never interact with solicitors or barristers may believe they have no need for confidential communication.

When the public is not engaged, it gives others free rein to suggest - however unfairly - the only ones who benefit from privilege are either criminals or big business.

Unlike a more general right to privacy which is broad and applicable to everyone, privilege is a right we need to make relevant, even to those who may have only minimal contact with lawyers.

Finally, the third challenge is around understanding.

The law is incredibly complex and challenging to comprehend. Legal professional privilege is an area of law that creates difficulty even for those with a legal background. There are exceptions and limits to privilege, and hundreds of years of case law to examine, consider and appreciate. Unlike privacy, which at its most basic level is easily accessible, we need to work harder to explain privilege. When it is misunderstood, it is easier to confuse and criticise. However, despite these challenges, it is still possible to improve how we engage the public.

Taking action

How do we explain the value of legal professional privilege, when it applies and who it affects without losing the attention of our audience?

The first step is addressing how we talk about privilege. We need to avoid legal jargon and we need to speak plainly.

When speaking with the public, we can explain legal professional privilege as the right for clients to communicate confidentially with their lawyer. While there are further complexities such as the right to confidential communications with a third party if the dominant purpose is for litigation - this could confuse the issue unnecessarily.

The next step is making a right relevant and personal.

The right to talk to your lawyer confidentially is crucial. It is not a right most people expect to use, but, like insurance, it is important it is there when they need it. Through introducing more accessible language and helping making privilege relevant, we can also improve understanding, not just among the public but also among government decision makers.

If we want to engage the public in the defence of legal professional privilege, it is important they understand it. Those reading the news or listening to the radio or watching TV should not need a law degree to understand solicitors and barristers when they are debating the issue.

The Law Society is committed to protecting a client's right to assert professional privilege and will vigorously defend that right in court.

Nonetheless, even if the ENRC appeal is successful, it is time to reconsider how we talk about privilege as a profession. We need to use clear and simple language, we need to engage the public on why it matters, and we need to be open about when it applies and who it affects.

It is no longer simply enough to push back when challenged.



Joe Egan, Law Society president

We need to speak positively about why legal professional privilege is a right worth protecting. We need to take charge of the narrative.

The barrister magazine

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That is until you reach the section about ending the jurisdiction of the European Court of Justice (ECJ) over UK law. Here, the Government's red line crashes through the preceding discussion of harmony and mutual cooperation like a Nigel Farage speech to the European Parliament. Much of what then follows is a discussion of how to replicate the existing JHA measures in some form of UK-EU Treaty (aka having our cake) whilst removing ourselves from the direct jurisdiction of the ECJ (aka eating it). Given the importance of JHA measures to justice and security, it is crucial to avoid any operational gaps, so the Government's ambition is to agree a new Treaty as part of the Withdrawal Agreement that terminates our EU membership. The proposed Treaty would place the UK in almost exactly the same position as it is now - a full participant in an EU-wide area of freedom, security and justice - rather than a semi-detached third party. But can this be achieved in practice?

The paper considers and rejects existing models for third country cooperation with the EU on justice and home affairs, such as those used for the Nordic States and the US. Whilst these arrangements tend to be outside of ECJ jurisdiction it is argued that they would *"result in a limited patchwork of cooperation falling well short of current capabilities... A piecemeal approach to future UK-EU cooperation would therefore have more limited value, and would risk creating operational gaps for both the UK and for its European partners, increasing the risk for citizens across Europe."* This echoes the language in Theresa May's letter to Donald Tusk on 29 March triggering Article 50, in which she made explicit reference (interpreted at the time by some as a threat) to the danger of weakening the fight against crime and terrorism through the failure to reach agreement. It is clear that the Government believes that the EU has as much to lose as the UK from any reduction in JHA cooperation, and intends to negotiate on that basis.

However, this approach leads to a problem which may produce unavoidable and unintended consequences. Many of the *"comprehensive and sophisticated suite"* of JHA measures which we wish to retain are based on the principle of mutual recognition. This is the free movement of judicial decisions across borders: a court order in country A is automatically enforceable in country B and vice versa. Mutual recognition does not require each jurisdiction to have the same laws, but it does require them to trust, recognise and enforce each other's judicial decisions. This, in turn, is predicated on the assumption that each jurisdiction has minimum substantive and procedural standards of criminal justice. In the lead-up to the 2014 opt-out and, to a lesser extent, the Referendum, many on the Leave side argued that this assumption is simply a fiction which leads to injustice: court orders could be enforced against UK citizens without any of the protections of our own legal system. This is a sub-set of the same basic argument in support of the Government's red line on ECJ jurisdiction: we should not be bound by any foreign laws. However, whatever the rights and wrongs of the debate, mutual recognition is what we are asking to sign back up to after Brexit. The EAW is quintessentially a mutual recognition measure. The European Investigation Order is mutual recognition, but on performance enhancing drugs.

To provide all the benefits to security and justice that we wish to retain, mutual recognition requires consistent interpretation of underpinning legal principles such as necessity, proportionality and procedural fairness. Any divergence in approach between participating countries directly undermines the foundations upon which cooperation is based. Pre-Brexit, the EAW system coped with divergence in two different ways. First, in other Member States, by officially ignoring it. Although many public officials across the EU privately acknowledged the wide variety in criminal justice standards amongst Member States, it was considered too risky to the whole enterprise of mutual recognition to address them directly. Any drive to enforce consistency, for example on pre-trial detention or whether EAWs should be issued for very minor offences, would have meant acknowledging in public that not all legal standards were equal. Diplomatic and practical remedies were the preferred solution. Second, by contrast, in the UK divergence was

'outed' and ultimately embraced.

Prior to our opt-out, critics argued that some countries issued EAWs for trivial offences which did not justify forcibly removing someone to face trial overseas. In addition, some jurisdictions requested extradition far earlier in proceedings than would be possible in the UK, leading to lengthy periods of pre-trial detention in unsavoury conditions, away from their homes and families, for suspects who were subsequently acquitted. Our courts had already diverged significantly from other Member States in routinely refusing extradition based on a disproportionate interference with an individual's private and family life under Article 8 ECHR; and by permitting arguments under Article 6 and/or abuse of process that challenged the substantive basis upon which an EAW had been issued. These practices infuriated practitioners in other Member States, who argued that they drove a coach and horses through mutual recognition. Undeterred, in 2014 the Government introduced new statutory bars to extradition which arguably did not feature in the EAW Framework Decision at all. Extradition could now be barred explicitly on grounds of proportionality, forum, or in the absence of a decision by the requesting State to charge and try the suspect.

Pre-Brexit, the UK was able to pursue a divergent approach to mutual recognition because the other Member States did not want to risk undermining the whole project. The EAW was - and still is - considered a success. It was too dangerous to start exposing and picking at the foundations; therefore the UK's unorthodoxy was tolerated. The irony is that, in negotiating a new UK-EU Treaty for justice and home affairs, the EU 27 no longer have as much incentive to be tolerant. The UK, by its own choice, will be outside of the EAW Framework Decision and outside of the jurisdiction of the ECJ that enforces consistency in approach, interpretation and application.

Post-Brexit, the risks to the Member States in demanding conformity from the UK will be greatly reduced. If the UK won't be bound by the ECJ, but still wants the benefits of mutual recognition, it is even more important to the Member States that any new Treaty is as consistent as possible with the measures that will continue to operate within the EU. They will want whatever replaces the EAW between the UK and the EU to operate like the EAW already does between the EU 27, and not the divergent version currently tolerated. So on the narrow question of dispute resolution, the EU may agree to forgo the direct jurisdiction of the ECJ, but is likely to insist that its pre-existing caselaw is binding and post-Brexit caselaw will be highly persuasive. This would preserve the Government's red line. But, on the broader principle of mutual recognition the EU may well demand that the UK strip out the additional bars to extradition introduced in 2014 that do not appear in the Framework Decision. Therefore, at least in relation to crime and security, by leaving the EU we will be obliged to conform more closely to its legal norms and to weaken, according to some, the additional protections for UK residents from the reach of 'inferior' legal systems. We may be able to have our cake and eat it, but the cake will have to be baked using the EU's recipe.



By Nick Vamos, Partner at Peters & Peters LLP

Nick has nearly 20 years of criminal law experience focussed on international, high-profile and sensitive matters. He joined the firm in September 2017 from the Crown Prosecution Service where he was Head of Special Crime, overseeing the most complex casework in the CPS including the Hillsborough disaster, corporate manslaughter, police corruption, deaths in custody, medical manslaughter and election fraud cases.

Euro Vision – the view from the European Circuit of the Bar’s 2017 Brussels conference

By **Abigail Holt**, barrister, Cobden House Chambers



As many will know, the European Circuit of the Bar provides a forum in which cross-border litigators and advocates can meet to exchange experience, good practice and to meet possible future colleagues for discussion of matters of common interest. Membership is drawn from the British Isles and Ireland as well as other European bars and includes members from many different areas of specialisation. One of the original focuses for its foundation was the diaspora of c. 1000 barristers with an address in Europe but outside the UK and today it is trying to focus on helping young practitioners to build international work into their practices. Since its foundation in 2001, it has always held an overseas event in conjunction with the local Bar of various European capitals (Berlin, Paris, Rome, Madrid etc) and it also holds speaker meetings such as the event in May 2017 which brought together European and UK constitutional specialists to discuss the

pros and cons of written constitutions based on practical experience of their operation.

This year, as summer leaned into autumn, the Circuit held its annual conference in Brussels in conjunction with the Brussels Bars - *“Euro Vision for litigators in Europe and beyond”*. It coincided with the referendum in Catalunya when passions were running high in Spain and hurricanes were storming across the Atlantic, but Brussels felt like an oasis of elegant, sophisticated, open, friendly calm.

As demonstrated by the unmistakable bling of a highly successful merchant class in the stunning architecture of La Grande Place, Brussels is a city long built on commerce, lawyering and orderliness. It was also evident everywhere in the structure of the city, that the industry of law had also given rise to a rich culture: fabulous architecture, art, music, luxury chocolate and world-beating moules-frites, (especially the chips, twice fried

a crispy perfection.....I digress). And yet, juxtaposed to the lively culture and laid back, open, purposefulness, there were hints of unsettlement in the wider world: lots of references to the displaced Congolese and their migrant African neighbours in the buskers on the streets and casual posters on spare walls; friendly, but very professional-looking, armed soldiers at strategic points, including doing the security checks at the Palais de Justice; and a very high police presence protecting the Synagogue de Bruxelles (dedicated as the Great Synagogue of Europe in 2008) during Friday night and Saturday prayers.

And so lawyers from England, Scotland, Ireland, France, Italy and Spain met with colleagues from the Flemish and French-speaking Brussels Bars, and had the privilege of hearing first hand from highly eminent members of the judiciary. Brussels has an amazing and flexible “butterfly” structure which allows for the two language branches of the Bar to share the same building and judges. Both the significance and pragmatism were not lost on the conference practitioner delegates who have, or aspire to have, cross-border practices.

Proceedings got off to a lively start on Thursday 29th September in the stunning but intimate reception rooms of the residence of the UK’s Permanent Representative to the EU on Rue Ducale, with a generous welcome from Katrina Williams (Deputy Permanent Representative) and from Chairman of the Bar, Andrew Langdon QC.

Friday morning started with tour of the massive Palais de Justice which was the biggest building in Europe at the time that it was built. One high point was sitting in on a hearing before a panel of three judges who happened to be an all-female bench. One party was 30 mins late for the hearing and it was fascinating to see the judicial ire which needed no translation from French. A second highlight was the marble meeting room dedicated to the Batonnier in the Second World War who refused to hand over names of Jewish advocates practising at the Brussels Bar and

who was subsequently assassinated by the Nazis. A third highlight was the well-used, wooden-panelled Bar Mess, a working cafe with tables, scribbling lawyers, scuffed furniture, proper coffee (served in real crockery), croissants, gentle gossip, a legal book stall and beer on draught! It was the antipathy of a skeleton service from a soulless outsider caterer skilled only in providing microwaved provisions.

Patrick A. Dillen (Stafhouder) opened the conference, emphasising that Brussels is an open, multi-lingual city where they intend to continue to encourage English-speaking lawyers to practise in their legal community, followed by Michel Forges (Vice-Batonnier) who congratulated the European Circuit for “this beautiful project”.

The importance of an independent judiciary was then considered at a time when we know that judges in certain European countries are facing real challenges and a number of Turkish judges have been dismissed or detained since events there in 2016. Sir Nicholas Forwood QC, chairing the session, pointed out that the judiciary is the “weakest” or most delicate part of interface between executive and legislature. Having modestly described herself to the conference as an “amuse bouche”, the Hon Lady Sarah Wolffe, (Justice to the Scottish Court of Session) then set out the challenge that the judiciary will face in attempting to interpret and apply European jurisprudence both pre- and post-Brexit were there to be inadequate guidance from parliament, with a risk that judges will again be denounced as “enemies of the people” if it appears that they are engaged in law-making as they attempt to navigate the legal voids created by Brexit. Judge Alfred Van Winsen (President of the Brussels Court of first instance Dutch Section) spoke of the importance of the courts and judges to have proper equipment and finances to pay for resources, without which justice is undermined. Judge Anthony Collins (Judge of the General Court, Court of Justice of the European Union) reminded us that the legitimacy of judicial power is that the exercise of judicial power is answerable to the people and that when constitutions are under pressure, constitutional values come under pressure.

Next there was a discussion of what EU law had given to the common law and the impact of common

law and lawyers on the EU. It was acknowledged that UK law had greatly benefitted from the EU, particularly in social and employment protection, but lawyers from the common law tradition were credited with having enriched European jurisprudence by bringing common law learning and procedure. There was also admiration from the European senior lawyers and judges of the contribution from Irish and British advocates and the benefits of oral advocacy including the rapid identification of pivotal legal points. It was agreed that this added an important extra dimension to written submissions and assisted in with the sifting and prioritisation of essential arguments. The advantages of the process of interaction between the bench and advocates was also explored. This session was chaired by David Barniville SC (past president of the Irish Bar) and the conference was extraordinarily lucky to hear presentations from Eleanor Sharpston (Advocate General at the Court of Justice of the European Union) and from Seamus Woulfe SC (Attorney General of Ireland) as well as their reactions to questions.

Later, amongst others, we heard from Alastair Sutton (Brick Court Chambers) who exudes energy and encyclopaedic knowledge of the evolution of European law and the key players within the European legal world, and from Isabelle Van Damme (Avocat, Van Bael & Bellis) about World Trade Organisation rules and remedies. Since the referendum, the WTO rules are mentioned in the news media in a vague and general way as the panacea to all of the UK's post-Brexit challenges. So it was refreshing, if worrying, to have the verbally elegant and obviously expert Isabelle Van Damme give a calm and dispassionate overview of the WTO rules including what sounded like some very real disadvantages of the World Trade Organisation for the UK post-Brexit when the UK becomes a relatively small fish in a pond dominated by behemoths including the remaining 27 EU block and the USA. Ed McGovern picked up the theme of the difference in enforceability by individuals as between EU law and WTO rules and Alexander Cooke from the UK Government Legal Department chaired the session.

The main part of the conference took place in the Salle des Audiences Solennelles de la Cour d'Appel generously lent to the Brussels Bars

and the Circuit for the conference. The room is decorated by massive painted scenes of groups of fleshy individuals scantily clad, save for convenient modesty-saving fabric, depicted against rich outdoor settings. Being reminded of nakedness and the essential vulnerability of human beings, our co-dependency and innate connection with the physical environment was appropriate as the conference ended concentrating more on the legal rights of individual citizens and practice rules for lawyers, in a session on Forum Shopping in Tort and Family law and a session examining the practical challenges related to lawyers practising abroad. Paul McGarry SC (current Chairman of the Irish Bar) chaired Me Arnaud Gillard (Avocat and Belgian Family law practitioner) who spoke about issues in cross-border family disputes and Philip Mead (Barrister at 12 KBW) gave in impressively concise summary of European personal injury litigation. Jean-Louis Joris (Avocat Cleary Gottlieb Brussels) chaired Trevor Soames (Avocat au Barreau de Bruxelles, Solicitor-Advocate and Barrister), Jean Paul Hordies (Avocat, Alphalex Avocats) and Luc Vanheeswijck (Head of the Cabinet of Stafhouder) who spoke, inter alia, of the uncertainties created by Brexit for professional relationships with European legal colleagues and the extent to which UK lawyers might be able to continue to practise in the Courts abroad.

We ended the conference with a delicious meal sitting round three big tables in a private room at the Restaurant “Au Vieux St Martin” in the elegant Grand Sablon. It was relaxed, not remotely stuffy and a brilliant way to talk openly, making new friends and learning from the experience of colleagues in other jurisdictions. The conversation and wine flowed. And yet walking through the Place Poelaert past the Palais de Justice on the way to dinner and a fabulous evening ahead, I was reminded of sad sober times by the First World War memorial there in which the people of Britain thank the Belgian citizens: “*Hommage du peuple Britannique en souvenir des secours prodigés par les généreux citoyens Belges, a ses soldats blessés et prisonniers. Ce sont des hommes de charité et de miséricorde et les oeuvres de leur piété subsisteront à jamais*”.

See www.europeancircuit.com for further information and membership.

Modern Setting

By **Catherine Calder**, Director of Client Care and **Martin Dyke**,
Business Director at Serjeants' Inn Chambers

"We work hard, we get better, we want to help those who want to excel, we want to lead by example and we want to teach: we want to raise the Bar". At a time of change and challenge for the profession, these opening words from Andrew Langdon QC at the 2017 Annual Bar and Young Bar Conference encapsulate the need for the profession to adapt, innovate and improve.



The question is how to steer a set through this process. With over 399 chambers comprising nearly 13,000 self-employed, independently-minded barristers, there can be no perfect, prescribed approach. This article sets out some of the ways in which Serjeants' Inn is facing the future but we appreciate that it is by no means definitive: different solutions will suit different sets.

For Serjeants' Inn, successful management starts with exemplary client service and includes professional leadership, a reflective, self-critical approach, and an emphasis on well-being, a diverse team, modern premises and a commitment to social responsibility. These and other priorities are underpinned by the implementation of a strong strategy to build the business of the set and its individual barristers, which is

now a commonplace - but necessarily confidential - feature of successful sets.

Serjeants' Inn is led by our joint Heads of Chambers, who provide vision and direction. Under their tenure the set has expanded significantly and gained new recognition: since 2015, 14 tenants have joined us – an expansion of more than 25 percent – and we have won over 30 awards and accolades.

We have modernised Chambers' structure through the appointment of a multi-disciplinary management team; this comprises three leaders with different areas of expertise who work closely with one another to give the set a more efficient and client-focused approach. We have retained a Senior Clerk, who manages our operational clerking function, and we have appointed a Business Director and a Director of Client Care. Both are experienced solicitors who have

worked in management roles at the Bar for nearly 20 years.

While many sets have appointed a professional manager as CEO or Director, we are unusual in having a team of three. For us this is essential because, having changed our constitution to provide for the full devolution of managerial and administrative duties to the management team, our barristers expect that team to work without the involvement of a management or similar committee. With greater autonomy comes increased responsibility and a workload that could not practicably be shouldered by one person alone.

Delegation to a management team enables swift and agile action. It increases our profits indirectly (because it releases our barristers to concentrate on their cases and clients)

and directly (through the strategic and commercial skills gained as a result of the appointment of the team).

We aim to create the “*openness to change and continuous improvement*” identified in a recent *Financial Times* Innovative Lawyers Report as being crucial to “*real industry transformation*”. To this end we have undertaken three major consultations in three years and reviewed the findings in a series of workshops, bringing in a range of structural, cultural and technological measures in response. We have also introduced smaller but significant initiatives, such as the facility to leave feedback on each individual barrister and staff web profile. This is in addition to a programme of one-to-one meetings at such intervals as clients prefer – last month the Director of Client Care’s schedule featured 14 visits around the country, including to clients in Belfast, Birmingham, Bristol, Manchester, Oxford and Worcester.

The feedback generated by these different means is invaluable in informing our approach. Our investment in a client care team – unique at the Bar – and a strong staff team overall means that we have the insight and resource to work in partnership with solicitors to support lay clients and build business together. Chambers and clients also benefit from ideas generated by members of staff who serve on the committees of excellent professional associations such as the Institute of Barristers’ Clerks and the Legal Practice Management Association.

A key indicator of success in any organisation is the wellbeing of its team. As one of 21 chambers awarded the new Bar Council Certificate of Recognition for Wellbeing we have adopted the BUPA philosophy: “*wellbeing is not an initiative, it’s about creating a culture and environment where people thrive.*” We have set out to establish an open, supportive culture in Chambers and have introduced measures that include enhanced mentoring arrangements, better communication channels, a wellbeing resource and confidential discussion board on our intranet and

the promotion of numerous schemes, such as free gym membership for staff and an annual ski trip for women who work at the set. In recognition that an individual’s definition of “thriving” will often encompass career success, we have also taken specific steps to improve practice development. In the last two QC competitions, six Serjeants’ Inn silks have been appointed.

We are proud to have attracted a balanced team, at least in regard to gender. Four of the silks appointed in the last two years are women and our three current pupils are female. Our staff team is now split 50/50 between men and women, with females in a number of key roles. We are acutely conscious, however, that BAME tenants and staff are under-represented in Chambers. Although two of our last three staff recruits are from BAME backgrounds, we recognise we have more work to do and are actively seeking to redress the imbalance.

Our premises are important. Having moved in 2013 to modern, purpose-designed accommodation in the iconic Lutyens Building on Fleet Street, reducing our footprint by nearly 20 percent, we introduced hot-desking and desk-sharing to facilitate communication and flexible working. We restructured our office last year to give a more economic use of floor space, further reducing costs to Chambers, members and in turn to clients. We also created a single bespoke area to bring all 20 staff together. A flexible office space is vital given our drive to retain and recruit first rate barristers and staff.

Lastly, we have a clear commitment to social responsibility, recognising its significance for both ethical and commercial reasons. Like many other chambers we support Freebar, together with the Free Representation Unit and the Bar Pro Bono Unit as a Friend in Law, as well as a number of other charities and campaigns. We work particularly closely with Spark 21 and First 100 Years, the inclusive and high-profile project celebrating the contribution of women to the legal profession to highlight female role-models for young lawyers. We have supported the initiative not just

financially but also in a practical way, playing an active role in the organisation of many of their events and providing consultancy and advice as well as the use of premises and facilities. In November 2017 we helped to organise and run the Spark 21 Women Leaders in Law conference, which brought our clients, contacts, barristers and staff together for a day of debate featuring The Right Honourable Lord Neuberger of Abbotsbury, The Right Honourable Lady Justice Thirlwall, the Right Honourable Lord Hodge, the CEO of the Fawcett Society, the General Counsels for ASOS and IKEA, the founder of Planet Organic, the lead prosecutor of the Yugoslavian war crimes and the MP for Bristol West, plus Nemone Lethbridge who was called to the Bar in 1956 and now runs a law centre in Stoke Newington in her 80s.

We offer these examples simply as a snapshot of part of the approach which, at present, works for Serjeants’ Inn. Other sets will have alternative, equally effective, methods for managing the unique business model that is a barristers’ chambers. Of course what we all have in common, to quote Andrew Langdon QC once again, is the “*perpetual striving for excellence*” that characterises the Bar.



Catherine Calder, Director of Client Care at Serjeants’ inn Chambers



Martin Dyke, Business Director at Serjeants’ inn Chambers



Improving Access to Justice? What the Changes to Cost Capping in Planning and Environmental Claims Really Mean?

Killian Garvey, planning & environmental law barrister at Kings Chambers, discusses the recent High Court ruling to re-impose fixed costs for disputes in planning and environmental cases.

You will likely have seen the headlines which accompanied the decision taken by the High Court last September to re-instate fixed costs for disputes in planning and environmental cases – overturning rules introduced by the Ministry of Justice last February.

To understand the full implications of the ruling, it is important to first understand the background against which the decision is set. From there, we can understand the likely impact of the ruling, and what it will mean for disputes in planning and environmental cases going forward.

The background

Going back to 1 April 2013, we can see that the Civil Procedure Rules were amended to include new rules for claims that fell within the Aarhus Convention.

This applied to any claim for judicial review that, in simple terms, engaged environmental matters. The definition of environmental matters within this context was intended to be broad and comprehensive.

Moreover, it provided a strong incentive against challenging whether the matter is environmental. If such a challenge was unsuccessful, the defendant would be ordered to pay indemnity costs for having raised the matter (per CPR 45.44).

Where the matter was a judicial review that engaged environmental issues, CPR 45.41 provided the claimant with the mechanism to secure a protective costs order. This meant that, even if the claimant lost their claim, they only need to pay £5,000 in costs to the other side, or £10,000 where the claimant was an organisation.

In *Venn*,^[1] it was held that these provisions could be read across to statutory challenges to an Inspector's decision. ^[2] However, they did not apply as a matter of course. The Claimant would need to demonstrate that they required the protective costs order in light of their financial resources.

These provisions in the CPR had, therefore, acted as a mechanism whereby claimants can pursue judicial reviews, whilst significantly limiting their costs exposure.

However, on 28 February 2017, at the behest of the Ministry of Justice, the CPR was amended to soften these provisions through CPR 52.19A.

The changes meant that the Court had the power to vary the costs cap of £5k or £10k, to a much higher figure depending on the claimant's personal resources and/or access to funds (including from supporters).

Accordingly, the previously fixed costs cap became a flexible figure, which could be varied on each occasion.

The challenge

A number of charitable groups invested in environmental decisions (eg. the Royal Society for the Protection of Birds) pursued a judicial challenge of these provisions in *R. (RSPB and others) v Secretary of State for Justice* [2017] EWHC 2309 (Admin). They contended that the rules were in breach of the Aarhus Convention.

The challenge was pursued on three grounds, namely:

- That the provisions meant the costs of litigation were no longer 'reasonably predictable', which would dissuade parties from pursuing challenges and compromise access to justice
- That it was improper that parties had to disclose their financial resources in a public forum
- That the costs involved in bringing the claim had to be relevant to the assessment of whether the costs would be prohibitively expensive.



Dove J found that the amendments to the CPR were not unlawful, however, he provided clarity on their application.

As regards ground 1, Dove J held that where a protective costs order is to be challenged, it should be done in the acknowledgment of service. The level of costs should be determined at the outset of the claim, so that the claimant can know early in the process their potential costs exposure.

As regards ground 2, the Court found that where the claimant's financial resources were to be considered, the hearings should be in private with such information being kept confidential.

This was to avoid 'the chilling effect, which the prospect of the public disclosure of the financial information of the claimant and/or his or her financial supporters' could have.

As regards ground 3, the Court found that the Claimant's own costs were relevant to assessing whether the costs were prohibitively expensive.

Following the ruling the law firm acting on behalf of the charitable groups claimed they had won 'major concessions' from the Government which 'make it radically better for access to environmental justice and go a considerable way to allay legitimate concerns of a chilling effect on otherwise meritorious legal claims.'

In particular, as result of Dove J's judgment, the costs cap must be set at the permission stage of the proceedings; whereas previously it was understood that at any stage of the proceedings the Court could vary the costs cap. Similarly, the Secretary of State for Justice has equally claimed success, on the basis that the amendments to the CPR have been upheld in substance, albeit their application might have changed.

For practical purposes, the judgment confirms that the previously fixed costs cap can now be varied in judicial review claims. However, only time will tell as to whether the Courts will typically be open to varying the costs cap in any appreciable manner.

Moreover, in light of the need for hearings in private, it might be the case that the costs associated with arguing this point outweigh the savings made in varying the costs cap in any event

At this stage there is potential for the High Court ruling to play out in a number of ways. Planning and environmental lawyers will watch with interest to see whether the amendments to the CPR have much difference in practice.

References

[1] *Venn v SSCLG* [2013] EWHC 3546 (Admin)

[1] Pursuant to s.288 of the Town and Country Planning Act 1990



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Could digital technology transform your chambers?

By **Doug Hargrove**, Managing Director - Legal Sector - at Advanced Legal

Digital disruption is here and it's happening – even within the seemingly conservative and traditional judicial element of the legal profession. As with any change, it has caused some consternation but, with the right tools and forward-thinking leaders, digital transformation can be a powerful business enabler. It allows a firm to identify the changes required, and provides the solutions that enable it to evolve into a more efficient, agile and prosperous organisation. However, in order to maximise the benefits of a digital transformation, chambers need to go beyond simply incorporating the latest technologies. They also have to reimagine their business, and the culture within it, to drive positive change. This digital disruption could not have come at a better time for the legal profession, with workload pressures and competition at an all-time high.

One example of these current pressures is the growing problem at the Court of Appeal, where a time/cost analysis in 2015 found their workload had increased by 59% in the previous five years. With no accompanying increase in resources, there is a growing backlog of cases waiting to be heard. Employing extra staff is part of the answer – and The Warwick Institute for Employment and Research estimates that 25,000 new workers will be needed in the legal activities sector between 2015 and 2020. But it is not the whole solution. In England and Wales, hundreds of millions of pounds are also being allocated for the modernisation of IT in courts and tribunals to enable digitisation and improve procedures.

Artificial Intelligence (AI) is starting to play a key role in this digital transformation. AI applications can sift through vast amounts of information,

automatically crunch the data and identify patterns significantly faster and more accurately than humans. With 1.4 million civil claims and petitions brought to the county courts each year, and each new case increasing the body of knowledge that a lawyer must get to grips with, firms hold increasingly vast amounts of information. Amongst all this data – including witness statements, court logs and judge summaries – will be the hidden facts, nuggets and insights that could help a lawyer win a case. Traditionally the task of manually extracting this vital information from mountains of unstructured data has fallen to junior associates, but this process is prone to inconsistency, inefficiency and human error. Universities such as Liverpool are already looking at how automated solutions can assist, using AI to explore a very straightforward premise – is there a predictable outcome to many cases based on historical legal data? In simple cases, where the facts are undisputed and well-established precedents exist, AI software can diagnose the situation and produce a draft judgement for the judge to review, freeing up time for more complex and contentious cases.

In line with this, chambers are looking to invest in digital technology such as AI that can offer leading-edge efficiency and outstanding client service. Billy Bot, which is the brainchild of Stephen Ward, MD of national chambers Clerksroom, is one example. In tests, Billy has been getting incredible results. Traditional chamber management tasks and processes, from a clerk first taking the enquiry through to allocating the case to the most appropriate barrister, are time-consuming, monotonous and laborious. Over 50% of the processes can be automated using AI. With total access to diary data, Billy Bot can query case management software for

barrister availability, conflict check, create the case in the system and acknowledge the booking to the client by email. The technology integration into the case management solution means Billy holds over 15 years' worth of accurate data. There is a barrister preference engine, which learns the preferences of Clerksroom's 77 barristers, so Billy knows the variables including likely fees for specific areas of law, all courts in England and Wales, legal expertise and distance to travel from home or chambers to the court centre. Clerksroom typically spends eight minutes and takes 167 actions to arrange a case – now, with Billy, its clerks are saving on average 250,000 clicks and keystrokes, equivalent to 200 hours per month. In addition, letting the client input the details via Billy Bot



means they are also seeing greater accuracy of data. Of course, the AI robot will never be able to replace the relationship of expertise and trust that develops between a law firm and its client. There will always be a need for lawyers who understand the nuances of situations, and provide the insight and empathy required. However, AI can free up firms to do more high value and highly paid work. This means time spent interpreting and advising

on their clients' issues, rather than the more tedious aspects of due diligence and routine work.

AI and indeed other digital innovations also provide an opportunity to bring greater transparency into the profession, with the introduction of self-service processes that can help to de-mystify the various stages of legal activities. Many legal problems go 'un-lawyered' today, and research shows there is a substantial legal need that is not currently being met by providers. This offers enormous scope to better align legal resources through technology. According to the Ipsos Mori Social Research Institute for The Legal Services Board and the Law Society (2016), only a third of people with a legal need seek any kind of third party advice, and just one in ten with legal problems actually instruct a solicitor or barrister. It is a similar story with small businesses. Research by Kingston University revealed that over half of organisations experiencing legal problems tried to resolve them on their own – or when advice was sought, accountants were consulted more often than lawyers.

With the support of digital innovations, clients can track their own cases, and instantly review what is happening

by accessing their information online. This will greatly reduce the amount of time legal professionals spend on the phone providing updates or allaying concerns about progress. By using technology, specifically around AI-driven automated processes, to reduce the time it takes lawyers to complete research and casework, it should also lead to reduced bills and simplified pricing structures – further encouraging people to instruct law firms.

With the rise of advanced technology, other smarter ways of working are also becoming available to chambers who want to move away from the traditional model in order to meet the need for improved efficiencies. Firms are facing challenges in adapting to a world where mobile working is seen as the norm. Staff expect increasingly flexible working arrangements, and clients demand more frequent and immediate communication. By adopting digital technologies such as the Cloud, barristers and their staff can work on the move, and still have all the real-time information they need at their fingertips. Case documents can be securely stored in the Cloud, meaning barristers and clerks can action tasks on the go, and the burden of document storage is lifted from clerks so they are freed up to focus on the clients who effect revenue and

business growth. Being able to store, share and edit documents quickly and easily from anywhere and any device makes collaborating with multiple parties quick and simple. It results in increased revenue, reduced printing and courier costs and better client satisfaction. All of this will make a firm an attractive proposition for those seeking legal services, providing an important edge over the competition. It also makes it easier to comply with incoming government regulations such as the Digital by Default strategy.

By offering mobility, agility, security and efficiency, technology can deliver an untapped opportunity for barristers. It can also help chambers attract and retain dynamic young talent from the born-digital generation who expect a level of investment in technology that supports and embraces the way they like to work. The increasing understanding, acceptance and adoption of AI integration will only accelerate the digitisation already underway within the legal industry. Digital disruption will transform the way the profession operates and communicates and for those chambers understanding the benefits of creating innovative and streamlined operating models, it offers unlimited possibilities.



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Lasting power of attorney risks – is there a resolution?

By **Matthew Yates**, Partner, Hunters Solicitors

Attorneys vs. deputies

We have all seen it happen. A slow decline in an elderly person's ability to manage finances or look after their personal care. They start to need a bit more help around the house, and decisions become more overwhelming. Family, friends and professionals become more involved in their personal lives, helping to share the responsibilities of looking after finances and dealing with health complications. Often unpaid, they carry on regardless of whether they are thanked or appreciated for the time they put in. In many cases they are acting as attorneys for the individual, chosen for their family relationship, financial acumen or general trustworthiness. And they carry on until the inevitable end, providing reassurance to the vulnerable that they are being looked after. It's a job they've taken on out of love, compassion or duty, or a combination of all three.

But, in fact what the attorneys are really doing is looking for a chance to embezzle the vulnerable and line their own pockets.

Harsh? Yes. Fair? Hardly. But that might well be the conclusion reached following comments made by recently retired Senior Judge Denzil Lush when talking to the BBC earlier in the year about the role of attorneys under Lasting Powers of Attorney ('LPAs'). His comments coincided with reports of the tragic case of the Dunkirk veteran, Frank Willett, whose unscrupulous attorney stole thousands of pounds from him.

Asked whether he would personally grant an LPA, Lush said he would not, and would prefer

his affairs to be managed by a 'deputy' appointed by the Court. His views were amplified in the Foreword to the latest edition of his authoritative work on this area *Cretney and Lush on Powers of Attorney* (8th edn, 2017). They are a damning indictment of the LPA system from a judge who spent 20 years adjudicating at the Court of Protection. His long and distinguished career at the Court has given him a greater insight into the problems of LPAs than many others. And so, coupled with heart-rending stories of abuse and theft from elderly and vulnerable people such as Frank Willett, why should anyone grant an LPA?

LPAs were introduced a decade ago to replace Enduring Powers of Attorney ('EPAs'). Although no new EPAs could be granted after 30th September 2007, there are still many thousands which are being operated or which will be invoked at some point in the future. However, EPAs provided little opportunity for flexibility for donors, were perceived to be open to abuse and could only be used in relation to property and financial affairs.

These issues were addressed under the Mental Capacity Act 2005 under which LPAs were introduced. LPAs can be granted in respect of both Property and Financial Affairs, and Health and Welfare, and separate forms must be completed for each. LPAs allow donors to appoint attorneys, and replacements if the attorneys themselves die or cannot act. The forms provide space for donors to express non-binding 'Preferences' and specify binding 'Instructions', which can be vital to help the Attorneys

perform their role. Safeguards were initially introduced to combat fraud. Donors had to specify people to be notified when the LPA was going to be registered, and a 'certificate provider' had to provide independent verification (specifying his or her own ability to assess the situation) of the donor's capacity to grant an LPA and that the donor was not being coerced into doing so.

The LPA system was intended to allow individuals to retain control longer, and to be involved in decisions wherever possible relating to health or finances. The overriding duty of an attorney is to act in the 'best interests' of the donor, but there is very little external regulation placed on the attorney, unless expressly stipulated in the LPA by the donor at the outset. The risks of an attorney stealing from the donor or exercising undue control could therefore be reasonably high if there are no other close family, friends or other concerned individuals interested in monitoring the situation.

Senior Judge Lush estimated that one in eight of all powers of attorney which have been created involve a degree of financial abuse, although he readily conceded that this estimate was not based on any formal research. No doubt he has seen the very worst in human nature, but what's the alternative?

The option personally favoured by Senior Judge Lush is for the Court of Protection to appoint a deputy. Once mental capacity has been lost, the deputy will act on the individual's behalf, but remain restricted to certain functions stipulated within the deputyship

order. The deputy could act continuously in relation to property and financial affairs or personal welfare, or in respect of a specific one-off issue. There is an initial application fee payable to the Court of £400, plus an extra £500 if a hearing is required, in addition to professional fees which may be required if a deputy needs legal advice in commencing the process. The process of becoming a deputy can take several months at a time when the patient's finances are likely to need attention. Expediting the process will, however, only occur in very urgent circumstances.

A deputy is not necessarily the person whom the patient would choose, but his or her presumed wishes should be taken into account. The Court can insist on a security bond being provided and its administrative arm, the Office of the Public Guardian ('OPG'), provides regular monitoring of deputies for an annual supervision fee (presently £320 for estates worth £21,000 or more). In addition, there is a requirement for the deputy to file an annual report setting out details of expenditure, major transactions and assets.

Given the responsibilities placed on deputies and indeed attorneys, they should be subject to scrutiny, and the opportunities for fraud minimised. But if everyone went down the route of involving supervision from the OPG via the deputy route, it would be an optimist who could foresee the Court of Protection not being drowned in the flood of extra work that would result, thereby reducing the overall standard of oversight and potentially leading to cases falling through the net. Even now, this added scrutiny from the OPG doesn't necessarily prevent fraud taking place, and often the first time a deputy's malfeasance comes to light is when care home fees go unpaid.

It is often the case that we, as solicitors, advise clients to grant an LPA because it allows the client to decide whom to appoint as attorneys and when the appointment is going to take effect, as well as to stipulate workable

restrictions and sensible guidance. We also generally advise immediate registration at the OPG which requires payment of an application fee of £82 per LPA (without which the attorney cannot act) to avoid delays at the OPG when the attorneys need to take over. All that then needs to be done is for the attorney to provide their ID to the asset holder and any confirmation of the donor's lack of capacity (if required).

These are practical steps in resolving the thorny problem of giving someone else authority to act on another's behalf. But there is always going to be a risk of someone exceeding their authority, whether as agent or attorney. So how to minimize the risks?

Regrettably, the stricter requirements to prevent fraud which were initially imposed on LPAs in 2007 have been watered down since 2015. Certificate providers don't now have to indicate their professional expertise or knowledge of the donor, and there is no requirement to notify a third person of impending registration. Without checks being made on the certificate provider by the OPG at registration, the role of the certificate provider could easily be assumed by somebody in cahoots with the attorney, increasing the possibility of fraud.

Despite the extra hassle these initial requirements caused and the often heavy-handed approach taken by the OPG in enforcing them, they did offer some barriers to fraud and abuse.

In the absence of those safeguards, a donor must choose practical and honest attorneys they trust from their family or friends. If there are particular concerns as to their trustworthiness, either they shouldn't appoint them or they should put restrictions in place such as requiring joint decisions to be made in certain circumstances. If there are no friends or family who fit the bill, then a trusted professional could be appointed to act as an attorney, but their fees in doing so must be factored in.

There is a fine line to be trod between a donor's freedom to choose how his affairs are to be managed when capacity is lost and the prevention of abuse of vulnerable people. It doesn't quite feel as though we have achieved the right balance yet, but the instinctive reluctance by many to involve the state and its organs in their private lives will be a difficult hurdle to cross. The trouble really is that human nature is such that, whatever systems and checks are put in place, those who want to steal and abuse the vulnerable will find a way to do so.





Defending private prosecutions

By **Nicola O'Connor**, Partner at Russell-Cooke



A defendant facing a private prosecution is a somewhat different experience to being prosecuted by the Crown Prosecution Service. There are a number of reasons for this. First and foremost there is an issue of resources. Public bodies during these times of austerity are often in difficulty in finding sufficient resources to investigate some matters, in particular complex fraud matters that perhaps have cross border elements. There are many occasions when the Crown Prosecution Service/police or serious fraud office decides not to pursue matters for various reasons. The complainants however, feel strongly enough to pursue a prosecution of their own.

Private Prosecutions in general

Private prosecutions have long been a part of the criminal justice system. Private prosecutions brought by

organisations such as the RSPCA have been common place in Magistrate's Courts throughout the country for many years.

However, more recently the legal landscape has seen law firms and large departments in existing firms set up focusing solely on private prosecutions. The numbers of larger scale prosecutions particularly in respect of fraud have increased in the Crown Courts. Our experience of defending these prosecutions is that they require a very different approach to those prosecutions brought by the Crown Prosecution Service.

The Prosecution brought by the Crown Prosecution Service

Prosecutors working on behalf of the Crown Prosecution Service follow a code for Crown Prosecutors. The Code

is a public document, issued by the Director of Public Prosecutions. It sets out the general principles Crown Prosecutors should follow when they make decisions on cases. Importantly those decisions include whether it is in the public interest to bring a case at all, whether there is sufficient evidence to bring a case and whether there is a realistic prospect of conviction.

It is somewhat surprising that private prosecutors are not required to meet that same standard. Many private prosecutors do follow the CPS code of practice and believe that it is good practice to do so. However there are others that do not. Indeed, we have heard private prosecutors argue in court quite proudly that they are not subject to such provisions and need not follow that code at all. We have seen evidence from private prosecutors who chose not to follow those codes of very different behaviour to what one would expect from a Crown Prosecution Service prosecutor in their approach to witnesses for example. This is a great cause for concern for those of us defending private prosecutions.

Possible motivations for bringing a private prosecution and the effect that may have on defendants

As I have referred to briefly above there may be a number of reasons why an organisation or individual decides to bring a private prosecution. It may be that a complainant is dissatisfied by police investigation or a decision by the Crown Prosecution Service not to pursue a prosecution for some reason. However, there may also be other reasons why private prosecutions may be considered a preferred option for some. There may be commercial considerations. Some private prosecutors advise clients that they can hope to recover more of their fees and lost funds if they pursue a private prosecution. It is also often the case that private prosecutions are brought in tandem with civil proceedings and one is used in leverage over the other in order to obtain the best possible settlement. Defendants quite routinely find themselves facing a case before the Civil Courts and the Criminal Courts in respect of the same issues.

Serious difficulties that can arise with private prosecutions

One of the most serious issues that we see in private prosecutions result from the solicitor client relationship. The dynamic between a solicitor / barrister being instructed directly by the client can generate some difficulties. There is usually a healthy distance between those prosecuting and any complainant in a case brought by the CPS. A lawyer instructed to prepare a private prosecution has a much closer relationship with the complainant than a Crown Prosecution Service Lawyer would do in any case and this can create an unhelpful dynamic within a case. The Crown Prosecution Lawyer is able to act independently of the complainant and bring a case which they believe is in the interest of justice. However, a lawyer acting for a complainant in a private prosecution has a very different

relationship with that complainant and may have different considerations when deciding to mount a prosecution. We have seen difficulties arise at trial when that close relationship can sometimes lead to conflicts of interest. For example when a prosecution is brought by the Crown Prosecution Service if their conduct should fall short the court may well make comments criticising those elements of the prosecution. However in our experience when that happens in a private prosecution it can sometimes lead to conflict between the private prosecutor and their clients. Defendants are often left wondering, rightly or wrongly whether the approach taken in the prosecution thereafter reflects what is in the interests of justice, the complainant or indeed the law firm prosecuting acting in its own interests.

Privilege

Another difficulty in defending private prosecutions are issues relating to legal privilege. Rightly or wrongly defendants often feel very suspicious about those documents that attract legal privilege. As there is no one that they see as being truly independent in the case to make decisions in relation to documents that should attract legal privilege there is often a sense of inherent unfairness amongst defendants facing private prosecutions.

There are always going to be disputes in the Crown Court about those documents that attract legal professional privilege. However, the advantage that Crown Prosecutors have is that there is some distance between them and the complainant. In a private prosecution defendants often see a much closer lawyer client relationship.

Finally another issue which often arises in private prosecutions particularly in fraud cases is in relation to the disclosure process itself. In cases investigated by the police and brought by the Crown Prosecution Service often a Police Officer or Lawyer is in charge of deciding what evidence should be disclosed to the defence. In a private prosecution however those decisions are often made in conjunction between the lawyers and the complainant themselves.

Whilst the rules of evidence do not change as a result of a prosecution being private or otherwise, it is easy to see that the perception can often be that this process is perhaps open to abuse. Rightly or wrongly the perception of the situation can be one of inherent unfairness when compared with public prosecutions.

Whatever your view about the rights and wrongs of private prosecutions it is important that public perception as to the fairness of these prosecutions is carefully considered. In the case of defendants who find themselves facing both civil and criminal investigations the financial cost let alone the personal cost of such enquiries are often crippling quite aside from any penalties the court may impose if convicted.





EWI conference 2017: Expert Witnesses confer and convene with legal high fliers on costs and other awkward questions

Elizabeth Robson Taylor and Phillip Taylor MBE of Richmond Green Chambers review the highlights of the 2017 EWI conference.

You always know it's autumn when the conference season kicks off. And it is usually the Conference of the Expert Witness Institute (EWI) that starts it in considerable style.

On the 21st September 2017, over 100 EWI members made their annual pilgrimage, as it were, to their usual conference venue of Church House, looking customarily impressive in its leafy, campus-like location in Westminster, not far from Westminster Abbey and Parliament.

As in previous years, the Conference was notable for its roster of distinguished speakers, from Lord Justice Rupert Jackson, who gave the keynote speech -- to the inaugural

address delivered by Martin Spencer QC (now Mr Justice Spencer) who, in addition to his role as a High Court judge, has assumed the chairmanship of the EWI.

Presided over by EWI Governor and Conference Chair, Amanda Stevens, this is a gathering where lawyers are well placed to garner important insights into the role of the expert witness in court -- and where expert witnesses can meet, greet and compare notes with each other, as well as with the lawyers whom they might possibly advise, or for whom they might well receive instructions.

Expecting an especially memorable conference this last year, the delegates

were not disappointed.

The Keynote

Lawyers of course will need no reminder that it was Jackson who, in 2009, accepted the monumental task of constructing the famed and often controversial 'Jackson Reforms' on the vexed question of costs, implemented finally in 2013. His keynote speech referred throughout to his latest supplemental report published on 31st July 2017. The title -- '*Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs*' -- is self-explanatory.

Interviewed just prior to his keynote

address, Jackson mentioned that his reforms have been the subject of some negative comment. The criticisms in his original report were aimed primarily at legal fees of the exorbitant, outrageous and disproportionate variety. Many have argued of course that what is termed disproportionate by the consumer of legal services is not necessarily considered so by the legal team which provides them.

Controversies on Costs

Herein lie the seeds of controversy, not surprisingly, which have been germinating for some time. Meanwhile -- especially transatlantically --- the matter of 'pricing' legal services has become almost a separate discipline, presided over by consultants -- not necessarily lawyers -- who claim special expertise in this area. It's equally unsurprising that these and related developments have pointed up the need once again, for Jackson's latest Report.

Affable and erudite -- note that he has been editor-in-chief of The White Book since 2010 -- Jackson explored more than a few key areas of scrutiny on fixed recoverable costs. As expert witnesses can and do provide testimony in court which can turn the course of a case one way or another, they do expect to get paid -- proportionately and preferably on time. Judging by certain searching questions from members of the audience, issues of costs at this conference began to emerge as a major concern.

Jackson therefore referred to the causes of excessive costs identified in his initial costs review. While most of his recommendations have been, in his words, 'bedded in' following their implementation in 2013, there are six remaining that haven't -- and in which apparently little or no progress has been made.

In response to the obvious need for a further review, the Lord Chief Justice and the Master of the Rolls commissioned Jackson in November 2016 to develop proposals for extending the principle of FRC -- Fixed Recoverable Costs.

An EWI First

Judging from Jackson's additional remarks just prior to the speech, the EWI members attending this conference were among the first to have sight of -- or at least detailed

information about -- the latest recommendations in his supplemental report.

As the Report was first published in July of 2017, government ministers who were to be its first recipients, were all away on their hols and therefore not available for comment. However, by the time this article sees the light of day, they will indeed have seen the Report, one hopes, and noted its contents. But considered in the light of experience, it is not even remotely possible that the newly published recommendations will be implemented before Jackson's retirement in March 2018.

His wide-ranging speech to Conference, however, covered many more issues, including matters such as guideline hourly rates... 'not satisfactorily controlled', and inadequate numbers of staff and IT facilities in the civil courts.

He pointed a critical finger at other factors that bump up costs: 'time consuming court procedures' are one example -- and 'the complexity of the law' another, in certain areas of litigation. The obvious remedy, which again is hardly likely to come to pass all that soon, is simplification, which would certainly benefit bemused members of the public and the growing numbers of litigants in person.

It would seem, however, that his criticisms of 'too high' court fees, have been met with indifference. 'I might as well bleat at the sea like King Canute,' he said. 'Instead of being reduced, they've gone up. I've made harsh comments about that, but no one has taken any notice!'

[Sorry, we can't help mentioning here that King Canute gets a bad press on this one. What he was really trying to do was convince his sycophantic courtiers that even he, with all his earthly power, couldn't control the sea -- any more than anyone can turn back the rising tide of new and ever-evolving legislation, as well as burgeoning costs.]

Turning his attention to matters of medical negligence -- 'a very difficult subject' -- Jackson expressed the view that most such cases worth up to £100,000 were not suitable either for the fast track, or even the new 'intermediate' track which he has recently proposed for other matters. However, other medical negligence claims of under £25,000 could -- or might -- be dealt with by a 'bespoke process' and a grid of fixed costs.





The Executive Summary
As for the Supplemental Report itself, 'read my Executive Summary,' is Jackson's best advice – and a good suggestion too, as it functions as a precis and guide to the main document, while reiterating crucial points.

The first of these is a reminder that 'In England and Wales, the winning party is entitled to receive costs from the losing party.' Now there's a grim reality that many overseas/transatlantic clients (you've probably got at least some of those) just simply don't get. In their view it is: (a) incomprehensible; (b) unbelievable and (c) grossly and manifestly unfair.

A Flawed Recipe

The consensus here is that each side should jolly well pay its own costs, thank you very much – which is not out of line with Jackson's considered opinion that this winner-takes-all policy is quite simply 'a recipe for runaway costs.' Now though, it appears that the 'recipe' isn't going to be changed in a large hurry.

Jackson nonetheless retains his staunch belief in fixed recoverable costs, stating unequivocally that 'the only way to control costs effectively is to do so in advance.' Agreed fees up-

front...or in advance -- or whichever way you want to put it -- should in most circumstances, be the order of the day.

Martin Spencer QC

As the new EWI Chair, Martin Spencer QC, in his inaugural address, discussed the challenges as well as the opportunities which face the expert witness as an individual and the EWI as an organisation.

As a leading clinical negligence practitioner, it was throughout his practice as a barrister, he said, that he had experienced at first hand the crucial role that expert witnesses play, particularly in cases in which judges are not experts, either in clinical matters, or in other specialist fields, (from accountancy to zoology, for example) -- nor can they be expected to be.

He mentioned the 'age-old problem of getting paid', (speaking of costs) with which he was very familiar in his thirty-six year career as a barrister. Referring to his recent appointment as a High Court judge, he looks forward, he said in somewhat jocular fashion, to at least getting paid regularly! So it was appropriate that the conference later included a panel

discussion on 'Experts Getting Paid' which followed a Fixed Costs Session featuring, among other things, government plans to introduce fixed recoverable costs for clinical negligence.

Advocating an active approach to media, marketing and communications in a digital age, Spencer revealed an expansive and optimistic vision of the future for the EWI. 'I believe we can be the definitive body of experts in only a few years,' he said, recommending the development and implementation of a quality mark that lawyers could depend upon as an assurance of expertise.

Experts and Expertise Galore

Certainly, there was a wealth of expertise and experts all in one place at this remarkable conference. Sadly, space doesn't allow detailed description of many of the other conference speeches and debates, most of which dealt with highly specialised topics, from forensic science to soft tissue injury, with more than a few led largely by lawyers. The food wasn't bad either and the networking opportunities were top drawer.

The date of the next EWI Conference, scheduled for September 2018, is one you should definitely include in your Chambers diary.



Fraud in Science: the Bigger Picture

By **Martino Jerian**, CEO and Founder, Amped Software

Cases of fraud within published scientific research are on the rise, with several recent cases involving the falsification of images. The legal system must ensure it has the knowledge and processes in place to handle such cases

The romantic view of science depicts it as an objective fact-based discipline in which hypotheses are put forward and either proven or rejected. Such a view does not allow for any “shades of grey”, or acts of duplicity amongst its practitioners.

Yet, in reality, we all know science is not divorced from its surroundings. Scientists are subjected to exactly the same pressures and temptations that drive people to commit fraud in all manner of environments and for various reasons. Sometimes the motivation is commercial; perhaps to obtain a research grant or to enhance the profile of the institution and attract more applications. In others it might be professional; to get published in a prestigious Journal or simply to save face after an experiment has failed to deliver the desired results.

Regardless of the justification, when these actions have legal consequences it is important to have the tools to detect when such fraud occurs. And more importantly to have the ability to scientifically prove this in a court of law. After all, while the majority of cases end to begin life as internal disciplinary matters, there are plenty of scenarios in which they can become a legal matter and even a serious criminal offence. For example, when research fraud has been deployed to fraudulently obtain millions in research funding. Or when a researcher needs to protect their own reputation and defend themselves against accusations that could have a long-term impact upon their career.

Upholding Scientific Integrity

A number of methods already exist within the scientific community to maintain standards and ensure accuracy in published research. For example, the process of peer review is well-established as a means of subjecting new research to the scrutiny of other experts in the field. Plagiarism software is also routinely deployed as a means of identifying whether scientific research is original.

However, the images used within published scientific research rarely undergo equivalent checks into their authenticity. This is a real problem as the ability for a human being to detect a falsified image with the naked eye is very low. If we are told a story and then shown an image that backs it up then we are strongly conditioned to believe what our eyes are telling us. This mentality runs so deep that it is even reflected in the language. How many times

have we heard somebody say “seeing is believing” or “the camera never lies” without questioning the validity of such statements? These assumptions are no longer valid in a world where every one of us has the means to falsify an image on our PC or smartphone. Adobe Photoshop was first launched over 25 years ago, so it’s not exactly a new phenomenon that we’re dealing with.

Given the lack of checks and low likelihood of getting caught there is growing evidence that the falsification of images is prevalent within published scientific research. A number of cases that have come to light within the past year stand testament to this. For example, in June the Leibniz Association reprimanded the research group of Karl Lenhard Rudolph after identifying eight high-impact papers that contained manipulated images. His institute is now banned from receiving Leibniz funding for three years. Meanwhile, in Italy, an investigation remains on-going into whether the prominent cancer research scientist Alfredo Fusco hired a photo studio to manipulate images that appeared in dozens of published papers. The public prosecutor has already stated “it is clear that some images have been manipulated” and is currently deciding whether or not to press criminal charges. Finally, in an alarming statistic that demonstrates just how widespread the problem really is, the EMBO Journal – one of the few to routinely submit images to a process of authentication – has told Nature it finds evidence of image manipulation in 20% of papers accepted for publication.

When Cases go to Court

Those of you who have tried a case in court will likely be familiar with the “CSI effect”; the phenomenon whereby individuals have unrealistic expectations of forensic evidence to conclusively prove a person’s innocence or guilt, based on what they have seen in film and television. The speed, ease and certainty with which investigators can conduct a forensic analysis in dramatised shows such as CSI Miami, Dexter or Person of Interest certainly makes good television. However, it does not reflect the real-world reality of the diligent scientific process that goes on behind the scenes to reach such conclusions.

This is particularly true of cases involving image manipulation where we may never have access to the original files and where it may not be possible to show conclusively what changes have been made. It raises a number of important issues for both the defence and the prosecution. In particular, the need for legal professionals to have the tools required not only to prove image manipulation but also to interpret it and present it in the courtroom to non-experts in a format that is verifiable, clear and understandable.

Considerations for the Prosecution

As all good solicitors know it is almost impossible to prove a negative, which in the case of an image manipulation trial means trying to guarantee the authenticity of an image. The onus is therefore on the prosecution to find traces of manipulation and to present compelling evidence of deliberate falsification. Many tools claim to be able to assist with this. For example, by answering questions such as whether the image is 'original', by revealing whether the metadata shows it has been processed with photo editing software, or flagging inconsistencies in the image. However, this is of little value in a court of law if the process lacks transparency and if the expert witness called cannot show their working. The concept of *voir dire* comes into play here as, if you can't independently substantiate the truth or admissibility of your evidence, why should the judge take it seriously? This is why when developing our own software we follow the scientific method, ensuring anybody could carry out the same process and obtain the same results.

Considerations for the Defence

Sadly, most research fraud cases that become a matter for the courts will have already gone through a publicised internal disciplinary process which has damaged – possibly even ruined – the reputation of the researcher or institution involved. However, everybody has the right to a fair trial and many such internal investigations are deeply flawed.

Without access to the appropriate tools it is far safer for institutions and publishers to err on the side of caution and block anything for publication that contains red flags or anomalies. In such cases, multimedia forensic tools offer a means of assessing whether or not the person even has a case to answer and dispute whether or not the images in question should even be admissible as evidence. For example, even the presence of photo editing software within the metadata is far from a "smoking gun". If it can be proven that software of this type was only used to resize the image then it can be proven that the image is still a fair and accurate representation of what it purports to show. Whereas, if a trained expert can identify the manipulation then the firm can quickly take an informed view on whether or not to take the case in the first place.

Summing Up

Multimedia forensics is invaluable within cases of research fraud, both for presenting a case or defending the accused. However, it's not good enough to simply bring in an expert witness and have them confidently present their case. Tools exist to carry out the analysis in line with the scientific methodology, giving the judge and in some cases the jury, a basis upon which to evaluate the full weight of the evidence. Consider it ironic, but if the right software is adopted within the legal system then the scientific method may just prove to be the answer to the current crisis facing scientific integrity. ■

Romanian criminals avoid deportation under UK law

By Ben Keith, barrister at 5 St Andrew's Hill specialising in extradition law

Reports that loopholes in the law allow Romania criminals to avoid extradition due to prison conditions are short of the mark. There are no legal loopholes only a massive and persistent failure of the Romanian Government to comply with human rights minimum standards.

There are serious and persistent problems with Romanian prisons. The problem was originally dealt with by the case of *Florea*. In that case, we argued that Romanian prisons were so overcrowded that there was barely space to move. Each prisoner was locked up for 23 hours a day and had under 3sqm of space to some as little as 2sqm (or the space of one single bed) to move about in. The toilet was in the corner of the room and not always screened so prisoner were kept for over 3 years in such conditions. Unable to move or do much other than

lie on their bed (if they had one) all day every day. The court in *Florea (No. 1) v Judge in Carai Courthouse, Satu Mare County, Romania* [2014] EWHC 2528 (Admin) including Blake J allowed Romania time to sort their prisons out and provide assurances that conditions would be compliant. The Romanian authorities provided those assurances, saying that they would give Mr Florea enough space to meet the minimum of human rights requirements. We argued that they would not be able to comply with them due to the immense overcrowding but we lost in front of Blake J in *Florea (No.2) v Romania* [2014] EWHC 4367 (Admin). However, that was only the start of what has proved to be an ongoing battle between lawyers, Romania and the UK courts.

Mr Justice Blake in a very clever judgment helped Romania out by coming up with a new formulation on

Article 3 of the European Convention on Human Rights. The European Court of Human Rights (ECtHR) had always said that a minimum of 3sqm per person was required this in itself being below the recommended 4sqm per prisoner. Mr Justice Blake said that if the prisoners were detained in semi-open conditions where they were allowed out of their cells for part of the day then they only needed 2sqm per person (one single bed of space). This was helpfully in line with the average space afforded to each prisoner in Romania!

The problem with assurances are that they are fundamentally unable to change their physical situation. The fact that a country promises to be better is not doubted but how can they produce more prison places at the drop of a hat and find more space in already appalling and overcrowded prisons. It is simple untenable for

more than the odd prisoner who might be detained in an individual cell. So the UK began to extradite prisoners and the Romania NGO's including the Helsinki Committee who monitored the Romanians compliance. As night followed day however Romania was unable to comply and cases began to come to the UK courts showing how Romania had failed to live up to their assurances. However the High Court kept rowing the Romanians out of trouble and **Christian Blaj and ors v Romania** [2015] EWHC 1710 (Admin) found that the assurances remained valid in spite of some problems. More breaches followed but the High Court kept dismissing the claims in **Mures and others v Romania** [2016] EWHC 2786 (Admin).

But it isn't just the UK who have concerns, other EU countries began to stop extraditing to Romania. Then calamity hit the Romanian system as the ECtHR issued two powerful judgements. The first was the case of **Mursic v Croatia** (2016) App 7334/13 which reminded Europe what human rights for prisoners meant. It made clear that 3sqm was the very minimum acceptable stating:

"137. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space..."

Gone was Mr Justice Blake's formulation in **Florea** and so Romania had to provide humane conditions. Then the ECtHR hit Romania with a damning pilot judgment **Rezmives and Others v Romania** on 25 April 2017. The pilot judgment procedure is the nuclear weapon of the European Court. All cases of prison conditions in Romania were to be successful until Romania provided and implemented an action plan. They had avoided this measure a few years previously but had not implemented their promised action plan. The argument against Romania recommenced in the UK courts.

More cases came before the UK Courts but this time the ECtHR had given strong guidance and Romania were still working with Mr Justice Blake's formulation and guaranteeing 2sqm. In June 2017 Irwin LJ and Collins J



delivered another judgment, this time against Romania in **Greco v Romania** [2017] EWHC 1427 Irwin LJ said:

It seems clear to me that the ECtHR has stated a deliberately crisp approach in Muršić, in the passage from paragraph 138 quoted above [26]. The Court has been careful to stipulate that the factors must be "cumulatively" met. The first "factor" cannot be met here at all, on the present state of the assurances. The assurance is that 2m² will be guaranteed. That cannot be thought a "minor" reduction from a minimum of 3m². And it is the guaranteed minimum for the overall semi-open regime: that is to say, that is the long-term and normal provision of space. It cannot be characterised as either "short" or "occasional".

He gave Romania one last chance

For myself, I would grant a final opportunity for varied undertakings. There is the greatest incentive to foster the extradition system. It will be very highly undesirable if extradition to Romania stalls, in respect of these requested persons and no doubt others to follow. There are precedents for specific provisions in custody conditions (and indeed trial arrangements) to secure continuing extradition. Any undertaking will have to satisfy the Court that prisoners extradited will, save for short periods, and to a minor extent (meaning a minor reduction below 3m²), be guaranteed at least 3m² of personal space. Moreover the guarantee would need to be

in clear terms, and terms which cover the whole of the anticipated terms of detention. In other words, the assurance would have to be in compliance with the test in Muršić.

That is where the law presently stands. Romania are now issuing assurances but are often unable to meet the basic minimum standards and where they are unable to give requested persons minimum guarantees of 3sqm the cases are being discharged. In theory when or if Romania improve then the UK will extradite there and continues to do so in cases where the bare minimum standard can be guaranteed. But in a system where gross overcrowding and human rights breaches are common place it may be some time until effective extradite resumes to Romania.

This isn't a legal loophole it's a question of the provision of fundamental rights. To deny prisoners human rights is a basic tenant of a civilised society. The prohibition on torture and inhumane and degrading treatment is an absolute right, no matter how heinous the crime is. Treating prisoners as subhuman degrades a society and upholding those basic and fundamental rights is one of the most important things that a state can do. The criticism of regimes by foreign and international courts over the course of time does change things, not instantaneously but incrementally and provided that there are improvements then we and other countries should continue to criticise until human rights meet basic minimum standards. To do anything less is unforgivable.

To boldly go'' – Free speech today in the US supreme court

By **Barbara Hewson**, barrister

The United States Supreme Court (SCOTUS) has been flexing its muscles in relation to various forms of official censorship. In two important rulings handed down on 19 June 2017, the so-called "Slants" case and the case of *Packingham v North Carolina*, the Court has come down uncompromisingly in favour of free speech, albeit in two very different legal contexts.

Slants and Redskins

The "Slants" case, otherwise known as *Matal v Tam*, was a trademark case, brought by a musician named Simon Tam, who in 2006 had set up an Asian-American dance rock band called The Slants. He sought to register the band's name, THE SLANTS, as a trademark with the US Patent and Trademark Office in 2011. But section 2(a) of the Lanham Act prohibits the registration of marks that may "disparage, or bring .into contempt, or dispute" and "persons, living or dead, institutions, beliefs or national symbols". This prohibition has caused some controversy.

In 2014, the Trademark Office invoked section 2(a) to veto the registration of six marks for a Washington football team, popularly known as "The Redskins", holding that this term disparaged Native Americans. Meanwhile, it also vetoed THE SLANTS' application as disparaging a substantial body of persons of Asian descent. Tam's case became the lead appeal.

Tam argued that his band's name was not intended to disparage, but rather to reclaim and take ownership of the impugned phrase. He appealed, at first unsuccessfully.

The American Civil Liberties Union (ACLU) has welcomed Tam's ultimate victory, arguing that government was interfering in the right of minorities to compete in the marketplace of ideas. It has called the prohibition "misguided", and accused government of acting as "speech police."

Tam's luck began to improve on a second appeal to the Federal Court,



which decided by 9:3 that section 2(a) was indeed an unconstitutional fetter on the First Amendment, which guarantees the right to free speech.

The government sought to reply on an exception to the First Amendment principle (which prevents state bodies from abridging the speech rights of individuals), arguing that this does not regulate government speech or require government to take neutral positions. SCOTUS disagreed, finding that trademarks are associated with private enterprises, rather than the articulation of state communications. If trademarks could be categorised as government speech, then this would lead to a situation where government could simply veto viewpoints of which it disapproved. Justice Kennedy concluded that viewpoint discrimination is "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny".

Justice Alito also rejected a subsidiary argument, which sought to classify the proposed trademark registration as "commercial speech": this merits a more relaxed scrutiny standard. He found that section 2(a) was not narrowly drawn so as to eliminate invidious forms of discrimination;

instead, he characterised it as a "happy-talk clause" which was over-broad. Intellectual property lawyers in America consider that this ruling will make it difficult to oppose future applications which contain language or subject matter that could be deemed "offensive" to a particular group.

Sex offenders' Internet access

In *Packingham v North Carolina*, SCOTUS was concerned with the brave new world of social media. Lester Packingham was a registered sex offender, who in 2002 as a 21 year-old college student had pleaded guilty to "taking indecent liberties" with a 13 year-old minor. In 2008, North Carolina enacted a statute which makes it a felony for a registered sex offender to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or to maintain personal Web Pages."

Packingham inadvertently fell foul of this prohibition in 2010, after he celebrated a minor personal victory in his local traffic court on his Facebook page:

"Man God is good! How about I got so

much favour they dismissed the ticket before court even started? No fine, no court cost, no nothing spent....Praise be to GOD, WOW! Thanks JESUS!"

Unfortunately, his effusive thanksgiving landed him in trouble with the secular authorities. A police officer noticed the post, and Packingham was indicted for breach of the new law. He was convicted and given a suspended prison sentence. He appealed successfully. The Court of Appeals in North Carolina held that the statute was over-broad. Instead of being narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse, it "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal."

His victory proved shortlived, as this ruling was overturned by the North Carolina Supreme Court. However two justices dissented, again reiterating that the statute was over broad. Packingham appealed to SCOTUS.

The majority opinion struck down the statute as unconstitutional. Justice Kennedy stated that the First Amendment ensured that "all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Places such as a street or a park are quintessential forums for the exercises of First Amendment rights. As Justice Kennedy put it, they are "essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and to inquire".

Social media sites – "the vast democratic forums of the Internet" – are now the most important places for the exchange of views, according to the Court, citing *Reno v ACLU*, 521 US 844, 868 (1997). There people engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."

Justice Kennedy noted that this case was one of the first in which the Court had been asked to consider

the relationship between the First Amendment and the Internet, and said that it must exercise "extreme caution" before suggesting that the First Amendment provides scant protection for access to that medium.

He held that the North Carolina law could not stand. It was so broad that it might well bar access to websites as innocuous as Amazon and the Washington Post. It was not sufficiently specific or narrowly tailored to be justified as serving a legitimate State interest: contrast a law which, say, prohibits a registered sex offender from contacting a minor. Nowadays, he noted, people use social media sites to find out about current events, checking employments ads, "speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."



He found it "unsettling" that only a limited set of websites could be used by those who had served their prison sentences. Even former convicts could derive legitimate benefits from access to the Internet, in particular if they seek to reform and lead lawful and rewarding lives. He concluded by repeating the conclusion of *Ashcroft v Free Speech Coalition* 535 US at 255: as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech".

The minority opinion, led by Justice Alito, concurred with the result, finding the law's "staggering reach" violated the First Amendment. It covered sites which were most unlikely to aid recidivist sex offenders, such as the health site WebMD. They differed somewhat as to the majority's dicta.

Justice Alito complained of the majority's "undisciplined musings" and "unnecessary rhetoric" about the analogy between the Internet and public squares and parks.

He suggested that "there are important differences between cyberspace and the physical world", and that caution should be used in applying First Amendment guarantees to the Internet. He noted that parents find it easier to monitor their children's physical locations, and the fact that the Internet "offers an unprecedented degree of anonymity". He urged a circumspect approach, "taking one step at a time."

Conclusion

Both these cases are of interest. IP lawyers will find the Tam case instructive. Criminal practitioners and child protection campaigners should take heed of the Packingham decision.

Tam illustrates the difficulty in trying to impose policy objectives on business brands by means of an overly paternalist approach to trade mark registration. Packingham illustrates the problem of legislative overreach, and the tension between seeking to keep tabs on sex offenders who might re-offend, whilst not shutting them out from rehabilitation within wider society. Justice Alito's more diffident approach to Internet regulation may be a portent of forensic struggles to come.

By contrast with the First Amendment to the United States' Constitution, the broad policy exceptions set out in Article 10.2 of the European Convention on Human Rights offer more potential routes to curtailing speech rights on public policy grounds. Even so, the requirements of necessity and proportionality should make it difficult for public authorities to interfere with such a fundamental right as freedom of expression, unless the interference is closely tailored to a legitimate state aim, and is sufficiently narrowly defined. Meanwhile, free speech advocates, policy-makers and courts will continue to wrestle with the question of Internet regulation: to what extent should Cyberspace be made a "safe place"?

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As with most things, the cheapest option is not always the best

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Price is currently the main deciding factor for the instruction of an expert witness instructed in serious criminal cases

It is not often that a purchasing decision is made on price alone. Normally a variety of factors are combined by individuals in making the choice of day-to-day services, including builders, who may be employed on recommendation, specific skills and cost, the garage chosen to service a car or even which lawyer to represent you.

However, price is currently the main deciding factor for the instruction of an expert witness instructed in serious criminal cases, whether that expert has been recommended on the quality of their work or not. When price and therefore, time, is the deciding factor

it can mean that important pieces of evidence go unnoticed.

A forensic copy of a computer or a mobile phone can contain tens of thousands of files, including those automatically generated by the system containing records of user activity (e.g. windows and Internet access history) as well as those created by the user including documents and images. Many thousands of those files may contain information that can prove or disprove an allegation.

Therefore when providing a quote to carry out forensic work an experienced examiner should know

the approximate amount of work involved, based on a review of the requirements of the client, including how long it is likely to take to complete that work and, most importantly, the best line of investigation to suit the instructions and this work may take a little longer than a generic review of the evidence, which however, would be specific to that particular case.

Alternatively, to ensure that the quote is kept as cheap as possible, the lines of investigation specific to the requirements of the case may be, either intentionally or unwittingly, left out of the intended work and a particular point then not explored which is especially likely when the requested work has not been considered by someone with experience in investigating computer evidence.

Though, much lower in cost to achieve, a computer examination should not be reduced to a generic automated process particularly when dealing with specific issues and complications that are normally involved in such evidence. However this line of examination is becoming more prevalent due to the continual drive by the LAA to find the cheapest option of expert.

In order to highlight this, we can consider a computer case involving unlawful images.

The majority of cases involving unlawful images, the majority involve identifying the source of the images, the point of storage of them and, most importantly, whether they had been created knowingly or unwittingly by a user and whether that user was the Defendant.

To determine this, the first aim to attempt to establish is the point of creation of the image. Depending upon the location of the image this process may be obvious, for example if it is a unique file with associated specific time/date stamps. However, if it

cannot be quickly identified then it can involve a significant amount of work to ascertain, for example if the relevant image is contained within a file that contains many other images (a Google Chrome cache file for example).

The next issue is likely to be who was using the computer at the relevant time. It is uncommon to be able to put 'a bum on a seat' and determine exactly who it was that had been sat at a computer at a specific point when an image had been created, however, it is frequently possible to build a picture of the identity of a user at a certain time.

As an example, the log on and use of an email or any social media account, Facebook, Twitter etc, the access of other Internet based accounts on websites, the viewing of certain files on the computer, the connection of USB devices, the use of remote access software may all contain evidence to suggest the use of the computer by a specific individual at a specific time.

Identifying the source of an image can be relatively straight-forward, for example, the location of it alone can answer the question immediately, however, to confirm that source, as well as within less clear cut cases, further investigation and searching of a device may be required.

One source of images frequently encountered are those stored during Internet browsing. However, the presence of an image stored in this way does not necessarily confirm that the user sought or deliberately accessed the page(s) containing it with prior knowledge that it was likely to contain such material.

To establish if the page had been deliberately accessed or whether it had been inadvertently encountered normally involves establishing which web sites/pages were visited prior to the relevant page as well as tracing the route taken by the user in order for the visit to have occurred.

If the website was accessed as a result of a 'click' by the user then it may be important to identify what, if any, clues were present on the preceding page to suggest that the next would contain unlawful material. It may also be that the preceding page contained a script

that automatically sent the user to the next page without their deliberate action.

Whether the page containing the image had been accessed deliberately or not, another point to establish may be the general content of that page, for example, identifying whether it contained several images.

If the page contained multiple images, it is also possible to establish the location of the relevant image on the page, including whether it was at the top or further down than would have been immediately visible to the user, meaning that that they would need to have scrolled down for the image to have been displayed (whether or not the image had been displayed, the image would have been automatically stored to the computer).

The presence of multiple images on a web page that contains a relatively small number of unlawful images often provides a rather different perspective to the assumptions made within any previous report.

Therefore, in the example of an image created during web browsing, that initially may have been identified by the Prosecution through the use of software that simply scans a device for specific images and lists them, more investigation may establish the time/date of storage of the image, the user likely to have been sitting at the computer, the specific source of it, the path taken, the number and nature of other images present on the same page and whether the image would have been displayed on the screen.

Another, quicker and cheaper approach in reviewing that evidence, that is more likely to be granted approval by the LAA, would be simply to identify that the image(s) had been created as a result of Internet activity and not to consider the point further, however, that would have removed the context from which the image had been stored, including any evidence to suggest that it had not been deliberate.

At the end of October 2017, the forensic regulator has introduced attempts to increase the standards of forensic expert witnesses within criminal proceedings by requiring

any provider for the Prosecution is accredited to the ISO 17025 standard. However, whilst a company may be able to achieve an ISO standard, it is ultimately an individual within that organisation that provides the statement and attends court to explain the evidence identified.

It is also the individual, rather than the company, that puts forward their interpretation of the data which is heard by the court. That interpretation is no more reliable than a combination of the experience, ability and accuracy of understanding of the individual who makes it as well as the time allowed in order for that person to consider the evidence involved in the case. Clear and accurate findings are also likely to save further significant cost at the court.

Therefore, perhaps accreditation should be focussed more so towards the individual rather than the company that employs them. This could not only increase the standard of work of expert witnesses in the courts, it could also balance the playing field between those companies employing more experienced staff who adopt a bespoke service to each case and those with less experienced staff who use more automated generic processes at a lower cost.

For the same reason that most would not employ an accountant or any other professional service based on cost alone, the use of the cheapest expert witness in serious cases, where it is often not possible to identify the correct answers in the shortest amount of time possible, is a false economy.

The normal way to improve a service is rarely to continually select the cheapest provider of it, particularly when the service available can differ greatly and the effect to a Defendant can be life-changing.

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FA's inquiry into race allegations: kicking discrimination out of the field

By **Ruth Kennedy**, Barrister, 2 Temple Gardens

The Parliamentary Inquiry into the racism allegations made against Mark Sampson and consequently the Football Association marked the end of a sorry chapter for diversity in football. As allegations of sexual harassment circulate Parliament, there has seldom been a time in the UK where the propriety of how high profile and influential bodies investigate and respond to grievances is more in focus. The form of the grievance procedure and the protections afforded to whistleblowers in place are now likely to be a subject of acute focus. This article seeks to consider some of the things that went wrong with the FA's handling of allegations of racism, and highlights some lessons that should be learned inside and outside of football in the future.

Looking after the players

Every employer should aspire to have an open and transparent grievance system where all individuals in their organisation feel like their experiences are valued and any allegations they make will be listened to, taken seriously and properly investigated. There are various aspects of the process which are particularly off putting for players bringing forward grievances to the FA in the future.

First, the length of the process itself. In this case, Eniola Aluko is said to have first made allegations of bullying and harassment against Sampson and his staff in May 2016. The final report of Katharine Newton, the independent barrister appointed to consider the allegations, is dated 17 October 2017. It was not until this final report that any of Eniola Aluko's accusations were upheld, with earlier reports clearing Sampson and his team of any wrongdoing. In the final report, following the submission of

further evidence, she found that on two separate occasions Mark Sampson had made comments that were discriminatory on the grounds of race within the meaning of the Equality Act 2010.

Second, some highlight that the timing that Eniola Aluko was dropped from the England team is rather telling. The manager is someone who properly has a wide discretion to make difficult and expert decisions. However, the nature of the role makes it difficult to point to where a decision about selection has or has not been taken because of race. There are those that point to the fact that Eniola Aluko was dropped from the England team for the first time in 11 years, following 102 caps, after giving her account of racial discrimination and a pattern of bullying behaviour against her. This looks highly coincidental. There are somewhat eerie echoes of what happened in the run up to Euro 2012, when Rio Ferdinand was snubbed by Roy Hodgson and excluded from the England squad. John Terry was facing allegations that he used racist and derogatory language against Rio Ferdinand's brother Anton. At the time, John Terry was facing prosecution for those comments. This resulted in grave animosity between the players. Some believe that for the Euros it came down to a choice between Rio Ferdinand and John Terry, and that in the end Hodgson chose to prioritise enabling John Terry to play. John Terry was later acquitted of racially abusing Anton Ferdinand at Westminster Magistrates' Court, but found guilty in FA proceedings. He was given a four-match ban and fined £220,000.

Regardless of whether there is any truth that the timing in both of these examples illustrates that something more sinister was at play, the FA should heed that these allegations are much worse from a public relations

perspective when the players do not feel as though they have been supported. This was the case both in respect of Eniola Aluko and Rio Ferdinand.

Third, confidentiality clauses should not be used as a way of short cutting a proper investigation. Non-disclosure agreements can be advantageous to all parties in some cases, giving each party the ability to draw a line under an affair and move forward without the destruction of either party's public image. However, that cannot be fairly said to have happened in the present case. Eniola Aluko felt that Martin Glenn's actions were "bordering on blackmail" in intimating that she would not receive the second part of her settlement agreement if she did not agree to release a comment saying the FA was not institutionally racist. With an institution as powerful as the FA, pushing a victim to participate in the PR machine of the organisation in this way is lamentable. This practice suggests a lack of interest in getting to the bottom of the problem and an overwhelming desire to see the problem dealt with and brushed aside as quickly as possible. This case illustrates that pushing a player firmly towards confidentiality in place of a properly investigated grievance procedure is highly risky and can backfire.

Getting everyone on board

There are other points of view that the FA should consider before moving forward. First, for example, during the Parliamentary Inquiry Martin Glenn stated that Mark Sampson was considering filing a claim for wrongful dismissal. This underscores the need for proper process in investigating grievances, otherwise, those accused (sometimes justifiably) feel as though they are being used as a scapegoat

rather than being held responsible for their actions. This danger is brought more sharply into focus by the fact that the initial inquiry by Katharine Newton found that there was no wrongdoing. It was after the story broke about the allegations that were being made by Eniola Aluko that Sampson was dismissed. On 20 September 2017, the FA fired Sampson with immediate effect, after full details of an investigation into safeguarding allegations made against him during his time at Bristol Academy were brought to their attention. He may feel that the negative publicity that attached to him after the allegations were made public had a decisive impact on the decision.

Katharine Newton's final report in the end found that on two separate occasions Mark Sampson made what she described as "ill-judged attempts at humour, which, as a matter of law, were discriminatory on grounds of race within the meaning of the Equality Act 2010". It does not instil trust if someone feels that their account has been vindicated, only later for it to be reviewed and altered. In the future, the FA should seek to ensure that any grievance, or issue with safeguarding, is properly and fully investigated quickly and effectively to ensure that all individuals (including those who have been accused) feel as though they have

had a fair hearing.

Second, meaningful change has to have the support of the top brass. During the Parliamentary inquiry Greg Clarke described accusations of institutional racism and bullying as "fluff". As Julie Elliott MP observed during the Inquiry, this speaks volumes. As she highlighted "language matters". One is led to infer that this is how those at the top of the FA approached the allegations. In order to win the trust of the players, those in governance must focus on creating an atmosphere where grievances and whistleblowing are valued and taken seriously. In order for the culture of an organisation to be meaningfully changed, it must come from the top down. While some are calling for resignations, it would be disappointing if this resulted in simply replacing the old guard with a new set of individuals who believe that the previous administration was a bunch of bad apples. This will mean that meaningful change will not occur, and ultimately it will be the players who suffer.

Third, the FA has already been given a number of changes that should take place as soon as possible to start rebuilding trust. In her first report, Katharine Newton stated as part of her conclusions that there was no grievance procedure, nor any obvious grievance framework which covered

players in Eniola Aluko's position. She encouraged that some thought should be given to putting appropriate procedures in place to deal with players, given that they are very likely to be considered "workers" for the purposes of employment legislation. This is something which now, in light of Katharine Newton's revised findings, should be a top priority for the FA. In her final report and in light of her revised findings, she further recommended that every employee of the FA should undergo training in equal opportunities and diversity matters. She pointed to the fact that training should be appropriately tailored to the footballing environment with a focus on "banter" and "jokes" and the appropriate boundaries thereof; this seems like a good place to start.

What shone through throughout the whole process was the strength and bravery Eniola Aluko showed in insisting that the allegations she was making were properly investigated. This should be an inspiration for future players. Hopefully because of her courage and resilience the FA will now review its grievance process or lack thereof, and proper protection will be in place for whistle-blowers and other players like her in the future. ■

EU legislation set to further tighten regulations on use of communications data

By **Ron Moscona**, Dorsey & Whitney, LLP

We live in a connected world and often we take for granted that our smartphones and other devices should know where we are, or where we were yesterday, or how many steps we took during the day, or that it should guess what music we like, or whose clothes we might want to wear, or who we might want to connect with.

A lot is happening in the background to make those functionalities work – data is gathered, logged, stored, analysed and shared, users are constantly monitored and often profiled, and the average consumer is barely aware of much of this activity. Many users of mobile devices, for example, might be surprised to realise that the default privacy settings of their smartphones are set to allow dozens of applications and functionalities to track their location (by tracking 'geo-location data') even when the app is not in use.

New EU ePrivacy legislation

In response to the changing technology landscape, European Union ("EU") legislatures now wish to tighten the rules on ePrivacy – the set of regulations applying to providers of telecommunication services in relation to the confidentiality of communications, the collection and use of "traffic data" and "metadata",

the tracking of users and the use of telecommunication networks for direct marketing purposes.

The European Parliament has recently approved proposals published by the EU Commission early in 2017 to recast the existing ePrivacy rules. The Parliament adopted the proposals of the Commission and added some language to tighten the rules a little more. EU Member States, the Commission and the Parliament will continue to mull over the proposals and the digital industry will surely try to wield its influence to reduce the burden of compliance on service providers. But it is clear that some industry practices would need to change in order to meet the requirements of the new regime.

The rebooted legislation comes with a significant threat to those who are complacent. Regulators will be empowered to impose heavy penalties, in line with those under the GDPR (the General Data Protection Regulation) – up to EUR 20m or 4% of total worldwide annual turnover (according to the higher). Offending service provider could be given administrative penalties and individual users will have the right to seek remedies from the courts.

What's new?

The ePrivacy regulation has been around for decades. But there is some catching-up to do. The rules concerning confidentiality of communications and use of 'traffic data' currently apply only to traditional telecommunication services (such as telephone and broadband services), not to services provided by applications such as Whatsapp, Waze or LinkedIn. The new proposals will widen the scope to capture a wide variety of communications enabled through the internet and through digital communication networks. All digital services offering communication capabilities are likely to be affected by the new rules as well as any service that collects data from users or which tracks users' activities.

Anti-spamming rules

Current rules on direct marketing prohibit the use of telephone, fax and e-mail to send unsolicited marketing communications (except in relation to previous purchases). In the last decade of the last century (when the ePrivacy rules were first adopted) no-one thought of social networking services, in-app communications and private chat groups. The new legislation seeks to widen the net and



will apply the restrictions on marketing communications to all forms of electronic communications.

The cookies rules

The rules requiring user consent to be obtained for the placing of 'cookies' on users' devices (used for identifying users and for tracking online activities) have been clarified in the last few years, but the current position remains unsatisfactory. The EU has been saying for years that users should be able to control their privacy preferences through their browsers and that the providers of the software should make it easier for users to do so. The new legislation seeks to force suppliers of browser software to do so.

Use of metadata

Users of mobile applications and devices are accustomed to receiving requests for consent to access data stored on the device and for enabling 'location services'. Legal requirements are driving many of those consent requests. Providers of digital services know that the days when services could be designed to surreptitiously harvest data from users and to channel it to the service provider without telling the user are long gone.

However, practices still vary greatly from one service to another. Default settings are one way in which service providers seek access to data without drawing the user's attention to the issue.

EU legislatures want to raise the bar. Not only would they like services to expressly seek consent for using 'metadata', they want the service provider to explain to users for which purposes exactly the consent is being requested. Further, consent alone would no longer be sufficient to meet the legal requirement. The draft legislation proposes a ban on the use of metadata, even with express consent of the user, except where strictly necessary for the purposes for which such consent is requested. In other words, service providers will need to demonstrate transparency as well as technical necessity in addition to have to obtain the consent of the user for accessing metadata.

Free choice – not forced consent

The adopted proposals emphasise that consent cannot be buried in terms and conditions or other obscure parts of the service and it requires that access to services (whether paid-for or free) must not be conditional on the user giving consent for the collection of his or her personal data or for the placing of code (such as a cookie device) on the user's device.

Whilst seeking to promote transparency and to give more control to users of digital services and to discourage unnecessary collection of user data and tracking of users, the proposed legislation also includes practical provisions. Where data collection is strictly required in order to deliver a service requested by a

user, the user's consent will not be required. Service providers will be free to install security updates on users' devices, without seeking prior consent, as long as the update does not interfere with existing privacy settings and that users are aware of the installation and can turn off automatic installations. Provisions are included to allow service providers to measure online activities of users, even without their express consent, and to allow such measurements by third parties engaged by the service provider.

Overall, the new legislation will require providers of digital services to act more responsibly and to pay more attention to consumer interests when designing services and the so called user journey. The requirements are not meant to curtail innovation or the development of new services in a digital environment, but they do require service providers to give consumers more control and a better understanding of how their data is being used and they will encourage the harvesting of data when this is not strictly required to deliver the service required by the consumer. Service providers that have in mind a revenue generation model based on the exploitation of users' metadata and the tracking of users' behaviour, on the back of a free digital service, may need to think again.

Ron Moscona

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Corrosive substances and other dangerous weapons: the Government consultation

By **Nigel Booth**, barrister, St John's Buildings Chambers, Manchester

On Saturday 14th October 2017 the Government began an open consultation regarding their proposals for new legislation on offensive and dangerous weapons. Two of the proposals result directly from a recent spate of highly publicised attacks where acid was the weapon of choice, though the consultation is much broader in its scope.

The two new offences relating to corrosive substances would prohibit (a) over the counter and online sales of products with the most harmful corrosive substances to under 18s, and (b) the possession of corrosive substances in a public place.

(a) Sale of products with the most harmful corrosive substances to under 18s

Secondary legislation would describe

the prohibited products, allowing for speedy changes where the law needs to keep pace with developments. The aim is to deal with corrosive substances that could lead to serious injuries to the skin and eyes. Familiar 'knife sale' defences such as reasonable precautions and due diligence would apply. No prohibition would apply to purchasers aged 18 or over.

Online sales present a particular problem for retailers when it comes to verifying the age of the purchaser. At page 5 of the consultation, the Government discusses the varying degrees of effort that retailers put into ensuring that online sales of knives are age-verified:

"The current online age controls used by retailers tend to be limited to asking the purchaser to ticking a box that they are over 18. Ebay UK and a number of major retailers such as Asda, John



Lewis and Wilko do not sell knives online. Other major retailers such as Tesco and Argos have a policy whereby if knives are bought online they must be collected in a store so that the age of the purchaser can be checked if necessary.”

To ensure consistency the Government proposes a new offence, but only in relation to online sales of knives, which would prohibit delivery to a private residential address. Instead, knives sold online would have to be delivered to a location where the age of the purchaser is checked. The consultation paper does not explore why this new restriction would not extend to online sales of corrosive substances.

(b) Possession of corrosive substances in public places

This proposal has been well-trailed and is designed to help the law keep pace with the development of acid attacks. Presently, of course, the only appropriate charge is possession of an offensive weapon for which the Prosecution would have to prove the carrier’s intention to cause injury. The new general prohibition would apply to all corrosive substances, not just the most harmful. A familiar defence would apply, namely good reason for possession:

“The new proposed offence would put the onus on the person in possession of the corrosive substance in a public place to show they had good reason for being in possession of it.”

The Government is effectively seeking to mirror the knife offence under s139 of the Criminal Justice Act 1988 in terms of offence description, available defences, maximum sentences (6 months in the Magistrates’ Court and 4 years in the Crown Court); and mandatory minimum custodial sentence if the offender has a relevant previous conviction. It is presumed that, so far as defences are concerned, the legislation would also refer to lawful authority, use at work, possession for religious reasons or as part of a national costume.

It is worth dwelling a moment on the topic of mandatory minimum sentencing across weapons legislation. The following will be borne in mind:

- a. Some weapons offences carry a mandatory minimum where the offender has a weapons-related “relevant previous conviction”;
- b. Other weapons offences carry a mandatory minimum for all instances of commission, even the first offence;
- c. Where either type of mandatory minimum applies, an offender aged 18 upon conviction must receive at least six months’ imprisonment, subject to at most a 20% reduction for a guilty plea (as to which, see s144(3), Criminal Justice Act 2003). An offender aged at least 16 but under 18 at time of conviction must receive a detention and training order, or DTO, of at least 4 months. But DTOs must be imposed for specific and stated durations, and 4 months is the lowest. When it comes

to credit for a plea, s144(4) CJA 2003 states that nothing prevents the court from imposing any sentence that it considers appropriate after taking into account the guilty plea.

Mandatory minimum sentences are questionable in their effect. If the intention is to ensure that more people spend time in prison as a short sharp shock, then the legislation achieves its aim. Will offenders keep pace with sentencing changes and, fearful of a 6 month sentence, adapt their behaviour by refusing to carry a bottle of a corrosive substance? The evidence for this is doubtful. Five days after the weapons consultation was launched, the Office for National Statistics published its statistical bulletin “Crime in England and Wales: year ending June 2017”. Offences involving knives and sharp instruments (defined as anything that can pierce the skin) were up by 26%. At page 41, the ONS stated:

“The police recorded 36,998 offences involving a knife or sharp instrument in the latest year ending June 2017, a 26% increase compared with the previous year (29,476) and the highest number in the seven-year series (from year ending March 2011), the earliest point for which comparable data are available.”

The mandatory minimum sentencing for repeated knife possession has been in force for a long time now. Contrary to hopes and expectations, knife crime has increased.

The consultation does nothing to help with the complexity of weapons legislation. Attached is a table reflecting the essential ingredients and sentencing. The present law is a mishmash of Acts of Parliament and amendments that have been created haphazardly over time. For example different criteria apply according to whether the weapon is a knife or an offensive weapon; whether the offence was committed in public or on school premises (but not higher education though even that is about to change). Navigation for the criminal lawyer has become irrationally hazardous. This article has not even dealt with the differences between the different statutory expressions in the weapons legislation such as “having it with him” vs “possession”, and the fact that not all the defences are the same for all offences. The court process, especially when it comes to sentencing, is complex when it should be simple. ‘Twas ever thus. The other ongoing consultation, from the Law Commission about a single sentencing code, is well overdue.

The new proposals in the weapons consultation, if enacted, would require new or amended entries in the attached table to take account of the following:

- a. The offence of possession of corrosive substances itself, which is described as a “new” offence, as opposed to, say, augmenting the existing offensive weapon offence;
- d. There will be an offence of possession certain weapons in private, so making it easier for

Police to seize items from private property. These weapons are those described in paragraph 1 of the Schedule to the Criminal Justice Act 1988 (Offensive Weapons) Order 1988, namely 19 weapons such as butterfly knives, zombie knives, push daggers; and section 1 of the Restriction of Offensive Weapons Act 1959 (flick knives, gravity knives);

e. Where offences relate to school premises, the definition will be widened to include the grounds of sixth form colleges, further education colleges and universities;

f. The offences of threatening someone with an offensive weapon or with an article with a blade or point (s1A Prevention of Crime Act 1953 and s139AA Criminal Justice Act 1988 respectively) will be amended so that the requirement that the defendant threaten the other person with the weapon “in such a way that there is an immediate risk of serious physical harm to that other person” will be removed. Instead the offence will be committed when “the victim reasonably fears they would be likely to suffer serious physical harm”;

g. The Government indicates that the proposed mandatory minimum sentence for the offence of possession of corrosive substances will be the same as for the other weapons offences to which it applies. But will the familiar definition of “relevant previous conviction” be the same as for the other weapons offences, ie any of the following offences: Prevention of Crime Act 1953, s1, s1A; Criminal Justice Act 1988, s139, s139A, s139AA? Logical consistency would suggest an answer in the affirmative. The expression in the Consultation is “for those convicted of a second or subsequent offence of possession of a corrosive substance”. Albeit rather obliquely, this also suggests an answer in the affirmative, which would require consequent amendments to all the mandatory sentencing provisions for the other offences in my table so that they include the new corrosive substance offence alongside s1, s1A; and s139, s139A, s139AA;

In addition, the Consultation proposes these two changes:

- h. The definition of “flick knife” would be amended so that the requirement for the with blade to be in the “handle” of the weapon is deleted;
- i. Two types of firearm would become prohibited under section 5 of the Firearms Act 1968: (a) .50 calibre ‘materiel destruction’ rifles of a type developed for use by the military to allow for shooting over long distances, (b) rapid firing rifles, such as the VZ 58 Manually Actuated Release System (MARS) rifle.



Safer Custody

Police or Prison Custody – Expert Witness

Joanne Caffrey is a former police officer with 24 years experience. She specialised in custody duties and designed national custody training programmes for Safer Detention. She worked on police and prison custody settings.

National award winner for Safer Custody training initiatives.

She also provides Expert Witness services for the use of physical intervention in the education sector.

Her areas of expertise include:

Suicide or self harm in custody	Unlawful detention	Handcuffs
Physical restraint techniques	Spit hoods	Safeguarding
Assaults on staff or prisoners	Levels of observations	Use of force in schools

Trained with Bond Solon Expert Witness Training in conjunction with Cardiff University Law school

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David Brotchie

BSc CEng MICE



David Brotchie is a highly experienced Chartered Engineer with a specialist knowledge of the structural design of masonry, steelwork, concrete and timber. Mr Brotchie undertakes instructions as an expert witness in a wide range of cases involving civil and structural engineering matters, including:

- Structural defects in buildings – such as cracking of walls, sloping floors, subsidence, excessive deflection of beams, unexpected or unusual movement of a building structure
- Defects in concrete – such as cracking, flaking, poor compressive strength, inadequate cover, spalling, chemical attack, corrosion of reinforcement
- Defects in structural steelwork – such as corrosion and loss of section, reduced load carrying characteristics, excessive deflection
- Defects in foundations due to poor structural design and/or poor analysis of the underlying ground conditions

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Martin Berkeley is an experienced expert witness and has acted in over 120 financial mis-selling cases for both claimants/defendants as single or joint expert in matters relating to investments, wealth management, banking derivatives and regulation, advising some of the UK's leading lawyers. Martin holds current FCA authorisation and the Cardiff University Law School/Bond Solon Civil Expert Witness Certificate. He regularly lectures on finance related topics and is conversant with CPR Part 35, trial procedures, cross-examination and court conduct. Martin is a Chartered Member of the Investment and Securities Institute and has additional

qualifications in financial derivatives and investment management. He has an LLM in International Financial Regulation (with Distinction) and his thesis focused on financial advice and suitability. He was named Financial Services Expert of the Year in 2016.

Areas of expertise include

Suitability, Derivatives, Interest Rate Swaps, Currency Options, FX, LOBOs, Wealth Management and Private Banking, Structured Products, SIPPS, Investments, Calculation of investment losses, UCIS / NMPI, FSA/FCA Conduct of Business Rules, Financial Regulation, Banking and Due Diligence.

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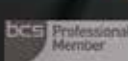
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Mr Raj Mathur

MBBS MD FRCOG

Consultant Gynaecologist



I have undertaken medicolegal work for 11 years and aim to achieve a quick turn-around, dependant on the complexity of the work. My areas of expertise are:

- Infertility investigation, screening and advice
- Fertility treatment, including assisted conception (IVF etc)
- Investigation and management of endometriosis and pelvic pain
- Menstrual problems, including fibroids
- Minimal access surgery, including laparoscopy and hysteroscopy
- Emergency gynaecology, including ectopic pregnancy and miscarriage

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Mr Sameer Singh MBBS BS, FRCS Consultant Orthopaedic Surgeon

Mr Sameer Singh is an experienced expert witness in personal injury and medical negligence cases relating to his specialist areas of expertise. These include:

- All aspects of trauma - soft tissue and bone injuries
- Sports injuries
- Upper and lower limb disorders and injuries
- Whiplash injuries

His practice concentrates on all aspects of Trauma (bone and soft tissue) with a specialist interest in Shoulder, Elbow and Hand disorders using techniques that are tailored to patient needs and utilising accelerated rehabilitation techniques to promote faster recovery and reduced time off work.

Mr Singh completes over 200 medico legal reports per year and offers an efficient turnaround within 10 days from receipt of all relevant documentation. He can take instructions for cases on behalf of either claimant or defendant.

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Jeffrey S Hillman ophthalmologist

Jeffrey Hillman is a Consultant Ophthalmic Surgeon with special interests in cataract and intraocular lens surgery and glaucoma.



He is principal expert and chairman of the UK delegation to the ISO committee which sets international standards for ophthalmic medical devices

Mr Hillman is a highly experienced medical expert witness and has prepared reports for both claimant and defendant in medical negligence and personal injury cases for over 30 years.

He is a member of the UK Register of Expert Witnesses, the Expert Witness Institute and APIL.

Mr Hillman has a rapid response facility for cases with tight time constraints.

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Mr R Scott-Watson

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Dr Katharine Winstone

PhD BDS MFGDP

General Dental Practitioner & Expert Witness



Dr Katharine Winstone is a dental negligence specialist with over 30 years in dentistry.

Specialist areas of expertise include:

- Traumatic or accidental dental injury
- Dental pain or pathology
- Gum disease and tooth loss
- Root canal treatment and related pathology
- Infections
- Cosmetics
- Consent issues

Dr Winstone is Bond Solon trained in report writing, courtroom skills and cross-examination.

She can act on behalf of claimant or defendant or as a Single Joint Expert and has appeared as a witness on several occasions at the GDC Fitness to Practice Panel.

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David Cook has extensive experience of acting as single joint expert as well as for both claimants and defendants, giving him a valuable insight into the opposing side's case. As well as civil litigation, David also frequently advises in criminal matters, both for the defence and the prosecution.
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