the barrister

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ESSENTIAL READING FOR BARRISTERS
26TH APRIL - 27TH MAY 2022

EST. 1999

PRICE £2.80

EASTER TERM ISSUE

www.barristermagazine.com

ISSN 1468-926X

The International Law Framework - Establishing Violence Against Women and Girls as a Human Rights Abuse

This article provides a brief synopsis of the international legal framework addressing violence against women.

It is not intended to be exhaustive but will address some of the key legal documents and instruments and consider their current force and application in English law.

There are now several international legal instruments that are binding or persuasive in our jurisdiction. That said, the journey toward recognition in law of the issue of violence against women at the international level and efforts to establish legal instruments to tackle it has been long and arduous and, is not yet ended.

Starting in the aftermath of World War II and as prodigious efforts to establish and codify human rights were underway the United Nations Commission on the Status of Women was established in 1946, its aims being to monitor the situation of women and to promote women's rights.

Celestine Greenwood, Exchange Chambers

The culmination of 30 years of the Commission's work was the adoption in 1979 by the United Nations General Assembly of the Convention on the Elimination of All Forms of Discrimination Against Women, more commonly known and

p.5

Criminal Legal Aid: Review calls for new measures to secure sustainability of criminal defence sector

Sir Christopher Bellamy QC's long-awaited criminal legal aid review was published in December.

The independent review, which was commissioned by the Ministry of Justice (MoJ) and brought together experts from across the sector, found the market did not need "radical reform" but highlighted "new possible ways of working", such as through not-for-profit community interest companies and firms specialising in particular kinds of work, supported by block grants from the government.
As well as calling for an immediate injection of £135m in new funding, with remuneration able to attract criminal lawyers "of the talent and calibre that the system requires" he highlighted the importance of supporting a new generation of lawyers into the sector and opening up to achieve more diversity amongst practitioners.

The next generation

The review recommended the MoJ consider allowing the Legal Aid Agency (LAA) to provide specific funding to legal aid providers to bring in trainees, targeted to areas where there is a particular shortage of specialist advice.

Individual chambers, the Inns of Court, or the MoJ, should make available top-up grants to ensure that young criminal

p.6

Features

News

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CJA sets out what Victims' Bill should include to improve lives of victims

The CJA has called for the upcoming Victims' Bill to enshrine all 12 rights of the Victims' Code in legislation and increase access to restorative justice. In addition, we have called for the government to improve support for people in prison who have been the victims of a crime and increase access to specialist services for Black, Asian and minority ethnic victims.

The Ministry of Justice recently launched a consultation on its long-awaited Victims' Bill. The CJA has set out a series of measures which should be included in the Bill to improve the lives of victims of crime, drawing on roundtables with members and surveys with victims' hubs.

We are concerned that the consultation document assumes that justice for victims is solely delivered through the criminal justice system and that a criminal justice response is what most victims seek. Members reported that some people who access their services do not want a criminal justice outcome and it is only a minority of victims who are involved in a criminal trial. Some members reported that where people do want a criminal justice response, they often feel failed as the criminal justice system does not deliver a resolution or address the harm that has been caused. In fact, it can be re-traumatising for many.

Research shows that restorative justice — a voluntary process which brings together victims and the person who committed the crime to address harm — can improve victim satisfaction and wellbeing and reduce reoffending. However, many victims are not made aware of this potentially life-changing process, and we are disappointed that the consultation document makes no mention of restorative justice. We want to see the Victims' Bill give victims a statutory entitlement to be made aware of restorative justice and a statutory right to be automatically referred to a service. We also call on the government to regularly produce a national action plan to increase access, awareness and capacity of restorative justice.

In our response, we raise concerns that people in prison who have been victims of crime are not able to access support until after they have served their sentences. CJA member Prison Reform Trust has reported that some people in prison who contact its advice and information service describe difficulties in both reporting crime to Police Liaison Officers and accessing victims' services. What's more, victims of violent crime who have certain unspent convictions cannot access compensation under the Criminal Injuries Compensation Scheme. CJA member Unlock has found that people affected by this rule have included victims of sexual abuse and other serious crimes, whose own offending can be clearly linked to the crimes committed against them and the trauma they have experienced. We recommend that Her Majesty's Inspectorate of Prisons should take part in the thematic review on victims due to be carried out by other inspectorates later this year, and that issues around access to compensation are addressed.

We are not satisfied that the experiences and needs of different cohorts of victims — such as children, young adults, women, people from Black, Asian and minority ethnic backgrounds (including Gypsy, Roma or Traveller communities) or those with insecure immigration status — have been sufficiently acknowledged and addressed. Victims can face discrimination and bias and a lack of cultural competence when dealing with the police and other criminal justice agencies, and specialist services can be best placed to support them. But members working with minoritised communities have said there is a need for greater and more sustainable investment and resources including core funding, rather than one-off short-term funded projects. There is also a need for more consistent collection of data on the protected characteristics of victims, which should be used to inform commissioning of victims' services.

Criminal Justice Alliance

SRA's fining powers should not be hiked to £25k

A proposal by the Solicitors Regulation Authority (SRA) to hike its own fining powers from £2,000 to £25,000 prompted solicitors' leaders to warn such a steep increase was simply not appropriate.

In response to an SRA consultation Law Society of England and Wales president I. Stephanie Boyce said: "We appreciate that increasing its internal fining threshold moderately would assist the SRA in making decisions in a greater number of straight forward cases, which is likely to speed up the process, as fewer cases would be transferred to the Solicitors Disciplinary Tribunal (SDT), saving costs and reducing stress for all parties concerned.

"However, increasing its fining powers by more than 12 times the current limit isn't appropriate.

"The proposed substantial increase to the threshold would potentially include many more serious or significant cases which currently go before the SDT and where full reasons for its decisions are transparently set out in written judgements and published on the SDT website.

"Our members have concerns about the SRA acting as investigator, prosecutor and judge without independent scrutiny.

"We suggest a more appropriate rise – based on statistical data from the SDT – would be somewhere between £5,000 to £7,500, based on analysis of previous fines imposed over the last three years."*

A fixed penalty regime has been proposed to deal with lower-level breaches of the SRA rules or non-compliance with its administrative requirements or failure to respond to requests.

I. Stephanie Boyce added: "There is insufficient information on this to be able to comment fully, however we have concerns about the administrative exercise in introducing such a model and the costs involved in setting it up when it isn't clear what the benefits are."

The SRA is also proposing rigid rules to deal with discrimination, harassment and sexual misconduct cases.

"It is right that discrimination, sexual misconduct and harassment within the profession should be treated with the utmost seriousness," said I. Stephanie Boyce.

"The behaviours covered under these broad and distinct categories can vary substantially and can arise in a wide range of circumstances. As such, decision-makers should have flexibility to look across the full range of possible penalties in deciding how to proceed, including imposing a financial penalty.

"All sanctions should be available to a tribunal or court to ensure that cases are dealt with fairly and proportionately. The regulator cannot restrict the powers of a tribunal or court.

"We believe any fining framework should be fair, transparent, proportionate and consistent and be a deterrent to firms and individuals from committing breaches under the SRA Codes of Conduct."

BSB report: Female barristers continue to earn less than male barristers, and barristers from ethnic minority backgrounds continue to earn less than White barristers

The Bar Standards Board (BSB) has published a report updating its analysis of data on barristers' income by gender and ethnicity. This builds on previous research by the BSB published in 2020 and research into incomes undertaken by the Bar Council in September 2021 by considering a wider range of factors liked to income (such as seniority and location) as well as comparing pre and post pandemic income levels.

Today's report shows that female barristers are likely to earn less than male barristers and that those from minority ethnic backgrounds are likely to earn less than White barristers. This holds true when looking at the income of barristers practising within the same area of law, within the same parts of the country, and amongst those with similar seniority in terms of years of practice. There are also differences in the income of barristers from minority ethnic backgrounds once ethnicity is looked at in more detail, with Black and Black British barristers earning less than Asian and Asian British barristers overall.

As it did in the BSB report published in November 2020, today's report shows that income differences are particularly marked when looking at gender and ethnicity together, with female barristers from minority ethnic backgrounds being the lowest earning group and white male barristers being the highest earning group.

BAR STANDARDS BOARD

The BSB collects data on income as part of the annual process by which barristers renew their practising certificates. This report examines the gross income of barristers. Around one fifth of barristers are employed and for them by "income" the report refers to their gross income before tax and national insurance etc. For the four fifths of barristers who are self-employed their "income" is their total fee income (excluding VAT) before they pay the costs of their chambers, which is estimated typically to take between 20 and 40 per cent of their income.

The effects of the pandemic on barristers' income are evident when comparing the figures in today's report with those published previously. A comparison shows that:

- barristers in all groups analysed have faced falls in income. The largest falls in income have been for male barristers from ethnic minority backgrounds, and barristers based outside London;
- female barristers seem to have seen smaller falls in income overall than male barristers, and ethnic minority barristers have seen larger falls than White barristers;
- the proportion of barristers in the lowest two income bands has increased, often markedly, for most groups of barristers. However, for many groups there has been almost no change in the proportion in the highest income bands – indeed, for some groups (female barristers from White or ethnic minority backgrounds) the proportion in the highest income bands increased from 2019 to 2020; and
- falls in income have been larger for certain areas of practice than others. When looking at the four most common areas of practice at the Bar, criminal law saw the largest fall in incomes, while family and personal injury law saw smaller decreases. In commercial and financial law, incomes increased.

BSB Head of Equality and Access to Justice, Shadae Cazeau, said:

"This report is based on figures relating to barristers' incomes in 2020. Whilst it shows that barristers of all characteristics faced falls in income due to the pandemic, the underlying income gap adversely affecting female barristers and those from ethnic minority groups remains troubling.

These disparities are marked and cannot be explained away by seniority, geography or area of law practised. As the regulator, we will continue to prioritise our work on diversity, to challenge the profession to address these income gaps, and to expect all chambers and employers to monitor the distribution of work."

The full report on income at the Bar by gender and ethnicity is available on the BSB website.

JUSTICE writes to Dame Elish Angiolini and Home Secretary on the Sarah Everard inquiry

JUSTICE Working Party Chair **Sir Robert Owen** has today written to **Dame Elish Angiolini,** copying in the Home Secretary, in respect of the public inquiry into the abduction, rape and murder of Sarah Everard by Wayne Couzens, a serving Metropolitan Police officer. Dame Elish has considerable experience in inquiries and investigations, and we welcome her appointment as chair. Sir Robert's letter draws attention to the JUSTICE report *When Things Go Wrong: The response of the justice system* and its recommendations which are of particular relevance to the Sarah Everard inquiry.

The letter identifies the crucial importance of the full cooperation of the relevant police forces, in particular the Metropolitan Police, for the inquiry to be effective. However, Sir Robert highlights that previous experience gives rise to serious concerns that Dame Elish will encounter institutional defensiveness. In the absence of a statutory inquiry or a statutory duty of candour, Sir Robert calls on Dame Elish to invite interested persons to the inquiry to expressly adopt Bishop James Jones's *Charter for Families Bereaved through Public Tragedy.*

In respect of Part 2 of the inquiry, which is to address broader issues for policing and the protection of women, Sir Robert calls for Dame Elish to consider several recommendations from the JUSTICE report, including: consultation on the terms of reference and any panel for Part 2, ensuring effective participation for bereaved people and witnesses, and the potential role of the inquiry in monitoring the implementation of its recommendations to help ensure accountability and systemic change.

JUSTICE

We hope the letter will help ensure that the Sarah Everard inquiry is effective, gains the public's trust, and reflects the needs of all victims and bereaved people arising from police failures in the protection of women.

The full letter can be found on: https://justice.org.uk/

p.1

referred to as 'CEDAW.'

Even though the Convention comprehensively addresses a plethora of rights, including reproductive rights, it does not specifically address, or even mention, the issue of violence against women.

CEDAW, in common with the other core international human rights treaties, establishes a committee, the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee), comprised of elected experts in the field, to monitor the implementation of the rights established by the Convention.
This task includes regular examination of a contracting state party's performance in meeting the obligations imposed by the Convention via the formal consideration of reports submitted on behalf of the State (the government) as well as reports submitted by civil society organisations.

For example, the Government of the United Kingdom last reported to the Committee in 2017 and the next report will be due in the near future.

In addition, the Committee issues recommendations and guidance about specific topics in documents known as 'General Recommendations.' To date the Committee has issued 38 General Recommendations two of which, Recommendation 19 and Recommendation 35, specifically address violence against women.

Further, CEDAW has an additional instrument, called an Optional Protocol that establishes the right to bring a "communication," or individual complaint, before the Committee for its consideration and adjudication, in other words a mechanism for legal oversight of individual cases. Decisions of the Committee, acting in this 'judicial' function, are published as "Views." Individual countries can choose to submit to this process by ratifying the Optional Protocol as well as the Convention . Ultimately the 'views' expressed by the Committee are not fully legally binding as the enforcement powers of the Committee are limited. That said, the Committee's jurisprudence has been comprehensive and of significant impact addressing issues such as a country's duties to provide an effective legal framework for the investigation and prosecution of violence.

Fortunately, the United Kingdom has ratified both CEDAW and its Optional Protocol meaning that an individual communication arguing that the British state and its relevant institutions has failed to respect, protect and fulfil a women's right not to be subjected to violence may be submitted to the Committee provided all available domestic remedies have been exhausted.

After the adoption of CEDAW, progress was slow until 1993 when the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action recognising the need to eliminate violence against women, recommending the creation of a 'special rapporteur' to monitor and report on the issue, and urging the United Nations General Assembly to adopt a declaration on violence against women. This happened later the same year when the UN proclaimed the Declaration on Violence against Women, the first international instrument explicitly addressing violence against women.
Since then, regional instruments aimed at combating the issue have been developed and adopted.

First in time, less than twelve months after the Declaration was proclaimed, the Organization of American States adopted the Inter American Convention on the Prevention, Punishment, and Eradication of Violence against Women (also known as Belem do Para).
Much later, in 2011, the Council of Europe agreed the Convention on preventing and combating violence against women and domestic violence (also known as the Istanbul Convention).

The Istanbul Convention which is based on the four pillars of prevention, protection, prosecution and co-ordinated policies, is widely regarded as being the definitive instrument addressing violence against women. It specifically requires countries to "take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere." In line with CEDAW the Istanbul Convention provides for monitoring of the performance of each country which is a state party in implementing effective measures to fulfil the duties set out in the Convention. As yet, however, the United Kingdom has not ratified the Convention and therefore it is not legally binding upon the UK. Notably, however, the UK Government did assert in its last report to the CEDAW Committee that the country has in place the requisite measures to meet its commitments under the Istanbul Convention.

Finally, it is worth mentioning The 2030 Agenda for Sustainable Development adopted by the United Nations Member States in 2015. The Agenda comprises 17 separate sustainable development goals, also known as 'SDGs,' each of which has a number of specified targets against which the implementation of the goal can be measured in respect of each country. SDG 5 "Achieve gender equality and empower all women and girls" contains two key targets, namely 5.2 "Eliminate all forms of violence against women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation" and 5.3 "Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation."

The SDGs are not legally binding or enforceable. However, they do represent a series of commitments on the part of the UK Government. The inclusion of the eradication of violence against women and girls as targets to be achieved by 2030 serves to cement and enhance the international community's - and with it the UK Government's - commitment to ending this endemic human rights abuse.

Celestine Greenwood, Exchange Chambers

Called to the Bar in 1991, Celestine Greenwood is a human rights barrister and activist. She specialises in family law, specifically public law children cases, and is a member of Exchange Chambers.

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p.1

legal aid barristers are not excluded from the profession for purely financial reasons in the initial period after expiry of a pupillage award.

Recognising the valuable role of CILEX Lawyers in the sector, the report included a recommendation to resolve the anomaly that actively prevents suitably qualified CILEX Lawyers from being recognised by the Criminal Litigation Accreditation Scheme (CLAS).

For CILEX practitioners, the first hurdle to a career as a police station duty lawyer arises at the very beginning. A lack of recognition of CILEX Advocates' training and competence creates duplicate standards for proving an ability to carry out work independently.

It was also proposed that the Solicitors Qualifying Examination could open "wider possibilities for qualifying as a solicitor", after which a transfer to the Bar could become a more common alternative to the traditional pupillage.

Our view is that the CILEX advocacy qualification fulfils the requirements under CLAS and that CILEX practitioners holding this qualification should be 'passported' across; an easy remedy that, if Law Society opposition could be overcome, removing this barrier faced by CILEX Lawyers looking to get onto the duty rota. Alternatively, a comparable accreditation scheme could deliver this assurance, something to which the MoJ has not, to date, been amenable.

The review's recommendation that this be addressed is an important step in opening up the sector to a wider pool of lawyers, potentially giving CILEX Lawyers the opportunity to take part in more police station work.

Diversity

In terms of social, gender or ethnic diversity, a common point made to the review, by organisations including CILEX, the Black Solicitors Network and the Muslim Lawyers Advisory Group, was that low criminal legal aid rates generally made it very difficult for smaller firms that traditionally offered career opportunities for lawyers from disadvantaged social or minority ethnic groups to continue to do so.

This was resulting in fewer lawyers from these backgrounds entering the system – a real issue given the relatively high proportion of socially disadvantaged or minority ethnic defendants in the criminal justice system. That, the report contends, meant a shortage of lawyers who could relate to these defendants that in turn was eroding trust in the system.

CILEX has a more diverse membership than other branches of the profession – 76% of our lawyers are women, 17% identify as Black, Asian or Minority Ethnic and 85% attended state schools.

This diversity was recognised in the report, acknowledging that giving members specialising in criminal defence work the ability to take on the same work as solicitors would improve diversity in the sector.

It was also proposed that the Legal Aid Agency should work with the MoJ and solicitors' representatives "to determine why the gender balance in relation to duty solicitors is in favour of male solicitors, and if so what steps should be taken to achieve a more equal gender balance".

To tackle the issue, the MoJ, the Bar Council and the Bar Standards Board should also, the report said, look to establish to what extent, and if so why, differences exist in the publicly funded incomes earned or the work undertaken by criminal legal aid barristers on the basis of gender or ethnicity, "with a view to taking any necessary corrective action".

Bureaucracy

The review highlighted that the primary objectives of the LAA should be "to support the resilience of the system of criminal legal aid, to reduce bureaucratic burdens on providers, and not 'to save the pennies at all costs'".

It was recommended that the MoJ should encourage and facilitate local arrangements for improving lines of communication between the defence, the police, the Crown Prosecution Service and the courts and that an independent advisory board should be established to advise the Lord Chancellor at regular intervals on the arrangements for the delivery of criminal legal aid.

Funding

The sector has seen a real-terms expenditure decline of 43% since 2004, with some fees for criminal law practitioners remaining unchanged for 25 years.

The review questions how this situation can be sustained given criminal legal aid firms "can neither attract sufficient new blood, because the fee levels restrict the salaries that can be offered, nor retain experienced practitioners because of the higher salaries offered by the CPS".

The review found that profits have also declined to a level well below those in other areas of legal practice. The result is that there is little incentive for new investment in the sector and insufficient compensation for business owners given the risks they are exposed to.

With the government recruiting more police and trying to reduce the court backlog, demand for defence services is set to rise. Sir Christopher argues that "absent a substantial increase in funding, there is a high risk that the system will simply be unable to cope with the challenges ahead."

He recommends an extra £100m for solicitors and £35m for barristers, a 15% increase, as "the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect".

He stressed that this needs to happen as soon as practicable to enable the defence side, and therefore the whole criminal justice system, to function effectively.

The Lord Chancellor Dominic Raab is facing mounting pressure from both the Bar Council and Law Society to act on the review and has stated that the MoJ's response will be published no later than the end of March. Justice Minister, James Cartlidge, has insisted that it is vital the government takes its time to get proposals for reform right.

Overall, the review was a cogent analysis of the challenges faced within the criminal legal aid environment and a grounded response designed to address the current challenges that are threatening the sustainability of the criminal justice system.

We urge the government to respond positively and without further delay as without these proposals being implemented quickly, there is a serious risk that the effectiveness of the criminal justice system may be harmed through a loss of access to justice by some of the most vulnerable in our society.

Linda Ford is the CEO of CILEX (Chartered Institute of Legal Executives)

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Legal Platforms: An opportunity for the Bar

In this article, Andrew Thornton Q.C. looks at the emergence of digital platforms offering legal services to SMEs and individuals and considers how the Bar might exploit the opportunities they bring.

The Bar's traditional types and sources of work

The types and sources of work available to the Bar remain largely undisrupted by the recent boom in legal tech.

Some work is now performed differently as a result of general technological developments and Covid-19 has certainly accelerated the use of digital hearings, but members of the Bar still tend to ply their trade offering the same services as always: advocacy, legal and strategic advice and drafting services through law firms and other providers of instructions at scale.

Similarly, most barristers still target their marketing efforts at intermediaries (such as law firms) rather than underlying clients. Direct access work has been introduced but has not yet taken off on a widespread basis. Indeed, the Bar's task in educating the public of its overall existence is a challenging one (the Bar remaining a relatively small profession).

The growth in legal platforms

The last few years has seen the launch and growth of digital legal platforms seeking to disrupt the existing legal market. US businesses such as RocketLawyer and Legal Zoom have been around for a long time but now compete with a number of more recent entrants including, LawBite, Farillio, SeedLegals, Pocket Law, Farewill and Sparqa Legal.

Although none of the digital platforms yet claim to have attracted millions of users, what has become clear is that blue-chip companies are becoming increasingly prepared to expose these brands to their underlying customers.

Each of the new platforms have signed partnerships with businesses able to introduce their services to tens of thousands of potential clients, whether they be banks, credit card operators, mobile telephone providers or insurance companies. This sector has emerged gradually as blue chips slowly overcome concerns about the risks inherent in being associated with the provision of legal advice. However, the scale of progress made by the new business suggests that properly structured partnerships are now considered an attractive addition to business-to-business and business-to-consumer operators.

The platforms all have distinct models; some provide no more than a way of accessing existing legal providers, some are limited to specific markets,

and others more expansive in their ambitions. Others add legal guidance and DIY documents to their offering. When one looks forward five years, it is quite possible to see a world in which every business and every consumer can access legal guidance and basic documents on their phone as part of an offering from one of their existing suppliers and use that platform to find and instruct a legal adviser when required.

Law firms are embracing these models

Law firms have started to recognise the potential of these platforms. Law firms spend significant amounts of resource each year seeking to identify new business; and the emergence of platforms with hundreds of thousands of prospective clients seeking legal assistance provides an obvious source of potential instructions. One only has to look to the real estate portals such as Rightmove and Zoopla to see how businesses and consumers might well access legal services from a centralised platform going forward.

Accordingly, law firms are increasingly offering their services through digital platforms and adapting their offerings to include specific, fixed price commoditised products. Platforms offer legal providers the opportunity to scale offerings in a manner not previously possible. Thus, a law firm offering a shareholders' agreement or employee handbook at a fixed price can now access an enormous market in one fell swoop.

The opportunity for the Bar

The legal platforms offer an opportunity for the Bar to level-up. The reality is that barristers' chambers cannot muster the marketing budgets necessary to establish their brands with underlying clients. However, partnering with digital platforms that can offer scaled introductions to potential clients and who require quality partners to whom they can refer users appears to be a win-win for both sides.

I have written before about the obvious benefits for clients accessing the Bar directly, given the higher level of expertise, for a price often lower than charged by a law firm. The challenges remain the same; can members of the Bar offer services directly to clients in a sustained and appropriate way (this may well require changes in attitude and structure) and are barristers willing to look far enough ahead to embrace the undoubted opportunities available to them?

One of the issues that the Bar faces is that it tends not to think on a corporate basis. A law firm, where the structure incentivises all to grow and act collectively, is on the face of it better suited to exploiting these opportunities. The question will be whether the Bar will take the commercial opportunities the digital platforms offer.

***Andrew Thornton Q.C.** is a barrister at Erskine Chambers and the founder of FromCounsel.com, a provider of corporate law knowledge to over 85% of the 100 leading UK corporate law firms.*

Andrew is also the founder of Sparqa Legal, one of the emerging SME legal platforms mentioned in this article.

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HMRC has identified that barristers and other professionals often make errors or adopt a treatment that may be open to scrutiny making them a target for scrutiny.

The recent case, Revenue and Customs Commissioners v Tager and another - [2018] STC 1755 illustrates the view HMRC can take against a non-compliant professional. The judge agreed with HMRC that the maximum penalty (£1,246,020) be imposed under FA 2008 para 50 Sch 36.

In Patrick Cannon and the Commissioners for Her Majesty's Revenue and Customs [2017] UKFTT 0859 TC0625, the position was much different. The FTT found that Cannon had relied on professional accountancy advice and could not be expected to be a specialist in all areas of taxation.

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Good Law Project and others v Secretary of State for health and Social Care

By Jonathan Compton, LLB LLM Solicitor, Partner DMH Stallard LLP

A note from a Provincial Hack.

The covid pandemic has disrupted our society and had a corresponding impact on government expenditure. One organisation monitoring government spending estimates £44.3Bn in covid related procurement as at 25.11.2021 [Tussell group]. Of this £44.3Bn, an estimated £20Bn has been spent on PPE (Personal Protective Equipment) and hospital contracts.

The reader will recall the dark days of April, May and June 2020. Hospitals were crying out for PPE. The government was coming under pressure for a perceived failure to be prepared in this, and indeed in other, regards.

In response, the government created a 'fast track' (the VIP lane) for ordering goods and services, including PPE on an emergency basis. As I recall, it was 'all hands to the pumps and we will deal with the problems later'. I recollect no rallying call for 'Bureaucracy now, PPE later!!!!'. Ministers were not mobbed by crowds of angry people calling for 'Scrutiny Now, doctors and nurses can wait!!'.

But I was wrong: Enter the 'Good Law Project' and 'EveryDoctor'. About 12 months ago they commenced legal action calling into question the VIP lane. The case of these self-appointed guardians of public propriety was simple. They questioned the legality of contracts being awarded to those with connections to politicians without going through the normal bureaucratic procedures.

On the 17th of January 2022 the Good Law Project trumpeted as follows:

'Over a year of hard work has paid off today. The High Court has ruled that the government's operation of a fast-track VIP lane for awarding lucrative PPE contracts to those with political connections was unlawful'. [website, Good Law Project 13.01.2022].

Well, "yes and no", as we will see later on. I think the conclusion of a '1-1' draw is a better one to draw than that of unbridled and self-righteous triumph. But I digress…

The Good Law Project then goes on to state (website 12.01.2022):

'Never again should any government treat a public health crisis as an opportunity to enrich its associates and donors at public expense'.

Respectfully, it is one thing to seek to use the law to correct, guide and see justice done. It is quite another to accuse one's opponent of corruption.

The judge also held "offers that were introduced through the Senior Referrers received earlier consideration at the outset of the process. The High Priority Lane Team was better resourced and able to respond to such offers on the same day that they arrived".

Again, a note of caution needs to be injected here, maybe a little perspective, and, dare I say it 'balance'.

The Good Law Project is correct, of course, in stating that the judge held that the VIP system was unlawful. But, and here is where the '1-1' draw comes in, the judge did not stop there….

The judge held that even had the correct procedures been followed, and the VIP track not been in existence, the two companies, Pestfix and Ayanda would have been awarded the contracts because of their expertise in the field.

There was much judicial criticism of the Department for Health and Social Care. But there was recognition also on the part of the Learned Judge that (para 450 to 452 of the judgment) this was an emergency and resource to audit contract applications was scarce. This is why some of the raucous crowing of the Good Law Project borders, on the distasteful.

I suggest it was this recognition of the then prevailing circumstances that caused the judge to come to the findings she made. Yes, whilst it was undoubtedly true that there were procedural short-comings in auditing the applications from companies seeking to answer the call of the government for emergency supplies, yes, parties known to politicians were fast tracked. But that needed to set against the crisis at the time and the lack of audit resource within government. At the heart of her decision, the judge was, it seemed to me, wrestling with the question of how to reconcile procedural niceties with the then need to take emergency action to save lives. The judge may have had at he back of her mind the real danger that there may be other variants or pandemics and the need to take emergency action, whilst needing guidance, should not be hampered to the extent that governmental hands would be effectively tied in future.

So how did the Judge go about achieving justice in this case? By an in depth analysis of the companies involved and coming to the conclusion that both sides were, to some extent at least, right. She handed the procedural victory to the Good Law Project but then said to the government, well, you got it right in terms of the substantive ends if not the means employed. An elegant judicial compromise. Judges have done this throughout history. In humble cases of negligence and contract judges regularly come to the conclusion that the defendant is in breach of duty or contract, and then go on to hold that the loss or event complained of would have occurred in any event.

Now, of course, the judgment runs to 125 pages and the above is a gross simplification. The word space of this article is limited, and many reading will have long lost the will to live in reading it, but I think I have covered the main points, and perhaps, through reading the judgment, gained a little insight into the dilemmas facing the judicial mind. So often, judges are called into areas of law which are at the cutting edge of politics. This is particularly so in cases where judges are called on review the decisions of government. Perhaps that calls for a wider discussion as to limits of the power of the executive as against the proper role of the judiciary.

And finally…. Perhaps a gentle word of admonition to the Good Law Project, and here I refer to the cited passage above from their website (13.01.2022)

'Never again should any Government treat a public health crisis as an opportunity to enrich its associates and donors at public expense'.

I am not aware that any criminal charges have been brought, which is, after all, the gist of this quote. Lest and before we ever come to crow too loud, a soft word of caution and good will to all: it would be as well to try at least to put oneself in the eye of the storm facing politicians and civil servants in time of global crisis. Sometimes governments must act to avoid catastrophe. Not often will this be the case, I grant you, but sometimes – exceptionally. There are situations where, whether we as lawyers like it or not, the substantive ends must overrule the procedural means. What is seen as so wrong in the cool air conditioned court room some 18 months down the line, may be seen as justified when the wolf is at the door and people are dying in their hundreds.

Jonathan Compton
LLB LLM Solicitor
Partner DMH Stallard LLP
Jonathan qualified as a barrister and is now practising as a solicitor.

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‘Pupillage, from behind the pixelated curtain’

By Eleanor Durdy, barrister, Park Square Barristers

Around this time last year, I wrote an article titled ‘CVP, Friend or Foe?’ In early 2021 I was a young, bright-eyed, and bushy tailed pupil, 3 months into my journey. Fast forward 12 months and I have since completed pupillage and secured tenancy at a progressive and highly respected set on the North Eastern Circuit.

Having completed my entire pupillage and commenced tenancy all during varying degrees of lockdown and Covid uncertainty, I have chosen to share my experience at the Bar from behind the ‘pixelated curtain’. I cannot continue without first paying a great deal of thanks to my pupil supervisor who tackled the unfamiliar treasure hunt for the conference pin with me. Despite the road to second six and eventually tenancy being littered with isolation speed bumps and mask related lipstick hiccups, we made it to the finish line together and enjoyed a well-deserved bottle (or three) of fizz at the end. I cannot express my gratitude enough to her or to Chambers for their unwavering support during pandemic pupillage.

In my article last year, I touched on the pros and cons of CVP, and 12 months on, I now have a more in depth prospective of it, regularly using it to conduct my own cases and conferences. With the government now relaxing most restrictions, businesses being encouraged to go back into the office, and life beginning to resemble what normality once was, I wonder whether what we have learnt from conducting remote hearings in the last two years will all now be forgotten.

As a young barrister in the very early stages of my career, remote hearings have given me as many positive opportunities to learn as it has detrimental ones. Whilst many members of my own Chambers and many on Circuit have never met me, or know my name, I have undoubtedly seen more applications and hearings than I would have, had I appeared in person to them all. I was able to spend around 40% of my whole pupillage in person, which all things considered was a large proportion of it. I have benefitted from reducing my travel time to Court which has reduced my carbon footprint and benefitted from seeing and conducting hearings all over the country from the comfort of my home. On the other hand, I have not met colleagues, networked with solicitors or caught many Crown Court returns because senior counsel have also benefitted from the same remote flexibility as I have. So, looking forward, should we be making efforts to maintain remote hearings where possible or go back to life BC, before Covid?

The convenience of dialling in from home offers an opportunity to take on work all over the country but that also leaves many, certainly at the Junior end, at a commercial disadvantage. Remote platforms provide an open invitation to those on other Circuits to take on work on each other’s door step because they never have to physically attend at Court, which if they had to travel, they wouldn’t. I have had challenging experiences with Court users who find using technology difficult. For those who do not use the internet regularly, or who have a phone as their only device, conducting video conferences and hearings can be a problematic issue. I have had hearings adjourned due to lack of signal and even missed hearings due to the Court not being furnished with my contact details in time, despite efforts to chase the Court. Remote hearings have also, in my experience, allowed the Court’s to utilise an unassigned list more often than they would have done before. Being stranded in a block list, told that you will receive a link when a Judge becomes free not only means that counsel remain chained to their desks, but also means that Court users are restricted in how they can apportion their time that day. Whilst I appreciate that the Courts have a backlog to get through, it is equally difficult for Counsel to return prepared cases last minute and to sit at the beckon call of the Court and the angry Court user until 1600 when the Court says that it has ‘no time to deal with the case today.’

We mustn't forget either that everybody has the right to a fair trial and we must continue to deliver a transparent justice system. Conducting hearings via CVP or Teams, whilst practical, feels less real, it is one of the reasons that witnesses are preferred to give their evidence physically in Court rather than by link if possible. We all know that courtroom advocacy is theatrical and emotive, and while we might try our best, we all have to admit that we struggle to maintain such high levels of professionalism over the telephone. Advocacy and giving evidence aren't just about the spoken words either, it is important to recognise the unspoken ones too which can often be lost over the link.

Arguably it is equally as important that we all acknowledge our part in reducing our impact on the environment, whether that be by reducing the amount we print or by reducing our travel. A great benefit to remote hearings is avoiding so much travel, helping to reduce the impact on the environment and reduce the impact on our own wellbeing. Our wonderful profession takes its toll in many ways, but excessive travel for short hearings reduces our preparation time and our mental stability with road rage. Convenience should not be underrated and creating a more productive work life balance for ourselves should not be either. In a time when we are being asked to be more environmentally conscious, I believe that remote platforms should continue to have a permanent place where deemed to be suitable. Whether we like it or not, it is a very real dilemma that we must move towards being a more sustainable profession. In the same breath, remote platforms also undoubtedly offer Court users a sense of comfort by delivering their evidence from their home, rather than attending an artificially lit building that they would never otherwise have to attend. As we have seen in the past two years, justice has continued to be done. Yes, there are times when appearing in person is paramount and I acknowledge that justice has to be seen to be done, but remote law does work.

Remote hearings have formed a vital part of our response to the pandemic and to keeping the justice system moving, and they should and will continue to play an integral part in the justice system moving forwards. Remote platforms are able to improve the efficiency of courts by modernising processes and protecting Crown Court time. The Police, Crime, Sentencing and Courts Bill for example, includes such measures. The Bill enables Court users to attend hearings and trials remotely by video or audio links, and the Court to run pre-trial hearings by audio or video link, so that courtrooms are reserved for trials, making the changes implemented for the pandemic more permanent in a positive way. Remote participation in hearings has become an integral part of the court and tribunals system. There will be occasions where a remote hearing is more or less suitable depending on the nature of the hearing and the needs of the participant, but importantly, they give us the opportunity to continue working, to continue offering pupillages and to stay safe. Convenience should not be mistaken as laziness. Justice has continued to be done, and the profession has continued to function without compromising its long term best interests. Pupillage for me and for those before and after me has been a very different experience, but not to be mistaken as an unpleasant one. I hope that remote platforms can continue to efficiently deliver justice, in the same way that the likes of the Digital Case System have efficiently replaced ribbon bound paper briefs.

Eleanor Durdy
Park Square Barristers

Why the legal sector needs to invest in accessibility

By Harry Charlton, Chief Executive at 7BR chambers

The simple phrase 'popping to the shops' rolls off the tongue for so many of us. Yet for some, such a seemingly straight forward undertaking requires a lot more planning and consideration. Language is a huge part of inclusivity, and for a disabled person, 'popping to the shops' can be a dramatically different experience.

Here at 7BR we recently spoke to a number of AccessAble Ambassadors about the realities behind such everyday phrases. For example, Charlie Randell, a Youtuber, Instagrammer, and wheelchair user with cerebral palsy, explained what 'it only takes two secs' actually means for him:

> *"Plan extra time to allow for getting the wheelchair in and out of the car, wheeling myself to wherever I need to go - plus more time on top of that for contingencies. Hopefully the pavement / road surface is ok - rough or hilly terrain always takes me so much longer. Whenever I'm told 'It'll only take two secs' I usually plan about half an hour! I've learned that many people without disabilities seriously misjudge how long everything takes me. Often people ask why I always arrive so early. It's because I have to allow all that extra time just to be sure of being on time!"*

Interviewing a number of AccessAble ambassadors really helped shine a spotlight for us on accessible language and all the different ways disabled people encounter challenges with the simple tasks many of us take for granted. We therefore instigated this awareness campaign (which you can read more about here) in parallel with the installation of our own innovative solution to help transform our building's accessibility.

At 7BR we have a challenge which will be familiar to many other Chambers - whilst we're privileged to call an eighteenth century Grade II listed building our home, its physical layout and ensuing planning restrictions mean modernising and modifying it is fraught with danger. Our buildings, 6 & 7 Bedford Row, have been home to Chambers since 2004, and retaining the building's architectural integrity whilst also ensuring facilities are in-keeping with our core values of equality, diversity, and inclusivity, presents a constant challenge.

We undertook a long overdue and comprehensive refurbishment three years ago, planned over two phases, both with accessibility at their core. Phase One was internally focused and retained accessibility at its core – for example, by lowering the reception desk for wheelchair users, ensuring control panels for alarms and lights are at an appropriate height, installing internal stairlifts, and undertaking significant investment in A-V and technology to allow Members and clients to interact as seamlessly as possible.

Phase Two was completed late last year with the issue of external access from our Bedford Row street frontage at its heart. Mindful of the inherent stresses and strains of visiting a set of Chambers for clients, visitors, and peers alike, we aspired to create an immediately welcoming and comfortable environment for everyone wishing to visit 7BR.

Having assessed our options, we alighted upon a unique solution: 'Sesame Steps' - installed by Sesame Access Systems, an innovative specialist lift company. The Steps work by hydraulically concealing the lift when not in use, which ensures the architectural integrity of our front entrance is preserved. The Steps can be independently operated by all users to allow a seamless entrance into the building - quietly, elegantly and efficiently.

The central ethos of the project is to ensure all visitors and occupants can enter and leave Chambers independently, with dignity, and in comfort. In this context the Sesame Steps have been transformational.

Moving beyond the confines of our own specific logistical challenges, 7BR Member Dr Gregory Burke has relayed some of his personal experiences of using the Courts as a disabled person:

> *"By way of example, Nottingham Crown Court has incredibly heavy internal doors off the lift, which means navigating them as a wheelchair user solo is almost impossible. As a baby-junior I was almost sent to Lincoln Crown Court before someone mentioned the accessibility was particularly dreadful, thankfully saving me a wasted trip. Ashford Employment Tribunal's lift is too small for wheelchair footplates to be attached. There is no reliable way to check what the access is like before you go somewhere new.*
>
> *"Despite Courts obviously needing to be accessible for all, the fact remains Courts can be very inaccessible, particularly to disabled people. Disabled-access is often a late afterthought or even non-existent."*

For 7BR, the Sesame Steps are a significant but very necessary investment, reinforcing our commitment to inclusivity and making ourselves as accessible as possible. We believe the issue of accessibility should be top of the profession's agenda, especially since the publication of the Legal Services Board's report in 2020 into reshaping legal services to meet people's needs - which called for a step-change to improve accessibility. And it should be an ongoing conversation too.

For 7BR, the installation of Sesame Steps and the remodelling of our building's interior is by no means the end of our journey. We want to deepen our understanding of diversity and to initiate active solutions to inequality wherever we can. The transformation of our front of house access is just the first step on the journey to becoming truly inclusive.

Harry Charlton, *Chief Executive at 7BR*

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The curious quirks of the vaccination cases

By Ian Brownhill, barrister, 39 Essex Chambers

Routine medical treatment cases

The Government's vaccination programme has been central to their strategy to exit the pandemic. Through each stage of the programme, the Court of Protection has been faced with cases where there are disagreements as to the best interests of patients who lack the mental capacity to consent to the vaccine.

The vaccination programme started in the United Kingdom in December 2020, despite that, there remain cases in the Court of Protection where issues as to the vaccination are being argued. The individual analyses as to the capacity and best interests of each individual before the court are fact specific. However, the raft of cases as to vaccination reveal systemic issues as to how people with disorders of the functioning or the mind or brain access routine healthcare.

To date, the published judgments of the Court of Protection have tended to focus upon significant medical issues. These cases are described as, serious medical treatment cases. Many relate to the withdrawal of life sustaining treatment or the amputation of limbs. Those types of medical intervention attract significant healthcare resources, often involve substantial planning and the weighing up of competing factors.

Rarely are there reported judgments in respect of more routine or mundane medical decisions. The experience of litigating the vaccine cases has revealed a number of striking issues.

Whose decision is it anyway?

One curious aspect of the vaccine cases has been how some healthcare professionals have approached the issue of consent to treatment to date. Whilst it appears that patients who are incapable of consent to treatment are being identified, there have been peculiar statements in respect of other people consenting (or refusing to consent) on their behalf.

One common phrase we have discovered in medical records is that, *"X's next of kin refused to consent on their behalf."* This phrase has appeared in a huge variety of cases causing wide disquiet amongst Court of Protection practitioners.

If a patient lacks capacity to decide whether to have treatment, then, unless there is a health and welfare attorney or deputy who is able to consent on their behalf, or unless the patient has made an advance decision to refuse particular treatment, then the relevant medical professionals will have to decide whether they reasonably believe that a form of treatment is in a person's best interests.

What the vaccine cases reveal is an alarming misunderstanding as to the law in respect of consent. In particular where family members (or even carers) have been asked to provide consent for the vaccination where they have no legal ability to do so. If this is happening in the vaccine cases, the inference must be that is happening in respect of other routine treatment decisions.

Whose application is it anyway?

The majority of vaccination cases have been brought before the Court by the relevant local Clinical Commissioning Group. However, not all. In the 2021 decision in *IOSK* [2021] EWCOP 65, the Senior Judge considered the protected party's vaccination following an application from the local authority. No health body was joined as a party to the proceedings. This case is not unique, a number of the vaccination cases have been brought to Court by the local authority.

Equally intriguing was a recent report from the Open Justice Court of Protection Project. They reported that a local authority had made an urgent application in respect of a man who had untreated ulcerated legs. The Project reported that a local authority had asked the Court to make an order that it would be in the individual's best interests to take him into hospital against his wishes for assessment.

The obvious implication is that local authorities are bringing applications in respect of routine treatment decisions when health bodies are not doing so. The question is why? The understandable answer is that local authorities are commissioning the social care packages of persons who do not have significant health needs.

However, the local authorities are not delivering the treatment. It appears likely that the local authority would only be aware of an issue in respect of routine treatment if, for some reason, it became urgent like the example given above.

What happens where there are disputes as to routine treatment, does the patient simply remain untreated until such a time as the issue becomes urgent? If that is so, then it is obvious that patients who lack the capacity to consent to their treatment will have poorer health outcomes than those with capacity to make decisions as to their treatment.

Such a state of affairs cannot be acceptable. Taking from the vaccine context, the Vice President stated in *SD v Royal Borough of Kensington And Chelsea* [2021] EWCOP 14 (at paragraph 14): "When an issue arises as to whether a care home resident should receive the vaccination, the matter should be brought before the court expeditiously, if it is not capable of speedy resolution by agreement. This is not only a question of risk assessment, it is an obligation to protect P's autonomy."

From afterthought to forethought

In June 2021, the concluding thought in the Lancet editorial was, "Disability should no longer be an afterthought and needs to be included in all public health equity efforts."

The Court of Protection must be part of that effort to secure public health equity. The assessment that someone lacks the capacity to consent to a form of treatment should not be a barrier to them receiving the treatment which is determined to be in their best interests.

The challenge for the Court is to encourage applications to be brought promptly when there is a dispute as to treatment and not when medical problems have progressed to the point that urgent medical intervention is required.

The Court has been strict in respect of obstetrics cases. In the annex to the decision in *FG* [2014] EWCOP 30, Keehan J gave clear guidance on how and when cases ought to be brought to Court. In 2020 the *Serious Medical Treatment, Guidance* [2020] EWCOP 2 was published, it has been invaluable.

The challenge now is to take the noteworthy observations from the vaccination cases, learn from them, and distil them into guidance in respect of disputes relating to routine medical treatment. Undoubtedly, such guidance would dispel some confusion and give clarity as to who is responsible for bringing the applications which will secure better health outcomes for persons who lack capacity to make decisions as to their treatment.

Ian Brownhill, barrister, 39 Essex Chambers

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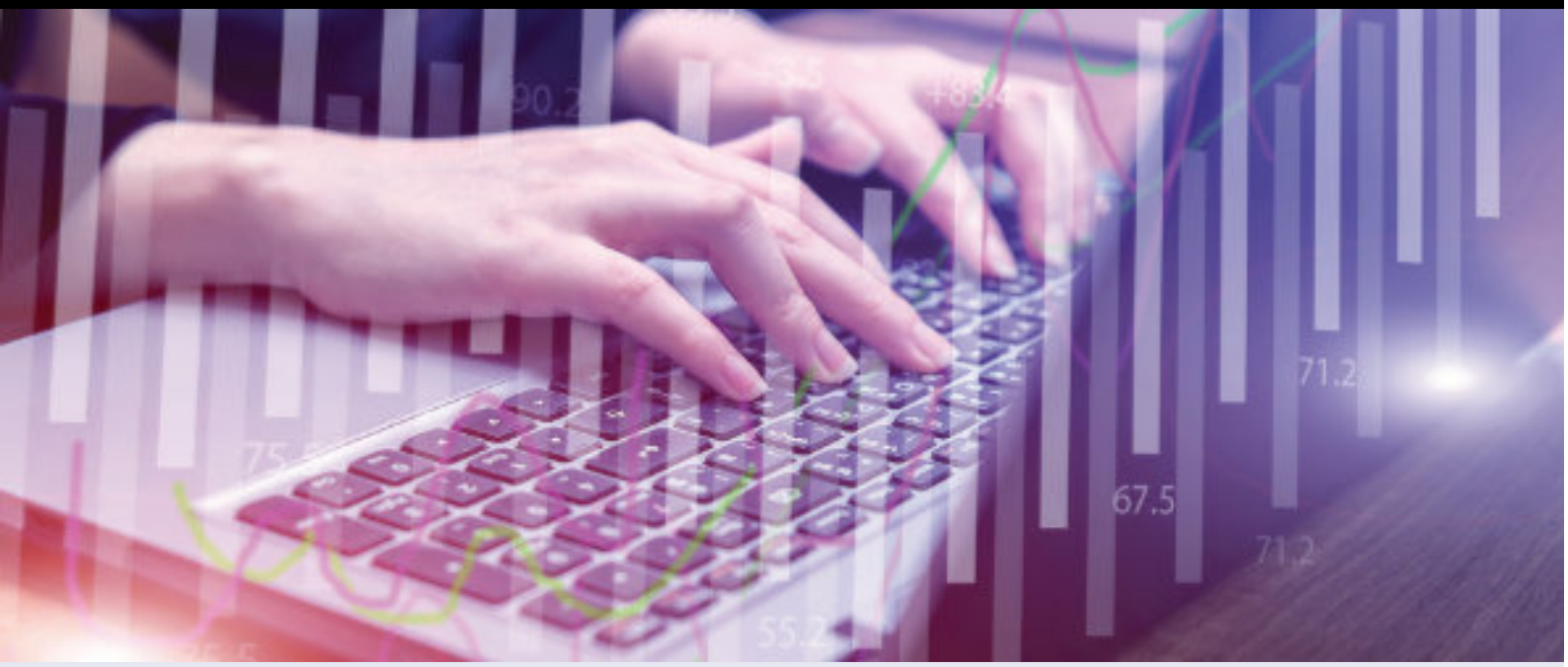
The Rise of the Digital Mercenaries

By Ian Whitehurst, barrister at Exchange Chambers



In the chaotic and sometimes lawless world of cyber, a new risk is arising as commercial or private entities realise the potential to weaponise cyber to further their own financial and geo – political interests on the national and international stage.

It is not only governments that are nowadays engaged in acts of cyber war and espionage, there is a growing tendency for businesses and corporations [whether with formal links to their respective States or not] who are keen to be involved in obtaining State and commercial competitors secrets through sophisticated means of hacking, the deployment of malware into systems or even disrupting the financial and economic activities of more dominant players in the market place to their advantage.

Running in parallel with 'legitimate' corporations and their misuse of cyber, is the growing threat by organised crime groups (OCGs) in using cyber not only to avoid detection and investigation in the first instance, for example by the use of military standard encrypted devices but also by the laundering of vast profits from a myriad of criminal activities through crypto currencies and the digital financial system.

The scenarios identified above are exacerbated and taken to a new level when former government agents decide to enter the private sector deploying their skill sets, knowledge and contacts to the highest bidder – these …privateersî or …digital mercenariesî pose a significant risk not only to government interests but also to society and democracy as a whole.

The recent case of three former US intelligence operatives being charged with criminal charges arising from breaches of US hacking laws and military export regulations, demonstrates the concerns that exist with former government agents plying their trade in the private and international sector and the potential conflict that arises to for western governments with former agents being allowed to work independently.

The traditional approach of deploying law enforcement and the threat of criminal sanction is understandable but in some respects this model is outdated and unlikely to be able to keep pace in such a dynamic field as cyber.

A successful investigation and prosecution is dependent on a number of factors – resources, skill sets, evidence and jurisdictional remit to name but a few – all factors that in some respects give a marked advantage to the digital mercenaries and their employers who can control and limit the remit of the investigative powers of the State in a world where the ability to deploy significant resources is a key advantage in the avoidance of detection and enforcement.

An alternative approach to addressing the risk of digital mercenaries to national security and economic interests is to approach this from a private law perspective and …front loadî the restraints upon government agents at the outset and thus be pro – active and not reactive in dealing with an issue that is always going to be present in such an evolving and lucrative field such as cyber.

By imposing stronger contractual terms, principally …restrictive covenantsî on state employees, stronger and better remunerated severance packages or by even placing a moratorium on them once they exit government service, is a far more pragmatic approach than trying to …bolt the stable doorî after the horse has left by adopting a traditional prosecutorial approach towards misconduct by former government agents.

Factor in effective civil asset recovery measures to the process in order to recoup monies and fees taken from third party states and organisations and you have a more effective deterrence based system to ensure the control of the …privateersî.

This approach is of course an alternative proposal to deal with a field of activity which is notoriously difficult to regulate. But in the interim and in the present absence of effective statutory law reform dealing with this issue, this more nuanced approach may be the way forward.

Ian Whitehurst, barrister at Exchange Chambers

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Barristers At Breaking Point: Does Burnout Continue to Plague the Legal Professions?

By Dr Lynsey Kelly

I wrote an article titled , "Are Barristers' High Levels of Stress Placing Their Health At Risk?" for the Hilary term 2017 edition of the Barrister magazine (p 22), based on my thesis research as a clinical psychologist. Invited to write a follow up article, here I look at burnout in more detail, and consider whether things have improved for since my research was published.

Research Findings

I interviewed criminal defence barristers working in the Magistrates' Court, a group that is stressed and pressured. Factors contributing to this stress were found to include: feeling the pressure of cuts to legal aid, high workloads, a feeling of responsibility for clients, a sense of working in a system that conflicted with their values, a lack of emotional support, and the need to appear confident and strong at all times. Distress and feelings of being overwhelmed were common, especially for junior barristers. The research found that barristers had many of the risk factors for burnout. Burnout is a state of psychological stress, where emotional demands have become so high that the person is emotionally exhausted and no longer able to fully cope. At that time, a number of initiatives to counter stress were introduced, such as "Wellbeing at the Bar."

Recent research suggests barrister wellbeing is an ongoing concern, with the International Bar Association (IBA, 2021) reporting that one in three legal professionals worldwide feel their work has a negative impact on their wellbeing, with 41% saying they would not discuss concerns with their employer due to stigma. Lawcare's 2021 report on UK legal professionals found a startling 69% had experienced mental ill health in the last year, with almost half not disclosing this at work. Echoing my small study from 2015, this research suggested that barristers continue to be at high risk of burnout.

Parallels with Medical Students

I currently work as a therapist for medical students at the University of Cambridge, and have been struck by the parallels between this group and the barristers I interviewed: highly intelligent, extremely diligent and hardworking, similar professional pressures to hide emotions, under immense stress, and at risk of becoming distressed. One pattern is common: working exceptionally hard, avoiding emotions but then falling into a state of apathy and disconnection. I thought it might be interesting to present this pattern as it may relate to burnout in barristers.

The Burnout Pattern: Overview

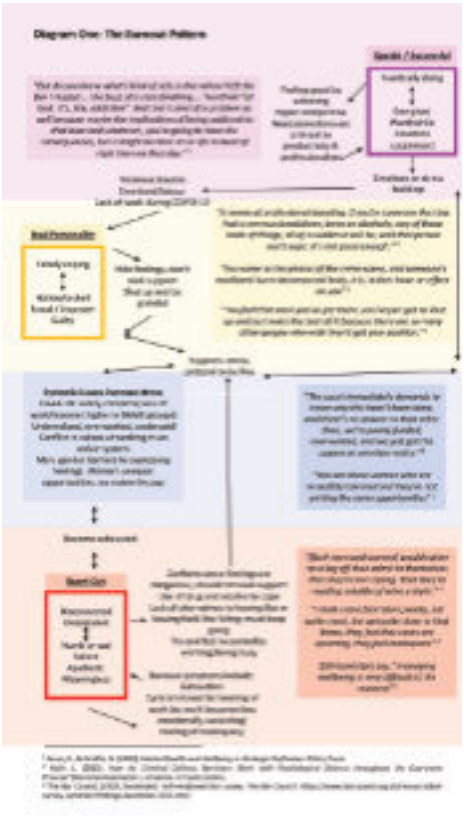
Diagram one borrows concepts from cognitive analytic therapy to demonstrate how aspects of professionalism, systemic pressure and individual psychology may create a vicious cycle that leads to burnout in barristers. The "special/successful," "dual personality" and "burnt out" boxes illustrate roles that can be received by others, or enacted towards the self and others. For example, someone in the red "burnt out" role may feel others are disconnected from them, disconnect from others and also disconnect from themselves and their feelings. The arrows indicate the patterns of thoughts, feelings and behaviour that link these roles, and the influence of systemic issues, with illustrative quotes from barristers. References for the diagram content and specific quotes can be found as footnotes. The diagram is schematic and does not attempt to include all issues that may lead to burnout.

Pink: Special/Successful role

Barristers who relate to this pattern would feel best in the pink role, being frenetically active, keeping up with the hyper competitive world of the Bar, and deriving a sense of esteem and worthwhileness from this. In such a role, noticing feelings or bodily needs is threatening, as it may preclude getting work done. It is also a threat to professionalism, which demands that feelings are hidden. It is not possible to maintain this role forever, and emotions and stress build up. The "emotional labour" of having to mask or perform emotion takes a toll, as does the vicarious trauma of being exposed to distressing evidence. Barristers may have been forced out of the "special/successful" role due to reduced work during COVID-19.

Yellow: Dual Personality Role

The yellow shaded area illustrates how emotions and feelings can start to build up, with barristers forced to present a dual personality. They may be falsely coping, hiding their emotions and not seeking support; feeling hollow, as if they are a fraud or imposter for feeling overwhelmed, or even guilty for not appreciating the opportunity. The



quotes illustrate how beliefs about professionalism, a requirement to "put up and shut up ," and exposure to traumatic material, mean barristers may attempt to suppress stress and pretend to be fine. They may manage to alternate between these two roles of "dual personality" and "special/successful": feeling guilty or inadequate for having feelings, and then escaping these feelings by getting back into frantic activity.

Blue: Systemic Issues Increase Stress

The blue zone shows what is arguably the causal driver of burnout: systemic issues. High workloads continue to put great stress on barristers. Financial stress has increased due to COVID-19, as many have suffered from loss of work and income, with BAME groups and women disproportionately affected; meanwhile, cuts to legal aid mean barristers are critically underpaid. A majority of barristers attending court feel concerned about infection control, and the risk of contracting COVID-19. A recent Bar survey reported the profession is at "breaking point." The same survey found barristers were very worried about access to justice; conflict between their work and their values is a known risk factor for burnout. Whilst men suffer gender barriers to

expressing their feelings, and are much more likely to complete suicide, women experience unequal access to opportunities and are particularly disadvantage by a lack of maternity support and pay. BAME legal professionals, and those living with disability, are more likely to suffer from poor wellbeing. These systemic issues create a level of toxic stress that may be unsustainable for most criminal barristers if conditions do not improve.

Red: Burnt Out Role

Some barristers will understandably therefore become exhausted, and burnt out, which can feel like being disconnected from themselves or others, feeling numb, sad or apathetic, and that life or work is meaningless. The main features of burnout include a sense of cynicism towards work and a corresponding loss of emotional fulfilment; a sense of incompetence, inadequacy or failure. Some may take the intensity of these feelings to confirm their sense that emotions are dangerous, that they should not seek support, use drugs or alcohol to cope, or try and feel in control by doing even more work. A sense of failure can be compounded by the lack of clear alternatives, or support for those who want to leave the Bar. Individuals who do not seek support at this time may manage to get back up to the yellow zone of fake coping by suppressing their feelings and pretending to be fine. Some may end up shuttling between these three roles on a long-term basis.

In therapy, diagrams like this are theorised to work by bringing unhelpful patterns into conscious awareness, allowing individuals to recognise where behaviours are self-defeating, and to start to make different choices. Barristers that recognise themselves or others in this pattern may be helped by seeking emotional support, perhaps considering therapy, or contacting Law Care or Wellbeing at the Bar. But as the blue zone illustrates, the underlying driver of stress may be systemic issues beyond the individual's control. What can be done to increase wellbeing in this context?

Systemic Changes V Sticking Plasters

I spoke to Dr Emma Jones, co-author of "Mental Health and Wellbeing in the Legal Profession," to discuss developments in support for barristers. Emma told me that in recent years, there have been a number of excellent wellbeing initiatives across the legal profession, including at the Bar. She said however, that "what is important is that these are evidence-based and sustainable, rather than a form of 'sticking plaster' to mask or avoid addressing deeper workplace issues." Emma confirmed that there is some evidence across the legal profession that wellbeing initiatives don't always have the intended effect on individuals, "so it is vital that they are implemented after consultation and with 'buy-in' from individuals at all levels of the organisation or body involved."

The IBA report comes to similar conclusions, recommending that focus should be on the structural and cultural working practices within law which are problematic for mental wellbeing, and not on enhancing the 'resilience' of individual legal professionals.

Conclusion

When I researched my thesis some years ago, there was very little on barrister wellbeing. There has been a considerable expansion in interest among both researchers and policymakers, with increased recognition of the psychological harm that can be caused by employment, and a willingness of some employers to incorporate wellbeing into their workforce management. However, despite several initiatives, barristers still seem to be at very high risk for burnout. It remains to be seen whether the profession can address the toxic medley of stress factors before it is too late, and barristers start quitting, threatening access to justice for all.

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Useful links:
Wellbeing at the Bar: https://www.wellbeingatthebar.org.uk/support-for-barristers
Law Care: https://www.lawcare.org.uk
The Barristers' Benevolent Association: https://www.the-bba.com

Lessons to Learn – Coercive Control

Both the family and criminal courts and those who practice I am sure will agree that we have come on leaps and bounds in recent years when it comes to coercive control. However, we are not there yet and there are lessons still to be learnt.

By Molly Mifsud, barrister, College Chambers

One of the biggest issues facing both the criminal and family courts is the lack of understanding about coercive control. People are beginning to recognise that domestic abuse is not exclusively physical, but it seems the understanding is still limited. Shouting threats at someone may now be seen as domestic abuse particularly if it is repeated and there is a real concern that the threats will be carried out. Repeatedly swearing at someone or insulting them is also something that people are beginning to recognise as domestic abuse. However, someone constantly commenting on your appearance, trying to indicate that you only look good dressed in a certain way or hinting consistently that your friend Jen is really not someone with whom you want to associate, is not something people tend to see as a sign of domestic abuse, specifically coercive control. They do not then tell their friends and family about this or when it keeps happening report it to the police as they don't want to look silly when it is just their partner's way of telling them they look nice or just because Jen said something they didn't like at dinner last week. It is only when they do walk away and take a step back that many people recognise this for often what it is or was: domestic abuse.

This is when we come in. They are in the police station hoping to stop their partner's abuse and see them convicted or they are in our offices trying to tell us their partner really shouldn't be coming to their house and collecting their child for unsupervised contact. But there is an issue. Evidence.

Frequently my colleagues and I are seeing domestic abuse, specifically coercive control cases coming before the court where there is next to no independent witness evidence, this includes hearsay evidence from others about their complaints. This might be the case particularly where the perpetrator was careful not to do anything when people were around. There is very little that can be done save for educating people about what coercive control is. It might be worth, particularly in family cases where hearsay is admitted into evidence, looking for any family members or friends who can say anything which

might support what was said even if it is no more than the complainant saying that the perpetrator had been making comments about her dress or that he wasn't pleased to hear that Jen was coming to the party and had a moan. GP letters can be similarly useful. If the complainant has gone to their GP with symptoms of depression or anxiety or similar and mentions problems at home the notes from this consultation can be helpful, contemporaneous evidence. All of this supports the case your client is putting forward. It is also worth considering applying for and then going through the police disclosure and DASH forms, if there are any, to check for comments like this.

Submissions are going to be key when we are in a case where it is one word against the other. We are all used to picking apart every sentence and every word the other side say, and this is going to be no different, if anything it will be more important. It almost does not matter which jurisdiction you are in; you will need to address the definition of coercive control and how it applies to the facts. You need to address how the reasonable person would have viewed this. To an extent you can remove your client's feelings. Focus on the words that the perpetrator is alleged to have said, the behaviour and how it was carried out. Was it said with a cutting edge, was it derogatory, did the perpetrator accept that they probably were angry, but the complainant wound them up? How were they giving their evidence, is it or could it be indicative of their attitude towards the allegations? As an advocate we need to consider all these things from the start of our involvement. Detail in this case will be key particularly where the opposing account is that it is made up or they simply have no recollection of the events. You need to show the court that this is what happened and that this is not something that has been imagined up by a complainant who is panicking about their own behaviour and how it looks.

Often courts are limiting the length of statements (we need to encourage the court towards narrative statements as per *F v M* [2021] EWFC 4 if they are not) and the number of allegations, although this is as subject of debate and can be difficult when alleging coercive control which is about a sustained pattern of events. When we are advising about the preparation of limited statements, we need to think about balancing quantity with quality of each allegation. The court are unlikely to give you opportunity to expand on the matters in EIC and so it will be important that the details are included and the elements that need to

be proven kept in mind. When choosing which allegations and what details about them to include we may wish to consider the following factors:

A. Severity.
B. Relevance to the issue in the case.
C. When it happened.
D. How much detail can be recalled by the complainant – is it an obscure incident no one could claim to have forgotten, is it credible?
E. Supporting evidence.

We need to make sure that we know and understand what has happened to adduce the right evidence. You may wish to consider having an early conference with the lay client and solicitor possibly before the preparation of the statement. You may need to be aware that the client may not recognise all the behaviour they are talking about as coercive and/or controlling. It is not your job to counsel them, but you may wish to explain to them the law around coercive control to help them understand the framework you are working with and how events compound. This will be important whether you are preparing to write a statement, giving written advice or a conference ahead of a hearing.

Make sure that you are asking open questions so as not to coach them, but you need to know and understand your case, whether anyone was told, why/why not, why they remember the incident, what they thought at the time about it, what did they say to the perpetrator, how did they react, was the incident mentioned by either party later, was that by message etc. The details will be important to adduce. We need again to make sure that their account is the more credible account and that we are ticking the boxes needed for a finding of coercive control. It might be that they are focusing on older and less relevant events as this was the start or the turning point but in terms of their application it is less useful. Allow them to talk freely but go through everything and advise them on what you think are the points that will help them.

On the topic of fact-finds, I will make a small number of comments about what we can learn here. I think we need to be more cautious in our approach to requesting a fact-find. They can be hugely helpful albeit difficult hearings, but we need to consider whether the information we will gain from it is proportionate to the cost, financially and otherwise. Ultimately it is a matter for the judge but your submissions on it may wish to broach the question. If everyone is agreeing contact and given the amount of time that has passed it is going to be in a contact centre for some time, is it worth a fact-find? Can we mitigate the risks in another way particularly when the allegations are old? Is there a more neutral narrative that makes the point but can be agreed between the parties that will inform CAFCASS and the court going forward?

This situation is undoubtedly going to get better with time and as more people know what coercive control is and how and to whom it can be reported. As legal professionals we need to help spread awareness about coercive control and, when we have such cases, we are drawing to the court's attention to the law and what exactly constitutes coercive control and how even years later it can have such a great impact on the parent and child. The more the court understands the intricates of the case, the more likely it is the decision will be the right one.

Molly Mifsud
College Chambers

All bark no bite: will a new offence reduce companion animal abduction?

By Samuel March, Barrister at 9 King's Bench Walk

"I read a learned article by some lawyer saying we should not bother about pet theft. Well I say to Cruella de Vil QC – if you can steal a dog or a cat then there is frankly no limit to your depravity." – Boris Johnson

On 06 October 2021 in his keynote speech at the Conservative party conference, the Prime Minister hit out at an article (possibly Mathew Scott's piece in the Telegraph) which was critical of proposals to create a new criminal offence aimed at tackling what has variously been described as the "theft", "abduction" or "taking" of companion animals.

Animal abduction is abhorrent. As a practicing criminal barrister, I recently acted in a burglary case where three men forced their way into a residential home, assaulted a homeowner and made an unsuccessful bid to steal her prize American Bully XL dog, apparently worth seven thousand pounds. Sadly, for as long as there is money in breeding and selling designer breeds, they will draw attention from opportunistic thieves. These crimes are dangerous, distressing and disorientating for animal victims, and devastating for their human families.

The actual scale of pet theft in the UK uncertain, partly because many police forces have not recorded or provided the data on the topic. Data collected by The Kennel Club using Freedom of Information requests to those police forces that do, suggests there were an estimated 2,355 cases of dog theft in 2020, representing a 7% increase from 2019. This rise may have been fuelled by the large numbers of families who decided to adopt dogs during the 2020 lockdowns, and the consequential rise in prices of certain breeds. Unsurprisingly, this led to calls for "something to be done" about companion animal abduction.

Enter s.43 of the Animal Welfare (Kept Animals) Bill ("the Bill") and its proposal for a shiny a new criminal offence: "taking of pets". If passed, a person in England would commit an offence if, "without lawful authority or reasonable excuse" they took or detained a dog so as to remove or keep it from the "lawful control of any person who is entitled to have lawful control of it".

The offence casts a marginally wider net than theft. To prove the theft of an animal, the prosecution must prove "dishonesty" on the part of the defendant, as well as an "intention to permanently deprive" the owner of the animal. Neither of these are express elements of the proposed offence, although one might expect that a defendant with a truly honest explanation will in many cases have a "reasonable excuse".

The ambit is narrowed somewhat by its strangely drafted "connected person" defence, which excludes cases where the two specified parties are spouses, civil partners, parents or siblings ("whether of the full blood or the half-blood").

S.44 provides a power for the Secretary of State to extend the offence above beyond dogs, to cover other commonly kept companion animals where there is evidence that they are "capable of forming bonds with the people who keep them" and removing such an animal "may adversely affect its wellbeing".

Looking to government press releases about the proposal, the primary selling point of the offence is promise that the offence would "put people who steal these much-loved pets behind bars for up to five years" (see s.43(3)(b) of the Bill for sentencing powers). The argument that this move should be supported because it will lock people up should, in my view, be unattractive to animal protection advocates. Those who see animal protection as a progressive movement based on evidence, reason, and compassion for sentient beings, should hesitate before calling to put more people, generally those already at the bottom of society's pecking order, into cages. This is particularly the case where carceral justice approaches fly in the face of the abundance of studies from across western societies which suggest sentence severity has little-to-no effect on crime levels. If proponents of the bill rely on any peer-reviewed evidence that increased sentences will actually reduce this type of offending, it is not something that features prominently in their press releases or policy documents.

If the suggestion is that these sentencing powers will act as a deterrent, it is hard to see how that could be the case where the chances of being charged and prosecuted are so low: the percentage of companion animal theft cases across England and Wales resulting in a charge brought against a suspect dropped to 2% in 2020.

Even if longer periods of incarceration for the unlucky few who are caught were a laudable outcome, the five-year proposed sentence is two years less than the maximum sentence for theft, and nine years lower than the maximum sentence that applied in the aforementioned dog burglary case. Of course, the maximum sentences only apply in the most extreme cases and are rarely imposed in practice. Instead, courts follow sentencing guidelines set by the Sentencing Council. The theft guidelines are largely based on the value of the item stolen, which is clearly an inadequate indicator of the criminality inherent in abducting sentient family members. Under the law as it presently stands, custodial sentences would rarely be the starting point for theft of a "low value" companion animal.

In an interview with the UK Centre for Animal Law, John Cooper QC, an adviser to the pet theft campaign, explained that campaigners had already tried to see whether this could be addressed within the general structure of the theft act. Indeed, during the parliamentary debates around pet theft in October 2020, Conservative MP Gareth Johnson explained that in 2016 he wrote to the Sentencing Council, asking it to change the guidelines to properly reflect the inherent value of much loved, but financially worthless mutts and mongrels. He said the Sentencing Council's reply was that the current guidelines were perfectly acceptable.

As a result, John Cooper QC criticises "eminent lawyers on the social media going on about 'well you've got the Sentencing Council; you've got the Theft Act'". He argues that the Sentencing Council's refusal left the campaign with no choice but legislative reform. Whilst that might have been the case for a backbench campaign, this bill is supported by the Prime Minister, the Home Secretary and (then) Lord Chancellor, Robert Buckland QC MP. The latter is significant due to the power, under s.124 Coroners and Justice Act 2009, to propose to the Sentencing Council that guidelines for an offence be revised. It does not appear that this power, which might have provided a much faster solution, has been used in this context. If the Sentencing Council were truly opposed to increasing sentence regardless of support from the highest level of Government, then the campaign would face further barriers in any event: because the Sentencing Council would still have the power to set lenient guidelines for the new offence.

The more attractive argument, for animal protection advocates, was always the suggestion that this was an opportunity to place the sentience front and centre in abduction cases. I would welcome any law that eroded the outdated and unjust principle that sentient beings are mere "chattels", whose value is limited to their market price. Early press releases made hopeful references to the creation of a "pet abduction" offence, and The Pet Theft Taskforce recommended in September 2021 that the offence "should prioritise the welfare of animals as sentient beings and recognise the emotional distress to the animal in addition to its owner".

If this is accomplished in s.44, then it is not explicit. The name "taking of pets" omits any reference to "abduction". Neither welfare nor suffering are key ingredients. Ironically then, it may not be until the Sentencing Council comes to prepare offence-specific sentencing guidelines that courts are given explicit instruction to consider animals' inherent value any more than they would under existing theft laws.

The proposed offence does nothing explicit to increase sentences and certainly nothing that could not first have been tried using s.124 Coroners and Justice Act 2009. When analysis is limited to the wording of the bill itself, the bill simply does for pet theft what vehicle taking (or "TWOC") did for car theft: an offence with a lower maximum sentence but where intention to permanently deprive does not need to be proved.

As an anti-speciesist, vegan lawyer specialising in criminal and animal protection law, I hoped that this would be an opportunity for meaningful action that would protect animals from abduction and begin to shift their status from mere property to something more. The legislation as it currently stands feels like an empty sandwich…and that coming from someone who won't eat most sandwich ingredients.

As a barrister who designed his own hemp wig rather than wear horsehair, I hope that I will escape the "Cruella de Vil" analogies. I am certainly not saying that we "should not bother" about companion animal abductions, but I am more interested in moving beyond cages and biting down on the problem rather than promoting vanity legislation whilst barking about locking people up.

By Samuel March, Barrister at 9 King's Bench Walk

Unwelcome Signs – Hospitality Regulation after the Covid Crisis

The hospitality industry is reeling in the wake of the Covid pandemic. The experiences of the last two years have exposed aspects of regulation and decision-making in this field that will have ongoing implications for legal practitioners for a long time to come, and are worth examining in more detail.

By Sarah Clover, barrister, Kings Chambers

As the nation has begun cautiously to contemplate life without Covid restrictions, the Government has promised to: "set out our long-term strategy for living with Covid-19". It appears that every business now needs such a strategy, in a regulatory landscape that has changed considerably, and will continue to develop at a rapid rate. In assessing the havoc that the pandemic has wrought over the last two years, nobody now speaks in terms of a return to "normal", as there is a sombre understanding that everything has altered to some degree, and that what lies ahead is uncharted, and in many respects, driven by factors that have nothing to do with the businesses themselves.

Many of the Covid measures and restrictions hit the hospitality industry catastrophically, including the periods of inability to trade sustainably, or at all; the specific restrictions on hours of opening, table service or covid passports, and the chronic staff shortages. As the recovery phase unfolds, entrenched changes in the trading environment have an ongoing influence that could not have been predicted.

One of the Plan B strictures being lifted is the requirement to work from home. The enforced absence from work places has cut a swathe through town and city centre outlets and venues that picked up the lunchtime and after work market. Even the formidable retail hubs of London were turned into ghost towns with the disappearance of tourists and workers. Businesses scrambled to explore and adapt to takeaway services and home deliveries, with varying degrees of success. As with the video conferencing explosion, however, these new circumstances forced former commuters to try stay-at-home lifestyles that they would not have considered before, and in significant numbers they have embraced the novelties into their lives, triggering a culture shift in behaviour and permanent new habits. Whilst many in the work force could not wait to get back to their offices, many more realised that it was not necessary or even desirable to do so. The focus of work breaks for them has shifted to local outlets or even their kitchens, and the focus of their evening entertainment has moved more often to their living rooms.

For those premises that survived and waited hopefully for the return of their former customer base, the pandemic crisis is far from over. Academic studies (Eg: University of Sheffield Department of Economics 2021) into the long term impact of Covid-19 have demonstrated that city centres could lose £3 billion due to permanent changes caused by the effects of the virus on consumer behaviour, particularly the shifts to home working. One study found that in 2022, the average UK worker will be working from home one day a week more than they were prior to the pandemic, and this is expected to be a permanent shift. Even at that level, there will be huge consequences for the retail and hospitality industries, and the behaviour will not be evenly spread in any predictable pattern. The study estimates that approximately 77,000 hospitality and retail workers could be forced to relocate or lose their jobs completely, which will see amplified impacts on low income workers, and exacerbate inequalities between affluent and poverty afflicted areas.

The report noted that city centres may have to transform themselves in order to remain sustainable, including a transition to more residential use instead of a retail focus, but this carries difficulties of its own. Many local planning authority policies seek to concentrate retail activity heavily into city centres, to promote every aspect of sustainability, from retail prosperity, to cutting car travel and air pollution. Random dilution of the retail offer will have destabilising impacts across the board.

Layered on top of this is the volatility of post-Covid visitor behaviour. In the immediate aftermath of the lockdown periods, there was a notable impact on consumer reaction to the day time economy, and even more acutely to the night time economy, which could be categorised very roughly as those who remained reluctant to go out, and those who could not wait. The ones driven by pent-up demand included those with criminal motivations, and the incidences of drug abuse, sexual assault and anti-social behaviour in the night time hours, including the alarming "spiking" phenomenon soared exponentially, to the dismay in particular of the Police and other regulators. Whether this settles into a longer term trend remains to be seen, but in the short term, it has only served to alienate a significant contingent of law enforcers. It has also served to harden attitudes towards the night time economy that were formed or exacerbated during the pandemic restrictions: namely, that the hospitality industry presented disproportionate risks and needed fundamentally to be restricted and controlled as opposed to being fostered.

Appeals from Ministers for a more balanced approach towards an industry in peril appear to have fallen significantly on deaf ears. In April 2020, Kit Malthouse, Home Office Minister wrote a letter to the Chairs of licensing committees in local authorities, identifying "key areas where licensing authorities may wish to consider a pragmatic and more flexible approach during this outbreak, while ensuring the licensing objectives are safe-guarded". The letter set out a balanced perspective, acknowledging the undoubted obstacles confronting businesses trying to comply with the strict letter of their licence conditions as they struggle to re-establish their operations in a post-pandemic environment.

These businesses face a perfect storm. Just as they find themselves in need of more experienced and competent staff, and additional door security details to handle the challenges of post-lockdown demand, they confront the worst shortages in modern memory as a consequence of furloughing and uncertainty causing thousands to leave the industry, and Brexit impacts compounding the effect. While the regulators are clamping down as never before, the industry finds itself in the worst position possible to comply with regulation, and with the least sympathy it has ever been afforded. Defences beginning with "Due to Covid" are cutting very little ice in any quarter.

At the same time, ironically, there is an increasing awakening to the vital and fundamental role that hospitality premises play in the operation of healthy urban life. Everyone will be able to think of ways in which they have missed their own preferred leisure time in a hospitality setting. The opportunities offered by food, drink and entertainment venues for sociability and cultural experiences in the lives of communities, as well as the contribution to employment, supply chains and the local economy are critical and indispensable. There is a growing recognition amongst all politicians, local and national, that a heavy handed approach to the industry in the wake of the pandemic is going to prove disastrous in a very wide context: and, in fact, that the disaster has already begun.

An extinction event for these businesses leaves a dramatically different look and feel to the places where we live and work, not only at night, but also during the day. This disconcerting transformation is being accelerated by a significant new influx of residents taking occupation of their newly built or converted urban centre apartments. The extension of permitted development rights has meant that offices no longer required for the home based workforce have been readily converted to residential units, driven by a national housing shortage and the imperative to boost unit numbers, almost at any cost. This might be thought to bring a welcome new customer base for the town centre night time economy in particular, but the irony is that, frequently, the exact opposite is the case. Those that buy their new homes in a flush of metropolitan enthusiasm all too often find that a change of personal life circumstances, perhaps in the form of a birth, a bereavement or a change in shift patterns means that they suddenly value sleep significantly more than the city slicker lifestyle. Instead of moving away, however, they attempt to complain their environment into quiet submission. This should not be as effective as it commonly transpires to be. The local authority planning officers who granted the residential planning permission, and the licensing officers who granted the premises licences for the noise generating venues very often did not consult with each other before those exercises, and it appears, with wearing predictability that neither department discusses the situation with the environmental health colleagues down the corridor, who are under a duty to deal with the noise complaints that typically arise years later, when it is all too late.

It is obvious in hindsight that these urban land use relationships should have been front loaded with negotiation, at the times of the grants of the respective authorisations. Instead, the competing neighbours are torn apart in acrimonious regulatory battles, that often see the venues creating the noise stripped of their rights to continue, when they were the ones in peaceful, if not quiet occupation and causing no harm in the original status quo. There is increasing push back against this outcome, with savvy licensees who spot the planning notices on lamp posts for new development in their area robustly highlighting the predicted future fall out before the Council has even begun to debate their decision. This is the territory of the Agent of Change principle, which is a policy tool in the National Planning Policy Framework that serves to point out these issues and require decision makers and developers to take them into account, with a view to protecting and not burdening existing noise sources in the neighbourhood.

These complex factors combine to form a highly complex, multi-faceted regulatory landscape going forward. The calls for deregulation and also for stronger regulation have gone up simultaneously, and this will be an area to watch closely over the next few years, to see which influences prevail, and how they impact upon decision making. In the meantime, all of these factors have had a damaging effect on the relationships between regulators and the regulated, in a legal arena which particularly promotes the benefits of partnership working. At this difficult time, there is too little of this in evidence, and the work of law and policy makers now must surely be to address these imbalances and find more solutions for the common good.

Sarah Clover, barrister, Kings Chambers

Cancel Culture –The social media retribution phenomenon

Cancel culture - the internet phenomenon resulting in the ostracism of an individual or groups either through social media or from personal or professional circles, has been propelled into the media spotlight due to numerous high profile celebrity cases over recent years.

By Christina Warner, barrister, Goldsmith Chambers

From topics such as Britney Spears' battle to end her conservatorship, R Kelly's convictions for sexual assault and pending sentencing and the allegations and convictions of sexual abuse and misconduct against Harvey Weinstein were all fuelled by the phenomena. As well as rallying international support for victims, it was equally swift and powerful in issuing financial and social retribution to the accused.

It is unsurprising that the phenomena has had such a profound impact as a 2014 digital survey found that 58% felt tweeting (posting short messages on social media platform, Twitter) was an effective form of advocacy[1]. But as robust as the support for the trend is, as is opposition to it. With the negative aspects of the trend having been addressed by the likes of former US President, Barak Obama.

Cancel culture can be seen as an extension of call-out culture: the natural escalation from pointing out a problem to calling for the head of the person who caused it.[2] During a speech at the Obama Foundation summit in October 2019, Obama said about 'call-out culture': "I do get a sense sometimes now among certain young people, and this is accelerated by social media, that the way of me making change is to be as judgemental as possible about other people and that's enough," Obama said. Going on to warn that "That is not activism, that is not bringing about change." Further commenting, "the world is messy. There are ambiguities. People who do really good stuff have flaws,"[3] prompting discussions as to whether the phenomena was simply a form of mob justice or simply crowd-sourced punishment.

Instant karma

In a world where immediate outrage is possible; is cancel culture effective in holding accused to account or is it simply a new form of boycott? Arguments have been made that the trend may be counterproductive through the casting of verdicts in the court of public opinion (via public discourse) and promotes toxic forms of criticism rather than the correct legal avenues being used.[4] Online social media-led movements have called out misogyny, exposed bullies and named and shamed those responsible for abuses of power. This being particularly the case for Harvey Weinstein which was a catalyst for the Me Too and Time's Up movements globally; beyond the entertainment industry and where the ripples of the movement are still being felt today. It was the October 2017 exposé by the New York Times regarding the film producer which ignited a spark to the powder keg collapsing Hollywood empires, with allegations of sexual assault and misconduct dating back decades. So impactful was the Hollywood discourse surrounding the Weinstein scandal and cancel culture emerging into the mainstream that is has been dubbed the Weinstein Effect.[5]

But whilst the manner of accessing and speed at which information is shared and consumed online, its hardly surprising that people are able to freely share their experiences on forums and social media platforms. This being particularly effective when stories of incidents are exchanged and so a common experience is felt leading to a movement for change. Cancel culture undoubtedly gives a voice to those who seek accountability where the justice system may have failed. This particularly being the case for members of disenfranchised or unrepresented social groups.

#FreeBritney and #MuteRKelly

The impact of the social media traction behind the publicity of R Kelly and Britney Spears created a demand for further information. Streaming service, Netflix featured documentaries on the subjects throughout 2019 and 2021, helping to create a cohesive narrative of the cases, which in turn garnered greater mainstream media awareness. The outcome of such widespread media coverage which came about as a result of cancel culture's beginnings contributed to Britney Spears' conservatorship ending the same year as the documentary revealing her story, *Britney Vs Spears* was released. Similarly, *Surviving R Kelly*, released in January 2019, fuelled the press coverage also reporting on Kelly's charges; ten counts of aggravated criminal sexual abuse on 22 February 2019 and eventually resulted in him being Indicted on 18 charges including child sexual exploitation, child pornography production, kidnapping, forced labour and obstruction of justice. It was on 27 September 2021 that Kelly was found guilty of nine counts and is due to be sentenced on 4 May 2022.

But the impact of the social media movement on Kelly's financial and artistic credibility was felt well before the start of his criminal prosecution.

The social media hashtag #MuteRKelly which stemmed from a US-wide, grassroots movement to end the financial support of Kelly's career, caused some of R Kelly's music collaborations receiving backlash and were removed from streaming services as the *Surviving R Kelly* documentary series aired in January 2019. The campaign gained momentum with the Time's Up movement releasing an open letter calling out music streaming and concert ticket services, Apple, Spotify, Ticketmaster, Sony Music and other companies to end their financial relationship with Kelly.[6]

Likewise, Britney Spears's conservatorship was legally terminated on 12 November 2021, the same year the documentary, *Britney Vs Spears* was released. The conservatorship, which was established in 2008 after Spears suffered a very public mental health crisis, appointed her father, Jamie Spears control over the singer's finances, career decisions and major personal matters which included visits with her sons, her ability to remarry or any decision to stop using birth control. Aside from the popularity of the documentary telling Spear's legal battle, so too was the social media #FreeBritney movement credited for contributing to the success of her contest of the conservatorship remaining, with Spears herself praising campaigners and the #FreeBritney hashtag.[7] The movement was so impactful, that the American Civil Liberties Union filed an amicus curiae to support Spears's plea to select her own legal representation.[8]

Roseanne Barr, Louis C.K, Kevin Spacey and JK Rowling, although not convicted of any wrongdoing have felt the wrath dispensed by cancel culture. ABC cancelled the *Roseanne* show shortly after the actress had posted a racist tweet, and Louis C.K. encountered major professional setbacks after he admitted to years of sexual misconduct against female colleagues.

Hollywood heavyweights such as Oscar-winning actor, Kevin Spacey who was effectively blacklisted after being accused of sexual misconduct and assault in July 2019 meant that allegations were propelled onto the front pages of tabloids. J.K. Rowling faced a similar fate when she expressed controversial views surrounding transgender rights on social media which resulted in her being 'cancelled' and her attendance allegedly being snubbed from a Harry Potter reunion in 2021. Similarly, Ellen DeGeneres was 'cancelled' after being accused of fostering a "toxic" workplace culture including allegations of discrimination and sexual harassment on her talk show, *the Ellen DeGeneres Show.*[9] The impact of cancel culture was enough to irreparably damage their careers, alongside a push to lessen their cultural influence and in some cases, challenge reputations that their careers were built upon.

As recently as February 2022, Whoopi Goldberg was temporarily suspended from her role as presenter on the US talk show, The View after making controversial comments surrounding the Holocaust which caused a widespread social media frenzy as to whether cancel culture has gone too far.

Hashtag activism

Certainly, the retribution handed down by cancel, consequence or call-out culture is swift and usually, long-lasting. Regardless of the stage of criminal or civil enquiry or level of police or judicial involvement, those who have fallen foul of the hashtag have argued that being judged by the court of public opinion is not adhering to due process and is detrimental in both principle and practice. Angela Sailor, former vice president of the Heritage Foundation, an American conservative think tank based in Washington, D.C. recently wrote, "Cancel culture is a direct assault on the construct of forgiveness. It seeks not to fix, but to destroy."[10] But questions have been posed as to whether cancel culture has worsened during the pandemic as the use of social media has grown exponentially so accelerating the trend.[11]

Hashtags and social media have enabled people to mobilise against issues less visible in mainstream media. Should movements and campaigns not come about from a cohesion of shared experiences on social media sites or forums then the same may be triggered through the increasingly popular documentaries found on streaming services. Social media culture has created a demand for immediate visual gratification - documentaries satisfy this by providing a condensed, pre-packaged and cohesive narrative on a wide-reaching scale and across diverse audiences. Similar movements demanding change have been mobilised as a response to other popular 'cult' documentaries focusing on environmental and animal protection, such as *Blackfish, Seaspiracy and Cowspiracy.*

Undeniably, these movements prompt dialogue on important issues and in some cases, have enduring legislative impacts. In the aftermath of the conviction of Harvey Weinstein, the US states of California, New Jersey and New York banned non-disclosure agreements that cover sexual harassment. Dubbed the 'Be Heard' Acts, California and New York both broadened their sexual harassment laws to offer protection for people harassed in an expanded set of business relationships. As

as legislative progress, the Time's Up movement defence fund has helped over 3,600 people seek justice and resulted in the reform of processes available for those reporting sexual harassment.

Christina Warner
Goldsmith Chambers

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Looking Beyond The Picture: How To Trust Video Evidence

By David Spreadborough, Certified Forensic Video Analyst

I last wrote here for the **Easter term of The Barrister in 2018** and honestly, where has the time gone? Considering all the troubles over the last two years though, it is not surprising that it only seems like yesterday that I was explaining some of the challenges with CCTV and Video Evidence. What has changed in that time? Are there new developments within the world of Digital Multimedia Evidence? The quick answer is yes, there have been changes and they affect every case where video and images are presented as fact.

Over the last few years, several new documents have been published offering guidance to Police Forces and private Forensic Service Providers in the handling and processing of Digital Multimedia Evidence. However, many have been contradictory, filled with ambiguity and in one case conflicted with the UK's Forensic Regulators Guidance and also that of the training delivered in the UK by **LEVA**, the Law Enforcement and Emergency Services Video Association.

Some of those, I am led to believe, are undergoing review and amendments but I wanted to start with this issue to highlight a key point. If guidance by various organisations is ambiguous, conflicting or wrong, how can a courtroom trust the presented multimedia evidence? One analyst may have followed one set of guidance, but another may be using the knowledge gained through training.

Trust, not only comes in the form of the presented evidence but also in the person who has handled that evidence. Without trust, the evidence is worthless.

Let me introduce you to the three pillars of forensic image and video evidence: integrity, authenticity and science.

It doesn't matter where in the world you are, what training you have received, how long you have been investigating video evidence, what guidance you have followed or what software you have used. If there are gaps or questions within any of these pillars then the weight of trust is reduced.

I mentioned a lot about integrity and authenticity in my previous article and I cannot emphasise how important these are now due to the digitization rollout within policing and the criminal justice system.

Integrity

As a reminder, integrity examines the origins of the evidence and the changes that have been made to it. At first reading, you may think that you do not want any changes and in an ideal world, that would be correct. However, just as a fingerprint cannot easily be seen or analysed on a piece of paper, videos and images often also need to be processed to enable the correct assessment and interpretation.

It is the initial acquisition, handling and processing that requires integrity.

Over the past few years, Police Forces have resorted to allowing members of the public to extract and submit their video evidence online. Many of these systems are then linked with new Digital Evidence Management Software (DEMS) that handles the vast amount of data being ingested during modern investigations. This has unfortunately exasperated the problem of images and video being used that have already undergone unknown and irreversible changes.

This is where the first question of trust appears - Can you trust that the image or video has not changed since the time of initial creation? If it has changed, what has been changed?

Many small businesses and homeowners now manage their CCTV and video surveillance via mobile apps on their phones. Some of these can create clips and then send those via email, or upload to a web service within policing.
During a recent test, I found that many of these videos can contain up to 4 times less visual data than the original video stored within the Digital Video Recorder.

During the early stages of investigations, requests are made for any CCTV and video evidence to be sent to the police. Screen recorded footage, the worst possible method of obtaining video evidence, is often received due to its speed and ease of creation. As I have said previously, these are invaluable for immediate media releases to trace suspects, but terrible for evidential analysis and use. Due to the limitations within policing, however, by the time that these are reviewed and deemed of use, the original video required for evidence has often been deleted.

The consequence of these mistakes, and those mentioned in my previous article surrounding the acquisition, is that we are already starting with something that has changed and it is often difficult to understand those changes and how they affect the questions being asked of the video. Can you trust what is being presented if you cannot repeat or validate the differences?

Staying with our integrity pillar, we

have the changes made to the images and video whilst stored within any legal organisation.
Even changes to the filename can cause issues, but the biggest problem is automated transcoding and undocumented naming of the video and imagery evidence.

Probably the largest mistake in any guidance document over the last few years was that of the identification of working copies. When is a file an original, when is a file a working copy and when has a file been created from another exhibit?

Again, you may believe these are easy issues to deal with and it's concerning that guidance that should have changed to reflect the ease of digital transformations did not get updated.

The consequence of this is that many forces were changing video evidence, perhaps by cropping, trimming or making it more easily viewable, and then naming the new video as a working copy of the original.

Forensic Video Units and Forensic Service Providers were analyzing "working copies', and in some cases oblivious to the fact that it was not a true copy of the originally acquired video evidence.

We have one last stage in the integrity and that is to answer the questions on the processing of the evidence.
For the sake of argument, and to move along, let us assume that our video evidence was acquired correctly from a CCTV system, and has been stored and labelled correctly with a Police Service. It then moves to an officer to view and assess. What does this officer use to complete that task?

Remember - This is evidence, not the latest viral video of a dog skiing.

A few years ago, we developed **Amped Replay**. A simple to use CCTV and Video Player designed for everyday policing but built with the forensic protection required within a modern legal system.

No need for various codecs or CCTV players. No need to screen capture footage and then take screenshots with PrintScreen. The Forces and units now using Amped Replay have the benefit of an easy to use program to view, assess and complete basic tasks like annotation or hiding the face of witnesses. They are also protected by forensic reporting of everything they have done.
What have they done, how, and who has done it? Here is the integrity again.

Finally, we then have the Forensic Video Unit or Service Provider.

A forensic image or video analyst should be able to identify errors in the integrity of a video upon initial analysis. At this point, the disclosure of those issues should be made, as it may result in no further work being completed. The lack of identification of gaps in the integrity of an item may highlight a lack of knowledge that brings into question everything else that they have done.

For instance, the opinion of a facial expert may be inadmissible if they never identified that the video was a screen recorded, transcoded copy of the original and their processing altered the dimensions of the face being analysed and compared.

Changes to an exhibit will, in most cases, need to be made to a video or image when questions are being asked of it. Some of those changes may be simple, such as extracting a single frame from a video, but some changes may be technical and complex. This is the last stage in the integrity chain. Any changes will result in a new derivative exhibit, and as such, the integrity chain starts again.

All the processing required in the creation of a new exhibit must be reversible, repeatable, reproducible and recorded.

Integrity, therefore, asks the question: has an exhibit changed since the time of acquisition?
The answer should be NO. If yes, those changes must be detailed and explained.

Authenticity

Authenticity enables us to rely on the video or image. Is it a true and accurate representation of that which it purports to be?

Again, I have mentioned this before but, the increased importance today cannot be overstated.
If a video or image has full integrity, then it still may not be authentic. How can this be?

The way video is recorded can be hugely complicated. It is not possible to capture uncompressed video at high frame rates across multiple cameras, the data size would be huge. As a consequence, video compression is used in many different ways to get the best effort. How this works is extremely clever but it takes someone with a full understanding of the image generation to verify the authenticity of objects, movement, colour and light.

Is the video authentic in that it displays motion correctly? In the case of a low frame rate video, the answer to that question may be No.
Is the video authentic in that it presents colour correctly? In the case of highly compressed video, the answer may be No.
Is the video authentic in that it displays a vehicle's speed correctly? In the case of transcoded video, the answer may be No.

Authenticity and the reliability of the image and video data can only come after analysis, and that is where the research, interpretation, restoration and enhancement of the exhibit happens, and this leads us on to our third and final pillar.

Science

Forensic Video Analysis is a scientific process. Even when the question relates to a task, such as, "can you prepare that video for court?" The process involved in that preparation must be accurate, repeatable and reproducible.

"Can you enhance that licence plate?" The process again must follow a scientific model to ensure the validity of the result.

A video, when exported from a CCTV system may not be authentic without processing. Its aspect ratio may be wrong, there may be lens distortion, there could be blur, lighting issues, the timing could be incorrect, the frame rate may be wrong. I could go on, but you should be able to get the picture (no pun intended).

For forensic image and video processing, restoration and enhancement, the image generation model should be used. This gives us a workflow that allows us to restore a video view or object and therefore regain authenticity.

Whenever a video has been produced from another, specifically for presentation, it is vital that the continuity chain can be followed back to the original exhibit and that all changes made follow the scientific model. These basic checks make it easy to assess all changes and allow all parties to test the item's authenticity.

The correct interpretation of events in a video directly relates to the initial understanding, analysis, restoration and enhancement of it. It is truly frightening to still see images and video being presented where there are errors in the basic skills and knowledge of the presenting witness, or when there is no understanding of the processes they have used.

Technology has also not stood still over the last few years and the presenting witness must be careful in their approach to it. Images and videos can pass through several different applications and systems but every exhibits movement must be verified to ensure that what is passed from one piece of software, is received correctly by another. If a video is not being decoded in the same way, for instance, it may show a different number of frames or playback at a slightly different speed.

The competency and reliability of the presenting witness are of vital importance in the identification of unknown and untested image processing. With advancements in technology and the increase in Artificial Intelligence (AI) algorithms to assist in

image and video processing, the analyst has a duty to the court to ensure that no unvalidated technology is used in the processing of images or video.

An analyst's responsibility is to ensure the evidence can be trusted. If they are unable to explain a processing stage because this has been conducted using an unexplainable computer algorithm, then how can the result be trusted in a courtroom?

Witnesses being proficient on the creative side of photography and video editing is not enough. They should have the approach of the scientist, not that of the artist, and they should follow valid scientific workflows.

In some cases, more than one witness may be required. A technician may have completed several image processing tasks, but may not have the technical knowledge to explain the methods used. Therefore, an analyst may be called to explain the more technical aspects to allow the image or video to be admitted.

This aspect can easily be managed during a peer review.

This is one of the final stages of the workflow and it is vital to ensure that the processing has been done correctly and all the facts are verified. A forensic image or video analyst is there to ensure that the presented evidence is factual. If an object or mark is highlighted as being of relevance then that object or mark can be trusted. If they are conducting a comparative analysis for instance, then they are comparing the representation of an object in a video or image, and that representation can be trusted.

The peer review should also consider the effects of unconscious bias. What was known to the technician or analyst? Have they conducted their analysis or task in an unbiased way to assist the court, and not to assist the particular side to which they are employed?

This is important in all comparative casework, but also in the tracking and recognition of persons through events or time. This is best completed through a staged disclosure approach to the analyst. It ensures they don't work 'in reverse' to follow a particular narrative and therefore any timeline of events can be trusted.

Video and image evidence is the most common form of physical exhibit. If we ensure that the presented material has integrity, authenticity and that all processing has followed a scientific model, then that evidence can be trusted. Corners must not be cut to assist in speed or ease. A lack of time or not having the correct software cannot be a justification for the submission of untrustworthy evidence.

Next time an image or video arrives in a case, ask yourself, "Can this be trusted?" Does it have integrity, authenticity and has it been processed in an explainable and peer accepted scientific manner?

For further information, please contact info@ampedsoftware or visit ampedsoftware.com

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With great respect, that is a bad legal argument: 'respect', courtesy or insult?

By David Wright[1], Helen Murray-Edwards[2], Jeremy Robson[2], Natalie Braber[1]

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"Eighteen of Mr Tangle's learned friends, each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a piano-forte, make eighteen bows, and drop into their eighteen places of obscurity."

It is nearly 170 years since Charles Dickens mocked the pomposity of legal proceedings in *Bleak House*. However, even in the twenty-first century, courtrooms are environments rich with stylised rules of courtesy and behaviour which continue to perplex, confuse and bewilder those outside of the profession. Given the verbal gymnastics that goes on in the courtroom, the language of the court has long been a focus for linguistic research, particularly in the field of 'forensic linguistics' which deals with language of the law and the legal process and language as evidence.

Linguists, and in particular discourse analysts, seek to examine and understand the nature of communication across contexts. It is therefore no surprise that a good deal of research in linguistics has focused on the criminal courts and most commonly on the language of witness examination. This necessarily entails, for the most part, the analysis of interaction between legal professionals and (usually) non-expert witnesses. In contrast, very little linguistic research to date has focused the appellate courts or on how legal professionals such as judges and advocates speak to *each other*.

Gina Miller's successful attempt to compel a parliamentary vote on leaving the EU was subject to intense scrutiny and analysis from both media and academics. The hearings in the High

Court and Supreme Court in relation to the need for primary legislation to trigger Article 50 provided a valuable opportunity to examine advocacy in action both from a legal and linguistic perspective. One of the major challenges for linguists analysing courtroom discourse is the difficulty in accessing transcripts. With the Brexit case, however, in order to ensure transparency in the public debate surrounding the UK's withdrawal from the EU, full transcripts of the Brexit hearings were made available online to the public. This means that the Brexit hearings provide a unique opportunity for linguists to analyse the language of advocacy in one of the most significant cases of constitutional law in British history.

The appellate courtroom is of particular interest to language analysts because it is characterised by argument, disagreement and judicial intervention. Linguistic behaviour that would ordinarily be considered conflictive or combative is central to the business of the appeal courts, particularly insofar as judges challenging the advocates and opposing advocates challenging each other. However, at the same time, when advocates appear before judges they are expected to demonstrate professional courtesy. The language of advocacy places an emphasis on obvious displays of courtesy which are engrained as both rules and normative principles. Such an emphasis accounts (at least in part) for the familiar terms of address 'My Lord', 'My Lady' and 'My Learned Friend'. Indeed, discourtesy can result in disciplinary hearings and a finding of contempt of court. As the Court of Appeal warned in the case of Farooqui:

> *"the administration of justice…depends on a sensible […] respectful working relationship between the judge and independent minded advocates responsibly fulfilling their complex professional obligations."*

The importance of advocates showing respect to judges, and to each other, is central to the operation of the rule of law, and the requirement to display courtesy at all times is something which is impressed upon advocates throughout their training and career. One of the challenges that trainee advocates face is learning how to express disagreement robustly but with suitable courtesy. Advocates are often advised to use linguistic devices which allow the conflict inherent in appeal court hearings to be negotiated whilst maintaining the impression of courtesy. 'Respect' (and its related forms 'respectful' and 'respectfully') is one such device. It is the perfect antidote for explicitly signalling courtesy while dealing potentially damaging blows to counsel or opposing advocates. The use of the word 'respect' has a special and significant meaning associated with it in the legal profession, very familiar to practising barristers. The counterintuitive interpretation of the ostensibly polite 'respect' is wryly summarised extra-judicially by Lord Neuberger:

> *"So, when the judge makes what the advocate thinks is a stupid point, the advocate will often begin his answer with the words, "My Lord, with great respect…"; if he thinks the point is particularly stupid, the advocate may begin his answer by saying, "My Lord, with the greatest respect ….". I leave it to your imagination as to what an advocate thought of a point I once made to him in argument when he started his answer with the words, "My Lord, with the very greatest respect possible …"*

The Law Gazette has advised junior barristers that "'With respect', 'with all due respect', 'with great respect', 'with the greatest respect', and 'with the greatest possible respect', are insults of increasing aggression". Meanwhile *Legal Cheek* published a "How to speak lawyer" guide for trainee solicitors and pupil barristers, in which readers are told that the phrase 'with the greatest respect' is to be translated as 'you are a total idiot'.

For this reason, in a recent paper published in the Journal of Pragmatics, we turned our attention to the use of 'respect' by the two primary opposing advocates in the Brexit case – Lord Pannick QC and James Eadie QC. To analyse the transcripts we took what is referred to as a 'corpus' approach to discourse analysis, whereby the analysis started by identifying frequently recurring patterns in the talk, followed by a classification or categorisation of similar instances and some close-reading qualitative analysis.

In total there were 230 instances of 'respect', 'respectful' and 'respectfully' used by Pannick and Eadie combined across the two hearings, meaning that it they accounted for around two words in every thousand spoken. By comparison, this is about the same frequency with which 'EU' was said during the hearings (279 times). Generally speaking, Eadie used it more frequently than Pannick, and both used it more frequently in the Supreme Court than the High Court.

Our analysis provided evidence to support what many in the profession would expect. That 'respect' is a multifunctional device for advocates, serving a range of purposes during interaction. On the one hand, 'respect' is frequently used by advocates to manage difficult situations in which they disagree with judges but must adhere to the strict institutional hierarchy at play. For example, when James Eadie QC disagreed with The Master of the Rolls he responded with a heavily hedged and courteous disagreement:

> *"My Lord, I think, the Master of the Rolls said: well, does this all depend upon the fundamental distinction being drawn between an amendment and a withdrawal, bearing in mind the wording of that Act. In my respectful submission the position is that withdrawal is not touched at all by that legislative scheme…".*

However, in many instances, the use of the word 'respect' is more complex than a simple act of courtesy. In the High Court, for example, James Eadie QC challenged an aspect of Pannick's submission:

> *"You need to exercise a little caution, if I may respectfully say so, with Lord Pannick's submission that you don't need to bother about this point because Lord Denning disposed of it in Laker in the terms that he did."*

Pannick does the same, using 'respect' to varnish, and perhaps exacerbate challenges and attacks of the opposing side's argument (and competency), such as this in the Supreme Court:

> *"It is no answer for the Attorney General to say in his submissions, as he did on Monday, and I quote: 'Parliament can stand up for itself.' With great respect, that is a bad legal argument".*

These are features of courtroom language that lawyers take for granted. However, from a linguistic perspective, there is much to be said about the skill, nuance and opacity of legal language. There is more to be learned about courtroom language than how barristers cross-examine witnesses. The linguistic interplay between legal professionals is a rich source of data for the analysis of institutional interaction, and what it can tell us about the relationships between duelling courtroom participants. In terms of 'respect' specifically, the power of its 'hidden' meaning is perhaps best summarised by Horace Rumpole, who describes advocacy as:

> *"Standing up and bowing, saying, "if your Lordship pleases, In my humble submission, With the very greatest of respect my Lord," to some old fool no-one has any respect for at all".*

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Getting your chambers fit for the future

By Nigel Wallis, Director,
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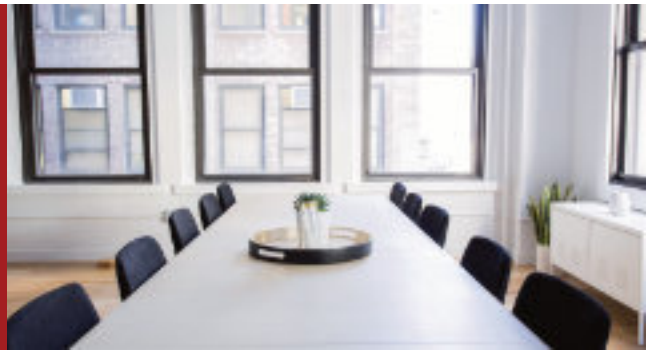

'Building Back Better' has become the world's slogan - from budget decisions to carbon emissions. The concept is, of course, far from new. It has been used in disaster recovery parlance for decades and derives from evidence that the collective shock of a major catastrophe somehow seeds a desire in those affected not just to return to normal but to pursue a better normal.

Anecdotally at least, the UK Bar has weathered the shock of the pandemic and its disruption to the justice system well. But our conversations with barristers and their professional support teams across the country, suggest that there are growing tensions within some chambers (bar firms) as adjustments are made for increased borrowings, technology challenges, fee pressures, unpaid debts, long working hours and shrinking markets.

Reflecting on the similarities and differences between law firms and bar firms, and how both are reviving themselves following prolonged periods of lockdown, here are some questions you may like to ask yourselves as you strive to build your chambers back better post pandemic.

Question 1 - Is your business strategy fit for the future?
Business gurus would have us believe that culture eats strategy for breakfast - and they are almost certainly right. But a culture without a clear business strategy will be directionless. A good business strategy should include a statement of your overall market proposition and your target audience, your chosen route or routes to market, the services you intend to offer and how they will be delivered. It should also identify the organisation's vision for recruiting and retaining the right people, its commitment to equality and diversity and to the environment, and how this will be reflected in the organisation's financial plans. As we emerge from the pandemic, a review of your current business strategy to ensure it remains relevant to the changing marketplace will help you build back better from a solid foundation.

Question 2 - Is your chambers operating model fit for the future?
The traditional chambers operating model is far from broken - indeed, law firms such as gunnercooke and Keystone Law have successfully adopted similar models, using a central services company to engage self-employed consultant solicitors based on a pre-agreed fee split. The Bar Standards Board's regulatory reforms enabling barristers to form BSB entities have opened up new models for barristers to collaborate via profit-sharing vehicles. These new operating models can take the form of Authorised Bodies (fully owned and managed by authorised individuals) or Licensed Bodies (owned and managed jointly by authorised individuals and non-lawyers). In our July 2020 article in The Barrister entitled **BSB entities offer positive future for the Bar**, we outlined some key issues to consider when forming a BSB entity. Early adopters of these new operating models report several benefits, including easier access to external funding and greater flexibility for service innovation. In pursuit of a better normal, investigating and considering these new operating models could be a valuable exercise, even if only to reassure you that your existing operating model is the right one for you.

Question 3 - Are your members' contractual engagement terms fit for the future?
As working patterns change and barristers look for greater flexibility and reduced operating costs, chambers should be reviewing their contractual terms with their members to make sure their interests remain fully aligned. Identifying and implementing positive improvements in contractual terms should pay dividends in terms of improved member retention and recruitment levels.

Question 4 - Is the reward structure for your employed staff fit for the future?
Like other essential services, those providing legal services (and their support staff) responded heroically to the pandemic, despite all the logistical challenges. Many legal businesses are now investing heavily in the personal development of support teams to ensure they are well-trained, well-nurtured and well-rewarded - not just to thank them for their past efforts but also to increase the chances of them being around when the next challenges come.

Question 5 - Is your cyber and risk management planning fit for the future?
Remote working has heightened the risk of allowing gremlins into the systems of every legal business. Chambers management teams must remain on red alert and ensure that their teams are properly trained, contracts for outsourced IT support are carefully negotiated, and cyber liability insurance cover is placed via a specialist broker.

Question 6 - Are your premises fit for the future?
There cannot be a professional business in the land that hasn't debated this labyrinthine issue. Lockdown has taught everyone to expect the unexpected and build as much flexibility into office facilities as possible, reconfiguring them so they become environments that people actually look forward to working in and visiting. A strategic review of your premises by a specialist chartered surveyor in conjunction with an expert space planner will add huge value to your decision-making.

Question 7 - Are your staff welfare arrangements fit for the future?
The pandemic has reminded everyone of the direct and inextricable correlation between personal wellbeing and business performance.

Question 8 - Is your chambers' leadership fit for the future?
Humility and humanity go a long way in a business leader, as does the occasional hint of vulnerability. But the last two years have shown that the defining quality in a successful business leader is the ability to set out a credible direction of travel, to inspire confidence when the going gets tough, and to create an environment where everyone can give of their best.

Never since the financial meltdown of the late noughties have these questions been more important than they are right now. Answering them honestly and then implementing the changes that the answers illustrate are needed will determine whether your chambers merely survives or thrives.

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FLEET STREET WEALTH

Take time to consider the top five tax year end opportunities

Scheduling time now to ensure you're taking advantage of the tax year end opportunities could pay dividends.

The top five areas to consider before 5 April are:

1. VCTs and EISs
Venture Capital Trusts (VCTs) and Enterprise Investment Schemes (EISs) are attractive for experienced investors and offer many tax benefits to investors.

2. Pensions
Consider contributing more into your pension (you are limited to tax relief on £40,000 per tax year). The Lifetime Allowance is currently £1,073,100. Don't forget you can invest into a pension for a non-working or non-tax paying spouse or civil partner, and for children under 18.

3. ISAs
Don't overlook your ISA allowance (£20,000 for 2021-22). Use it or lose it! Junior ISAs are a tax-efficient way to build up savings for children and grandchildren (maximum investment is £9,000 per child).

4. Inheritance Tax (IHT)
The sums you can gift for IHT purposes are small, but you should use these exemptions where possible (gifts worth up to £3,000 in each tax year are exempt from IHT on death). Certain gifts don't use up this annual exemption but incur no IHT.

5. Capital gains tax (CGT)
Every individual is entitled to a CGT annual exemption – currently £12,300 (£6,150 for trusts). You can't carry forward this relief, so consider crystallising any gains or offsetting any losses before 5 April.

This information is based on our understanding of current allowances and rates which could be subject to change. The value of investments can go down as well as up and you may not get back the full amount you invested. The past is not a guide to future performance and past performance may not necessarily be repeated. It is important to take professional advice before making any decision relating to your personal finances.

Act now – download our free guide

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