Issue 24

The Circuiteer

News from the South Eastern Circuit

Spring 2007

Education and the Bar

A Note from the Editor

The Circuit elected a new leader in December. Our congratulations to David Spens, Q. C., who in his first Leader's Column plunges straight into the issues which most concern members. While his predecessor, Tim Dutton, Q. C., struggles with the wider issues as Vice Chairman of the Bar, Tim's three Juniors pay tribute to his successful years as leader of the Circuit. The Circuit itself is now so big that there are four presiders. The not quite new boy, Mr. Justice Calvert-Smith – who as a former practitioner and DPP needs little introduction – generously discusses his role and how it feels to be on the bench.

One issue on which the Circuit is unequivocal is its commitment to diversity. Although scarcely anyone would disagree with that, the Carter process has created the risk that a price-competitive criminal justice system will hit hardest just those who make diversity in it possible. Oba Nsugbe Q. C. and Marcia Williams, who are best placed to discuss this, tell us what worries the Carter Diversity Group

Another issue vexing circuiteers is the use of Higher Court Advocates in the crown courts. Busola Johnson, who left the Bar for the CPS, reassures us that her new colleagues are just as committed to doing a good job as were her old.

This Circuiteer is dedicated to education. The old idea that it ended for a barrister on the night he or she was Called now seems like ancient history. First, the 'Bar finals' became the skills-oriented BVC. Once it was accepted that advocacy was not something which was inherited but could be taught, the gates were wide open. It is now being suggested that training should extend beyond 'new practitioners'. Although the Inns demur, on the grounds that they lack enough barristers willing to donate their time, it remains, for those with sufficient imagination, an exciting prospect of innovative courses, tailor made for one's actual specialism.

Education of course does not always happen in the classroom. Doris Brehmeier-Metz, a distinguished German state prosecutor who decided to qualify as an English barrister, simply taught herself the law—with a little tutoring—over a period of months and in her second language. She tells us of her determination, of her love of her Inn and of how she took what she has learned to her own jurisdiction. Dara Islam, in contrast, has taken a roundabout route, taking advantage of opportunities all over the world. The cover shows him playing the witness in Jamaica and amongst colleagues in Nigeria.

This is the time of year to recall that the Circuit furthers the education of its own. The splendid Dame Ann Ebsworth lecture was given this year by Mr. Justice Harms of South Africa—Alex Price-Marmion reports. The cover shows a 'Keble moment' from 2006: Philip Bartle, Q.C., then our Director of Education, conscientiously giving feedback to a delegate who is taking it on board. One is tempted to say that Keble is the best advocacy course in the world, but that would relegate Florida to be second best. It is also a brilliant week in which people can polish their skills even in a foreign jurisdiction. Members of the appropriate vintage are urged to apply.

The Bar's ability to educate itself is demonstrated once more by our three learned articles. Each dispels a facile assumption about that branch of the law. Have newspapers libelled someone by printing something which is untrue? Not necessarily so, as Adam Speker sets out in his explanation of the latest case on Reynolds privilege. Are family courts closed to all but the participants? Not always, as Poonam Bhari points out, and perhaps even less so in the future. She also tells us what children—after all the subject matter of many hearings—think should be done. Aren't all criminal matters proved beyond a reasonable doubt? Not under the current trend to use the civil standard of proof to obtain orders, the breach of which have penal sanctions. Maya Sikand explains this disturbing trend. And for those who want to sharpen their skills without attending a course, *Witness Testimony,* reviewed here, is required reading.

Even in the darkest times, though, pleasure beckons to the Bar. Our restaurant critic, Tetteh Turkson, returns to give his verdict on the latest outpost of the Gordon Ramsay empire. The always enjoyable Circuit trip this year is taking place in Istanbul. Details are inside. And our great annual gathering—the dinner—will happen on June 29. Book now, using the form within.

D.Wurtzel@city.ac.uk

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Leader's Column

Fees

Unsurprisingly, still not a day passes when the publicly funded Bar is not under further threat of cuts in fees.

One of the favourable aspects of Lord Carter's report was that no changes needed to be made to the family GFS. However on 1st March the government published a consultation paper entitled 'Legal Aid Reform – Family and Family Mediation Schemes'. The most alarming proposal is that in private law cases a new scheme will be introduced for solicitors and barristers from October 2007. There has been a six month consultation period, closing on 16th April. Work for and in preparation for a final hearing will be excluded from this scheme until April 2008. However, in relation to interim hearings the paper states it will be the responsibility of solicitors to negotiate with counsel or their clerks the fee to be paid. It will have to come out of the capped amount the solicitor will receive. This proposal will be of particular concern, especially to the young Bar, if the solicitor has already spent much of his limited fee. The FLBA Fees Team has well in hand its response to this proposal and the further proposal that the GFS for barristers in care proceedings will be reworked from April 2008. If any members of the Circuit have concerns to express to me they will be welcomed.

On the criminal front there is limited good news. There is no reason to think the Draft Funding Order will not become law on 30th April. This new GFS regime will cause an average of 30% increase in rates for those doing the smaller cases. The Bar's IT providers are ready for the scheme but HMCS's will not be until 30th July 2007. The delay in payment will relate only to cases commenced on or after 30th April. It is estimated that it will affect not more than 2000 cases, mainly cracks and guilty pleas, so it should not have a significant practical effect. If any of you find it does, I suggest you speak first with your Head of Chambers to see whether chambers will alleviate the problem until the fee arrives. If that fails, there are hardship provisions in the Funding Order and you can speak to me or obtain advice through the Carter Implementation Group at the Bar Council.

Draft Graduated Fee Payment Protocol

This Protocol, once agreed, will apply to the new criminal Graduated Fee Scheme. It has been designed to deal with the distribution of the single fee paid to the Instructed Advocate and to ensure it is fairly shared among senior and junior barristers. It requires barristers to adhere to certain rules concerning who is the Instructed Advocate in a case and who, if anybody, is being led; the permissible grounds for returning a brief, and measures designed to ward off such an eventuality; the resolution of disputes; the structure of payments and accounting systems; and tax.

It has important consequences for chambers' management. Cheques to IA's will be paid into one chambers account, out of which payments will be distributed twice a month. Some chambers already have such a system which works well. Other chambers may be required to change their constitutions.

Of particular importance is the requirement that barristers or their clerks sign a letter on receipt of instructions (a draft is at Annex D of the Protocol) which will contractually bind the Instructing Solicitor (and hence any in-house advocate) to the Protocol. If all members of the Bar contract on this basis it should mean there will not be abuses of the young Bar either by senior barristers or by solicitors.

Higher Court Advocates

The CPS has been deploying HCAs in increasing numbers across the Circuit. To ensure briefing practices are equal and fair the Bar and the CPS have worked together to reach an agreement which has been reflected in a Statement of Principles.

There remains justifiable concern that CPS HCAs are doing too many PCMHs and then not doing the trials. This is in conflict with the Carter ideal of case ownership from beginning to end. Moreover it also leads to very late returns by the CPS. This is a matter which I, together with Tim Dutton, Q.C. have taken up with the CEO of the CPS. I will press at the next Advocacy Liaison Group meeting for clearer identification of criteria by the CPS of cases in which they should instruct counsel early.

On the defence side, because of the squeeze on their fees, there has been a surge by some solicitors to take up Higher Courts Advocacy rights, to employ HCAs, and deploy them at every opportunity. This has resulted in some instances of briefs being withdrawn from counsel, and of the briefing of HCAs without appropriate experience.

The Bar Council has drawn up a draft Statement of Principles which mirrors that agreed with the CPS and reminds solicitors of the obligations they already have under their Rules, in particular to act in the best interests of their clients and to instruct appropriately experienced advocates. The draft has been presented to the Law Society, the LCCSA, SAHCA, and the Solicitors Regulatory Authority and their agreement is actively being sought.

I know how the Bar feels about these developments but it is important to take a long view and to keep a steady nerve. I remain sure there will always be the need for an independent referral Bar. For example, I do not believe highly skilled advocates are going to be attracted to the CPS or if employed at an early stage of their careers, remain within the CPS. What will guarantee your success is if you perform and can show yourself to be better than the HCAs.

If you encounter the extremes of bad practice, for instance briefs being withdrawn after delivery with instructions for trial, and/or when a plea is in sight, or the instruction of 'straw' juniors in serious cases, please e-mail me directly at davidsp@gclaw.co.uk. What I require is evidence, not anecdote, which will be treated in confidence and anonymised.

It may reassure you to know the leadership of the Bar Council is very alive to the problems of the criminal practitioner and has produced "A Discussion paper on current issues facing the Criminal Bar" which can be found on the CBA website at http://www.criminalbar.com/papers which I recommend.

I, for my part, have organised a meeting on 19th April for the Presiding Judges of the Circuit, all the Resident Judges, and the Bar Mess Chairmen at which Lord Justice Leveson, the Senior Presiding Judge of England and Wales, will address case ownership, listing practices, mentions and other concerns.

Projects

Recently the Circuit established a new form of subscription, that of judicial membership, to establish and maintain contacts between the bench and the Bar. Twenty eight circuit judges have already joined; we are now approaching the High Court judiciary.

I am concerned that there may have been a growing number of unmeritorious disciplinary cases brought against members of the Bar resulting in acquittals but without any award of costs or an insufficient award to cover the expenses of the defence. I have set up a working party to investigate whether the test for instituting prosecutions is sufficiently high, and what more can be done to secure the award of if not all, at least a greater proportion of reasonable costs to successful defendants. The barrister now charged is, I believe, covered by BMIF insurance but there is no reason to think the BMIF will not be equally concerned to recover costs.

David Spens, Q.C.

SOCIAL EVENTS

27th April 2007:
A dinner in the Old Hall, Lincoln's Inn, to honour Tim Dutton, Q.C. Simon Barker, and Andrew Ayres, 7 for 7.30pm, black tie

25th-29th May 2007:
Circuit trip to Istanbul, organised by Giles Colin. £595 including four nights' accommodation, flights and Saturday dinner

29th June 2007:
The Annual Circuit Dinner in the Great Hall, Lincoln's Inn, 7 for 7.30pm, black tie.
Guest speaker Sir Anthony Clarke, Master of the Rolls

If any Bar Mess, especially outside London, is organising a social event I would be happy to attend

A Presider and the Circuit

Of the four presiding judges of the Circuit, Mr. Justice Calvert-Smith is best known to Circuiteers, as a former criminal practitioner and as DPP. From his unique perspective, he tell us how – and where – things are going

As older readers will know I was for many years what Nick Purnell once described as a journeyman advocate practising exclusively in crime and exclusively on the South Eastern Circuit. I therefore have the advantage of knowing intimately most of the crown courts outside London and all them in London – well perhaps not Woolwich! – both as advocate and recorder, and as a colleague and friend of many of the current circuit and district judges. It has been enormous fun for me to get to know them again as a fellow judge after a period when I could only talk to them at the arm's length necessary for a public prosecutor.

No change there

When the editor asked me to supply him with some copy I asked in turn what my predecessors had said in similar articles. It is both depressing and comforting to see from Richard Aikens' piece that many of the problems and issues are still alive and well.

His topics were first, the importance of maintaining the circuit as one entity despite the governmental division of the south east into two regions. All of us presiders are careful, when we see it in draft documents, to erase the word 'region' and to replace it with 'circuit' and to encourage a 'circuit ethos' within HMCS. Richard Swinney's circuit listing unit aims to strengthen this, with courts in and out of London helping each other out.

Second there was the desirability of presiders whenever possible sitting at all the London crown courts and not just at the Old Bailey. I have sat so far at Blackfriars, Snaresbrook, Inner London and Middlesex and I hope to complete the set long before I step down. Third, there is the need to minimise the risks to jury trials by ensuring that they are properly conducted by the advocates on both sides – in particular the proper preparation of cross-examination, legal argument (even the somewhat basic need to have Archbold or Blackstone in court) and the evidence of experts so that the jury is best able to grasp and decide the issues. He was, as I am, in favour of written directions to juries. I go further. I am keen, with counsel's help, to give juries a set of issues in the form of questions at the beginning of trials so that they know from the outset why they are there and can relate the evidence they hear to the decision(s) they will ultimately have to make at the time they hear it, rather than having to think back to it when the judge sums up.

So what's new?

Well, quite a lot. From our point of view as presiders the new constitutional arrangements have greatly extended our formal role. Peter Gross, now and, poor man, for the next two years, the senior presider, said in his article last year that there is no job description for the presiding judge. While that remains true there is now a great deal in writing which sets out duties which we must perform, duties which we can delegate but for which we are ultimately responsible and accountable for to the Senior Presiding Judge, Leveson LJ etc. In addition to nearly 300 circuit judges in crime family and civil, since April last year we have taken over the magistracy, and also have responsibility for the lay magistrates and district judges and their clerks and legal advisers within our jurisdiction. Richard's article introduced the thinking behind the introduction of the third presider. I can simply say that the introduction of the fourth was inevitable to cope with this fresh demand.

The current rough division of responsibilities between us is as follows. Peter Gross oversees us all and has principal responsibility for London crown court crime. I deal with things like judicial holidays, visits etc and have principal responsibility for circuit crime. Jeremy Cooke has principal responsibility for civil and David Bean for the magistracy. The Family Division liaison judges are currently Mark Hedley (who replaces James Munby in April) (London) and Anna Pauffley and Julia Macur (non-London).

And in addition

My diet has been further enriched by becoming the unofficial case management judge for "terrorist" cases. The protocol issued by the President of the Queen's Bench Division, and which – in spite of James Richardson's comments on such documents - I believe is a very useful document, has been extended so as to cover not just indictable only cases but either way cases which are thought to be suitable for the regime. Reasons inter alia for the existence of a protocol and of a very tight team of judges to manage the cases are:

1. The need to ensure that cases are tried at the most suitable venue, and not necessarily at the Old Bailey

2. The need to ensure that both sides get on with the cases from day one. It is vital that once the investigators believe that an intelligence-led operation is likely to turn into a prosecution, they start to look ahead to the presentation of evidence and the disclosure process so that the prosecution is in a position to serve its papers and primary disclosure sooner rather than later

3. The defence and prosecution should have their legal teams instructed as early as possible. There must be complete disclosure so far as counsel's other commitments are concerned. Returns at any stage are to be avoided, and the court will be very slow to grant an adjournment if counsel has got overbooked or the solicitors have put themselves under too much strain. The prosecution, often in possession of enough material stored on computers to require years to examine it, must call a halt

4. Because a significant number of the cases will require the trial to conducted by a High Court judge and/or a secure court – both limited resources – the planning of such cases has to be a high priority

Learning curves

The steepness of the other learning curves for me can perhaps be gauged from a civil trial I conducted fairly early on. After day two, when the various

experts had been through the witness box and I was wandering about trying to find my way from court 60 something back to my room I thought how interesting it would be the following morning to see what the jury would do, before realising a minute or two later that I was the jury.

Sentencing is – as we all know – a far more complicated process as the result of recent legislation. And the sections of the CJA which introduced 'honesty' into the process by requiring judges to explain to the defendant and the public at large exactly how long he/she will be locked up have of course given the newspapers acres of cheap and cheerful copy with which to excoriate the judges individually and the system generally. There is also a bit of a credibility gap for judges who read guidance as to the circumstances in which immediate prison sentences should be imposed. Most if not all would say, and be able to prove, that they only impose such sentences for serious, dangerous and/or persistent offenders. Until Parliament removes prison as a sentence for minor thefts, etc., there will still have be a time when, every other method of deterrence having failed, when such an offender has to go to prison.

All we would ask of advocates for both sides is that they are aware of the court's powers in respect of a given offence or series of offences, and, in the prosecution's case, of any mandatory requirements for the sentencer and any guideline cases. In a number of cases I've sat on in the CACD it seems that the strictures of the Court that reliance on individual cases reported in Thomas is deplored have led counsel not even to look at them. I can say that a keen new High Court judge will look at the cases in Thomas to get a view of the range of sentences reported. If the advocate does the same he or she may avoid going love fifteen down with the court when submitting that 'a sentence of imprisonment was wrong in principle…'

Evidential issues

Hearsay and bad character. The few arguments I have heard have been in cases where the decisions were eminently arguable and the advocates have without exception been brief and to the point. At the JSB seminar, I was horrified to discover that a full judgment needed to be given in each case. So far as both hearsay and bad character are concerned my desire to preserve jury trial means that I am in favour of any rule that allows them to hear evidence which a judge sitting alone would consider relevant. The best, indeed in my view almost the only valid argument against juries has been that they are not allowed to hear relevant evidence. It is because they cannot be trusted to consider relevant evidence fairly, that it is suggested that the process of convicting the guilty and acquitting the not guilty is artificially skewed.

Richard Aikens came to criminal trials by jury with a deep scepticism about the institution. His years as a Queen's Bench judge and as a presider left him convinced of its value. As a criminal 'hack', I have always been a strong supporter and my support has if possible been reinforced by my experience on the bench. At the Bar they were of course a good jury if they did what I asked them and not if not. On the bench I do not – would I ever? – ask them to convict or acquit and yet I have always felt that the verdict – whichever it was – was the result of a conscientious decision. Notes and questions – 72 in my last trial! – are far more common. Sometimes they are irrelevant. Sometimes they are beyond the competence of the witness. But all indicate a desire to perform the jury function properly. Even the irrelevant ones give an opportunity to steer them away from such matters before they take hold. The only cases in which I concede it could be said that jury trial is inappropriate are those cases in which the prosecution is artificially restricted from presenting its full case against an accused by considerations of the length of the trial. I hope the new procedure (an extension of the Newton hearing principle) in which a second, non-jury, trial follows a jury trial on sample counts will be able to eliminate that concern.

Money

Money. Ours and yours. I deal with them together because, unfair as it may seem, they are linked. As well as the 'efficiency' savings which the Treasury has imposed on most government departments to cut expenditure in real terms annually, HMCS has been subjected to further cuts this year and next in order to cope with the DCA's overspend on, among other things, criminal legal aid. I was one of those in the 1990's who spent many hours in the then Lord Chancellor's Department negotiating new fee structures in criminal legal aid. In general we won the arguments. But two of those wins have of course came back to haunt us and now(!) you. First, our successful campaign to include as an element the actual length of a case as well as its size in pages of evidence and the gravity of the most serious offence on the indictment had two results: cases generally have got bigger and therefore longer, and there was no financial incentive on advocates who had no fixture waiting for them to be concise. Result: more overspend and lack of control of budget. Second, the cases outside the system have become more and more expensive and their proportion of the total legal aid budget higher and higher. Same result. The battle we lost – over an 'exceptional' category within the GFS to cater for boxes of unused material--would, I fear, if won have added to the pressure now being brought to bear on fees.

I have watched with admiration the way in which Geoffrey Vos, Mark Ellison and others have conducted the Bar's negotiations in a far more difficult situation. I am only too well aware, from having helped to produce the 'Funding Entry to the Bar' report of a few years ago, how difficult life is at the junior Bar for those who come into the profession carrying a huge overdraft. All we can do is hope that whatever the practical effect of Carter it, and the profession itself, enables the younger part of the profession to survive and flourish and to maintain the high standards which justify the existence of the private Bar. We, and by that I mean the circuit bench as well as the presiders will always be impressed by those members of the Bar who, for peanuts, and with no expectation of doing the eventual trial, nevertheless take the trouble to do a proper job at the PCMH or other interlocutory hearing. The reverse is also true. If work is accepted then the independent Bar has a professional duty to do it properly whatever the fee.

Tough on judges

Our problems are also severe. We are – until at least July I suspect – 35 judges light on this circuit. The budget cuts and the fact that the vast majority of our expenditure is on salaries have meant that many staff are not replaced when they leave. Other results have been that in spite of all being agreed as to the need to modernise and/or extend courts around the circuit – e.g., the continuing scandal of Aylesbury Crown Court – the actual work has been delayed. We have not yet resorted to such locations as Woodford Church Hall which I remember being pressed into service as a crown court in the 1970s when money was tight. But who knows?

The Circuit

I was happy to be allowed to sit in on part of a committee meeting last year. I, and I believe my fellow presiders, but you had better ask them first! - would be delighted to be asked again.

I could go on, but won't. And that will enable me not to go into print about the current Chief Justice competition.

Looking Outwards

Qualifying for the Bar can be a daunting experience for anyone, but to do it in your second language, on a self-taught basis? German state prosecutor Doris Brehmeier-Metz broke ground by doing just that. As she uses some of her lessons in her new role in The Hague, she looks back on her extraordinary nine months of an English legal education.

Like so many Germans, I have always been fascinated by England and the English. Once I had started practice as a criminal lawyer, however, getting to know the English system--and perhaps even using this knowledge--seemed to be totally out of reach, given the differences between the two legal systems. What was left for me was the odd journey to the 'sceptred isle' and a bit of Rumpole every now and then--always accompanied by a taste of regret and a feeling of envy for any German lawyer with a dual qualification.

Be the first

One day in 2001, however, I received a phone call from the late Judge Peter Jackson whom I had first met at a conference in Germany. To my complete surprise he suggested that I should become a barrister. What he proposed was that I apply for the Bar Council's Aptitude Test which was open for European qualified lawyers. Once I had passed (which he at least took for granted) I would be the first German if not European prosecutor who would be dually qualified. He thought this would add to the Bar's reputation.

Until then I had never heard of such an opportunity, let alone considered it for myself. My superiors, however, were as fascinated by the idea as I was. A solution was found to enable me to spend what seemed to be sufficient time in London to study for the test. The Bar Council, however, found it difficult to appreciate that like many other European countries Germany does not have a split profession. All German lawyers have the same level of education when they start their professional career – be it as a judge, an attorney or a prosecutor. At the same time, German prosecutors will never defend, whereas defence attorneys are not allowed to prosecute. Before I could be admitted, therefore, I had to prove that German professional prosecutors are fully-fledged lawyers just like any other, and that it did not matter that the admission requirements spoke of attorneys and judges only.

Having surmounted this minor hurdle successfully and been admitted to the Aptitude Test, I went to London in the autumn of 2002. I was in good spirits, not really knowing what lay ahead. The Bar Council simply supplied me with information about the issues that might be the subject of the test, with past papers. There was however a deadline: I had to pass within two years. The arrangement I had made with my superiors only allowed me nine months in which to finish. Following Judge Jackson's advice I had applied to be admitted for all the tests available, not merely concentrating on criminal law, but also venturing into land law, equity and trust. I seemed, however, young (or perhaps naïve?) enough not to shy away from the self-set task 'The English law in nine months'. Having joined Middle Temple as a student member I found myself in its library which would soon become my second home.

Statutes and case law

German law students are used to being told what to learn and where to look. They learn statutes, textbooks and commentaries. Case law is not that significant since German law – like any civil law system – does not know binding precedents. The first completely new thing for me, therefore, was that not everything relevant for my studies was set out in statutes (I do admit that once I had got used to common law I was happy whenever I did not come across an English statute). The second problem was that I myself had to compile a concept about how and when to learn what. I decided it would be best to follow the Bar Council's list of issues and perhaps assess them according to the questions in past papers. Some topics had never been mentioned, whereas any paper on contract law had so far contained a question on offer and acceptance. However I dared not rely completely on the papers. This proved to be the correct assumption: my paper on contract law did not contain one single offer and acceptance question. I then used textbooks, 'Questions and Answers' and of course the law reports in order to find and summarise the relevant decisions.

Thus I found myself in the library every day. *Donogue v Stevenson* taught me the relevance of ginger beer for English law, *Grant v Australian Knitting Mills Limited* to distinguish it from woolen underpants. My English improved considerably. I learned to include words such as "stevedore", "charter party" and "mooring" into my vocabulary. I also discovered the English system of tutoring. I found two very competent barristers who helped me, the one with understanding land law, equity and trust, the other with all the rest. That, too, turned out to be an experience utterly different from my studies in Germany. There I had sat in vast lecture halls together with some 400 fellow students and listened to the words of the learned professor whom I could hardly see at that distance. Here I would discuss legal problems rather than simply be interrogated, present my own arguments to another person and defend them if need be. I shall not forget the discussions on separation of powers I had with my tutor following the decision to abolish the post of Lord Chancellor [later reversed] and to introduce a Supreme Court.

The quality of education

Life at the Inn was a revelation. I adored (and still do) to lunching in the most beautiful canteen of the world, to dine, to attend lectures, and to meet fellow students and experienced barristers. The fact that even the highest ranking judges would come to the aid of students was an eye-opener on how studying can be. I also benefited from the Inn's student programme, attending advocacy weekends and training courses. Again this assistance for students and young practitioners (clearly also intended to hold up quality at the Bar) was an experience completely new to me. I had not had a single minute of advocacy training before I had first appeared in court. Here, I trained in a court room before a real judge. Being constantly assigned the task to defend, however, was a heavy undertaking for someone who had never before left the field of prosecution – but it clearly broadened my horizon.

There were of course many moments when I was on the edge of despair. I would then meet Judge Jackson who would make it clear to me that there was no other way: of course I would pass the test. I did. I was called to the Bar of England and Wales in November 2003, being the first German prosecutor ever to have reached this goal.

It works

Coming back from London to my usual prosecution work in Germany, I found that I had profited from my experiences in many ways. I had come to know and appreciate a legal system completely different from the German one. Notwithstanding its merits, I discovered in both legal systems what seemed to me both the good and the bad things. To my surprise (and that of the judges and defence counsel, too, I bet) I found myself cross-examining witnesses in court. In offering advocacy courses similar to those I had seen provided for Middle Temple trainees and pupils, I tried to pass on the English concept on to them. It seems that they benefited a lot, not to be as inexperienced as I was on my first day in court. The idea of a criminal moot court that I proposed to Mannheim University has since been put into action by students taking over the roles of judges, defence and prosecution under

the supervision of several experienced practitioners.

In the meantime I successfully applied for a job at the International Criminal Tribunal for the Former Yugoslavia and have been working as a Trial Attorney with its Office of the Prosecutor since September 2005. The procedures here are almost entirely based on common law principles, and I now benefit from my studies and the training I received in London. The concept of precedent, which would require getting used to for a lawyer from a civil law country, does not keep any secrets from me now.

Looking outward

Thus getting to know both a legal and educational system completely different from the ones I come from has opened my mind and made me understand things. I strongly believe that it is utterly important to know what happens in other countries' systems even if an immediate use for one's work at home is not apparent at first sight – in my view the difference in systems should be reason enough to acquaint oneself with them.

The Education of a Pupil

Most BVC graduates are eager to start their pupillage. Dara Islam has managed to postpone this for years by doing a lot of other things. It has left him with an insatiable interest in courts

Despite having completed the BVC, and having done five mini pupillages and six marshalling placements, I felt far from ready to take on OLPAS, let alone launch into a career at the criminal Bar. I decided to postpone pupillage applications as a tactical measure. This has given me the opportunity to develop another view of the Bar, and to pursue my passion for travel and knowledge of other legal systems.

How it all began

Whilst still studying for my LL.M. in 2002, I began work at 18 Red Lion Court, then the Chambers of Peter Rook, Q.C. as the research assistant and librarian. The practices within chambers range from sexual offences to fraud and terrorism to human rights. It has approximately eighty two members of chambers, seventeen Q.C.'s and an annexe in Chelmsford. My role was to manage the library and provide frontline legal research and information services to members and to some solicitors.

My research included detailed and protracted research on both international and domestic law. I was lucky enough to work on the issue of legality of the war in Iraq and the belligerent occupation of Basra (the then chairman of the Bar Human Rights Committee, Peter Carter, Q. C., is in chambers). I also worked on an amicus brief in Rasul v Bush in the US Supreme Court, in which the court held that Guantanamo detainees have the right of habeas corpus. Meanwhile, I did research for *Rook and Ward on Sexual Offences Law and Practice 3rd edition* and for *Smith and Hogan Criminal Law 11th edition.*

A love of travel

It all began in the summer of 2000, when I went to Croatia as a member of the European Law Students' Association to attend a Human Rights conference in Dubrovnik, with lectures and interactive workshops on various international legal issues. Two years later, I was a member of the ICSL tour of the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia, where I observed part of the Milosevic trial. Since then my interest in advocacy and foreign jurisdictions has become insatiable. So much so that even on family holidays I cannot help but pop in to sample the flavour of local courts.

In April 2004 I travelled to Canada although only a student as part of the Middle Temple Amity visit to Toronto. It was a chance to visit the local courts and institutions including the Ontario Court of Appeal at the historic Osgood Hall, and the University of Toronto for a friendly mooting competition between our 2004 Middle Temple moot competition winners and the Canadian champions. I observed different styles of advocacy but noted the close relationship between the two legal systems.

Middle Temple in Canada

In March 2005 I travelled to Jamaica with Gray's Inn and the Centre for Capital Punishment Studies (CCPS), as a volunteer on the Humane Advocacy Programme. It encompassed the Training the Trainers Programme and New Practitioners Advocacy Programme for the Jamaican Bar Association. I was the only UK 'guinea pig' with two other volunteers from the Norman Manley Law School, performing various civil and criminal advocacy exercises. I was put through my paces by Michel Kallipetis Q.C., Peter Carter Q.C. and Anuja Dhir.

While on Jamaica, I visited the infamous Gun Court in downtown Kingston, which is a part of the Supreme Court that deals with firearms offences and homicide. I observed part of a murder trial where a leading gang member allegedly shot a police officer. Here was a totally different and much bolder style of advocacy to that in the UK. I also visited the new Drug Treatment Court, part of a wider multi-agency UN health and justice initiative, set up as an alternative sanction to prison. Much to my surprise, every successful drug abstention case was met with a round of applause in open court. I also met staff and interns at the Independent Jamaica Council for Human Rights, an anti-death penalty NGO working closely with the CCPS. All of this was far beyond anything I had learned on the BVC.

With death row inmates in the Philippines

Further afield

In the summer 2005 I travelled to the Philippines with Kathryn Duff, as part of an eight week CCPS internship, based at the Institute of Human Rights (IHR), at the University of Philippines in Manila. We were mainly based at the IHR, assigned to Attorney Ricardo Sunga, where we worked with local Attorneys and NGOs on capital punishment matters, and on various research projects including a comparative study of ways to prove minority in capital cases.

We visited the Philipino death rows located at New Bilibid Prison (NBP) in Muntilupa City and the Correctional Institute for Women in Mandaluyong City, in order to meet some of Attorney Sunga's clients and to assess conditions. On one occasion we had lunch at the NBP, hosted by Francisco Juan 'Paco' Larrañaga, an affirmed death row inmate, joined by his parents and two other inmates. It was

The Education of a Pupil (continued)

a truly humbling experience. No amount of BVC conference skills training could prepare you for that setting. We discussed amongst other things the return of the death penalty, seven years after its abolition in 1987. It was awkward discussing the trigger offences, such as kidnap, rape and murder, the very reasons for which our host was awaiting execution. In April 2006 the Philippines commuted all its death sentences after a Government moratorium, lamentably only until 2012. As a consequence Paco is serving a double life sentence. His case is supported by Fair Trials Abroad and Reprieve. Recently the UN Human Rights Committee said that the Philippines should reconsider his conviction.[1]

We took advantage of this period to take a three week tour of the provincial jails and local courts across the Visayas region, and developed contacts with local lawyers and NGOs involved in human rights work. I am very grateful to Middle Temple for their financial assistance to do this.

International Development

Almost a year later, in May 2006 I travelled to Nigeria, as a consultant for the Justice component of the Security Justice and Growth Programme (SJG), an African development programme funded by the DFID and managed by the British Council. It was part of a wider initiative to help improve legal education and access to justice in Nigeria. I went on behalf of the BHRC supported by 18 Red Lion Court. My role was to provide basic IT and online legal research training to the academic staff at the Nigerian Law School (in Abuja, Lagos, Kano and Enugu) over two successive visits and to produce a course manual for approximately four thousand students and help incorporate a course into the domestic curriculum.

The first phase of the training was at the Bwari Law School in Abuja, in the relatively modern IT suite set up by the British Council, comprising twenty Israeli reconditioned computers, a data projector and white sheet used as a projector screen. I worked with twenty five participants including library staff and representatives from each of the three campuses, all of whom were emphatically keen to improve their online legal research skills. I am looking forward to returning to Nigeria in April this year to complete the training in the remaining three campuses.

Closer to home

Finally, I worked part time as a Legal Assistant at Brent Magistrates' Court between December 2005 and March 2006. I was clerking specially constituted district judge trial courts dealing with a backlog of cases. This involved not only effective trials but also pre-trial reviews, bail applications, sentencing and ineffective or cracked trials. In the absence of an usher I had regularly to liaise with the police, cells, witness services, probation and CPS. I gained valuable insight into the treadmill of dealing with cases every day in the magistrates' court. I also gained a greater appreciation of the level of collective hard work and multi-agency coordination behind the scenes of every effective trial.

Moving forward

My path since the BVC has been a long and winding one. But it has been an opportunity to gain experience in the areas of crime and human rights and work with highly committed and adept members of the Bar. A unique experience I could never have gained in pupillage.

Sometimes you need to move sideways to move forward. My decision to postpone pupillage worked out for the best.

[1] Report No 276, *Fraud* (2002). http://www.lawcom.gov.uk/docs/lc276.pdf

Go to Florida

Florida veteran Tetteh Turkson of 23 Essex Street, reflects on his experience and urges fellow Circuiteers to apply for the civil and criminal courses

Under the regime of New Practitioner and CPD points, people are always keen to find as painless a way as possible to accumulate the hours. When I first heard about the advocacy course in Florida, I thought it would be a fantastic solution to my own NPP problem. I was a pupil, and just coming up to a tenancy decision. It seemed the perfect excuse for a holiday without the (theoretical) risk of incurring the wrath of either the clerks or the tenancy committee.

I saw what was involved: a week's course, based on two criminal cases. One was a murder; the other was about the sale of drugs. It was taught by a faculty of Floridian state attorneys, public defenders and judges, augmented by local people who appear in the Federal court. My first concern was that there would be too many applicants. But surprisingly, few—too few—people apply. I suspect that either they think it will be hopelessly over-subscribed, or no one quite knows to whom it is suited. My view is that it is best to have at least a couple of crown court trials under your belt before going. Most Floridians have done tens of jury trials. For us, it is a great opportunity to try out new styles and approaches.

The teaching is not as structured or consistent as in England, although there are some of the same features, such as video review. The British-approved method was not always followed, but most of the trainers used some form of it. Each had his or her stylistic preferences. I found it particularly interesting that the Federal style is the most similar to ours: no walking about without express permission from the judge—which is rarely granted. As a result, guidance from Federal advocates barely had to be adapted. The other faculty members will listen carefully to what is permissible, and will give feedback for improvements. On the whole, the teaching staff encouraged a measured approach. Having said that, nothing quite prepares one for the seemingly acceptable practice of making objections for effect.

Best of all, the Florida Bar Association pays your course fee and hotel expenses, leaving you merely to pay for the flights to Gainesville. This results from a long-standing association between the Florida Bar and the South Eastern Circuit. They in turn provide delegates and trainers for our Keble course.

A large part of one's time there is social. This gives an opportunity for the hosts to get to know one another, but it is also a powerful way of maintaining the links between the Florida Bar and ourselves. The atmosphere is suitably convivial.

Everyone stays in the same, comfortable hotel, complete with swimming pool and hot tub. Our hosts are extremely generous and in return we host a party with our traditional drinks—Pimm's, gin, and beer that tastes of something.

I would recommend the Florida course to anyone. Some of the people I trained with have remained lasting friends.

There is still time to apply to Laura McQuitty *(see details opposite)* for the civil course in May. Applications for the criminal course in August are most welcome.

Florida Advanced Advocacy Scholarship

Civil: 8th – 12th May 2007

(Four scholarships available for Circuit members of up to 7 years call)

Criminal: 3rd – 10th August 2007

(Four scholarships available for Circuit members of up to 5 years call)

COST: ALL COSTS EXCEPT FOR THE RETURN FLIGHTS ARE COVERED BY THE FLORIDA BAR/ SEC

24 CPD hours are available (TBC)

Applications (to include a C.V.) in writing to Laura McQuitty:
LauraMcQuitty@23es.com
Ph: 0207 413 0353

Closing date for applications:
Criminal course: Friday 29th June 2007

www.southeastcircuit.org.uk

Advocacy Training for the Young Bar

The Bar is under scrutiny, from Clementi to Carter, and from the Bar Standards Board to the Legal Services Bill. Our leaders concur that our future as an independent referral profession depends on the quality of our advocacy. British Q.C.'s train advocates as far afield as Hong Kong, South Africa, Pakistan, the USA and the War Crimes Tribunal at The Hague. How can this standard be maintained? With competition increasing, and augmented expectations from the general public, the standard must continue to improve. Emily Radcliffe, of 9 Gough Square and a member of the Gray's Inn Student Affairs Committee, comments on the advocacy training available to the young Bar.

Mooting

Since only a handful of universities make mooting a compulsory part of law degrees, most students treat it as an extra-curricular activity. Some are sponsored by law firms or chambers hoping to promote their profile and to talent-spot. Essex Court Chambers, for example, runs an annual workshop with Cambridge University Law Society to teach the basics of mooting for beginners, intermediates and teams. For all students, there is the National Moot Competition. Fourteen universities participate, including Oxford, Oxford Brookes, Bristol, Newcastle, Hull, Greenwich and De Montford. At City University, which provides the original and largest university conversion course, students undertake a basic moot at the start of the year. They can progress on to the annual competition sponsored by the Inns of Court. The winner is decided by a High Court judge, with professors and tutors providing feedback. These events make up an important part of a student's OLPAS application for pupillage. They may also contribute to the hefty cost of Bar training through the coveted cash price.

You are on camera

Once students start their course at one of the eight BVC providers, advocacy training is unavoidable. Civil and criminal advocacy modules are assessed at the year-end. Actors play the witnesses in a case study and the role play is videoed. Students prepare for this during the year, through weekly practice with their fellow students. They either cross-examine a bearded lap-top thief, or a short-sighted elderly eye-witness. In the civil assessment, a tutor will 'play' the judge during an application for an interim (American Cyanamid) injunction. This is again videoed, to pick-up every verbal stumble and nervous tic. Despite the raft of complaints about the efficacy of the BVC course, this particular training is effective. After all, this is what we barristers do; and practice with specific feedback is the tried and tested mode of improvement. Able students can be held back by the large class sizes of mixed ability. A student's rate and threshold of improvement is in direct correlation to the quality of the tutor, some of whom are not exercising their own advocacy skills on a regular basis. The BVC is currently under the microscope as part of a proposed fundamental review by the Bar Standards Board Education and Training Committee.

Quite apart from any part time job they have to hold down to keep their debts to the minimum, students juggle their BVC obligations with the 12 qualifying sessions at their Inn. These can include a moot, judged by barristers and/or judges. The Inns are doing their best to accommodate students coming from far afield with sessions based both in London and on the circuits. Cumberland Lodge weekends are halcyon days of undergoing training while overlooking a sun-drenched Windsor Great Park.

Jumping through hoops

Once an advocate is Called, it falls to the Inns and his or her chambers to prepare them for the first day on their feet. How can a pupil persuade a lay bench not to issue a warrant not backed for bail? How relevant is the engineer's report in a 'bent metal' small claim road traffic accident? The Bar Standards Board will only issue a full qualification certificate if pupils have attended an advocacy training course and an advice to counsel course (now termed 'practice management course') covering conditional fees, business finance and relationships with solicitors. The advocacy training course is held in one's Inn if one is based in the south east. Middle Temple's two week course includes court visits and lectures for specialist advocates. It is hard work but beneficial but means that one misses two weeks of trying conspicuously to impress members of chambers (and potential earnings, if it takes place in your second six). Gray's Inn, by contrast, fits advocacy training into evenings and weekends culminating in students arguing a multi-party road accident claim in the Royal Courts of Justice.

Barristers have three years to complete the two-day forensic accountancy course. This is generally viewed as being undoubtedly lucrative to the Financial Training Company, who is contracted to provide it at £365 a pop (chambers sometimes pays) but too general and superficial to be of any practical benefit. It is just another hoop to jump through on the long and winding road to practice.

In the run-up to a tenancy application, many chambers assess their pupils' advocacy ability in-house. This in itself forms an important part of advocacy training for the young Bar. It also ensures that tenancy applicants, and especially clever young advocates from less privileged backgrounds, are assessed on their skills for the job rather than the more nebulous and easily criticized criteria of 'fitting in' to chambers.

Ironing out bad habits

Barristers who have commenced independent practice since October 1997 are termed 'new practitioners'. Within the first three years of Call, they must notch-up 45 continuing professional development hours, including nine in advocacy and three in ethics. This is no mean feat. The Inns, fortunately, run advocacy and ethics courses on Saturdays and Sundays which satisfy the BSB's requirement. Inner Temple provides a weekend at Latimer House, where practitioners are split into civil and criminal streams. During the course they cross-examine real-life expert medical witnesses, discuss the ethics of a conference with solicitors, and receive feed-back from Q.C.'s during the dreaded video review. Places on Grays Inn's similar programme at Highgate House are highly sought after. These weekends provide a helpful opportunity to meet others at the same stage taking different routes (for example, at the employed Bar, or working for government departments), those that have made a successful name at the independent Bar, and members of the judiciary in front of whom one may appear in the foreseeable future. Bad habits that have been accumulating are ironed out. Analysis of the ideal skeleton argument is particularly instructive. But for how long can the Inns rely on the good will of volunteers from bench and Bar? All Inn training is enormously time-consuming for everyone involved. One highly beneficial way to satisfy the requirements is by taking the South Eastern Circuit's superb and well-established new practitioners' advocacy course at Keble College, Oxford, held every August. Participants learn how to conduct each element of a trial, culminating in a trial itself, and also learn how to cross examine a financial or medical expert in a trial setting. Since it is residential, one is there full time with the senior practitioners and judges who do the teaching. The civil and criminal advocacy courses in Florida (described more fully elsewhere in this issue) are also instructive. Any remaining foibles can be shaken-off by volunteering as an Inn judge in a student moot. Watching different advocacy styles first-hand can prove to be a sound lesson in effective argument and a warning against superlatives and hackneyed phrases.

The Future

Geoffrey Vos, Q.C., Chairman of the Bar, has proposed a new scheme for advocacy training for those between three and five years' Call. This is potentially an excellent opportunity for specialised training, in a partnership between the Inns and the SBAs. If there is to be a Quality Assurance Scheme for Advocates or a Bar Council Register, as seems likely, such continued training will be essential. But how will this work in practice? To be truly effective, advocacy training for the young Bar must be provided by successful senior barristers in current practice. This means yet more volunteers giving up significant chunks of their precious free time. How can more be induced to contribute in this way? The prospect of adding this to one's Bencher CV may be insufficient to attract the quantity required. Could funds be raised to pay them? The alternative is for the courses to be run by non-practising advocacy trainers. That said, in the current climate, barristers are unlikely to look a gift horse in the mouth.

Bar to HCA: The Upside

For those barristers who are concerned at the use of CPS HCAs, Busola Johnson, who became one on the strength of a career at the Bar can offer some timely reassurance

Elizabeth Joslin, Unit Head of Snaresbrook with Busola Johnson in Paris

I joined the Crown Prosecution Service in June 2006, after several years as a tenant at 9 Gough Square. My primary motivation for leaving the independent Bar was my wish to continue to be an advocate while achieving a more equitable balance between work and my personal life.

A choice

Having applied for jobs, I was fortunate enough to have a choice of two offers within the CPS. One was for the post of senior crown prosecutor just outside London at a crown court which I know well and at which I had often appeared. The other was to be one of about ten Crown Advocates within the Pathfinder Plus Project at Snaresbrook Crown Court. Ultimately, what made me choose Snaresbrook was that the job offered something that was unique: the opportunity to continue to conduct advocacy exclusively in the crown court for about 80 percent of the time and the chance to spend the other 20 percent giving charging advice to the police. The latter scheme had been initiated to try to increase the number of such charging decisions being made by lawyers who knew the crown courts and its procedure. Most of the charging lawyers have traditionally been primarily experienced in magistrates' court advocacy.

There were already four in-house Higher Court Advocates at Snaresbrook; the rest of us were largely recruited externally, from the Bar and in one instance from a firm of solicitors. Having up to ten resident advocates at Snaresbrook would also mean that the delay (sometimes lasting weeks and days) between an important issue being raised at court and counsel being able to take 'instructions' from a CPS lawyer could be dramatically cut to minutes. There was also the challenge of being part of a new project in the busiest crown court in the country. All in all, the job at Snaresbrook seemed too good an opportunity to miss.

A brief arrives

Having made the decision to become a Crown Advocate, there then came the difficult process of announcing my departure from chambers at which I had been happy. I was very pleased to leave on good terms, and to keep the precious, and I hope lifelong, friendships that I formed there. I had initially been worried that it would mean never seeing these friends. Ironically, because we have all made more effort to spend time together properly, rather than just a quick chat in the lift or by the chambers photocopier, the transition has been seamless.

So it was that I started my new job last summer. On the one hand I was a little anxious about having left behind a familiar and happy working place; on the other, I was excited to be starting out on a new adventure. There was one wobble on my second day: I bumped into a solicitor who had, for some five and a half years, promised to send me work. Having singularly failed to do so during that time, he now told me that he'd rung my clerks in chambers the previous week to instruct me as a junior in a murder.

No regrets

Nevertheless, I can honestly say that I have not regretted my decision to leave chambers to work for the CPS. My colleagues are, without exception, completely committed to prosecuting fairly. In addition to being delightful company, they are all very able lawyers, incredibly well-motivated to improve the service that we provide to the public. Having previously been a free-range, self-employed barrister and never having had a "boss", I did not know what it would be like to be directly line-managed. I have been extremely fortunate to be line-managed by a lawyer whose legal judgement I completely trust and whose people-management skills are a wonder to behold. A few weeks ago, 19 of us spent a very happy day together in Paris (Eurostar tickets paid for by us, I hasten to add) and, emboldened, we are now contemplating a weekend away together in Rome later on in the year.

Some predictability at last

It has been nice that some things about my working day have remained constant - I still prosecute, I am still exclusively in the crown court and am still able to take on a mixture of PCMHs and trials. At Snaresbrook, the CPS has advocates of varying levels of seniority. I was led last year by a colleague of sixteen years' Call in a nine-handed public order case. There exists a camaraderie between the Crown Advocates which replicates that found in chambers, and my fellow lawyers share their knowledge and time generously.

One happy side effect of being based at Snaresbrook is that I now work from only one crown court, and no longer have that moment of utter confusion at 6am immediately on waking when I wondered whether it was Northampton today or Woolwich. Perhaps, however, the starkest difference is that I am now able to take decisions myself about the cases for which I have responsibility. This is a part of my job that I take very seriously. It is one thing to give advice to the reviewing lawyer about the future of a case; it is quite another to be the person to whom the complainant writes to say that their life has been ruined by the decision made by you on behalf of the CPS when you thought you were acting in the interests of justice.

Part of the community

The fact of that we are based at Snaresbrook means that we are in a good position to seize the opportunities available to join the court community. Snaresbrook must be unique (or at least unusual) amongst crown courts in having a chapel in the building. There is a chaplain here once a week, and services – to which all are welcome - are held at important times in the Christian calendar. There will be a court open day next summer in which the Crown Advocates have been invited to take part. There are daily opportunities to meet other court users and build good relationships with them. Being part of things at court, however, does not mean that we receive special treatment. Neither would we want it.

What motivates me

What is, undoubtedly, challenging is the reality of working in a large, publicly-funded organisation with finite resources which does important work very much in the glare of often critical publicity. What motivates me is the knowledge that I am contributing to an enterprise in which I genuinely believe – the prosecution of offenders fairly and the provision of a service to the public. At difficult times, I am fortified in the knowledge that I am doing my best in all the circumstances. I have seen from the inside the challenges which face members of CPS staff everyday and how people work hard to try to keep cases on track.

Good relations

One cannot be blind to the fact that many members of the independent Bar continue to be anxious about the impact that in-house CPS advocates will have on their work in the crown court and, therefore, their livelihoods. I continue to be incredibly impressed at the care with which most members of the independent Bar who prosecute at Snaresbrook prepare their cases, sometimes at short notice. What I can say is that we, at Snaresbrook, could not work without the independent Bar and consider it imperative that we invest in good relationships with other advocates.

Carter and a Diverse Profession? Still not Right

Marcia Williams

Oba Nsugbe, Q. C.

Barristers have followed the 'Carter process' for the impact it has on their own practice, but there are wider issues as well. The Carter Diversity Group has been looking further afield than 'what will this do to my fees?' and has asked hard questions about 'what will this do to the quality of legal provision to the BME communities and to the quality of justice overall?' Both Oba Nsugbe, Q. C. joint head of Pump Court Chambers and Chairman of the Group, and Marcia Williams, Head of Diversity for the UK Film Council and a Lay Representative on the Bar Council Equality and Diversity Committee, have given evidence to the Constitutional Affairs Committee about this. They now remind circuiteers of the issues.

The Carter Diversity Group (CDG) was established to provide a forum through which the views of black and minority ethnic barristers and solicitors about the likely effect of Lord Carter's criminal legal services proposals could be effectively organised and channelled cohesively to Bar representatives, Lord Carter's review team, the DCA and the LSC. It is made up of a broad cross section of black minority ethnic (BME) barristers and solicitors in independent and employed practice, including representatives from the Black Solicitors Network, the Society of Asian Lawyers, the Carter Group of BME barristers and solicitors, the South Eastern Circuit Minorities Committee and members of the Bar Council's Race and Religion Committee.

The CDG organised a number of well-attended public meetings, held at the Greater London Assembly's City Hall, the House of Commons, and the Law Society, amongst others. These meetings brought together practitioners, community figures, and organisations such as the Law Centres Federation, Liberty, and Black Britain. They discussed the impact of Lord Carter's proposals on the BME communities and practitioners. The concerns were in turn expressed when the CDG gave evidence to the Constitutional Affairs Committee Inquiry into Carter's proposals.

A cull

Put briefly, those concerns are that these reforms fundamentally threaten access to justice for BME communities, and the advances made by BME practitioners in the legal professions in recent years. Lord Carter acknowledged in his final report that a diverse supplier base is essential for clients of diverse backgrounds to have confidence in their legal services. However, we would question his notion of a diverse supplier base. In practice it will necessitate a 'cull' of the vast majority of smaller firms currently providing lower value criminal legal services, and will create fewer, larger, contracting entities. Lord Carter carried out an analysis which he says led him to conclude that his reforms should not have a negative impact on black and minority ethnic firms and solicitors on a national basis. Nevertheless, he noted that 'there may be some disparity of impact at a regional level'. His final report suggested an 'over-representation' of BME lawyers in the present marketplace. His diversity strategy therefore is to retain a statistically proportionate number of BME practitioners nationally, across fewer larger, diverse, firms. He also feels able to justify any disparate impact on BME practitioners by the need to control legal aid spending and to promote efficiency of service in the public interest.

Fundamental flaw

The CDG believes that Lord Carter's approach is fundamentally flawed. There is a clear link in terms of ethnicity between the client and their legal representative of choice. This is acknowledged by Carter's final report in Chapter 5 at paragraph 78. Available data shows that clients from BME communities tend to choose BME firms for reasons both of their geographic location and of their linguistic, cultural and religious affinities. It is important to note that in making that choice, BME clients are identifying with the BME firm, as an entity, and as represented by its cultural makeup and identity. That is a choice that cannot necessarily be offered to the client by an individual BME solicitor practising in a non-BME firm. The link of cultural affinity underpins confidence in the criminal justice system for many from BME communities.

The importance of a diverse Bar is nowadays readily recognised, and spoken about at every level of the profession. This is undoubtedly a good thing. However, it is worth pausing to reflect why this should be so. Indeed with barriers being broken by people from backgrounds traditionally under-represented at the Bar, and with historic 'firsts' achieved, many may be asking themselves-- and understandably so, perhaps--what all the fuss is about. It would be easy to become complacent about the importance of diversity at a time when the debate about it seems to be frequently rehearsed.

The imperative of diversity

It seems to us that the imperative of diversity for the Bar goes far beyond merely avoiding discrimination. It must be about moving from formal to substantive equality of opportunity. By this we mean not simply a merit-based profession of talent drawn from all backgrounds, but that the Bar collegiately has the potential or a duty to send out key messages about this country and the openness of its establishments, while delivering a quality service to the broad range of clients served by the Bar. A genuinely diverse Bar carries with it the potential to be a transformative and dynamic influence on society and to take the lead both nationally and internationally.

The Bar gets the message

There is little doubt that the Bar has not only absorbed this message but that it takes steps towards realising the true implications of it. The lead established by the Bar Council's Equality and Diversity Advisers in embedding non-discriminatory and equal opportunities policies into mainstream Bar thinking policy has encouraged a wide range of policies and strategies for the profession's future. These have been developed by the Bar, government and others to be considered and assessed through the lens of diversity and inclusion. However, in our view, much of this progress is threatened by Lord Carter's reforms, and the way in which the Bar responds and continues to respond to this threat will test its resolve to protect that progress.

In the context of publicly-funded lower value criminal legal services, statistics indicate that a significant proportion of the independent Bar is supported by small firms. In particular, 46 percent of all lower value criminal contracts are held by BME firms. Further, BME firms account for 52 percent of all small firms in London, compared to 33 percent for their white counterparts. This pattern of representation is replicated across other major cities such as Birmingham, Leicester, and Bradford. It has to be recognised that these BME-owned firms support the Bar generally – they don't only support BME barristers. In this respect, the professions are even more closely interdependent than the Bar has perhaps been prepared to recognise in its response to Carter.

Think of the younger Bar

It is arguable that the Bar's success has been built on a model of small high street practices nurturing and supporting practitioners' development and progression at the independent Bar. Seen in this light, diversity ought not to be dismissed as a special interest concern. It is instead a powerful commercial driver. The Bar cannot assume that larger, or consolidated, firms will necessarily continue to support its growth and development in the same way. The Constitutional Affairs Committee asked specifically about the threat to the independence of the Bar posed by 'one case one fee'. Helen Cousins (Partner in Cousins & Tyrer) responded, 'Once the money has been split into proxies, when solicitors have higher rights within their firm and the monies can all go into the firm with the overheads that we have, why would you instruct a barrister? If you can do it in-house, you will, which I think will decimate the lower Bar, the younger Bar, which will leave less people there to be the specialist counsel that you need, as the independent referral agency, for more important and more serious matters. So, yes, I think it offers a great risk to the Bar.' Admittedly, the question to her was not about Carter's reforms per se, but the message to be drawn is the same. Put simply, the presence of small firms has acted as a buffer between a healthy specialist advocacy profession and the fusion of the professions, or at least a vastly diminished Bar.

The steady progress achieved in the last 10-15 years in increasing the diversity of the Bar will be threatened by Lord Carter's proposals. As a result, the growing pool of talented BME lawyers from which judicial and other appointments are made, will begin to evaporate. There is no mention of these consequences in that part of Lord Carter's final report that assesses the impact of his proposals on the Bar.

Given the strength of the connection between the independence of the Bar as a specialist referral profession, and small firms, it is all the more surprising that the latest LSC Consultation contains a regulatory impact assessment which is not only woefully short of detail but actually contains no assessment of the potential impact of the reforms on the Bar.

Not adequate

Lord Carter's Final Report recommends that the period of managed transition in the run up to best value tendering 'should be used to sustain and promote a diverse and sustainable supplier base. This should enable clients to be confident in the quality of the service they receive and still offer a choice of legal representative'. He puts forward only two recommendations for ensuring a diverse supplier base.

First, he recommends 'the introduction of the following measures: monitoring of ethnic data throughout all stages of the transition to the market structure in 2010 and beyond; and regular monitoring of quality checks to ensure that they have no unintended discriminatory effects and a requirement that all suppliers have in place an equal opportunity policy'. Second, he says that 'the Legal Services Commission together with partners, including DCA, should create a wider diversity advisory group to report to the Lord Chancellor and LSC Commissioners on the state of diversity within the suppliers of legal aid services and make recommendations for improvements where necessary'. He goes on to suggest that 'the Legal Services Commission, Law Society and the Commission for Racial Equality should jointly review the number of black and minority ethnic practitioners within firms providing legal aid services.'

The Carter Diversity Group believes that taken together these two recommendations are inadequate and perhaps even naïve in terms of preventing the damage to access to justice for BME communities and the haemorrhaging of BME firms and practitioners from the legal services landscape. The CDG believes these recommendations are unimaginative and will be ineffective for the following reasons:

- The DCA and LSC are already obliged to monitor the ethnic impact of their activities by virtue of the Race Relations Act. Monitoring, of itself, will not secure a diverse supplier base
- The existing Solicitors' Anti-Discrimination Rule and Equality Code for the Bar already require firms and chambers to have in place formal equal opportunities policies aimed at improving workforce diversity (which this recommendation focuses on). It is important to note here that workforce diversity by itself, is not the same as supplier diversity
- The Bar Council and Law Society already monitor (quite extensively in some aspects) the composition of their professions. It is therefore difficult to understand what the recommendation for monitoring here is intended to achieve
- There is a considerable difference between requiring organisation-level, internal, HR-led, equal opportunities policies and having supplier diversity strategies for the sector. There is a considerable difference between the organisational and cultural capacity of a firm to work effectively with the diversity of the community it serves and 'diversity' in terms of the composition of a firm's staff. The phrase 'state of diversity within firms' belies Carter's lack of awareness and sensitivity to these issues
- An advisory committee in this context is inappropriate and inadequate because the imperative is to ensure the continuing presence of BME practitioners delivering legal services to those who need them. It is difficult to see how a forum that is advisory can practically ensure this, whilst the roll-out of this reforms package continues unabated
- News from the Legal Services Commission of the withdrawal of the proposed transitional funding referred to by Lord Carter to help firms to introduce significant structural changes in preparation for the advent of best value tendering, taken together with the fact that that none of Carter's proposals are to be tested through piloting in advance of their implementation is creating understandable anxiety among BME practitioners and their clients

We are disappointed by the compliance-oriented approach of formal, rather than substantive equality adopted by Lord Carter. It is dismissive of the likely impact for BME communities and BME firms and practitioners; and is dismissive of the public value that BME firms represent. It is the CDG's view that this approach reveals Lord Carter's failure to appreciate the significance of the purposive strands of the public sector race equality duty which require all of his proposals not just to be non-discriminatory, but positively to promote equal opportunities and good race relations among ethnic groups.

The CDG is disappointed if perhaps not surprised by the Government's determination to introduce these reforms in the absence of a full, statutory race equality impact assessment - especially in the light of the predicted disproportionate impact upon BME practitioners and their clients. It is therefore our view that the implementation of Lord Carter's proposals may be unlawful in the light of the public sector duties contained in the Race Relations Act, as amended. Fortunately, it would appear that this key concern is now clearly on the radar of the Constitutional Affairs Committee. At the same time that the committee has been enquiring into the effect of Carter, the Home Affairs Committee of the House of Commons has been conducting hearings on young black people and the criminal justice system.

There is a strong link between a commitment to diversity, social inclusion and access to justice. The potential political and social consequences of any community' sense of exclusion from our justice system are unacceptably high. This is especially true at a time when the confidence of BME communities in the criminal justice system appears to have been stretched to its limits, and when diversity and community cohesion are apparently high on this government's agenda.

Confessions of an Advocacy Trainer

I am part of that generation that never received advocacy training. I recall, during my Bar finals, the visit to the magistrates' court. A young barrister was given a dock brief. Halfway through his plea in mitigation, the stipendiary magistrate (as he then was) said, 'I thought a great deal more about your client before you began than I do now'. I saw that barrister around the courts for years thereafter, still being briefed. One drew the obvious conclusion.

Trained up

I volunteered for my Inn's advocacy training at its inception. Feedback in those early days resembled a running narrative between trainer and pupil. It was a bit like a director taking an actor through a screen test: louder, slower, that was a leading question, better, thank you. Then along came Hampel. I spent a weekend being trained up by Alan Moses, Q. C. (as he then was) and discovered that there was indeed a great deal to learn.

Pluses and minuses

One can see the obvious advantages of Headline, Playback, Reason, Remedy, Demonstration, Replay. It is predictable. The trainer knows exactly how he is going to give feedback and the pupil knows exactly how he is going to receive it. The Inn knows, more or less, how the classes will be conducted. It restrains some of the more ebullient members, who would really rather spend the two hours telling Old Bailey stories. It also provides structure—the attribute which we know is missing in virtually every exercise done by a pupil. It is also a challenge. Strict Hampel is taut, fit and succinct—the sniper as opposed to the cluster bomb.

Having trained trainers I know that barristers do not necessarily 'get' the method. Since it is essentially a straitjacket, it is a bit like trial management with time limits on questioning witnesses—and we know how the criminal Bar feels about that. Some perhaps would prefer to sprawl, so to speak, like a leisurely cross examination which touches on this and that in the hope that eventually the witness might just say something damaging. The method is much more demanding. You have to listen carefully to the pupil's performance, both in detail and as a whole. You choose one fault, but it has to be the most significant fault. The performance might only last a few minutes, before you call 'time' or the pupil runs out of steam, and then you are up on your feet, with the feedback at your fingertips. Meanwhile, you scribble away furiously, noting what they have said, so you can do your Playback, and choosing as quickly as you can which Headline it is going to be. You also have to listen to your own demonstration: have you just made a mistake as well? If so, apologise immediately, or they will point it out. After all, the greatest pleasure you can have when you are being criticised is to turn the tables on the person who is acting as if he knows it all. All in all, it is much more nerve wracking than thinking on your feet in court.

Things are easier for the pupil. They just have to listen, and if they can get away with it, imitate your demonstration. That is why you must insist that they do not re-do that passage but some other part of the evidence. You must also get them to 'play fair' when acting the witness. They ought to be convincing witnesses. Since they are at the start of their career as a lawyer, they are still able to think like laymen. Too few take the opportunity really to play the parts in a way that challenges their questioners.

Was I any good at this? I don't know. The Inn didn't know. There was no monitoring, and no feedback. I was graded after my training weekend. But no one told me what that was. It was the policy not to tell trainers what their grading was and indeed not to tell them that a grading system existed. I found out, by accident, nine years later. It was rather as if they could not bear to tell a chap who was giving up his time whether or not he was really helping.

In the City

When I began to teach advocacy to people beyond the Bar, I clung to Hampel. I told the young City solicitors who were trying to obtain their higher rights qualification that this is how barristers were taught; that I was showing them respect by treating them in the same way in which their future courtroom opponents had been. City firms, though, are different. They do give feedback, after every session. Unlike the pupils, they are paying customers. I used the strict method, and my feedback ratings crashed.

Hampel, I now realised, is both austere and negative. It tells you one thing you did wrong and how to remedy it but it leaves you ignorant as to whether overall you got it 90 percent wrong or 10 percent. It provides no support and does not tell you what you are doing right. City solicitors who are working 16 hour days with my advocacy lessons sandwiched in wanted a few words of praise—or as they put it, 'balanced feedback'.

It 'works'

Every introduction to the Hampel method begins with 'it works'. Does it? What does 'works' mean? If there is any empirical evidence on the subject, I have not seen it. Elsewhere in this issue, Emily Radcliffe points out correctly that pupils want to be taught by practitioners. You do not need to be a practitioner to do Hampel, you just have to know what the rules of advocacy are. What practitioners add is what the pupils want but which Hampel excludes. They want to know what actually happens in court, and how I would handle that issue. Sometimes they want a seminar on the law. Sometimes they are hard to keep under control. I sympathise. It is sadly not unique to find a promising young pupil—someone whom you know would reach this stage no matter how high they place the bar—who still does not know the purpose of examination in chief.

But the NPP

Relief comes with the new practitioner courses. Here we drop the straitjacket. In effect we say after a performance, 'let's talk'. And they listen. At Keble, replay is now postponed, in order to give delegates a chance to think about how they will improve their performance. New practitioners also get video review (though not in all Inns). This has the same effect on them as city centre CCTV does on burglars: that can't be ME?

Does the 'relaxed' method 'work'? In March I ran across someone I taught at Keble. I asked her how it felt now. 'It gave me confidence', she said, and looked at me oddly. I realised that she had no recollection of ever having met me. That is excellent. I didn't matter; what I tried to teach her did. What I enjoyed was the opportunity to engage with them. It permits a factor which is otherwise missing: empathy. Barristers are no more natural teachers than anyone else but I have seen barrister trainers with brilliant empathy. The trick is that they remain in total control of the situation while making sure that the spotlight remains on the person being trained. Come to think of it, it's not unlike the purpose of examination in chief.

D.W.

CIRCUIT TRIP 2007
ISTANBUL 25-29 MAY

This is a fantastic opportunity to meet with our Turkish counterparts in Istanbul to discuss legal issues affecting both jurisdictions at a critical time in Turkish history. The Saturday morning discussion will prove to be stimulating, informative and will generate debate - it will also attract CPD points. The rest of the time will be your own to explore this historic and magnificent city. This is not a trip to be missed!

Proposed itinerary:

25/05/07	1725 hours	Depart London Heathrow	BA680
	2305 hours	Arrive Istanbul Ataturk	
		Transfer to Hotel	
26/05/07	1000 hours	Meeting with Turkish Bar	
	2000 hours	Group Dinner	
27/05/07		Free Day	
28/05/07		Free Day	
29/05/07	1725 hours	Depart Istanbul Ataturk	BA677
	1935 hours	Arrive London Heathrow	

Cost: An absolute bargain of **£595** per person (on basis of a couple sharing a room)
First Class hotel accommodation for 4 nights, transport to and from the airport and dinner on Saturday night included.

PLEASE NOTE:

A supplement may be charged on single occupancy of rooms
Only 25 seats have been reserved on the flight
You are advised to take out suitable travel insurance as your cancellation may not result in refunds of the airfare.

YOUR PLACES WILL BE RESERVED BY SENDING YOUR CHEQUE [made payable to SOUTH EASTERN CIRCUIT BAR MESS] TO: Giles Colin, 1 Crown Office Row, London EC4Y 7HH (DX 1020 LDE) For further details please contact Giles Colin - e-mail: giles.colin@1cor.com

Tribute to Tim

Following the retirement of Tim Dutton, Q.C., as Leader of the South Eastern Circuit in December 2006, the three past juniors, Tanya Robinson, Laura McQuitty and Tom Little, look back on his time with fondness and perhaps just a little exhaustion.

Laura McQuitty and Tom Little

Rumour has it that in 2003, when Tim Dutton, Q.C. was anxiously considering whether to throw his hat into the ring for the elections for Leader of the Circuit, he was told by the then leader, Stephen Hockman, Q.C., 'Don't worry. All of the publicly funded fees issues are resolved'. Cruel joke or unwitting error, as it transpired, nothing could have been further from the truth. It was a hotly disputed issue that dominated Tim's time as leader throughout his three years.

Tim, however, took it in his stride.

One of us

Any concerns that criminal practitioners may have had that as a successful civil practitioner Tim would be out of touch with the sort of issues facing them, were quickly and rightly dispelled. During his three years, as we can bear witness, Tim worked relentlessly and tirelessly on behalf of the interests of all members of the Circuit. This was on a whole host of issues, and not just fees, although that demanded most of his time and efforts. Circuiteers will remember (with some emotion?) the settlement of the VHCC dispute at the end of June 2004, just five months into Tim's term. Then, there was a perception that what had been achieved would come at the expense of the publicly funded junior Bar. It is testimony to Tim's dedication to the cause, that just before the close of his term, the Lord Chancellor announced that Lord Carter's proposal would be implemented. Those were made subject to some amendments, the ones for which Tim and the team led by Geoffrey Vos, Q. C., fought long and hard. Thanks to Tim and the team, the future of the referral bar is, for now at least, intact, and in theory, the junior Bar is better off.

Whether it was the VHCC dispute in 2004, the July 2005 cuts or the rollercoaster ride of the Carter Review, Tim led from the front. This meant attendance at meetings all over the Circuit. He prided himself on being accessible to everyone. He always used a firm hand and logic to argue the Bar's case, both to Government and to the Circuit itself. His reception was sometimes mixed. Unconfirmed reports of Tim having to dodge a bottle thrown by 'Disgruntled from the Northern Circuit' following the Jesus College Advanced Advocacy Course in 2005, later sparked further rumours that CCTV footage of the incident was 'missing in action'. Undeterred, Tim bravely soldiered on in meetings up and down the country, always accessible to members (unless they were carrying glassware, of course).

More of us

And as if not satisfied that he (or indeed we) had enough on our plates dealing with the existing membership, Tim was determined from day one to drive up membership numbers. The Tireless Trio of juniors, under the watchful eye of our esteemed Leader, soon became the Fantastic Four. With the very welcome addition of the diligent Assistant Treasurer, Andrew Ayres, we together embarked on the leader's latest mission. Many hours and days even were spent labouring over the production and refinement of a Circuit database. Friendships were tested as each of us trawled through names trying to identify someone who could be prevailed upon to become their chambers' representative for the Circuit. Not since the storming of the beaches at Normandy, had the world seen such an unrelenting onslaught. Similar casualties were suffered and before long the Fantastic Four found themselves the Dynamic Duo. Heartfelt thanks have to go to Tom Little and Andrew Ayres for courage in the face of such adversity. Anyone attempting to attend the Circuit Dinner for the past two years will know just how successful that recruitment drive was.

Them and us

The CPS was never far from the agenda. The difficulties of the Preferred Set System and the need for grading was an issue which Tim took seriously from the start. He ensured that the Circuit was represented in all the discussions with the CPS about the development of such a system. Although the application form itself left a lot to be desired, Tim continued even in the dying days of his leadership to encourage and support all Circuit members in their applications.

Tanya Robinson

Of even greater importance, was the issue of the increased use by the CPS of HCAs. This was yet another area where Tim took the initiative and chaired the CPS/Bar Advocacy Liaison Group which has agreed a set of Principles. These are intended to govern the relationship between the CPS and the Bar in relation to prosecution work and the deployment of HCAs. If complied with, they will provide the Bar with important safeguards.

No-one but Tim and his long suffering wife Sappho know how he managed to fit all of his Circuit responsibilities in around his very busy civil practice. Some clue though emerges from the countless late night and early morning emails that each of us received as junior.

Such was Tim's immersion into all things criminal, that he accepted a leading criminal brief in a manslaughter case last year. We notice though that it was off Circuit. Perhaps he was secretly hoping that no-one on the Circuit would notice his turning to the dark side.

Tim at the 2004 dinner

Tim in Warsaw

Fun with us

It was not all work, work, work though. During his leadership, Tim introduced a number of Circuit adventures. In May 2004, he organised a day's sailing to the Isle of Wight and back. Some attendees will have better recollections of the day's events than others (naming no names and confessing nothing). Others will remember the fun-packed trips to Warsaw in 2004, to Berlin in 2005 and to Barcelona in 2006 all under the pretence of cross-cultural exchange and one CPD point. Closer scrutiny of these "educational" trips reveal what really lies close to the past leader's heart: fine wine, fine dining and fine company.

Tim in Barcelona

The greatest revelation during Tim's three years of leadership may come as something of a surprise to the esteemed members of the Circuit. Those who shock easily should read the next part of this article sitting down. Tim showed us a side to his character no-one had ever seen before (except perhaps his wife). At the 2004 Circuit Dinner as final arrangements were being put in place, Tim arrived bearing an enormous box of beautiful pastel coloured roses to be worn as button holes by members of the committee and to be placed on the table mats for the female guests of the Circuit. Not merely a telephone order: rumour had it that he had hand selected each one showing just how in touch with his feminine side he was.

Other personal touches followed. The 2004 dinner was our only one in Middle Temple – Lincoln's was undergoing refurbishment that year – and introduced a sung grace which has been repeated at each dinner since. Prior to 2004 it had last been sung to the Judges of Assize at Durham Cathedral in 1969. Circuiteers will remember Pia Dutton's involvement in that memorable first grace. We hear that Pia is now an undergraduate at Keble. Proof, if it was needed, that the apple does not fall far from the tree.

Education for us all

Advocacy courses throughout the Circuit have gone from strength to strength under Tim's leadership. The Keble Advanced Advocacy Course, which of course he started years ago, has now grown to such proportions that in the words of one recent attendee 'it could lay claim to being the best advocacy training course in the common law world' incorporating as it does not just young English advocates but also a cohort of keen foreign lawyers.

Sappho at the Dame Ann Ebsworth lecture

Many will also remember the establishment of a series of annual lectures to be held in memory of Dame Ann Ebsworth. She devoted a great deal of her time to the teaching of advocacy, and Tim recognised that the Circuit had benefited greatly from her involvement over the years at Keble. He was determined that the Circuit would take very great pride in establishing these lectures as a fitting memorial to her. Without a doubt, the first speaker in February 2006, The Hon. Justice Michael Kirby of the Australian High [Federal Supreme] Court provided a thought-provoking address and a proper tribute to the woman and jurist that so many had come to the lecture to honour and remember.

Pia Dutton sings the Judge's Grace

The international theme continued with a host of distinguished international speakers who graced Circuit events during Tim's three years. It was fitting perhaps that at Tim's final Annual Dinner as Leader he invited Anthony Gubbay, the former Chief Justice of Zimbabwe, as Guest of Honour. The story which our esteemed guest told of fighting for the rule of law whilst his own life was under threat in Zimbabwe was a salutary reminder to put the profession's fight for its survival in its true context.

Thanks from us

All Leaders of the Circuit probably feel that their time was more difficult than any other. Each year presents its own challenges. However, in Tim's case it must be said that the combined challenges of VHCC's, Carter, Clementi, CPS grading and CPS HCAs to name but a few highlight just what a mountain (and how many mountains) Tim had to climb. Each issue was addressed with Tim's characteristic dignity and endeavour. The Circuit's loss was the Bar's gain as he moved on to his new position as Vice Chairman of the Bar. As his past juniors we wish him every success.

The Second Ebsworth Memorial Lecture

Judging under a Bill of Rights

Mr Justice Louis Harms delivered the second Dame Ann Ebsworth Memorial Lecture on January 24. He came to London with Mrs. Harms, herself the daughter of a former Chief Justice of South Africa. He was introduced by Philip Bartle Q.C., our former Director of Education. Alex Price-Marmion of 2 Pump Court reports

Mr. Justice Louis Harms

One of South Africa's most distinguished judges, Louis Harms was appointed to the Supreme Court of Appeal, then the country's highest court in 1991. He has had a glittering career. He won the Hugo Grotius Medal at graduation as the best student after which he specialised in Intellectual Property law at the Bar, taking Silk at the age of 39. Five years later, in 1986, he was appointed to the South African High Court bench. He was senior editor of the South African equivalent of Halsbury's. He has run several one-man judicial enquiries, notably into politically motivated murders. Mr Justice Edwin Cameron, fellow judge in the Court of Appeal says of him, 'His intellectual distinction, breadth of learning and intellectual acuity are unequalled'.

Mr. Justice Harms' lecture was delivered with modesty, charm and wit. 'I know that judges and lawyers seldom derive any joy from listening to others', he said. 'They only do so out of a sense of duty'. He paused, then continued: 'Not unlike accepting a judicial appointment'.

On judging in general, he supplied a colourful comparison:

'The great bullfighter, Belmonte, was once asked to explain his method of fighting. He answered, 'Well, I don't know! Honestly I don't. I don't know rules, nor do I believe in them. I feel bullfighting and, without worrying about the rules, I go about it in my own way.'

'The same,' Mr. Justice Harms told us, 'applies to judging. It is, by and large, an unconscious act. And it is not only about law; it is primarily about facts (I come from a jurisdiction that does not have a jury system). Once you have the facts, the law tends to take care of itself.'

He had a sense of humour highly attuned to his audience: 'I can sense that some members of the Bar may question my imagery. They may think that the bull, and not the bull fighter, represents the judge; and the red flag learned counsel.'

The Bill of Rights

Until 27th April 1994, South Africa was ruled by a 'supreme' parliament. The function of the courts then', he explained, was. 'to enforce – and not to question – laws.' On that date an interim Constitution came into effect, followed on 4th February 1997 by a final Constitution and with it, a Bill of Rights. 'This Bill of Rights can,' he said, with justification, 'be described as one of the most 'liberal' and 'democratic' in the world.'

'No one can doubt the value of a liberal Bill of Rights. The ability to scrutinise and declare laws of Parliament invalid is awesome. The capacity to develop the common law is priceless. To be able to backchat when the lawgiver speaks – even coherently – is something to treasure. I would never wish to live under another system again.'

Liberal Indigestion

'But sometimes too much of a good thing can cause indigestion. This the Danes now know (I am not referring to their pork but to cartoons and the freedom of expression). A constitution can be too liberal or too democratic. For example, ours recognises eleven official languages and purports to give them equal status and protection. In addition, it requires the promotion of at least 15 others. This simply does not work.

'Unfortunately,' Mr. Justice Harms noted, 'the word 'liberal' is undergoing a change of meaning. Some who know better now use it, usually with a racial undertone, as a synonym for 'rightwing'.

'One reason for the distrust of liberal values may be because African societal norms differ significantly from those of the West – they are not inherently 'liberal' in the classical sense. The individual is less important than the community. For instance, communal property is the rule; not private ownership. In spite of what some Americans believe, a Bill of Rights designed for one community in a particular historical setting cannot, without complications, be adopted by another.

The highest political end - democracy

'The Constitution requires of the judiciary to advance the values of an open and democratic society. Democracy is itself the highest political end (Lord Acton) unless one shares Malcolm Muggeridge 's view that an autocracy tempered by the occasional assassination is somewhat better. Democracy is supposed to mean a government by the majority that respects the rights and interests of the minority. But the term is loaded. It means

whatever one wants it to mean. As George Orwell once said, anyone using the term has his own definition, but allows his hearer to think that he means something quite different.'

Mr Justice Irwin and David Spens, Q.C.

Freedom *after* speech

'Maybe I should not have been surprised when reading in a judgment that pre-litigation discovery is a 'fitting philosophical approach to dispute resolution in an open and democratic society'. 'Otherwise', he asked, 'I am not sure what the effect of 'democracy' is on the interpretation of the Bill of Rights although I am reminded of the Rumanian law professor who was asked some years ago by a student to explain why the right to freedom of expression guaranteed by its Soviet-based Constitution was not the same as the right of freedom of speech one finds in, say, the SA. Replied the professor: We may have freedom of speech; but that does not mean that we have freedom *after* speech.'

Comparisons are odious

'The point is that a democratic constitution does not create a democracy. During November 2006, *The Economist* ranked South Africa as a 'defective democracy', even less democratic than Britain. But then, comparisons are odious.'

A bill of rights is a living organism

'Bills of rights are by their very nature drafted in general terms and cannot be too specific to have any permanent value. They have to cater for future generations. A bill of rights is, contrary to what Justice Scalia believes, a living organism. Ours, it has been said, is not only a formal document regulating public power but it also embodies an objective, normative value system. However, as a legal document it says some things and doesn't say others. And it sometimes employs high-sounding words containing incompatible concepts. This enables judges to fudge and for jargon to replace principle. It also can lead to the politicisation of issues and judgments.'

A hiding place for politicians

'There is another downside. Politicians who are unwilling to make difficult or unpopular decisions are able to hide behind a bill of rights, not only when drafting it but also thereafter. For example, it is a matter of common knowledge that violent crime is epidemic in South Africa – 18,000 murders during 2005 – and that we had the death penalty. I, for instance, had to impose or confirm it; in one case, that of the notorious White Wolf who had murdered seven persons in a killing spree that was racially and religiously motivated. In view of the popular support in the country for the retention of the death penalty, those who negotiated the Bill of Rights chose to avoid the issue. Instead, they left it to the courts to decide in the light of the relatively vague 'basic rights'. They intentionally created, what they called, 'constructive ambiguities'. Now politicians can and do hide behind the judgment of the Constitutional Court, which declared it unconstitutional, if the matter is raised. And the courts and the Bill of Rights get the blame for the crime rate.'

Dame Ann Ebsworth, 1937-2002.

Blame the courts, again

'The equality provision in the Bill of Rights is, in the light of my country 's history, at the forefront. Discrimination based on marital status or sexual orientation, amongst others, is specifically proscribed. But government could not make up its mind how to deal with same-sex relationships. It had a few options but, because of its concern about public acceptability of legislation, it simply sat back and waited for the Constitutional Court to tell it how to deal with the matter. When the deadline set by the Constitutional Court arrived, a bill said to comply with its prescripts, was rammed through Parliament without proper debate. Once again, responsibility for a political decision was shifted from the political arm of government (where it belongs) to the judicial (where it does not belong). Blame the courts, again.'

A bill of rights: a reflection of societal values or their creator?

'Let me be clear about this: I do not favour the return to the death penalty and I do not object to the formalisation of same-sex relationships. I mention these examples to raise, without answering, the question of whether a bill of rights should reflect existing societal values or whether it should create them or allow courts to create them. The advantage is that bills of rights remove the debate about basic rights from the democratic process because democracy, in the sense of majority rule, is inimical to democracy itself and to the protection of classical liberal human rights.'

Liberalism -v- Democracy

'This tension between liberalism and democracy is acutely felt in judging. Add to that second generation rights such as rights to housing. The Germans, as could be expected, thoroughly analysed the theoretical basis of the issue and came up with some or other Prinzip. One writer came to the conclusion that judicial review under a bill of rights is a practice suspended between notions of populism, progressivism, constitutionalism and democracy. Democracy at least is not an –ism.'

Judicial Activism and Judicial Realism

'A bill of rights does not provide any justification for courts to disregard any legal rule, statutory or common-law; on the contrary, it is the reason why courts must act within the confines of legal rules because it imbeds the rule of law. Many judges do not understand this. One finds a bit too often that judges use the Bill of Rights as an excuse for ignoring the law.

'The difference between the dictatorship of the proletariat and the dictatorship of the wig and gown is one of degree and not one of substance.

'Our Bill of Rights does not only invite but demands judicial activism in four fields: first, in interpreting the Bill of Rights a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; second, when interpreting any legislation courts must promote the spirit, purport and objects of the Bill of Rights; third, when developing the common or customary law, courts must promote the same values; and fourth, in deciding a constitutional matter courts may grant relief that is 'just and equitable'.

'The Constitution also gives the high courts the 'inherent' power to develop the common law. (This is a contradiction because if the power is derived from the Constitution it cannot be 'inherent').

'When speaking about 'judicial activism' a good starting point is the warning of Lord Bingham

that 'constitutional dangers exist no less in too little judicial activism as in too much.' This reminds us of the fact that judicial activism can be either a left-wing or a right-wing virtue or vice.'

The lawless judge

'The lawless judge can pursue ideas other than political ones, assuming that, since even sex has become a political issue, there are any legal issues that are not political. And the lawless judge can also have a knee-jerk reaction to issues with which the judge is besotted. It is perplexing to know of judges whose answer to any particular problem, irrespective of the facts, irrespective of the law, and irrespective of the argument, is predictable.'

Judicial modesty

'Two further points may be made in this regard. First, as Justice Heydon observed, many modern judges think that they can not only right every social wrong, but are also able to achieve some form of immortality in doing so. They disregard the 'principle of judicial modesty'.' [A principle, it was evident to all present, embodied by Harms himself]. 'They are blissfully unaware of the fact that 75 per cent of Americans know the names of two of Snow White's dwarfs but that only 25 per cent know the names of two Supreme Court giants.

'It really is easy to write popular judgments; the unpopular ones require intellectual honesty.

'The second point is that 'the dignity of intelligence lies in recognising that it is limited; and that the universe exists outside it.' Judicial flashing and intellectual arrogance are too often part of the judicial armoury.

Judging or fudging

'The common law has always provided (more or less) that everyone has the right to administrative action that is lawful, somewhat reasonable, and procedurally fair. This right has now been constitutionalised and is entrenched. Obviously, if a statute provides differently, it is invalid.

'Otherwise everything remains pretty much the same. Except this: one has to get used to a new vocabulary. Buzz-words such as accountability, transparency and proportionality abound. As Don Watson said, when you see the word 'transparency' so often, you cannot help wondering if it's not hiding something.'

A recipe for judgment

'One has to write with circumlocution. Subsidiary legislation is not merely ultra vires (sorry, I forgot that Latin is strictly verboten). No, one has first to refer to the principle of legality; throw in some quotes; mention that the Constitution is built on it; explain the break with the past; throw in more quotes; move to purposive construction; remember that context is everything; look at the provision through the prism of the Constitution; add further quotes; then to see whether the enabling statute is compatible with the Constitution; make another analysis of the subsidiary legislation; reach for a thesaurus for adjectives and adverbs with a compassionate undertone; reach for the noter-up to pad footnotes; and so it goes.'

Common roots

'Our common law was, and still is, Roman Dutch law, a system closely related to Scots law and suffused by natural law concepts. Bear in mind that its greatest exponent was Hugo Grotius. Our constitutional law, however, was English law.

'From these two great systems we inherited a large number of basic rights including equal justice, freedom, freedom of speech, dignity and rights such as the right to privacy and the like. These rights were not entrenched. But the judiciary always saw it as its duty to protect them to the fullest extent possible.

'The problem', emphasised Mr. Justice Harms, 'is how to enforce social rights without impinging on the doctrine of separation of powers in a country where the lack of capacity (human and financial) is a serious problem and where there is not enough to go round. So far the courts have been singularly ineffective in making a difference.'

Developing the common law

Following two examples on this, he remarked, 'I just do not know what the 'new' common-law rule is supposed to be. If one has regard to the fact the US Supreme Court is able to hold that exhibiting the Ten Commandments in a public building is unconstitutional but not if they are exhibited in a public park one can only conclude that constitutional judgments need not be consistent.

'Let me recall the fate of the famous French chemist Antoine Lavoisier, also known, at least by the French, as the father of modern chemistry, who lost his head – literally – in 1794. When the guillotine blade came down, an officious bystander, Joseph Louis le Grange, remarked that it took Lavoisier a second or so to lose his head but it will take France a few centuries to grow another one like his. Once you mess for the sake of the revolution with a rule that works, it may take a long time to put matters right again.

'A bill of rights should, like the bell tower of Pisa, stand the test of time. Although built somewhat askew on an unstable foundation, and sagging, it should keep standing for hundreds of years, even if it requires to be propped up regularly. A bill of rights should not be like the Zimbabwe ruins: built perfectly but now in complete ruin and we do not even know who had built them.

'I would like to be seen as an objective South African… We may sometimes create the impression that we have reinvented the wheel, which is not quite true. What I did come to tell you, and you have experienced it already within your own jurisdiction, is that judging under a bill of rights is different from judging without one, and it has its own challenges.'

A sacred text

'A bill of rights is very much like any sacred text – Bible, Koran or whatever. Any true believer appreciates it as the primary and ultimate source of law and ethics and it regulates one's life immutably. On the other hand, true believers tend to interpret such texts differently…Most find in them things not said or intended. They are open to abuse.

'But that is not what a bill of rights is supposed to do. It is supposed to remove arbitrariness, not only of legislation but also of adjudication. It is supposed to create legal certainty, not uncertainty. It is supposed to create respect for the law and the judicature, not disrespect. That it can do – and usually does – if we as judges respect its spirit. And we can do it, even though we have to use vague formulae and fall into the jargon trap. The law is no longer carved in the proverbial Mosaic stone; it is here and has to be flexible but it also has a breaking point.'

The road ahead...

'These are early days in our constitutional history. We are mapping out a path where western liberalism, universal democracy and African socialism can meet without colliding. We are feeling our way to social peace and justice. We are looking for the road to a fairer legal system.'

Taming the law

'I began with bulls and aim to end with horses. Judging involves taming. One has first to break in counsel and through them the solicitors and parties. That bit I find quite easy and pleasurable. Next, the facts – truly unruly – have to be tamed. The material facts have to be extracted, without becoming distracted by the immaterial facts, in order to make the matter comprehensible. In order to determine the relevant facts one has to tame the law. This requires some understanding not only of the rules but also of the psyche of the law, and its limits.

'And whilst on the topic of taming, perhaps it is not inappropriate to quote Antoine de Saint-Exupéry once more when the fox says to the Little Prince: 'Men have forgotten this truth. But you must not forget. You become responsible, forever, for what you have tamed. You are responsible for your rose.

'I hope I may say, with diffidence, that the one rose in my life has been the law and I am conscious of the great responsibility involved in taming her. Taming the other rose in my life, my wife, well, that is another story.'

Mr Justice Louis Harms tamed us as well.

SOUTH EASTERN CIRCUIT BAR MESS

The Annual Dinner of the South Eastern Circuit Bar Mess
is to be held in Lincoln's Inn Great Hall on
Friday 29th June 2007 at 7:00 for 7:30pm.

The Guest of Honour

THE RIGHT HONOURABLE SIR ANTHONY CLARKE

Master of the Rolls and Head of Civil Justice

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Tel: 020 7242 1289 Fax 020 7831 9217 DX: 240 London, Chancery Lane

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* I require a vegetarian meal Yes/No

* ***Please delete as applicable***

The 'Civilisation' of Criminal Law

Every law student knows the difference between 'crime' and 'civil' but the Government has now spent several years blurring the distinction. This blurring means that the usual safeguards of the criminal process do not apply in many civil orders now available in the criminal courts, despite the fact that breach of the order carries a penal sanction. Maya Sikand, of Garden Court Chambers, and an expert on anti-social behaviour orders, explains what has been happening

Criminal law today

Those who practise in criminal law cannot but notice that the introduction of the Criminal Justice Act 2003 and the Criminal Procedure Rules has changed the complexion of the criminal trial process. As has long been the case in civil trials, hearsay evidence, of whatever degree, is now admissible, subject to various statutory tests being satisfied. Another import from the civil trial process is the recent insistence by the courts that issues between parties are defined at an early stage. In a recent judgment the Divisional Court, considering an appeal by way of case stated from the magistrates' court, used strong language to dismiss the contention that the defence could effectively keep its powder dry until the very last moment.

> 'In my judgment, Miss Calder's submissions, which emphasised the obligation of the prosecution to prove its case in its entirety before closing its case, and certainly before the end of the final speech for the defence, had an anachronistic, and obsolete, ring. Criminal trials are no longer to be treated as a game, in which each move is final and any omission by the prosecution leads to its failure. It is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage. That duty is implicit in rule 3.3 of the Criminal Procedure Rules, which requires the parties actively to assist the exercise by the court of its case management powers, the exercise of which requires early identification of the real issues. Even in a relatively straightforward trial such as the present, in the magistrates' court (where there is not yet any requirement of a defence statement or a pre-trial review), it is the duty of the defence to make the real issues clear at the latest before the prosecution closes its case…'[1]

Some of us may be surprised to discover that to insist that the burden of proof remains on the Crown throughout is both 'anachronistic' and 'obsolete'. A great number of us will be even more surprised to learn that criminal trials were once a game. Nonetheless the above demonstrates a definite shift in culture, albeit a subtle one. What is not so subtle, however, is a different kind of 'civilisation' that has been going on in the background for a number of years. By 'civilisation' I mean the introduction by statute of a number of civil orders into the criminal courts, breaches of which result in a relatively heavy penal sanction.

The history of civilisation

'Civilisation' began a while ago. Local authorities have had since 1972 a statutory power to 'promote or protect the rights of inhabitants in their area' by way of injunctive relief. Since this was commonly used to tackle begging, prostitution and kerb-crawling[2], it invoked the assistance of the civil courts in aid of the criminal law[3]. Exclusion orders to counteract football hooliganism (more recently in the form of 'football banning orders') have been available in one form or the other since 1986[4]. Breach of them constitutes a criminal offence.

These powers have widened and grown enormously over the last few years, in particular with the introduction of the Crime and Disorder Act ['CDA'] 1998, the Police Reform Act ['PRA'] 2002 and the Anti-Social Behaviour Act ['ASBA'] 2003. The CDA 1998 introduced not only ASBOs (limited to the criminal courts at that stage) but also parenting orders, sex offender orders, child curfew orders and child safety orders. The PRA 2002 introduced ASBOs in the county court and increased their availability generally. ASBA 2003 further widened existing powers and brought in a raft of new measures including 'crack house' closure orders, dispersal orders[5] and new powers to tackle fly posting, graffiti, waste and litter. Applications for closure orders are heard within 48 hours of service of a notice, which is not enough time for a hearsay notice provision to be complied with.

The Sexual Offences Act 2003 introduced sexual offences prevention orders (SOPOs), replacing sex offender orders under the CDA 1998. Such orders may be made not only on conviction, but, like ASBOs and football banning orders, on an application made to a magistrates' court. Like ASBOs, the breach of such an order can result in up to five years' imprisonment.

And more

As the popularity of ASBOs increased, the Serious Organised Crime and Police Act ['SOCPA'] 2005 gave the Secretary of State the power to extend the list of authorities that can apply for ASBOs[6]. The Criminal Justice Act ['CJA'] 2003 introduced individual support orders ('ISOs')[7] and the Drugs Act 2005 introduced intervention orders[8], although these can only be made in addition to an ASBO.

Just when we thought we had enough 'orders', the Police & Justice Act 2006 was enacted early this year. It introduced drinking banning orders, modeled on the ASBO and available on a stand-alone or post-conviction basis. They are also an addition to existing proceedings in the county court[9]. Like ASBOs, a breach of such an order is a criminal offence. Finally, the Serious Crime Bill, published on 26 January 2007, seeks to introduce Serious Crime Prevention Orders (already colloquially known as the 'Super ASBO'), on an application to the High Court by the DPP, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions. The order would prohibit or restrict (for up to five years) an individual's financial dealings, working arrangements or access to premises. The court would only need to have reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime; crown court judges would have similar powers but on conviction of a defendant. Once more, it is a civil order with the potential for extremely restrictive prohibitions. Breach of it would a criminal office, punishable on indictment for up to five years plus the power of forfeiture.

Criminal or civil? Preventative or punitive?

When ASBOs were first introduced there was concern that although they were described as civil orders, because they were given the penal sanctions upon breach, they were in reality criminal in nature. A further concern arose because hearsay is automatically admissible in civil proceedings. ASBO defendants were therefore deprived of the full protection of Article 6 of the ECHR. This question was resolved by the House of Lords in the now well known case of *R (on the application of McCann & Ors) v Crown Court at Manchester; Clingham v K & C Royal Borough Council*[10]. The appellants argued there that, seen as a whole, the

scheme provided by the CDA 1998 for the making of and enforcement of ASBOs is punitive, rather than preventative, and therefore truly criminal. An ASBO could, for example, banish a person from the area in which s/he lived and provided in the event of breach for higher penalties than many criminal offences.

The ECHR distinguishes between criminal and civil proceedings, and affords minimum rights in accordance with Article 6(2) and 6(3) to those charged with criminal offences. Classification is therefore all-important. The Strasbourg Court, in order to prevent states from circumventing the safeguards provided by the criminal law by simply re-classifying proceedings, has long insisted that 'criminal charge' is an autonomous concept[11]. In other words, the Court will decide for itself whether the proceedings in question involve the determination of a 'criminal charge'. It will not be bound by domestic classifications. The approach taken in the Strasbourg jurisprudence is to determine that issue by reference to three criteria: (a) the classification of the proceedings in domestic law, (b) the nature of the offence or conduct in question, and (c) the severity of the potential penalty[12]. The first issue is not as important as the second and third. As was acknowledged by the House of Lords in *McCann,* the third is the most important[13].

In relation to the third question, their Lordships were not prepared to view ASBO breach proceedings as part and parcel of the ASBO procedure. They decided that these were separate and independent procedures. An ASBO was a preventative and not a punitive measure, imposition of which did not result in any penalty. Support for this view was found in various Strasbourg judgments. In *Guzzardi v Italy*[14], for example, the applicant was suspected by the authorities to belong to a band of Mafiosi and was made subject to special supervision for a period of three years with an obligation of compulsory residence on an island off the tip of Sardinia. He was required to look for work, to report to the supervisory authorities twice a day (at least), he was forbidden from associating with those with criminal records and those subject to preventative or security measures, he was subject to a curfew, he was forbidden from entering bars or night clubs or taking in part in public meetings and he had to tell the authorities in advance who he was telephoning and from whom he was receiving a telephone call. He was liable to punishment of detention of one to six months if he failed to comply with any of his obligations.

Whilst the Strasbourg Court found that he had been deprived of his liberty contrary to Article 5 (1) of the ECHR, it was of the view that the proceedings did not involve the determination of a criminal charge within the meaning of Article 6. In *McCann,* their Lordships accepted that an ASBO may well restrict the freedom of the defendant to do as he wants and to go where he pleases, but that those restrictions are imposed for preventative reasons and not for punishment.

Further, their Lordships distinguished *Steel v UK*[15]. That is authority for the proposition that bind over proceedings do involve the determination of a criminal charge for the purposes of Article 6, on the basis that the magistrates may commit to prison a person who refuses to be bound over not to breach the peace where there is evidence to the criminal standard that his or her conduct caused or was likely to cause a breach of the peace. This they said 'was an immediate and obvious penal consequence'[16], unlike the ASBO position.

A way out

The House of Lords, having resolved that that there was no punitive element in ASBO proceedings, looked bound to decide that the proceedings were determined to be civil in character. However, they found a way out. Despite the fact that proceedings were civil, due the 'seriousness of matters involved'[17], the criminal standard of proof should apply. They saw no illogicality between that requirement and hearsay evidence. In short, they followed earlier Court of Appeal decisions in relation to sex offender orders[18] and football banning orders[19], in accepting that there should be procedural safeguards in place when Convention rights are engaged. In ASBO cases, the right most commonly engaged is that enshrined in Article 8.

Some commentators have seen the granting of quasi-criminal status to such orders as somewhat of a compromise by the English courts as well as a contradiction. How can hearsay ever satisfy the criminal standard? In practice, most ASBO hearings rely almost exclusively on hearsay evidence, often multiple and often anonymous and usually impossible to test. This is despite the fact that the Court of Appeal has recognised the real dangers of hearsay evidence in these kinds of cases[20].

Back to square one

While the House of Lords reassuringly decided that the criminal standard of proof applies to the first limb of the statutory test for imposing an ASBO, this approach has not been followed in respect of all civil orders in the criminal courts. In *Chief Constable of Merseyside Police v Harrison [2007] QB 79* the Divisional Court decided that in respect of closure orders relating to premises associated with Class A drugs under section 2 of ASBA, the standard of proof was on the civil standard. Lord Justice Maurice Kay drew a distinction between the case before him and *McCann.* ASBOs must be for a minimum of two years; closure orders are much shorter (three months, subject to an extension). Closure orders 'are less adverse to the interests of the individuals than is the making of an anti-social behaviour order' [para 22].

Then there was the question of the intention of Parliament. One did not even have to look at Hansard, he said, 'to be persuaded that the Act was brought into being. . in response to a serious social problem which cannot be resolved simply by the enforcement of the criminal law against individuals committing criminal offences'. 'It is well known that in those circumstances [the way 'crack houses' operate] the criminal law is simply not adequate to bring the problem to an end by the prosecution of one or two individuals for specific offences' [para 14].

Having effectively congratulated Parliament for dealing with the matters as they had, he then looked at Hansard and found that there was 'specific Parliamentary assistance that can and should be taken into account'. The junior minister who was responsible for taking the bill through Standing Committee said, 'we are talking about the balance of probability, not proof beyond all reasonable doubt'. No one was so definite during the enactment of ASBOs. The two orders 'are different concepts with different consequences'. Even if magistrates have to deal with an ASBO at the same time, they are quite used to dealing with 'cases in which sometimes the burden or standard of proof varies within a single hearing' [para 19]. Those affected by such an order can still invoke Article 8 though 'in the majority of cases, one would imagine, on appropriate evidence the applicant will be able to establish that the making of the closure order is proportionate'. No doubt 'there will be cases in which some people who have done nothing wrong themselves will be displaced and will, at least for a period of time suffer some hardship. But that simply is the consequence of this legislation' [para 21]. A failure to comply with such an order however remains a criminal offence.

We will have to see how flexible the standard of proof will be in due course in relation to drinking banning orders and more importantly, the 'Super ASBO' – if the Bill ever becomes an Act. If it does, it will be the end of the criminal law as we know it.

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1 *Malcolm v The DPP* [2007] EWHC 363 (Admin) at paragraph 31.

2 Local Government Act 1972, s222. See in particular *Nottingham City council v Matthew Zain (a minor)* [2001] EWCA 1248 (Civ) in which the Court ruled that s222 could be used to seek an injunction to prevent a public nuisance such as drug dealing.

3 Described as a comparatively modern power by the House of Lords in *Stoke-on-Trent City Council v B & Q (Retail) Limited* (1984) AC 754 at 776.

4 Football (Spectators) Act 1989 as amended by the Football (Disorder) Act 2000.

5 Interpreted as a permissive and not coercive power by the High Court in the first challenge in relation to this power: see *R (W) v Commissioner of Police for the Metropolis & The London Borough of Richmond-upon-Thames* [2005] EWHC 1586 (Admin).

6 S139 (3) amending CDA 1998, s1A. The list of relevant bodies that can apply for ASBOs (traditionally the police, local authorities, social landlords) has recently been widened to include Transport for London, the Environment Agency and most recently, residents' groups.

7 CDA 1998, s1AA and s 1AB, inserted by CJA 2003.

8 CDA 1998, s1G and s1H, inserted by DA 2005

9 Not yet in force

10 [2002] UKHL 39, [2002] 3 WLR 1313, [2002] 4 All ER 593, HL.

11 The leading case is *Engels v Netherlands* (1979 – 80) 1 EHRR 706.

12 Ibid.

13 [2003] 1 AC 787 at [30].

14 (1980) 3 EHRR 333

15 (1998) 28 EHRR 603

16 *McCann* at [32], op.cit.

17 Lord Steyn, *McCann*, op. cit., at [37].

18 *B v Chief Constable of Avon & Somerset Constabulary* [2001] 1 WLR 340

19 *Gough v Chief Constable of the Derbyshire Constabulary* [2002] 3 WLR 289

20 *Moat Housing Group-Group South Limited v Harris & Hartless* [2005] EWCA Civ 287

Privilege, and this time we mean it

In 1999, the House of Lords in Reynolds v Times Newspapers Limited recognized a privilege defence for public interest journalism. Liberalising the law doesn't always achieve the desired effect, however, and in the more recent Jameel v Wall Street Journal their Lordships restated the principle. Defamation practitioner Adam Speker of 5 Raymond Buildings explains the background and where we are now

The journalist and one time libel litigant Adam Raphael ended on a pessimistic note his 1989 book, *My Learned Friends, An Insider's View of the Jeffrey Archer Case and other Notorious Libel Actions.* He wrote:

> *'The scene is thus set for many more years of wrangling and many more libel millionaires. But who really benefits? Neither the public nor the press. Neither plaintiffs nor defendants. Ogden Nash got it right: 'Professional people have no cares. Whatever happened they get theirs'.'*

Journalists will seldom if ever be happy with the state of the libel laws in England but much has changed since 1989. Jeffrey Archer has been exposed as a liar, sent to prison and had to pay back his libel damages. The eye-watering jury awards of the past are now rare, as damages have generally decreased owing to the interventions of the Court of Appeal. The changes to civil procedure have resulted in fewer trials. There is now a defence of public interest for newspapers. Perhaps for Mr Raphael and Ogden Nash the most surprising development would be the introduction into this field of conditional fee agreements and cost-capping, which has meant that solicitors and barristers are no longer always getting theirs.

Good news

It is just one of those developments - the public interest defence - which is the focus of this article. The recent House of Lords decision in *Jameel v Wall Street Journal*[1] is good news for journalists although it is neither new nor radical. It is a re-statement of the liberalising judgment of the House of Lords in *Reynolds v Times Newspapers Ltd*[2], which in 1999 recognised a common law qualified privilege defence for public interest journalism to the world at large, but it should breathe new life into *Reynolds* since this latest message from that House is that the new defence it recognised has been too restrictively applied at first instance.

The impact of *Jameel* should not be seen in isolation from the other recent developments in media law. Lord Hoffman said at [38] that, 'until recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *(Naomi) Campbell v MGN*[3] and in favour of the press to publish stories of genuine public interest in *Reynolds.* But this case suggests that *Reynolds …* has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles' .

In addition to the shift in the law's treatment of the private and the public, there should be awareness of the appellate decisions on the test to be applied for interim injunctive relief to restrain media publications[4] and the correct test to apply. The latter requires balancing the competing rights under Articles 8 (respect for private and family life) and 10 (freedom of expression)[5] as well as important decisions from Strasbourg confirming the extent to which Article 8 can give protection to an individual's reputation[6] and freedom from harassment and intrusion by the press[7]. Whilst *Jameel* has had parts of Fleet Street dancing, it is likely that the *Campbell* decision (and subsequent case law) will have a greater impact upon journalism in this country.

The tests, old and new

English defamation law has long been seen as claimant friendly. To establish a prima facie cause of action a claimant merely has to prove that defamatory words that refer to him were spoken or published to at least one third party. If so, they are presumed to be false and to have caused damage. The burden shifts to the defendant to show that the words are true or protected by law in some other way. Before 1999, there was very little protection if it was not possible to prove the statements were true.

The House of Lords decision in *Reynolds,* directly influenced by the imminence of the Human Rights Act 1998, was intended to bring English law into line with the Strasbourg jurisprudence, which stressed both the high value to be attached to political speech and the vital role played by the press in a democratic society. The House unanimously rejected an argument by *The Times* which would have recognised a new subject matter category of qualified privilege whereby all political information would be protected whatever the circumstances (subject to malice). Instead, building upon the traditional common law principles of duty and interest, the House of Lords decided in favour of a qualified privilege defence for responsible journalism covering stories of significant public interest, political or otherwise. Giving the lead speech, Lord Nicholls acknowledged the vital role of the press and identified ten indicative factors that would assist the court to judge whether the material complained of was the product of responsible journalism in the public interest, such that privilege should be accorded. Such factors included the tone of the article and whether comment was sought from a claimant before publication. Lord Nicholls recognised that the elasticity of such a defence would mean some uncertainty but he thought that 'over time, a valuable corpus of case law will be built up.' By this means, there were introduced into English libel law, new concepts which became known as 'Reynolds privilege', 'responsible journalism' and the 'Nicholls factors'.

High hopes

Some academics and lawyers in other common law jurisdictions criticised this solution, but it was, unsurprisingly, welcomed on Fleet Street as the dawning of a new age. Here were judges who appeared to understand that the press 'discharges functions as a bloodhound as well as a watchdog' and who stipulated that the 'court should be slow to conclude that a publication was not in the public interest… any lingering doubts should be resolved in favour of publication.' Hopes were high.

'Reynolds privilege' succeeded on its next outing. Despite George Carman Q.C.'s submissions that there would be 'champagne corks popping in Wapping' if the *Yorkshire Post* was entitled to privilege for an article warning that a local karate company was selling 'rip-off' lessons, Sir Oliver Popplewell upheld the new defence at trial[8].

It was not to last. There were well publicised defeats for the newspapers in the cases involving the politician and (subsequently) *Celebrity Big Brother* contestant George Galloway MP, the former Liverpool goalkeeper Bruce Grobbelaar and the international businessman Gregori Loutchansky. Ironically, its infrequent successes have been in cases where the courts have developed a sub-

specie of the defence to protect what has been described as 'neutral reportage' where the mere fact that allegations were being made was in the public interest even if verification (one of the Nicholls criteria) was impossible.

A *Reynolds* defence had been successful at first instance or on appeal five times out of the seventeen in which the defence had been adjudicated upon by the court.[9] Of the ten failed *Reynolds* defences, four were disposed of as unviable before trial[10] and six failed at trial[11]. As for the others, one settled before determination after it was deemed arguable[12] and another which had been struck out at first instance was reinstated by the Court of Appeal before the case settled.[13]

Those statistics led Lord Hoffman in *Jameel* to consider that 'Reynolds has had little impact upon the way the law is applied at first instance' and it was necessary to re-state the principles.

The facts

Before considering those principles the facts in Jameel were as follows. The Wall Street Journal ('WSJ') reported that the Saudi Arabian monetary authorities were monitoring, at the US Government's request, certain bank accounts in connection with the witting or unwitting funding of terrorism. The Abdul Latif Jameel Group was named by WSJ as one of the account holders. The main company in the Group and its president sued for libel. The substantive defence was *Reynolds* qualified privilege. There was no plea of justification. At trial Eady J ruled that the plea of privilege failed. The WSJ appealed to the Court of Appeal which dismissed the appeal but on narrower grounds. The House of Lords gave permission to appeal on both the scope of *Reynolds* and also on the application to corporate claimants of the presumption of damage in defamation claims.

The appeal on *Reynolds* privilege[14] was unanimously allowed for fundamentally the same reasons. Despite some reservations by Lords Bingham and Hope, the Lords reversed the decisions of the High Court and the Court of Appeal, and did not remit the case back. Unusually, therefore, the Lords overturned the decisions, both at first instance and in the Court of Appeal, on the facts, which is what they did in the *Naomi Campbell* case two years earlier.

The speeches in *Jameel* re-stated *Reynolds* and did not apply any different or new test. In fact, the development of a new test contended for by the *WSJ* – one of protection for high quality journalism that was 'newsworthy' - was rejected as unnecessary. According to Baroness Hale, *Reynolds,* properly applied, was sufficient protection for serious journalism which needed to be encouraged and not discouraged.

The decision

Lord Hoffman explained the decision in *Reynolds* by boiling down the test into three questions: was the subject-matter of the article as a whole in the public interest? If so, was it justifiable to include the particular defamatory allegation about the claimant? If so, were the steps taken to gather and publish the information responsible and fair? Responsible journalism was not to be judged too harshly and was not that different to concepts such as reasonable care.

Baroness Hale considered that the first question was whether or not there was a 'real public interest in communicating and receiving information' which did not mean 'vapid tittle-tattle about the activities of footballers' wives and girlfriends'. The second was whether or not the publisher had 'taken the care that a responsible publisher would take to verify the information published.' Such care normally required the publisher to believe the information was true and that he had done what he could to check it. This included contacting those concerned for comment.

And now?

That is all well and good but how will *Jameel* go on to affect defamation cases generally? Even without this re-statement *Reynolds* has had a considerable impact upon defamation practice through the advice now given to clients, both claimants and defendants. Whether or not a *Reynolds* defence has a reasonable prospect of success is crucial when considering whether a claimant should issue proceedings. Whilst many such defences may ultimately fail – and it is of course usually the weak or uncertain ones which get to court - few libel claimants who are concerned about their reputations and the often serious allegations leveled at them want to spend hundreds of thousands of pounds litigating whether a journalist made enough telephone calls or spoke to a sufficient number of unnamed sources to check the story before publication. Media organisations, moreover, know that if their conduct pre-publication performs well when subject to the scrutiny of the Nicholls factors, for instance by putting allegations to a potential claimant and giving proper coverage to the response, they are less likely to receive complaints and, ultimately, less likely to be the recipient of a claim form.

Some indication of the practical effect of the Jameel decision may come shortly from the Court of Appeal in the appeals in *Roberts v Gable,* heard in February, and *Charman v Orion* in March. The defence was upheld in *Roberts* but rejected in *Charman* although it was common ground that there was a public interest in both the subject-matter and the particular allegations about which the claimant complained. The main challenges to the defence post-*Jameel* will still be the same although the emphasis will be shifted in a defendant's favour. Claimants will still argue that information is not genuinely in the public interest and even if the subject-matter of the article was in the public interest it was unnecessary to include the defamatory allegations about the claimant. Few would disagree with Baroness Hale's reference to vapid tittle-tattle about footballers wives and girlfriends not being in the public interest but, as the privacy cases demonstrate, there is no bright line between what is of public interest and what is not. The decision still leaves much room for disagreement about whether the identities of individuals alleged to be guilty of, or suspected of, criminal or anti-social behaviour should be included in a general discussion about such matters although in *Jameel* their inclusion was considered to be an editorial decision. With a greater value being attached by the courts to the individual's reasonable expectation of privacy, even where the information subsequently turns out to be false, what is or is not in the public interest will not necessarily prove as clear-cut as it appeared to the House of Lords in *Jameel* where the allegations related to the funding of terrorism.

Again whilst the House emphasized that editorial decisions were for journalists all of the speeches stressed that the journalism had to be responsible. The WSJ employs fact-checkers. Most British publications do not. Whilst the press here will benefit from the emphasis that responsible journalism is not a gold standard, and from the dicta that weight should be given to the professional judgment of a journalist at the time, absent some indication that those judgments were made in a 'casual, cavalier, slipshod or careless manner' there will be arguments aplenty about what is to be condemned as casual, cavalier, slipshod or careless and as to the requirements of responsible journalism in any particular factual context. Although journalism about political figures attracts strong support in Strasbourg a reading of one of the chapters in Andrew Marr's book, *My Trade (The Dirty Art of Political Journalism)* shows that it can indeed often be dirty.

Overall though, *Jameel* should benefit and encourage serious journalism by reducing the number of libel actions about non-private matters. If so, it remains to be seen whether the press will, as their Lordships hoped, feel less inhibited about publishing stories of immense public interest that previously would not have seen the light of day.

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1 [2006] UKHL 44
2 [2001] 2 AC 127
3 [2004] UKHL 22; [2004] 2 AC 457
4 See, in particular, *Cream Holdings v Banerjee* [2004] UKHL 44; [2005] 1 AC 253
5 *In re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593
6 See eg *Radio France v France* (2005) 40 EHRR 706
7 *Von Hannover v Germany* (2005) 40 EHRR 1
8 GKR Karate v Yorkshire Post [2000] EMLR 410
9 *GKR Karate v Yorkshire Post* [2000] 1 WLR 2571, *Lukowiak v Unidad Editorial* [2001] EMLR 1043, *Al Fagih –v- HH Saudi Research & Marketing* [2002] EMLR 215; *Bonnick v Morris* [2003] 1 AC 300, *Roberts v Gable* [2006] EMLR 692
10 *Gilbert v MGN* [2000] EMLR 680, *Baldwin v Rusbridger* [2001] EMLR 47, *Miller v Associated Newspapers* [2004] EMLR 698, *McKeith v News Group Newspapers* [2005] EMLR 780
11 *Grobelaar v News Group Newspapers* [2002] 1 WLR 3024; *Loutchansky v Times Newspapers* [2002] QB 783, *English v Hastie* (31 January 2002, Gray J), *Jameel v Times Newspapers* [2006] UKHL 44, *Henry v BBC* [2005] EWHC 2587; *Galloway v Telegraph* [2005] EMLR 7; *Charman v Orioin Publishing* [20006] EWHC 1756.
12 *Sheikha Mouza al Misnad v Azzaman Ltd* [2003] EWHC 1783
13 *Armstrong v Times Newspapers* [2005] EMLR 797
14 (see Lord Bingham at §35; Lord Hoffman at §§88-89; Lord Hope at §§110-112; Lord Scott at §144 and Baroness Hale at §151)

Transparency in Family Proceedings

Most people simply think that family cases are closed to the press and public, but the situation is more complex than that. In addition, the Government now wants to improve both transparency and privacy. Poonam Bhari of 9 Gough Square takes us through the debate and gives us an insight on what children think about it.

It began in October 2005, when amendments to the Family Proceedings Rules expanded the range of people to whom information relating to proceedings could lawfully be communicated. Last year the Department for Constitutional Affairs issued the consultation document, 'Confidence and confidentiality: Improving transparency and privacy in family courts', CP 11/06. Launched in July 2006, the consultation period ended on 30 October 2006. We are now awaiting the next stage.

It is clear that the current family proceedings system is far from satisfactory and includes a number of anomalies. Public access to the Court of Appeal is unimpeded but there is no access to cases at first instance. Members of the press are at liberty to attend the Family Proceedings Courts pursuant to Section 69 (4) Magistrates Courts Act 1980. The victims of domestic violence apply for injunctions in private, but if they seek to commit the other party to prison, then the matter moves into open court.

The recommendations in 'Confidence and Confidentiality' are that there should be a uniform code: the media should be allowed in all courts as of right but any court may exclude them if necessary and impose reporting restrictions to guarantee anonymity to parents and children.

The Young Bar Conference on 7 October 2006 held a timely session about the issue. It was sponsored by the Family Law Bar Association, and moderated by its chairman, Anthony Kirk, Q.C. The main speakers were Mr Justice Munby and Hugh Levinson, the Editor of the Radio 4 programme 'Law in Action'.

The judicial perspective

Mr Justice Munby explained that there are six defects which need to be addressed.

1. The present law has unnecessarily complex rules about access to the court room
2. The current law is a 'hodgepodge mixture' with statutory and non-statutory rules and there is wide spread ignorance of the law
3. In terms of case law there are conflicting decisions and differing notions of where there should be public scrutiny
4. The courts recognise arguments in respect of privacy requiring more onerous justification in care cases *(Moser v Austria [21/09/06])*
5. The present law is untenable: the media is permitted in family proceedings courts but not in the county or High Court and the anonymity of a child is not automatically protected once proceedings have ended (see *Clayton v Clayton* [2006] EWCA Civ 878).
6. The present state of affairs undermines confidence in family courts, particularly by people with an agenda

Munby J asked four questions:

1. What automatic restrictions should there be on reporting cases (e. g., health professionals and expert witnesses)?
2. In what circumstances and with reference to what criteria should the court impose reporting restrictions, or relax reporting restrictions?
3. Should two categories of people – a) people who are not parties, or directly involved and b) the general public – be allowed into court and if so, for what type of cases or parts of cases?
4. In what circumstances should the court be able to admit people without an automatic right to be there?

The media perspective

Hugh Levinson pointed out that journalists see themselves as the 'public' and consider that their rights of access should be the same. It is difficult to know if someone is telling the truth about their experience of the family courts when proceedings are conducted in private. There is however a current project between journalists, the DCA and District Judge Nicholas Crichton. Mr. Levinson played a tape recording of a programme in this project involving a journalist, in which the parties in both a private law and public case discuss their experiences and the judge explains the case and the decision he made.

The Norfolk case

Three weeks after the Young Bar Conference, Munby J heard argument about whether he should allow parents in care proceedings to tell their story in public by allowing the media to attend the forthcoming hearing. The three elder children of Mr. and Mrs. Webster, as we now know them, had been the subject of full care orders. The parents felt that they had been the victims of miscarriages of justice. The present proceedings concerned the youngest, a baby aged five months called Brandon. The judge held **[Norfolk County Council v Webster and others [2006] EWHC 2733 (Fam)]** that there were 'overwhelmingly strong reasons for authorising the disclosure'. While respecting the practice recommended by Wall, L.J. that circuit and Family Division judgments about care and adoption should be given in an anonymised form and in open court, 'cases of alleged miscarriage of justice seem to me to stand on a somewhat different footing. After all, what is being alleged. . is that there has been a failure of the *judicial process*'. (para 110) Brandon's name and photograph were already in the public domain. It was left to the trial judge to have the ultimate right to control access by the media to any hearing and to decide whether a particular or a category of witnesses should be entitled to anonymity. The 'vigorous on-going debate about 'transparency' in the family justice system' included comments both by this judge (cf 2005 Family Law 945) and by Lord Justice Wall (cf 2006 Family Law 747), speaking extra-judicially.

Children's views

What do children think of it all? On 30 September 2006 there was a mock hearing at the Office of the Children's Commissioner. The purpose of the event was to obtain children's views about privacy in family courts and the right for children to have disclosure of case papers and/or judgements. Professor Sir Albert Aynsley-Green, Children's Commissioner for England and Professor Carolyn Hamilton, the Office of the Children's Commissioner's senior legal adviser, both attended.

District Judge Nicholas Crichton and four barristers, myself included, participated, together with children and young people from across the country, many of whom have had contact with the family court system. The Department for Constitutional Affairs also took part in the event.

The hearing included family law scenarios acted out by children. Two adults playing the roles of parents were cross-examined by the barristers before a 'jury' of children and young people. The scenarios consisted of a private law case concerning 'Raj' who sought access to court records of proceedings concerning him when he was a child; and a public law case concerning 'Katrina' which considered whether the press/media and public should be allowed into court to hear her case.

Case Study 1 – 'Katrina'

Katrina is 15, and her brother Jake is 5 years old. Katrina and Jake are Samantha's children, and up until two years ago when she got very sick, she looked after them on her own. Samantha sadly died. The father does not want to look after Katrina and denies paternity of Jake.

Katrina went to stay with a 22-year old neighbour called Melanie and Jake went to stay with another neighbour. However, after a few days the social services came and put Jake in a foster home. Katrina asked social services to put her and her brother in the same foster home, so that she could look after him herself once she turned sixteen. However the local authority was unsuccessful in finding a joint placement and now

want to put Jake up for adoption. Expert evidence confirms that Katrina has a very good close relationship with her brother. Katrina is obviously very upset that her brother will be placed for adoption, and that she is currently only allowed to see her brother for two hours every two weeks.

Katrina has now fallen out with Melanie. In revenge, Melanie gave Katrina's very forthright personal diary to the social services department at the local authority.

The local press want to make this case their lead story. Katrina's father is a well known local DJ and music presenter. He is not well liked and has previously made some rude comments about the press.

Melanie has made an application to be present during the court hearing, as she feels bad about her argument with Katrina and the fact that Katrina no longer lives with her as a result of this.

Both Katrina and Jake may want to access the court records at a later date. What record should the judge place on the file? Should it be simply a judgment or a more detailed explanation?

Case Study 2 – 'Raj'

Six years ago, following a hostile breakdown in their marriage, Pam and Ahmed went through an angry divorce. Things came to a head. Pam disappeared for two weeks, and Raj was left to look after Sunita and Mo. Eventually, he had to ring his Dad and tell him that they were on their own.

Ahmed applied to the court for the children to come and live with him and his new girlfriend. Pam was vehemently opposed to the children moving to live with Dad. Pam really disliked Ahmed's new girlfriend, Layla, who is 'expensive' and demands lots of money from Ahmed. She was worried that Ahmed would go back to crime to raise money and might involve the children.

When the case gets to court, there is a mound of paper work, including statements from the parents and Layla, a CAFCASS Reporting Officer's report, medical and psychiatric reports on Pam, a report from the police on Ahmed and an assessment of Ahmed's parenting skills.

The judge explained to them at the hearing that if they did not get their act together, the children might go into care, and that they were both to blame equally. The court hearing had a real impact on Pam and Ahmed. They agreed that the children would stay with Pam but Ahmed would have regular contact.

The situation now, six years on, is very different. Pam and Ahmed get on reasonably well, and the children are happy both at home and school. Despite only having a hazy memory of the bad times, Raj wants to know about what happened to him and his parents. He is worried that there might be something hidden in his background that could impact on his current relationship with his girlfriend. Raj is now 18; his siblings Sunita and Mo are aged 16 and 14.

Below are set out the Children and Young People responses to the issue of privacy and disclosure.

The Press and the Public:

The panel consisted of 30 young people between the ages of 13 and 18; one was 24. Eleven were male; 19 were female.

1. **Do you agree that the media should be allowed into court in family proceedings?**
   Yes: 15 (they added qualifying comments, such as the party should make final decisions)
   No: 13
   2 added in maybes – stated that it should depend on a decision by family and judges

2. **If yes, should the judge have the right to ask them to leave at certain times or be allowed to restrict their access in certain cases?**
   Yes: 17. No: 1

3. **If the judge has the right to decide, should he take any of the following factors into consideration?**
   The interests of the child? Yes (unanimous)
   The safety of the parties and witnesses? Yes (unanimous)
   Where evidence is of a sexual, intimate or violent nature?
   Yes: 25 No: 5
   Where confidential information is involved and others attending would damage that confidentiality?
   Yes: 26 No: 4

4. **Should the parties to the case or the child involved have the right to make a decision on whether the press should be allowed to attend?**
   Yes: 17. No: 12

5. **If your answer is no, should the judge take their views into account?**
   Yes: 12. No: 1

6. **Should members of the public be allowed in?**
   Yes: 4 (but access to court room can be refused)
   No: 23 (unless the parties agree)
   Maybe: 3 (as long as they keep private info about the people to themselves)

7. **Should members of the public who can show that they have an interest in the case be allowed in?**
   Yes: 17 (if parties say so). No: 11

8. **Should the parties have to consent before a member of the public is allowed in?**
   Yes: 24. No: 6

Questions about Access to records:

The panel had the same range of age as above. Twelve were male; 21 were female.

1. **Where a case is about a young person, should he or she be allowed to have access to the court records when they are 18 (i.e. an adult) if they want to?**
   i) Yes, in all cases: 8
   ii) Yes, as a general rule, but each cases should be decided individually: 25
   iii) No: 0

2. **If a young person should be allowed to have access once they reach the age of 18, what should they be allowed to see?**
   i) Everything in the court file: 3 (except confidential medical records)
   ii) Just material that relates to them: 25
   iii) Material which relates to their parents, carers, or members of their family, including brothers and sisters

3. **Should a young person have access to reports on their parents?**
   i) In Katrina type cases (i.e. care cases): Yes 23; No 9
   ii) In Raj type cases (i.e. contact and residence cases): Yes 23; No 9
   iii) Other: 1 (depends on individual case)

4. **Should parents be asked for their consent before their statements or medical psychiatric reports are released?**
   Yes: 25. No: 7

5. **Should a young person be able to see the CAFCASS officers report or the Guardian's report?**
   Yes: 28. No: 5

6. **Should they be able to see these reports even when they were not the young person who was the subject of the proceedings?**
   Yes: 7. No: 26

7. **Do you think that access to court files should differ according to whether there is a care case? (i.e. Katrina type) or contact / residence (i.e. Raj type)?**
   Yes: 23. No: 10

8. **Should access to certain records depend upon whether the young person has been removed from the family or the court refused contact with one member of the family or should all young people seeking access to court files be treated the same?**
   i) Should depend upon whether young person removed or contact with parent denied: 17
   ii) Should all be treated the same: 16

9. **What information should be left on the file about the outcome of the hearing?**
   i) Should the judge record a special statement for the child who was affected by the proceedings to find when he or she is 18, explaining the decision that was made?: Yes: 24
   ii) Should they leave a full judgment?: Yes: 5
   iii) Should they leave a summary judgment? Yes: 3 (+8 also stated this as another option)
   iv) Is there anything else that should be put on the file for the young person to find when they reach 18? (note left: because of hereditary issues, medical issues and violence should be summarised and put on the file for the child to access, once an adult)
   v) All of above: 1

maze: Dining at a Star?

Whatever the Bar's fears of the impact of the Carter reforms on our wallets, our restaurant critic, Tetteh Turkson, of 23 Essex Street, again shows that even the publicly funded Bar can—and should—enjoy themselves. Gordon Ramsay's latest Michelin-starred restaurant proves to be vaut le voyage, up to a point.

It was not a terribly auspicious start. When JC and I went out for my surprise birthday dinner I was in a bit of a grumpy mood having just returned from holiday with some lurgy I couldn't shake. It had a lot to live up to as well, since last year I was taken to Gordon Ramsay in Royal Hospital Road.

Where's Asia?

As we reached the restaurant my mood did not much improve. ***maze*** describes its food as French cuisine adopting Asian influences. All too often that means a mish-mash of styles and flavours Actually at ***maze*** both JC and I struggled to see much of an Asian influence in the cooking, so those of you who hate anything other than European food need not fear.

Style but not stunning

maze is yet another restaurant in the Ramsay stable. It is located on Grosvenor Square. Although it has only been open since May 2005, it has already acquired a Michelin star. The blurb on it says that the restaurant has 'style in abundance, stunning contemporary design by [American] David Rockwell'. I agree that it has a contemporary feel. The restaurant feels that the 'neutral' colour scheme evokes 'the earthy tones of a garden' It is relatively large—the restaurant capacity is 90, with 50 in the bar – and is split into levels and areas. The furniture is said to be Italian custom-made and handcrafted down to the 'smallest cabinet handle on the service stands'. It feels open and welcoming, but I would not describe it as stunning.

Not overbearing

Now that they have discovered the outrageous margins that can be made on water, some restaurants appear to employ someone simply to fill that glass. ***maze*** did not plague us with the water man. On the whole, the service was charming and reasonably attentive but not overbearing—apart from one occasion with the wine. If a restaurant is going to place the bottle away from the table, it seems to me that they should never leave you with an empty glass. We were not drinking very quickly, but on two occasions there was a noticeable wait. It is hardly a terrible offence but it is the one thing that prevented me awarding their service a gold star.

Tasting for all

Normally for journalistic and greed reasons I would chose the tasting menu on my birthday. At ***maze*** it is all a tasting menu. Essentially it is arranged as a tapas menu. Some dishes are larger than others but you are encouraged to order a number. The advantage over the more usual tasting menu is that you do not get that slight worry that you may explode around course five. The food is not, however, all brought together and so the idea seems a little of a conceit. Jason Atherton the executive chef is apparently the first British chef to complete a stage at Costa Brava's El Bulli (considered by some to be the best restaurant in the world) and so it may be that that is where he got the idea. There is an a la carte menu available as well for the more traditionally minded, but it looks considerable more expensive [£16 for aged English beef with artichoke, foie gras in miso, red chard and snail-garlic mash]. The tasting dishes were priced between £7 and £10.50. Three of these dishes each were enough for those of us with an average appetite.

I really liked it but

And so to the food. I want to preface this by saying that I really liked the food. There was nothing at all unpleasant about anything. The combinations of flavours and textures all worked. Unlike at JAAN I didn't have to experiment to get the right combinations to make it taste good. It was a very good meal and yet it was not a great meal. It lacked just the little bit of something extra that one would expect from a Michelin-starred restaurant.

Our first dishes were a prime example. JC had chosen the foie gras marinated in Pinot Noir caramel, smoked ham hock and piccalilli. I had avoided this, expecting the piccalilli to be the bright yellow sauce from a jar of my youth. In fact piccalilli was a posh name for small pickled vegetables. The terrine of foie gras had the ham hock layered into it. It was smooth without being velvety. The caramel was not the sticky sweet mess I had also avoided but a pleasant accompaniment.

Similarly my Cornish crab mayonnaise with avocado, sweet corn sorbet and Oscietra caviar was perfectly pleasant but not spectacular. There was nothing about it that set it above many less lauded restaurants. The pureed avocado was complemented by the texture of the shredded crab. The sweet corn sorbet was exactly that – sorbet that tasted of sweetcorn.

It gets better

JC's dish of the meal came next – the Jerusalem artichoke veloute with duck ragout and cep brioche. The test of whether and how much JC finds something delicious can sometimes be seen in her reluctance to allow me to share it. This dish did not quite have to be prised out of her hands, but it was a near thing. The veloute was pure velvet and combined with the shredded duck was absolute treasure. One could smell the cep brioche as it was brought to her. It did not disappoint – flavoursome without being overwhelming. A dish that would grace any table.

I ordered scallops. The quality and tenderness of them were outstanding. Although all the ingredients in all the dishes were of a fine quality, this particularly stood out. It was therefore a bit of a surprise to find it was paired with a pork croquette. This, I am afraid, was in essence a spam fritter. It smelled of spam, it tasted of spiced pork. Now I like spam fritters a lot – true, they may just be a comforting reminder of childhood – but I didn't expect to be served it in ***maze.*** I presume it was a bit of a chef's joke. It by no means ruined the dish, but it was the one combination that was close to failure. It definitely detracted from the quality of the scallops though it was an interesting twist.

After the fireworks

The main course portion was pretty uneventful. The smoked raisin reduction that came with JC's Duart salmon and pork belly tasted little of raisin or smoke. Nonetheless the dish was pleasantly presented and perfectly cooked. My own slab of pork belly was absolutely perfect. It had just the right amount of fat on it. In other words, it was neither a gelatinous mess nor the consistency of a steak. It melted in the mouth. The pork belly was accompanied with slow roasted fillet. I must give my thanks to the Royal Berkshire that provided both – it was absolutely delicious. The apple cardamom puree and jasmine reduction (an Asian touch at last) was neither too sugary nor too sharp but frankly I was too distracted by the sheer quality of the pork to care much. My own favourite dish of the meal.

And to end

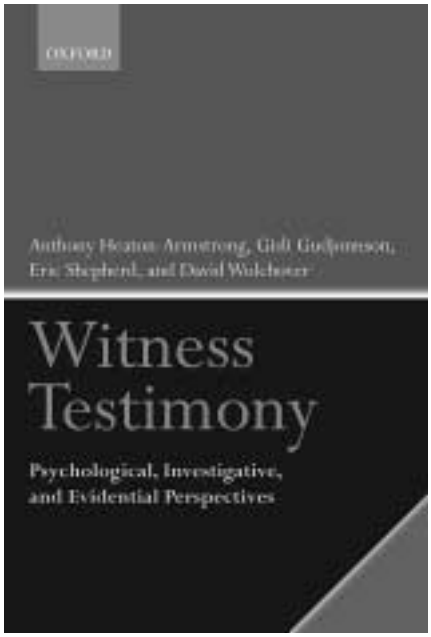
Finally, an honourable mention to the white chocolate and coconut panna cotta with green olive caramel, white chocolate granite. It sounded foul so we had to order it. It was unusual and absolutely wonderful. My tolerance for errors in panna cotta consistency is pretty low, but I need not have worried. As for the green olive caramel, it was everything that I had hoped the whole meal could be – a combination of flavours that you would not immediately place together but which enhance each other perfectly. It was a shame that, spam aside, I was not surprised by the rest of the meal.

It was nonetheless a fine meal. The tasting menu is priced within affordable levels even for the criminal practitioner. On that basis alone is well worth the visit. You will not be disappointed, but nor will you be enthralled.

Maze is at 10-13 Grosvenor Square, London W1K 6JP, telephone 020 7107 0000 or maze@gordonramsay.com. Open for lunch and dinner, Monday to Sunday. Average spend, £55 per head.

Evidence: The Other Perspectives

WITNESS TESTIMONY, edited by Anthony Heaton-Armstrong, Eric Shepherd, Gisli Gudjohnsson and David Wolchover, Oxford University Press, £49.95



This book will not change your life. However, if you take note of what it says, and incorporate even some of it into the way you conduct trials, it can have a very important impact on the life of your lay client. It is, as Lord Justice Judge, Head of Criminal Justice has said, 'a quite remarkable book'. If nothing else, it should forever shake you out of certain long-engrained assumptions: witnesses, like life, are more complicated than we imagine. Every time you justify doing something in court by a phrase beginning with 'we all know', it is worth remembering that the psychological truth could be quite different.

Witness Testimony follows on from and expands on the authors' 1999 book, **Analysing Witness Testimony,** which also dispelled many of the myths on which criminal trials are based. For example, can anyone seriously believe that three police officers who were present at the same incident would, independently, produce the same account of what was said and done? If not, what purpose is served by a 'pooled recollection'? And yet every day, the police 'pooled recollection' is allowed to go forward to a jury as good evidence, while an officer swears to the truth of what in fact someone else saw and heard. Research has shown that officers are no more reliable than civilians in their observation.

Demeanour

Or what about the old idea—which advocates are always recommending to juries-- that we can ascertain the truth of what a witness says by judging his demeanour? Judges don't do that, writes Lord Bingham in the most elegant essay in the book. 'There are, I feel sure, occasions on which a witness leaves a judge with a profound conviction that he is, or is not, telling the truth,' 'based ultimately on impression'. But 'to rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm'. It is though common for a judge to find 'after using his imagination to place himself in the position of the witness and in the context of a case as a whole, that an account given in evidence is one that he simply cannot swallow. While this is not a very scientific test nor is it in my view if carefully and imaginatively applied, any the worse for that'.

The book is divided into three parts: psychological perspectives, investigative perspectives, and evidential perspectives, which in turn consist of seven or eight chapters each. The authors range from academics to psychologists to judges and to practising barristers, including Anthony Heaton-Armstrong and David Wolchover, who also edited it along with a psychologist and perhaps the best known professor of forensic psychology. Every chapter is interesting in itself and reminds us that each witness and each suspect is an individual. The reader should forever banish from his or her repertory of jury remarks 'why would anyone wish to lie about this?' or 'do you really think that a person in custody would say that to the police?' On the other hand, you will now be in a position to make submissions which most closely accord with how witnesses and defendants do react to a situation which almost no barrister or judge has experienced first hand.

Telling the whole story

Since witnesses are habitually criticised in the witness box if they deviate from what they have said in their written statement, it must be assumed that the statement reflects everything which they wished to say and is in their own words. That of course is a wrong assumption. Memory is not a simple matter: it can be corrupted by a number of influences of which lapse of time is only one (there is also the matter of what other people have said to them). How the officer actually conducted the session which led to the witness putting their signature on the piece of paper remains a mystery during the trial process. Until such time as these sessions are recorded, we really do not know what happened. 'It may be a truism that the form a question takes will determine the quality of the answer but this conventional wisdom was methodically validated by experimental psychologist many decades ago'.

'Disclosure of the questions which elicited the responses may be as important as the responses themselves'. Although the witnesses are thoroughly cross examined on the basis of their statements to the police, how often is a statement-taking officer cross examined about his methods and of how he filtered out what he considered to be the extraneous aspects of the witness's account? Even video-taped 'Achieving Best Evidence' statements can create problems. 'An interview is a conversation with a purpose . . but the whole exercise constitutes an inherently self-defeating exercise if detail that the witness could have disclosed had they been interviewed appropriately, remains unsaid'. How carefully do we cross examine the interviewer, either of an ABE interview or of one with a suspect, about their training, qualifications and methods? How well does the officer appreciate the difference between talking to a witness and talking to someone who has been told that anything they may say could be incriminating? Hands up, who can tell the court what PEACE stands for, and exactly how many police officers follow it?

Science cannot necessarily come to the rescue. Polygraph tests—often mentioned in government proposals as a way of exposing lying suspects--have their limitations. The machine can only record arousal, not deception in itself. The assumption is that a liar will be aroused when giving his answers. 'This premise is theoretically unsound': liars are not necessarily more aroused and truth tellers may also be afraid of not being believed.

The whole picture

If I may use the analogy of a film, what the authors want us to do is to pull the camera back, away from the narrow focus of the courtroom itself, and to understand everything which has fed into the process which has led, in the end, to the trial. This includes the background and vulnerability of the court participants and everything which was done – or not done – in order to bring the evidence into being.

Statements made by witnesses to health professionals may be untrue due to vulnerability or suggestion and 'may become ingrained in their memory as real-life events'—assuming that the officer has pursued his lines of enquiry as far as social services and the medical profession, in order to discover if there is material which casts doubt on the reliability of a witness. Too often the jury only sees a snapshot-worth of evidence. This relates as well to the question of disclosure. A first report of crime made to a police officer at the scene could have unforeseen significance: the obvious example is that of the Taylor sisters (both white), who were convicted of the murder of Alison Shaughnessy although the detective sergeant in charge of the investigation had information that a passer-by at the scene had seen two females leaving the victim's flat, and had described one of them as being black.

Sea change

Barristers, like the rest of the world, can be divided into two categories: those who recognise that they still have a lot to learn, and those who do not. This book is essential reading for both.

D.W.

From Around the Circuit

Central Criminal Court Bar Mess

The year 2007 is proving to be very significant for the Central Criminal Court Bar Mess. The actual building on Old Bailey is celebrating its centenary. This important birthday was marked by a visit from Her Majesty the Queen and H.R.H the Duke of Edinburgh on 27th February. In addition to a fine showing from judges, past and present, the court staff and Bar Mess were well represented. The Mess will be holding a dinner as its own celebration of the big Bailey birthday in the autumn.

Mark Ellison's chairmanship of the Mess is now in full swing. Amongst the thorniest issues to cross his desk has been the furore generated by the Mess Caterer's decision, for what are actually understandable financial reasons, to stop selling chocolate bars. The Mess has, of course, been to the fore in seeking to negotiate the return of KitKats, Twixs and Snickers to the display cabinet, and we are hopeful that normal service will resume soon. If it has served no other purpose, the confectionary conundrum has taken Mess members' minds off the no smoking policy which came into effect at the start of the year.

The Mess AGM took place just before Easter, and the next edition of the Circuiteer will report on the new look committee. We are keen to elicit the views of the membership as to what they would like the Mess to be doing on its behalf, both in terms of improving facilities for advocates at the Bailey and in representing their views to court management and the Circuit.

Attendance at the AGM and the dinner is only open to members of the Mess. As ever, membership application forms are available from Duncan Atkinson at 6, King's Bench Walk.

Duncan Atkinson

Herts and Beds Bar Mess

The annual Mess dinner which was also our farewell to HH Judge Joe Gosschalk was held at St. Michael's Manor, St. Albans, on 30th November. It was a great success, with John Coffey, Q. C. on top form as our speaker. The occasion gave us the opportunity to welcome the two new circuit judges at St. Albans Crown Court, HH Judge John Plumstead and HH Judge Stephen Warner. Many see them as a 'breath of fresh air' though the metaphor will remain inappropriate for the former until he finally gives up smoking.

Luton Crown Court's resident judge has recently been spotted trying murders at the Old Bailey and the rumour-mongers are already whispering how he may be about to return to the place from whence he came. The fact is that HH Judge Bevan, Q. C., has become so popular with the regulars at Luton that they will be very reluctant to let him go.

Andrew Bright, Q.C.

Thames Valley Bar Mess

The Thames Valley Bar Mess has been under 'new management' since the start of this year. Notices of the events which we will be organising will appear in due course. It is hoped that as many members as possible will take part in the revitalised Mess. The Committee in turn looks forward to representing to the Circuit and the Bar at large the concerns which we all feel.

Brendan Finucane, Q. C., Chairman

Kent Bar Mess

This is my last entry as Junior of the Kent Bar Mess. It has been grand, but I will be glad to be handing over the reins to……..watch this space! The AGM will take place on 12th April 2007, 5.30pm, at Maidstone Crown Court.

The last three months has been great fun. We had the annual dinner early in December, Lady Justice Hallett being our guest of honour. HHJ O'Sullivan delivered the speech. He seemed to be obsessed with why women open their mouths to put on mascara. He then moved on to one or two of his usual 'rugby' jokes, that we all love him for. I just should not have put him facing Saunders for the rest of the evening! It was a grand occasion, and reminded us of the days when HH David Griffiths was with us, in the midst of all that fun.

We were entertained regally by HHJ's Williams, Carey, and Patience Q.C. to the pantomime of 'Cinderella'. The trio played all of the characters. We will leave you to decide which parts were played by whom.

Christmas Lunch in Maidstone was fun as always, and we were pleased to invite some recently retired judges to join bench and Bar. Christmas crackers were courtesy of HHJ Lawson, Q.C.

It has been a pleasure to welcome Mr Justice Cooke, who has been trying a murder at Maidstone for the last seven weeks. The Mess is greatly in his debt for allowing us to hold a party at the lodgings on 22nd February. A most welcome guest was David Spens, Q.C., who arrived (without riders) in his capacity as the new leader of the Circuit. Long may he reign!

On a more sombre note, in December, hundreds of people attended the memorial service in Cranbrook of Mary Statman, wife of HH Judge Philip Statman. In a deeply moving tribute, Philip recalled the happy times they shared before her life was so tragically cut short by illness. Our hearts go out to Philip and to his two lovely boys who now face such a difficult time.

Fiona Moore-Graham

Sussex Bar Mess

On behalf of the Sussex Bar Mess I would like to congratulate His Honour Judge Richard Brown DL, who has been upgraded by the Lord Chancellor to the post of Senior Circuit Judge. Judge Richard Brown has been the Resident Judge at the Lewes Combined Crown and County Court Centre since 1996, following the retirement of His Honour Judge Gower.

The volume of Crown Court work at the Lewes Court Centre has been rising beyond the national average in recent years and to meet this growing workload, two further courts have opened. It is hoped that these additional courts will assist in reducing the unacceptable delays within the court system.

Following my article in the autumn, referring to the retirement of His Honour Judge Lloyd at the Brighton Family Court at the end of March 2007, Judge Lloyd has been persuaded to delay his retirement to the end of July. The Bar Mess is hosting a dinner at Shelley's Restaurant in Lewes on 30th March 2007 where Judge Lloyd is to be guest of honour. This should be a splendid do and we are all looking forward to it. The FLBA will be hosting a formal retirement dinner for Judge Lloyd later in the year.

His Honour Judge Sessions has also announced his retirement and will be standing down from the bench on the 26th April. He has become a regular face at Chichester Crown Court and a popular member of the local judiciary. His presence will be sadly missed. We look forward to honouring Judge Sessions later in the year and wish him a long and happy retirement.

Finally, can I remind all members that the AGM is to take place on the 26th April. There are important elections coming up and those wishing to stand must get their nominations in at least 10 days prior to this meeting. Send them to Jeremy Wainwright, Junior, at jeremywainwright @hotmail.com.

Cambridge & Peterborough Bar Mess

Despite the seasonally warm weather the flowers of gossip have yet to germinate in the Fens. If you want gossip you will have to look elsewhere! The back seat of a Government limousine would be a good place to start if the newspapers are to be believed.

Cambridge Crown Court welcomed HHJ Worsley, Q.C. during January and February. He has now departed back to the Middlesex Guildhall Crown Court. The Mess awaits the next judicial traveller!

On the 18th January the Mess said farewell to HHJ McKittrick at a dinner held at the Haycock Hotel just outside Peterborough. The wine flowed all evening which perhaps explains why I cannot remember how long His Honour had been one of the regulars in Peterborough or whether a gift was presented. What can be reported is that he leaves not for the excitement of retirement but the residency at Ipswich Crown Court. From the fiasco

of the last circuit judge competition I hope to be able in the next report to name a successor!

The Mess was saddened to hear of the death of Ros Mandel-Wade on the 15th December 2006. She was well known to many who practise in Cambridge. Our thoughts are with Andrew [a regular himself at Cambridge & Peterborough] and the two children. Puts everything into perspective!

Cromwell

Central London Bar Mess

A typically convivial Central London Bar Mess drinks party was held last term in the Crypt, Ely Place at which we were delighted to see a good attendance by bench and Bar alike. It was pleasing to see our former Chairman Ann Curnow, Q.C., in her usual indomitable spirits. The late extension of the champagne bar tells its own tale.

In February we enjoyed dinner at the Reform Club for the presiders, resident judges, et al. It was with sadness that we learnt of the impending retirement of Judge van der Werff. Throughout his time sitting at Inner London he has proved a sympathetic tribunal and has always done what he can to promote the interests of the Bar. He is a judge who will be greatly missed.

We are currently preparing for the closure of Middlesex Guildhall Crown Court, an event which is deeply regretted by all those who have appeared there over the years. A drinks party is to be held on 22nd March with the closing ceremony on the 30th. It will come as no surprise to Circuiteers to read that even at this late stage there are those hoping for a reprieve.

Gareth Patterson

North London Bar Mess

Snaresbrook Crown Court had said farewell to David Pitman and HH Martin Reynolds when they retired recently after many years of service. We wish them well. As a testament to their popularity their courts, on their last day, were fully packed with little standing room. The Snaresbrook Mess organised a goodbye party on 14th December 2006. Since then HH Pitman has returned to Snaresbrook but not in Court 1.

An 18-month programme of repair has started already at Snaresbrook. However, that will not stop the Open Day on the 16th of June. Rumour has it that HHJ Collender, Q.C. will be presiding over a trial in a Victorian court setting. Another attraction will be a Metropolitan Police helicopter to amuse the younger visitors. A further rumour is to the effect that we may see some famous actors make guest appearances there. It promises to be a good day for the family. So put June 16 in your diary. See you there.

Another date for your diaries is the 16th of May for the North London Bar Mess Spring Drinks Party at Lincoln's Inn. The tickets will be on sale soon.

Pamela Oon

Essex Bar Mess

The church was full as her family and many of her friends gathered in Cambridge at the very start of the year to bid farewell to Ros Mandel-Wade. She had faced her death with remarkable bravery, knowing that her cancer was inoperable. Her husband Andrew spoke at her funeral Mass with enormous love and dignity as he reminded us of the wonderful character that was Ros. May she rest in peace.

Frank Lockhart has finally, on doctor's orders, hung up the judicial wig, so at last, there is nothing to stand between Frank and an early start at the first hole. Sadly Adrian Cooper has not yet been able to return to Southend, so for the first time in many years the court there is without a 'resident' judge.

The new Essex Recorders are beginning to sit – news that David 'Evening All' Holborn has been assigned to Norwich has prompted a smile or two in certain quarters – they do some things differently up there, David!

Talking of regional variation – a group of Essex regulars, including Crusher and Adam Budworth had the interesting task of running an abuse of process argument in Sheffield where the police had decided to prosecute some brothels after some years of informal regulation. All credit to our Mess members who in the face of local indifference to this particular chapter in Archbold succeeded in persuading the judge that the proceedings should be stayed. Questions as to the need for views of the locus have not yet been fully answered, but Craig is prepared to consider answering such matters on notice, and under caution.

Judge Ball's court in Chelmsford was occupied in January with an unusual case involving allegations of gross negligence manslaughter against two farmers whose agricultural trailer had shed a wheel that killed a pedestrian. For two or three weeks the mood was a curious mix of The Archers and Jeremy Clarkson, far removed from the usual diet in Court 1. After a summing up that had just a hint of Cantley J to it the defendants were acquitted – rightly, on the evidence.

At the same building recently, two young vandals were sentenced for trashing a local nursery school. They had amongst other things killed three guinea pigs. As the learned Recorder was spelling out his reasons for treating the whole saga as seriously as he was--referring to the trauma for teachers and children alike as they returned from their half term break to a much depleted menagerie--he noticed a wry smile on the faces of Livingstone, Roochove and Earnshaw. They explained later that the staff had tried to avoid that particular problem by buying three replacement animals. One very bright little lad observed that they seemed rather smaller than they had been before the break. 'Ah, that's because whilst you were away on your break, so they were they, on an outward bound course specially designed for guinea pigs'. Worthy of Gervase Phinn, though probably only if told in a Yorkshire accent, but a tribute to the ingenuity of the teaching profession nonetheless.

We also bade farewell to HHJ Linda Stern Q.C. It has been a while since she regularly trod the boards in Essex, but she will be much missed by the older members of the Mess. Your scribbler once had the great pleasure of being led by Linda at the Bailey in an Essex gangster case where a particular highlight was witnessing her hand bagging Andrew Trollope, who was too much of a gent to be able to really cope with her formidable style of advocacy. She remained a delight on the bench at Wood Green, in itself no mean feat, the twinkle never far from her eye. She fought with courage and dignity her final illness. May she too rest in peace.

On a happier note; delighted to hear that many of those who were incomprehensibly dropped from the A-G's list in the recent competition have been re-appointed after successful appeals. Thanks must go to Stephen Hockman, Q.C., who raised the general concern as to the procedure with the appropriate official within the department, as indeed did others on behalf of the individuals affected. A relief to see that injustice within our profession can be corrected. Perhaps too much store is being set on form filling at the moment in all of these competitions?

Before signing off a thank you on behalf of all who attended the Essex Mess dinner. The floor show was provided by HH Judge Michael Yelton who revealed a side to his character that necessarily does not get let out often in court. His speech was simply one of the funniest we have heard in recent years. Even Michael had to stop for a breather at one point - in fairness he was at that stage reading from a judgement of Ward LJ. That's a measure of how good he was, although in fairness the LJ was pretty good too!

'Billericay Dickie'

Surrey and South London Bar Mess

On March 21 the Annual Mess Dinner took place once more at the Crypt of St. Etheldreda's in Ely Place. There was a champagne reception followed by the dinner. I passed on the baton of organising it this year to a new young team who more than deserved the support they received for a fine event.

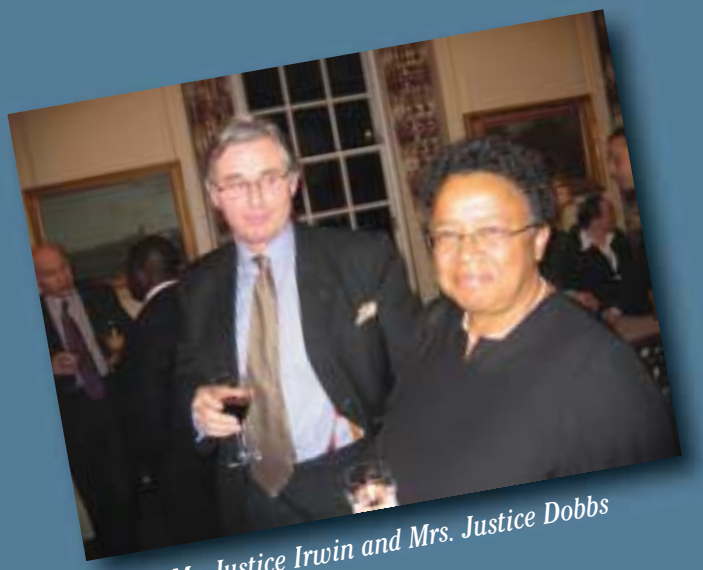
The next date for your diary is Wednesday, July 18, when the Mess will host its Summer Garden Party in Middle Temple. Please come and tell your friends. Weather permitting, it is always great fun.

There is not much to report from the court centres in the last quarter, but if I have missed anything, I hope that all interested parties will forgive me.

Sheilagh Davies

The Second Dame Ann Ebsworth Memorial Lecture

Mr. Justice Harms and Mrs. Harms

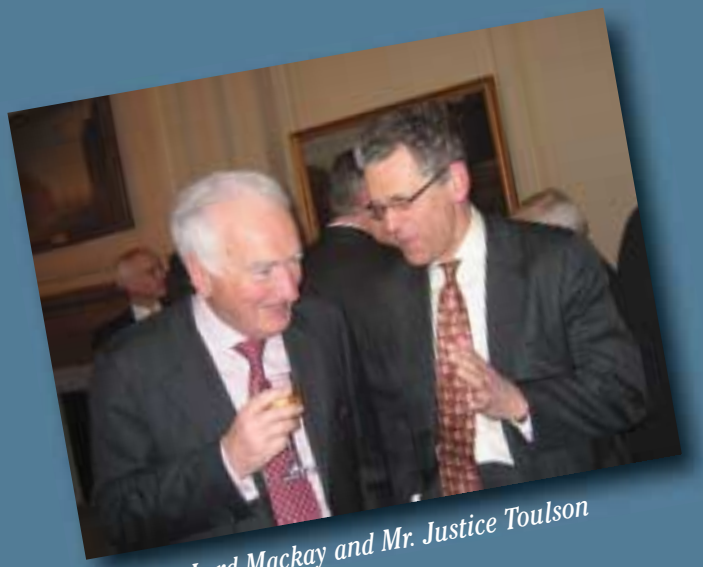


Mr. Justice Irwin and Mrs. Justice Dobbs

Tim Dutton, Q. C., Stephen Rubin, Q. C. and Baroness Hale

Mr. Justice Langstaff, Martin Seaward and Philip Bartle, Q. C.

Sappho Dias and Mrs. Harms



Lord Mackay and Mr. Justice Toulson