Issue 22

The Circuiteer

News from the South Eastern Circuit

Spring 2006

The Young Bar

A Note from the Editor

This issue of THE CIRCUITEER is dedicated to the young Bar, though 'the more junior Bar' might be more accurate. Every year, large numbers of people give up perfectly good careers to have a go at the law. The photographs on the cover, which I took at the last Middle Temple Call ceremony, show the new intake to be eager and diverse.

The world they face is uncertain. No doubt it always was, and comparisons are difficult. When I was Called in 1974, a story made the rounds that an eminent judge had just attended a law dinner at Cambridge. Turning to a fellow guest who was a practitioner, he asked, 'how are things at the Bar today, good or bad?' 'Good', the barrister replied politely. The judge then made a speech on the theme of 'come to the Bar, things have never been better'. Since we all knew that we had arrived at the Bar a few years too late, this was thought to be the height of irresponsibility. Thirty-two years after the judge's speech, students criticise the BVC providers for supplying over 1700 places when perhaps only an eighth will find pupillages. Or a sixth. Or is it a quarter? There are no reliable statistics.

The students continue to come, regardless. Some have done well. In this issue, Sarah Clark tells us what it was like to do the BVC without having a pupillage. It turned out to be less of a disaster than is usually thought. Michal Bisgrove in contrast reflects on what it was like doing the course when he knew that he had a future (or at least the first rung on the ladder). Ruby Hamid, the secretary of their chambers' pupillage committee, explains the problems posed by choice. Samuel Townend and Eleanor Mawrey provide a happy ending to the struggle.

By anyone's definition, it is a tumultuous time in which to start out. Part 1 of Lord Carter's report has been published. The Bar holds its fire until it sees the rest of it. The Bar Council has circulated a consultation document on the future of the BVC but it is only intended as the basis of a stop-gap. A Bill will be introduced in Parliament to bring about multi-disciplinary partnerships. At the end of last year, I heard someone in my Inn complain about the burdens of marketing: 'We mustn't be vulgar', he concluded. Today's students, who will be living in a world of multi-disciplinary partnerships within an alarmingly short time, may indeed have to be 'vulgar'. The young Bar at least has a strong voice in the Young Barristers' Committee, whose function is explained by its chairman (and the Circuit's Junior), Tom Little.

Perhaps the greatest source of uncertainty is the Government itself, with its endless appetite for new legislation. Do they understand the Acts they pass? The distinguished legal correspondent and author Joshua Rozenberg has very kindly contributed to this issue and tells us what it feels like when a Q. C. and M. P. doesn't quite get her head around the relevant Act.

For practitioners, it is business as usual in coping with the law as it is. For criminal barristers, Professor David Ormerod de-mystifies the current state of 'bad character'. For family barristers, Jonathan Cohen, Q.C. and Charles Hale provide advice for those dealing with the most difficult children matters in the light of a House of Lords case in which they appeared. Tim Akkouh makes a welcome return, detailing the state of the law on the question of fixed and floating charges. All branches of the law have to deal with expert evidence and everyone shares the frustration at what to do when the expert gets it wrong. Penny Cooper sets out the state of the law (until the Court of Appeal gets hold of it) following Professor Meadow's successful appeal to the Administrative Court.

It is difficult for some barristers to stay put. Iain Morley, who previously formed part of the defence team in the trial of the late Slobodan Milosevic—the world's best represented litigant in person—has now taken the prosecutor's brief in the horrific Rwandan war crimes trials in Arusha. Conflicts can resolve, eventually, and Tetteh Turkson returns to a more peaceful Belfast to enjoy its high lights. For those who travel to court, Rowan Morton holds out the prospect of a rewarding time in Guildford, our latest Circuit town.

It is the time of year when we look forward to some of the great Circuit events—the annual dinner on June 30, the Circuit trip (this year to Barcelona) and the Keble College advocacy course. We also look back on the first Ann Ebsworth Memorial Lecture. Justice Michael Kirby of the Australian High Court had to raise a glass to his father's 90th birthday from a distance of several thousand miles in order to be with us in Inner Temple to deliver the talk, which Tanya Robinson summarises.

It is worth noting that even in a time of change, England still resembles itself. In February, the first High Court judge to enter into a civil partnership announced this in THE TIMES. It shared the page with the usual announcements of births, deaths, engagements and marriages. Quite properly, no one outside the couple's family and friends took any notice.

David Wurtzel
D.Wurtzel@city.ac.uk

Table of Contents

Leader's Column

Intro?

Lord Carter's Review

As this edition goes to press the Bar awaits the outcome of Lord Carter's second report, which is due at the end of May. He has to include civil and family legal aid in his plans so that the costs of his proposals can be seen across the board. The Bar's team involved in the Carter review now numbers between 30 and 40 people, who meet as a whole every week, although members concentrate their efforts in particular areas. Members of the South Eastern Circuit have been prominent in this work, and have dedicated countless hours to it. What has emerged from this has been a dynamic working relationship between different specialists at the Bar. The Carter Group is headed by a tough civil Silk, who draws on specialists from crime, family and civil work for speedy and high quality in-put to the Carter process.

A healthier working relationship with the DCA has also emerged. If the figures come out right in the second report we will be able to put the antagonism of recent years behind us. If the figures are wrong the Government will be seen to have forsaken proper funding of an essential part of the criminal justice system for political expediency. Whereas some politicians believe that trotting out stories about fat cats will serve their electoral interests, I do not believe the public is bothered by these stories; nor do they buy them any longer. They are much more concerned about an under-funded criminal justice system, which does not see the guilty convicted or the innocent acquitted.

Our concerns

There are some disappointments for the Bar in Lord Carter's first report. He has not given an express undertaking to preserve the referral profession. However, a careful reading of the market-speak language of the report indicates that what the Bar needed to ensure its status as a referral profession is there (e.g. ring fencing of advocacy fees, and if there is to be bidding there must be a reasonable fee below which the advocate's fee cannot fall). There are also concerns being expressed about the desire to reduce the number of solicitors' firms who undertake legal aid work, by concentrating the work into fewer, larger units. This has obvious implications for small firms particularly outside London who fulfil an important social need.

It also has serious implications for diversity: black and ethnic minority lawyers are under-represented in large firms of solicitors, and there are still diversity problems at the Bar. Lord Carter has to address this aspect of the impact of his proposals so as to ensure that what he finally recommends operates fairly. There must be a sensible working review mechanism of the new scheme, but no such mechanism is recommended in the first report. The law is dynamic: changes in the law and in practice – particularly in the criminal law under this Government – require a review body on the procurement side to ensure that the legal aid scheme can adapt to meet such changes, and that problems within it can be corrected swiftly without waiting for the system to break down and another review. If, as the government has shown, it wants dynamism on substantive law and procedure, it cannot hope to achieve this, with a static procurement scheme. That is a yawning non sequitur.

The CPS and HCA's

Meanwhile, the CPS has publicly declared its objective that 10 percent by value of its work should be undertaken by its own Higher Court Advocates (HCA's) by the end of 2006. The national figure is still much less than this, but there is no geographical consistency. Apparently the CPS takes the view that a "world class service" requires advocates to be recruited in house. At Snaresbrook, for example, the CPS has recruited five HCA's, which will produce more than the declared objective. There has been a lack of planning and consideration for the referral Bar which has loyally served the CPS, and whose chambers need to know where they stand before their own recruitment decisions are taken. The Chairman of the Bar has established a working group, with representatives of the CPS and the Bar. Tom Little and I from this Circuit are on it, to make sure that the CPS's other declared objective, of having a thriving referral Bar, is actually met and not simply stated--still less believed in some quarters. The group has started to meet and we will speak frankly to each other over the coming months. In the end a supplier of services, even criminal advocacy services, cannot simply dictate that the customer should always take its services.

Our argument

Where advocacy in a criminal justice system is concerned there are two very strong arguments which we are making. First, the Bar, despite the under funding of recent years, still provides, and will always strive to provide, the highest quality advocacy services of any Bar in the world. It does so because of the experience gained day in and day out by advocates who both prosecute and defend, in robust, professional competition with each other. An in-house system can, by definition, never achieve this. An in-house advocate cannot spend as much time on his/her advocacy and cannot act for the defence. Neither does he or she have the advantage of the outside scrutiny which an independent Bar provides. CPS would do well to look at what happened in the City after the Courts and Legal Services Act 1990. Most of the City solicitor firms invested large sums on advocacy training. One firm only (Herbert Smith) has recruited two senior members of the Bar to head an in-house advocacy unit but that firm still uses the referral Bar extensively and has declared that it will continue to do so. The rest do some advocacy in-house but depend upon the referral Bar when cases become difficult. Once it is appreciated that a high quality referral Bar is required, logic and common sense dictate that its users must encourage the right numbers of talented barristers to join at junior levels, and to have a supply of a mixed range of work, so as to become the advocates to turn to for the difficult cases in the future. This means that attempts to take "blocks" of work in-house are misguided. The second, obvious, argument is cost. The Bar is more economical.

The year ahead

We have much in store – as this excellent issue of the Circuiteer demonstrates, starting as we did with the first Ann Ebsworth memorial lecture. Keble is coming on well, and Barcelona beckons at the end of July for the Catellan-inclined amongst you. This year's Circuit dinner on 30th June, has as its Guest of Honour, the former Chief Justice of Zimbabwe, Anthony Gubbay. We fight for our profession but he had to fight for the Rule of Law, whilst his life came under threat. Such people help to make us see our own problems in their true context. Book early for all of these. I want the Circuit to give a particularly warm welcome to all of our guests.

What's Wrong with the Lawyers?

Joshua Rozenberg, Legal Editor of the Daily Telegraph and the last legal affairs correspondent of the BBC, has kindly contributed to The Circuiteer some thoughts on Ministers, the Prime Minister and their grasp of the legal system. Not even Q.C.'s seem to get it right.

What does Tony Blair have against lawyers? His father was a law lecturer. His brother became a successful Q.C. So did his wife and his best-known flatmate. And of course he was Called to the Bar himself (Lincoln's Inn, 1976; Hon. Bencher, 1994). So it's not as if he has any excuse for believing in popular misconceptions about the law and lawyers. Is he trying to overcompensate, perhaps — attacking the legal system to show that he is not in thrall to his heritage?

Why did I enact that?

This hypothesis would be more plausible if Mr Blair had a better grasp of the profession he once professed. Three examples suggest that the real problem is that he does not really understand how the legal system works.

My first example is the Human Rights Act 1998. I regard this as one of his government's finest achievements. But you can be pretty confident that Mr Blair does not. Even an Act as delicately nuanced as Lord Irvine's legislation was bound to mean a shift in power from the politicians to the judges, something Mr Blair must now be regretting. Why else is he backing an attempt by the Dutch government to overturn the Chahal case, a ruling by the European Court of Human Rights that foreign terrorist suspects cannot be deported to countries where they may face torture?

My second example is the Constitutional Reform Act 2005 — again, in my view, a much-needed piece of legislative tidying-up. But remember its genesis? Not only did Mr Blair announce without prior warning that he was abolishing the Lord Chancellor after 1400 years of history, he seemed to think he had the power to do so merely by issuing a press release. It took a great deal of work by senior judges and the House of Lords to make some sense of the Government's plans.

What was in the Act I voted for?

Though less momentous, my third example is just as telling. It is a speech by the Prime Minister on January 10 in which he said that Britain was fighting twenty-first century crime with nineteenth century methods.

In one sense, that is literally true. It is extraordinary that, every day in every court, defendants are tried under the Offences Against the Person Act 1861, drafted in language that was archaic even then. But Mr Blair was not promising to adopt the Law Commission's much-needed reforms.

Instead, he wanted to extend methods of dealing with anti-social behaviour that, as he saw it, "reversed the burden of proof".

This is what he regards as the effect of the Proceeds of Crime Act 2002.

"The suspected drug dealer loses the cash. He has to come to court and show how he got it lawfully," the Prime Minister said in January.

Is he referring to the assumptions in confiscation proceedings? Normally when the police seize cash they can only do so for a limited period of time before they must return it, with interest. The burden of proof is on the police to show that it has been obtained through unlawful conduct and should be forfeited.

Another supposed example of reversing the burden of proof mentioned by the Prime Minister is the penalty notice that the police may issue under the Criminal Justice and Police Act 2001 for various types of disorderly behaviour. "The person who spits at the old lady is given an £80 fine. If they want to challenge it, they have to appeal," said Mr Blair.

Not so: the police officer must have reason to believe that the person has committed a penalty offence, but a penalty notice is simply an opportunity to discharge any liability to be convicted of that offence. A person who receives one (section 4) may simply decline to pay and ask to be tried for the offence, in which case proceedings may be brought against him. Again, the prosecutor must still prove his case before the offender can be convicted.

The mischief

Exploiting the public's fears about anti-social behaviour by denigrating the criminal justice system may win votes — though it hardly engenders respect.

It also sends a strong signal to other ambitious lawyers in Parliament: if you want to get ahead in Government, attack the system and don't worry too much about the facts.

Mrs. Baird's press release

In November 2005, I received a press release from Vera Baird, Q.C., Labour MP for Redcar. What her email omitted to mention was that she was parliamentary private secretary to the Home Secretary, an unpaid post regarded as the first rung on the ladder towards ministerial office. Mrs Baird still holds that post at time of writing, although she clearly hopes for a job in Government before long.

Mrs Baird was commenting on a case reported that afternoon in the Evening Standard. As the report explained, Roderick Evans, J. had instructed a jury in Swansea to acquit a man accused of raping a 21-year-old student after she had passed out through drink.

In her press release, the MP said she would be inviting the Lord Chancellor to investigate the judge's behaviour forthwith.

"In the circumstances reported in that case," Mrs Baird said, "it is totally wrong to suggest that there was any consent. Section 74 of the 2003 Sexual Offences Act makes crystal clear that a person can only consent to sex if they agree by choice and have the freedom and capacity to make that choice. How does an unconscious woman have that capacity?

"Section 75 of the Act means that the defendant has to prove that they thought the victim was conscious. The 2003 Act was passed precisely to protect women and men in these circumstances from having sex forced on them.

"This case calls into question how well the judiciary are being trained in the new law and how well they understand it. It is very arguable that this degree of misinterpretation is grounded in outmoded attitudes about women found in some male judges. It is deeply damaging to rape complainants."

In fact, as the newspaper report made clear, the case was abandoned by the Crown after the complainant had failed to come up to proof.

Huw Rees, for the prosecution, was quoted as saying: "The question of consent is an essential part of the case. Drunken consent is still consent. She said she could not remember giving consent and that is fatal for the prosecution's case." Whether the issue should instead have been 'capacity' is a different matter but that is not how the case was dealt with.

What the Act says

You hardly need to be a Q.C. specialising in crime to know that a judge must direct an acquittal if the prosecutor drops the case. Yet Mrs Baird said that the judge was "utterly and totally wrong".

We all know that to prove rape the prosecution must prove that the alleged victim does not consent. But what's all this about defendant now having to prove he thought the defendant was conscious?

This, in part, is what s 75 of the 2003 Act says: "If … it is proved that the defendant did the relevant act, that any of the circumstances specified in subsection (2) existed, and that the defendant knew that those circumstances existed, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether [the complainant] consented…"

One of the circumstances specified in subsection (2) is that "the complainant was asleep or otherwise unconscious at the time of the relevant act".

I'm only a reporter and Vera Baird is a Queen's Counsel who sat on the committee that scrutinised this legislation. But this is how I read it.

First, the Crown has to prove that the alleged victim was asleep or otherwise unconscious at the time of the relevant act and that the defendant knew this. On the facts as we know them, I'm not even sure that this was established. The woman was drunk, clearly, but said in evidence that she came round to be aware that something was happening. But let's assume, in her favour, that the defendant knew she had passed out at the time of the relevant act.

In that case, she is to be taken not to have consented "unless sufficient evidence is adduced to raise an issue as to whether [she] consented".

I am not sure exactly what that means, but it's certainly not the same as saying that the burden of proof is on the defendant to prove consent, or to prove that the victim was conscious.

It seems to me that if the defence can show there's some doubt about whether the complainant did not consent, then the Crown can't rely on the sweeping evidential presumption in s75.

Similarly, the defendant does not have to prove he reasonably believed she consented. All he has to do is to adduce sufficient evidence to raise an issue as to whether he reasonably believed it.

In this case, the defendant did just that. He established in cross-examination that she couldn't remember what happened. That was surely enough to raise an issue over consent. His own evidence was that she was fully conscious when intercourse occurred. How could she possibly prove he was wrong?

And yet, a couple of months later, here is Mrs Baird fulminating in the Law Society's Gazette.

"It is hard to overestimate the scale of damage of that decision. It sends a message that if you are raped, you get no justice," she said.

You did say you were a lawyer

What an extraordinary thing for a lawyer to say. On what basis can Mrs Baird say that the complainant in this case was "raped"? Who is she to say that the woman received no justice?

The Prime Minister and his supporters may believe they have reversed the burden of proof in cases where it might prove inconvenient. Fortunately, a glance at the legislation shows that Parliament has more sense.

A Voice for the Young

Tom Little, the current Junior of the Circuit is also the Chairman of the Young Barristers' Committee. He explains the work being done by the Committee on behalf of the Young Bar

The Young Barristers' Committee ["YBC"] is one of the main Bar Council Committees. The YBC was first established just over 50 years ago in 1954. At that time the Chairman was a Q.C. Thankfully things have moved on since then. The YBC is made up of elected members of the Bar Council in the under 7 years' Call category. In addition the Chairman co-opts a number of other practitioners to ensure broad and effective representation of the Circuits and specialist Bar associations. The YBC currently has 26 members and meets regularly throughout the year.

The Circuit has significant representation on the Committee, with a number of members in common. This includes the Vice Chairman, Sophie Shotton, and Fiona Jackson, a former Junior of the Circuit and currently the Recorder.

2006 is likely to be one of the toughest years yet for the Bar and especially for the Young Bar. The YBC is seeking to ensure that all that can be done on behalf of the Young Bar is being done.

In particular this year the YBC is:

- Actively involved in the Carter Review (Fiona Jackson is a member of the Carter Response Group)
- Consulting the profession in relation to the Carter Review by holding open meetings jointly with the Criminal Bar Association
- Organising an all day Young Bar Conference in London in the autumn
- Organising the Young Bar Forum at the Bar Conference
- Actively involved in responding to the Legal Services Bill (both through membership of the Bar Council's Clementi Committee and in meeting the Legal Services Reform Team at the Department for Constitutional Affairs)
- Publishing a Young Bar Magazine
- Responding to the consultation paper on Vocational Training for the Bar
- Organising the Anglo Dutch Exchange with the London Young Professionals Group and the London Trainee Solicitors Group
- Organising the International Weekend, which coincides with the Opening of the Legal Year, in conjunction with a number of the Young Solicitors' Organisations
- Assisting in the organising of the Bar National Mock Trial Competition for schools

In the last few years the YBC has become a powerful part of the Bar Council. So far this year the YBC has had meetings with the Attorney General, Solicitor General and the Lord Chancellor where issues including fees and the future regulation of the profession have been discussed. We have made the point to all of them that recruitment and retention of the best barristers is vital for the future of our profession. Recruitment and retention can only be ensured if Lord Carter ensures two further 'R's. The first is redistribution of criminal legal aid down to the 1 – 10 days cases. The second is the establishment of a review mechanism to ensure that there is not another 9 year pay freeze for criminal fees.

The YBC takes a keen interest in the PR of the profession. In the second half of 2005 there was far greater use of the Young Bar with the media – the result of which was good publicity for the Bar as a whole. A number of the members of the YBC are media trained. They have and will speak to the press about the realities of publicly funded work and other issues. The use of the Young Bar as our public voice will continue.

The YBC also promotes the Bar internationally as well at home. At Easter I will be attending the World Referral Bar Conference in Hong Kong and Shanghai where I am speaking at a session entitled 'The Young Bar strikes back – safeguarding our future' – my part of which relates to 'Recruiting Excellence'.

If there are any issues that any reader of this article feels are of concern to the Young Bar and should be considered by the YBC, then please write to me, or the Secretary, Gillian Dollamore, at The General Council of the Bar, 289-293 High Holborn, London WC1V 7HZ.

The Student's Tale

Michael Bisgrove, BVC student but next year a pupil at 18 Red Lion Court, explains the challenge in finding a pupillage. As someone who did find one at an early stage, he reflects on how this affected his attitude to the course.

It is fortunate that the date on which pupillage offers came out was a week before I had to pay the first instalment of the BVC fees. In the months leading up to this I had been struggling with the question of what to do if I didn't get pupillage. There were two options; either to bow out gracefully and seek an alternative career, or to pay the fees and hope for better luck next time. Neither option was appealing.

Why the Bar?

It seems a long time ago now that I decided on the criminal Bar. During my undergraduate degree, I had considered a number of careers, and decided just before my final year that I was looking for a vocation, not a 9 - 5 job. Law struck me as ideal for two main reasons; firstly it presented an academic and personal challenge, and secondly the job entailed representing a system which, for all its flaws, is one we can rightly be proud of.

The conversion course stretched the abilities of most people who took it - cramming the essentials of a law degree into nine months was never going to be easy. The process was complicated by the numerous applications we had to make. Scholarship and BVC applications took up valuable time. However, the application that people were most concerned about was the one for pupillage. The deadline for submitting the OLPAS form loomed large in everyone's minds. Once it had passed not a day went by without checking the website for interview offers or rejections, and mulling over the knowledge that only one in five intending barristers made it to pupillage.

The interview

As exams drew closer, so—if slowly—came the offers for interview. I had specified only pure crime sets. First round interviews were often almost indistinguishable. By this stage in our education, most people have been to a large number of interviews and there are any number of careers services or websites giving advice on what to expect in them. Standard questions meant that as I went to more interviews, my answers become more polished. My views on current awareness topics also crystallised as I thought more carefully about them.

Early questions were variations on the theme of why I wanted to be a criminal barrister. They usually compared it with an alternative – either a career in science (my first degree), as a solicitor or as a civil barrister. As a section on why I wanted to be a barrister was already on the OLPAS form, I imagine that the point of these questions was partly to hear me speak, and partly to see if I had thought about alternatives. Next came questions on my view of the law and its relationship to current issues – things that I would change about the law or my views on terrorism laws (particularly common following the July 2005 tube bombings).

Questions asked

Most chambers advertised on their websites what they were looking for in potential pupils. These requirements became apparent in the way interviews were structured. Advocacy and a reasoned thought process were common themes, tested by argumentative questions from an often adversarial panel. At one interview I was asked to give my view on a topic, and then argue for the opposite view. Other questions asked me to sell a product in three minutes, or to argue for or against the use of previous convictions as evidence. Though there were no major surprises in the type of questions asked, they seemed for the most part to be well thought out. However, when asking for feedback from unsuccessful interviews chambers commented that there were often upwards of 300 applicants for less than a handful of places. It was clear that an element of luck was involved.

Second round interviews also followed a common theme, though here I am drawing on a much smaller sample. I was given a bundle of papers and about half an hour to prepare. I was then asked to argue either a bail application or an appeal against sentence. There were further discussions on the approach I had taken to the application, and on the general role of the barrister.

Risk and the BVC

An offer finally came, and I paid for the BVC. The high cost of the course, combined with the low odds of obtaining pupillage, means that those embarking on the BVC without pupillage take an enormous risk. It has never been made clear how the BVC is looked on by other professions, but however favourably it may be, taking the course is certainly not the most efficient way of getting in to any career bar the Bar. However, security for one's investment is not the only thing to be gained from a more certain future.

Attitudes change

No longer concerned about what to do with myself after the BVC, my attitude to the course changed. It was no longer just another set of exams to pass and put on my OLPAS form, it became an opportunity to practice and develop the skills that I will be using for the rest of my career. Each exercise that is set feels more relevant if it can be thought of as a rehearsal for practice, instead of a test of exam-readiness. And, with the pressure off to get a "good" grade, I am free to concentrate on the areas of the course that are the most interesting. The advocacy exercises tend to reflect what will be encountered in the early years of practice. During court visits, one can often see in action the things that one has prepared for earlier in the term. Extra investment in these types of classes will hopefully pay off once pupillage starts.

Theory vs practice

The teaching style on the BVC is not entirely what was expected, however. My view of the Bar was based around mini-pupillages spent at court, with advocates on their feet. Only one class per week here is based around actual advocacy, with each student having less than 10 minutes to perform. The rest of the work, both in terms of classes and preparation, is research based or written. Given the small number of contact hours, combined with the nature of the work, it seems that the BVC is more concerned with teaching the theory of practice rather than actually practising the skills. This may be an inevitable side effect of the large number of students on the course, and it means that getting the most out of the course requires significant self-motivation.

On the 25th May, the BVC will end. To pass the course, we must be judged "competent to start pupillage" in all 13 exams. Once this is achieved we can go on to be Called as barristers. However, though the massive majority of people will attain this standard or higher, only a quarter will go on to pupillage. The rest, however competent they are by BVC standards, face an uncertain year.

The Pupil's Tale

Sarah Clark, pupil at 18 Red Lion Court, describes the problem of applying for pupillage and of doing the BVC while not knowing whether there is a place for you at the Bar

My ambition to come to the Bar was not, I'm afraid, borne out of a desire to save the world. At that time, nothing of the sort had really occurred to me. I was a fifteen year-old at an all girls' grammar school in Kent, work experience week was fast-approaching and I had a notion that shadowing a barrister for a week might be fun. After all, I thought, they get paid to argue all day and they seem to be very glamorous. My mother spoke to a solicitor friend, who put her in touch with a junior tenant at 1 Harcourt Buildings. An extremely patient Amanda Eilledge allowed me to follow her around for a week back in 1996. And so it began. A mere ten years later, I write this as a pupil at 18 Red Lion Court, three weeks away from being 'on my feet'. Yes, it has all been worth it, but no, the reality is not quite as glamorous as it appears when you are fifteen.

The fascination of crime

I undertook several mini-pupillages as an under-graduate (reading Law). I had tried my hardest to enjoy all the more lucrative fields, having built up not insignificant debt and knowing there was more around the corner with the escalating cost of the BVC. But I could not get away from my fascination with the criminal law. I had also become involved with Amnesty and Amicus at University and developed a strong interest in Human Rights. I was keen to join a set where members undertook pro bono work.

Pupillage on the back burner

I decided to have a year out between University (Cambridge) and Bar School (I.C.S.L.) because I felt that once I had started pupillage and hopefully established a practice, it would be more difficult to go away for any significant time. I can see now that I was dramatically underestimating the competition for pupillages at the top sets, but content in my ignorance, I embarked upon a gap year and gave pupillage very little thought. I spent part of that year working as a paralegal in the Legal and Business Affairs Department at Warner Brothers. Amongst other roles, I liaised with lawyers across the world to co-ordinate translation of film trailer rights for the first Harry Potter film. I then spent a season in Val d'Isère which I also recommend highly, but which is not nearly so relevant to this article.

If at first you don't succeed

When I started Bar School in 2003, I set about filling in an OLPAS form for the first time, and applying to non-OLPAS chambers as and when their deadlines came up. Looking back I simply don't think I knew what it was that chambers were looking for. I had a modest success in terms of first round interviews, but only two second rounds (and no offers). It was clear to me that I was doing something wrong. I can see now, that although my commitment to the criminal Bar was clear in my own mind, half the battle is demonstrating that commitment to the committees; a) on your form and b) in the dreaded interviews.

I realised quite quickly that I needed to get a better appreciation of how the 'case study' style teaching at Bar School translated into practice. I was determined not to appear naïve and ill-equipped for pupillage in the next OLPAS season. So, I went and found some outdoor clerking work in my spare time. Soon the theoretical learning I was doing at Bar School was far more interesting, because being in court took it out of its academic vacuum and put it firmly into context. I also got more involved with the causes I had become interested in at university. I took part in the Amicus Death Penalty Law training, got involved with Reprieve and applied for a scholarship from the Centre for Capital Punishment Studies.

I am quite sure that this demonstration of interest and commitment did come across in my second attempt at pupillage applications as I had a far greater success in terms of interviews, and ultimately, offers.

Success—and off to Malawi

I was offered my pupillage at 18 Red Lion Court in the summer following Bar School. I was elated to have been accepted by such a well regarded set, but also immensely relieved to be finished with OLPAS. I was successful in my CCPS application and got a scholarship to spend five months working in Malawi, East Africa, with the Legal Aid Department. Upon my return, I worked for Saunders Solicitors for six months, which provided an invaluable opportunity to put my BVC knowledge into practice.

Not necessarily a bad thing

I would say that commencing the BVC without a pupillage 'in the bag', though more stressful, is not unusual and ultimately not necessarily a bad thing. The 'enforced' gap year I had after the BVC and prior to pupillage in fact turned out to be an extremely valuable one. I felt far better equipped to deal with a criminal pupillage having worked with a criminal firm. I had a better understanding of how things work; how procedure operates in practice, the relationship between solicitors and counsel and how to deal with large volumes of material in preparing a case for trial.

My first six has been far more exciting and far less stressful than I imagined. My pupil supervisor (Ramiz Gursoy) has an enviable practice in which he has allowed me to become fully involved. But the real test comes in three weeks time. Still, no pressure, I've only been waiting ten years!

Tips for Bar School / Pupillage Interviews:

- ✔ Do get some practical experience alongside the BVC to put it in context.
- ✔ Do act on as many legal-based interests as you can; volunteer at a Law Centre, apply for scholarships to do voluntary work abroad, outdoor clerking.
- ✔ Do some work for FRU / mooting / debating – anything to help your advocacy as you are likely to have an advocacy exercise in your second round interviews.
- ✔ If you end up with a 'free' year after the BVC use it to prepare yourself for pupillage in whatever way you can.

The Pupillage Committee's Tale

How were Sarah's and Michael's applications dealt with? Ruby Hamid, secretary of the pupillage committee for 18 Red Lion Court, explains how they go about it, with some valuable lessons in good practice.

500 applications, a 10-strong selection panel, and only 5 pupillages on offer. Choosing pupils is never easy. It is not simply the numbers. The standard of pupillage applications is high, and weeding out the weak candidates from the strong is a challenge. So how does a criminal set select its pupils?

OLPAS

The vast majority of sets are now part of OLPAS: the official 'OnLine Pupillage Application System' operated in conjunction with the Bar Council. OLPAS allows a candidate to submit a single application form to up to 12 sets of chambers, via the internet. The form asks about academic qualifications, work experience, relevant skills and career motivation. The candidate must identify which practice areas particularly interest them, and they are asked for the all-important 100 words describing that interest.

Who we are looking for

We look for very bright candidates with a proven academic record and who expect a 2:1 or a First class degree, unless there are special circumstances. Applications from mature students are greatly encouraged – all criminal practitioners know the advantage that varied life experience brings to the job. Criminal sets will look for candidates who demonstrate a real commitment to the criminal Bar – mini-pupillages, work at Law Centres or FRU, marshalling and outdoor clerking are good indications. We look for applicants with empathy, good judgment and promise. The advocacy exercises which form a major part of the interviews usually highlight the strongest candidates. The potential to develop as an excellent advocate is probably the skill most sought after in a pupil.

The challenge

Applicants can forget that criminal barristers advocate in writing, as well as on their feet. The best applications demonstrate a high standard of written advocacy: well presented, persuasive and compelling. They are the 'skeleton argument' which sells the applicant as an advocate with potential and promise. Bad spelling, sloppy grammar, repetition and incomplete sentences, send an application straight to the rejection pile. Similarly, a cut-and-paste from the chambers' website in the section marked 'Reason for applying to Chambers' does not impress.

Making the best of it

At first glance, the OLPAS form appears limited, but there are opportunities to shine. The best candidates take full advantage of the 'work experience' section, which imposes no word limit. Holiday jobs, volunteer work and gap year teaching can all be used to good effect when there is an explanation of the skills they developed and the insights they gained. An ability to deal with the public at all levels is vital to a criminal practitioner, and a good application form shows that ability in action. You can tell, at a glance, which have been thoroughly and carefully constructed. With only 100 words available to persuade chambers of their commitment to crime, sensible candidates write and rewrite their reasons to make every word count.

Advice to applicants

All chambers abide by a common timetable, limiting the period during which offers of pupillage can be made. This makes for an unseemly crush on the 1st August, with chambers fighting to make offers to the same clutch of impressive candidates. The best way to decide on a chambers is to visit it, spend some time with members, and get a feel for the atmosphere. No two sets of chambers are the same.

The spring round of pupillage applications is now open. OLPAS can be found at www.pupillages.com. Selecting pupils is an arduous yet rewarding task, and I wish pupillage committees the circuit over the very best of luck. Let the games begin.

The Tenant's Tale: I

What is it like to get a tenancy? Samuel Townend of Keating Chambers describes a journey which has now been crowned with success.

I was Called in 1999 and am a member of Lincoln's Inn. I took a year off before Bar School to raise some funds to pay off existing debt and to do a bit of travelling. I was modestly assisted during my BVC year by Lincoln's, who awarded me a dining scholarship and a place in one of their flats in Chancery Lane.

My original intention was to become a barrister at the planning Bar. However, having only limited success in that direction, (I received one offer of pupillage, at 2-3 Gray's Inn Square, on the express basis that they were not intending to take on any tenants that year), I considered all my options (two other offers) and took the best one, an amply funded pupillage at Keating Chambers. It specialises in construction, engineering and related professional negligence disputes.

Two of the three pupils in my year were ultimately given tenancies and I have greatly enjoyed my practice ever since. My work ranges from being junior on an exploding (human) waste processing factory case to settling adjudication proceedings on a matter in connection with the new Wembley Stadium. There have also been a host of smaller and domestic construction-related disputes. The money is good and certainly better than for my contemporaries working in solicitors' firms. As is the lifestyle--in particular, the freedom to decide when and where to work. My fellow members of chambers are congenial and always prepared to offer their advice when asked. However, I don't appear in court as often as I anticipated. Nevertheless it was a great career decision for me and is to be recommended to others.

The Tenant's Tale: II

So is it all worth it? Eleanor Mawrey of 9 Gough Square gives a resounding 'Yes'

As many of the accompanying articles demonstrate, getting—and surviving--a pupillage is no walk in the park. Have no illusions: it is tough. But what about the perks when you finally complete the very long and arduous road called becoming a barrister?

First joy

The joy really begins from the moment you first get on your feet. This is what you have spent at least four and a half years preparing for. Yes, you might feel a little sick. Yes, you might not have got much sleep the night before, having spent the best part of four hours preparing for a two minute hearing. But Oh, to finally stand up, say "Yes Sir" and sit down again (which is all I had to do at my first hearing). The sense of achievement is overwhelming. Some considerable time later, you get your first cheque. A momentous event which enables your bank manager to sigh (albeit a very small sigh) of relief.

And then

Then hopefully comes a tenancy. You get your name on the door. Deep down you have a warm glow (at least for the first week or so) every time you see it. There are no more pupillage supervisors to impress. You don't have to be the first one in any more, nor the last one out at night. If your case goes short, you can indulge in a bit of retail therapy, or, better yet, catch the lunchtime screening of the latest blockbuster. You can even take a holiday!

There are many perks to being self employed. It does require discipline and more than a few late nights preparing that last minute brief. You continue to have to work hard, to impress solicitors and to keep your clerks happy. However you are your own boss and that in itself that is worth all the hard work.

Prosecuting the Rwandan Genocide

Iain Morley, of 23 Essex Street, who helped to represent the late Slobodan Milosevic at The Hague (Circuiteer, spring 2005) was asked to join the prosecution team at the war crimes trials in Arusha. From the heart of Africa he explains the terrifying background to those cases and how the culprits are facing different types of justice.

At the foot of volcanic Mount Meru--which climbs to 15000 feet and is not far from Mount Kilimanjaro, which climbs fat and magnificent to 20000 feet—and amid the nearby wildlife splendour of the world famous Serengeti and Ngorongoro safari parks, 500 miles from the tropical coast, but at a height of 4000 feet above sea level, allowing a gentle breeze and an evening coolness in the equatorial climate, there is Arusha, in Tanzania.

Life in Arusha

The town has a population of perhaps 400,000 (although being the fourth poorest country in the world, the figures are hard to verify). There are about six tarred roads, and everywhere else is dirt-track. Many houses are made of mud with corrugated iron roofs and an outside toilet cesspit shared between fifty. Hygiene is a challenge. Seven children die each day here from malaria. There are electricity cuts, street children, floods, and at the same time, drought. In the countryside the cattle are dying from lack of water, and the nomadic Masai people are close to starvation. On the uneven roads, there are brand new four wheel drive monster vehicles, and Chinese trucks from the 1960s which have no lights and belch thick black smoke. There is internet access, mobile phones, and children play barefoot in fields kicking tennis balls with the skill of Ronaldo. Despite the poverty, and the strange contrasts, everyone smiles.

The Geneva of Africa

Arusha has been called the Geneva of Africa by US President Bill Clinton. It includes the Arusha International Conference Centre (AICC), built by the Chinese Communist Party in the 1970s, during the years of socialism under the British-educated father of the nation, President Julius Nyerere. Nyerere oversaw the transition of colonial Tanganyika to self-governing Tanzania in the 1960s, and it was in Arusha that the Cold War turned hot throughout Africa. In 1967 at what is now a poorly staffed museum, he announced the nationalisation of most capitalist institutes, such as banks, mines, and industries. Other African countries soon followed his example. Arusha is possibly the most significant political and most picturesque tourist location in Africa.

It is also perhaps the most significant legal location on the continent, for within the AICC, there is the UN International Criminal Tribunal for Rwanda. The Tribunal was convened to deal with the horrific events of 1994, not often remarked upon now in the West, but which sear the minds of any who have had to study and consider it.

The crime

In 100 days, between April and July 1994, in tiny neighbouring Rwanda, a beautiful country of a thousand rolling hills, a little like Tuscany--the Hutu—mostly with machetes and cudgels, and to some extent with small arms and grenades—murdered one million of their neighbours. Almost all of them were Tutsi civilians and most of those were women, children and the elderly. Given its small time span, it may have been the most prolific killing event in the twentieth century. People were stopped at roadblocks and butchered on the spot. When refugees gathered in their thousands in churches, schools, football stadia, and hospitals, they would be surrounded, and in disciplined shifts hacked to pieces between 9am and 5pm. Evenings were reserved for beer drinking and re-energising for the next day's 'gokura' which means 'work'. The cruelty was unbelievable. Children were cut up or thrown alive into wells and cesspits in front of their wailing mothers, who were then raped into unconsciousness before being speared vaginally through their body length.

How it happened

After assisting Steven Kay, Q.C., in the court-appointed defence of Milosevic in The Hague for five months from October 2004 to February 2005, I have now since March 2005 found myself assisting the prosecution of those who created the Interahamwe, which began as a youth movement within the leading political party, the MRND, and was corrupted into the very worst of genocidal instruments. Young men of previously high moral standing were recruited to the party, and then were indoctrinated to believe that the Tutsi were an internal enemy to the security of the state. They were given some military training and armed with cheap Chinese machetes. When the Hutu President was shot down on 6 April 1994, in their thousands, like swarms of hornets, the authorities let slip these dogs of war among the quiet families of their inoffensive neighbours. No one should imagine that what happened in Rwanda was some primitive spontaneous tribal bloodletting: it was highly organised. There is a sense of purpose to this work which I have not before experienced, and I can only hope I will fulfill the expectations of me.

The background

The basic problem in Rwanda goes back to the days of Empire. In ancient times, the cattle-rearing Tutsi descended south from Ethiopia while the pastoral Hutu came east from the Congo. Both got along well until the Belgians arrived, in the late nineteenth century. The Belgians thought the Tutsi looked more like white men, since they were tall with angular features. They therefore assumed they must be more intelligent. The Tutsi were a minority of 15%, and were given disproportionate power within the colonial administration, breeding an understandable, seething resentment on the part of their Hutu neighbours. When Rwanda was finally given self-rule in 1959, the democratically elected government was naturally Hutu, as they were the vast majority. Many Tutsi fled in fear of revenge for years of abuse. The Tutsi occupied refugee camps along Rwanda's border.

On top of Mt Kilimanjaro on Boxing Day

Although many stayed within the country to face periodic pogroms, the border camps bred a desire to return to Rwanda. In time, Ugandan President Museveni's army recruited from the Tutsi refugee camps within Uganda, and a Tutsi army with able leadership grew into a powerful machine. In October 1990, an incursion into Northern Rwanda was launched which began a war. The UN intervened to broker a peace. Peace would mean allowing the Tutsi refugees to return, and importantly to share power.

The Hutu majority became uneasy there might be a return to Tutsi hegemony. The political leadership began speaking in riddles, which are peculiar to Rwandan communication, intimating that the Tutsi civilians within the country were an internal enemy, whom they called 'inyenzi' which means cockroaches. They were said to be supportive of the invaders. Hutu youth movements attached to political parties were trained in military

Prosecuting the Rwandan Genocide (continued)

camps. The Hutu President of neighbouring Burundi was assassinated by a Tutsi in October 1993. Anti-Tutsi feelings began to reach a fever pitch, with radio stations and political rallies speaking of how the Tutsi were intending to eliminate all Hutu, which was riddle-speak for how all Hutu should eliminate the Tutsi. On 6 April 1994, the Hutu presidents of Burundi and Rwanda were shot down as their plane approached Kigali airport returning from Arusha where there had been further peace talks. Rwanda erupted.

The slaughter

Within minutes, soldiers were going to Tutsi houses, carrying death lists, and killing whole families. Moderate political leaders were murdered, including the Prime Minister who was first sexually assaulted in her home. The ten Belgian peacekeepers assigned to protect her were gathered, disarmed and later mutilated to death. Roadblocks sprang up, manned by youngsters, aged 15 – 30. All Tutsi whose ethnic identity appeared on their identity papers, were slaughtered on the spot. People wondered where their friends had gone. When they went looking, they were stopped at the same roadblocks, butchered, and their bodies dumped in road drains. Then the next group would come looking, and so the process would repeat itself. Soon the bodies were just lying on the pavement. The Tutsi had nowhere to run. They hid in their homes, but armed gangs would go from house to house and murder everyone. The Tutsi would gather in their thousands, under the apparent protection of the police, who would refuse to feed and water them. They would weaken, and then be surrounded by Interahamwe, who butchered in formidably disciplined shifts. They hid in the fields, and on hills, and in roofs, and in swamps, but were ruthlessly hunted.

The government was so busy killing its civilian population that the war was ignored. The result was that the Tutsi invaders, known as the Rwandan Patriotic Front (RPF), took over the country. At least a million Hutu fled to the Congo, and to Tanzania.. The world thought they were the victims of the genocide, but slowly the truth dawned on the concerned international community – the refugees in fact were the killers fleeing revenge.

For those who may want to understand more about the Rwanda nightmare, I would recommend watching the films 'Sometime in April' and 'Hotel Rwanda'. There are also the factual tome, 'Leave none to tell the tale,' by Human Rights Watch expert Alison Des Forges, and 'We beg to inform you tomorrow we will be killed with our families,' by the New York journalist Phillip Gourevitch.

So far

The UN set up the ICTR to deal with the principal architects of the genocide. The first judgment was rendered on 2 September 1998 in the case of an administrative bourgmestre named Akayesu. On 4 September 1998, the prime minister of Rwanda during the horrors, Jean Kambanda, pleaded guilty to genocide. Between May 1995 when the trials began, and today, 26 accused have been tried, while a further 26 are presently being tried. Seventeen are awaiting trial. The Tribunal is due to conclude trials in 2008 and appeals in 2010. There are approximately 800 UN support staff. The trials take place in shifts with simultaneous translation into three languages (English, French and Kinya-rwandan). Most legal arguments are conducted in writing, with precious Chamber time reserved for hearing evidence. Witnesses can take a lot longer than in the UK, principally because the simultaneous translation lengthens the hearing, but also because culturally the Rwandan witnesses do not always answer questions directly. I have just finished calling a witness under sentence of death in Rwanda for his role in massacres, and his evidence took four weeks.

Meanwhile

In the meantime, the Rwandans have processed more than 60000 genocidaires in their informal tribal "gaccaca" process. Gaccaca means grass in Kinya-rwandan, and it connotes the community gathering to sit on the grass and collectively judge each other. Accused people are lined up and members of the community are asked if they have any accusation to make. While the process is open to abuse, it has been perceived internationally to have been effective at restoring a measure of good relations among neighbours who were formally hunter and hunted. Naturally there is a comparison often made that the ICTR is too slow in contrast to the local method. However, a substantial body of jurisprudence is developing, which has resonance worldwide, in the hands of capable judges drawn from many countries, following argument from a varied collection of colourful lawyers, many of whom have international legal and academic standing.

The teams

In my own case, which is one of nine ongoing mostly multi-handed trials, my judges are from Ghana, and Burkina Faso. My Presider, Sir Dennis Byron PC, is from St Kitts in the Caribbean. I work with a team of prosecution lawyers from New York, California, Quebec, Nigeria, Cameroon and India, and face three defence teams drawing lawyers from California, Senegal, Cameroon, Rwanda, and France. The President of the Tribunal is Judge Erik Mose from Norway. The Prosecutor is Hassan Bubacar Jallow from Gambia, leading approximately 150 prosecution lawyers, co-ordinated by Chief of Prosecutions Stephen Rapp from the US. From South Africa are the special advisor Alex Obote and the deputy prosecutor Bongani Majola. The appeals are headed by James Stewart from Canada.

My three defendants were the leaders of the MRND which was the party which set up, trained and indoctrinated the murderous Interahamwe political youth movement. The are Mattew Ngirumpatse, President of the Party and special advisor to the President of the Republic, Eduard Karemera, Vice President of the Party and Minister of the Interior, and Joseph Nziroera, Party General Secretary. The trial will not end before 2008, and is simply huge in scope, taking in all the politics leading to the 1994 genocide. In addition, the MRND leadership is charged with nationwide rape. This promises to break new grounds in jurisprudence, alleging that while none individually participated in any of the hundreds of thousands of sexual assaults, each can be fixed with the mens rea of each offence because rape was a foreseeable and inevitable consequence of unleashing so bestial a murder spree in the hands of so many ill-disciplined youths, whose killing method with machetes and spears necessitated close quarter contact with their victims and deeply personal violation.

Outside court

While the days in the office are long and utterly absorbing, come the weekends, there is the heart of Africa to explore. Down the road there is almost every African animal young children see in school books. There are still gorillas and chimpanzees to find, and they are in Rwanda, so I imagine in time there will be some trekking there in the jungle away from the urban scenes of carnage.

It is often said that once you have drunk from the waters of Africa, you shall always return. It has been 21 years since I spent a wonderful six months in Zimbabwe before Oxford, and inevitably I have found my way back here. No doubt I will in time find my way back to life among the robing rooms of England's green and pleasant land – but not just yet….

Appellate Advocacy – New Challenges

Tanya Robinson, Past Junior, reports on the first Ann Ebsworth Memorial Lecture, held in Parliament Chamber, Inner Temple on 21st February 2006. The Hon. Justice Michael Kirby of the Australian High [Federal Supreme] Court was the distinguished inaugural speaker.

Getting back to the Temple in time for a 5.30pm lecture can be a difficult ask for many Circuiteers. They came, however, in large numbers to attend the first Dame Ann Ebsworth Memorial Lecture on 21st February. Just a brief scan of the front rows in Parliament Chamber read like a list of the "Who's Who" of the legal profession: Lord Carswell, Lady Hale, Lord Walker, Lord Woolf, Lord Phillips, Sir Anthony Clarke, M.R., Sir Mark Potter, President of the Family Division, Dyson L.J., Kay L.J., Rix L.J., Mr. Justice Burton, Mr. Justice Hedley, Mr. Justice Langstaff, Mr. Justice Sumner, Mr. Justice Toulson, Mrs. Justice Bracewell, Sir Michael Morland, Dame Elizabeth Butler-Sloss, HH Judge Lawson Q.C., Stephen Hockman Q.C., Chairman of the Bar, Ian Gatt Q.C., Andrew Stafford, Q.C., Nicholas Davidson, Q.C. and Marion Simmons, Q.C. to name just a few. Lord Mackay of Clashfern could not attend but he had telephoned the day before to speak of his very high regard for Dame Ann and of his great pleasure in nominating her for appointment to the High Court bench when he was Lord Chancellor.

We heard first from Mr Justice Hedley, of the Family Division, who was described as "the epitome of a modern judge, in touch with society and its issues". Then there was the guest of honour, The Hon. Justice Michael Kirby of the Australian High Court, who had come to London (on what turned out to be his father's 90th birthday) to lecture on the subject of "Appellate Advocacy – New Challenges".

Where else could Circuiteers get 1.5 CPD points while hearing two delightful speakers and sharing a few glasses of wine and nibbles afterwards—and without paying a penny?

The idea for the lecture series, organised by Philip Bartle Q.C., had come from Tim Dutton Q.C., Leader of the South Eastern Circuit. It was to be a memorial to Dame Ann Ebsworth's life and her work within the law. In later life she had devoted a great deal of her time to teaching advocacy, both at Gray's Inn and at the annual South Eastern Circuit course for young practitioners at Keble College, Oxford.

Mr Justice Hedley's personal memories of his 'old room-mate'

Mr Justice Hedley spoke of Ann Ebsworth with great fondness. His deep respect and affection for her were obvious to all. "He had", he said, "been faithful in life to two women: his wife and Ann Ebsworth with whom he had shared a room in chambers". Their careers had followed what he described as an "almost unseemly" path together as he followed her first to the Circuit bench (even inheriting her room, usher and court after she was appointed to the High Court bench), and later, in 2002, to the High Court bench after her ill health led to her retirement. In court, Mr Justice Hedley said, "she was somewhat austere. She was always impeccable and outstanding but a little remote". The person he knew, however, was "a warm deeply attractive friend to spend time with". In private she was humorous. He reported that some 18 months after her appointment to the Circuit bench, she had confessed to him "I haven't looked at you in court since my appointment because you're one of the two people I know who can make me laugh at will!" Ann was, he remembered, "always self-deprecating and also quite unsure of herself in many ways". She was "someone who knew that help was needed to turn talent into success at the Bar". She refused to apply for Silk saying that as she could not conduct a proper Queen's Bench action.

His was a touching and personal insight. He concluded, "had Ann known that there was to be a series of lectures in honour of her memory," she would "have demanded to know what all the fuss was about!" To his mind, "the people here today" demonstrated that Ann was "answer enough".

Justice Michael Kirby introduced

Philip Bartle, Q.C. introduced Justice Michael Kirby AC CMG as a jurist of international reputation. He was the first chairman of the Australian Law Reform Commission from 1975 to 1984; a judge of the Federal Court of Australia from 1983-1984 and President of the Court of Appeal of New South Wales from 1984 to 1996 when he was appointed as one of the seven judges of the High Court of Australia, the final Court of Appeal in Australia. He had always been a champion of minority interests, reportedly saying in a recent lecture "we must do more to promote access to law, reform of the law and its rules and the engagement of lawyers with ordinary people and litigants to whom, ultimately, the law belongs". He had held numerous national and international positions including UN Special Representative in Cambodia and as President of the International Commission of Jurists.

Dame Ann Ebsworth remembered

Justice Kirby began by paying tribute to Dame Ann Ebsworth recording a few personal facts about her: "Ann Ebsworth was born on 19 May 1937. She read history at the University of London where she was known as a formidable debater. In 1962 she was called to the Bar by Gray's Inn. Her practice, which was in Liverpool, was predominantly criminal with some family work (which increased) and some civil (which diminished). She rose to be head of her chambers. She was known as a considerable adversary, particularly in criminal cases. She was described as an "… effective and formidable advocate, thorough in preparation, lucid and courteous in style and entirely unflappable". She was appointed a Northern Circuit judge in 1983. In 1992 she became the sixth woman to be appointed to the High Court but the first to be assigned to the Queen's Bench Division. It was no mean feat. Tim Dutton has recalled her as 'formal and slightly formidable as a judge,' but 'a kindly and self-effacing person'. At her memorial service, Mr. Justice Hedley said that she was a 'model judge who stood no nonsense from unprepared barristers'. She conducted a large number of difficult trials, was rarely appealed and even more rarely reversed.

"Ann Ebsworth did not marry. After her mother died, she lived with her father. He died soon after she was appointed to the High Court. She cared deeply about the law, but even more deeply about justice. She was not a strong supporter of affirmative action for women or anyone else. She had a belief that talent would shine through. At least in her case, it did.

"In 2000 she was diagnosed as suffering from mesothelioma, a deadly and particularly painful form of cancer. She continued with her work and with teaching advocacy as long as possible, facing her illness, in Baroness Hale's words, "with the same quiet courage and determination that she handled all her professional life". Dame Elizabeth Butler-Sloss has described to me how she fought

Appellate Advocacy – New Challenges (continued)

Justice Kirby and Lord Woolf after the lecture

against her condition bravely, continuing to sit as a judge for as long as she could. Her ambition was to be a good judge. The inauguration of this series of lectures indicates the opinion of her professional colleagues that she greatly succeeded in her aim. Dame Ann Ebsworth's funeral was conducted at Gray's Inn on 10 April 2002."

The 'Rules' of Appellate Advocacy

Justice Kirby then turned to the topic of his lecture "Appellate Advocacy – New Challenges". Talent in advocacy he said had "traditionally been viewed as a natural gift rather than a skill to be developed". However, in recent decades it had "increasingly been recognised that advocacy skills can be improved and sharpened" by formal advocacy training. "At its heart, advocacy is always about persuasion... there is no single objectively correct style of advocacy" however "it is possible to identify a number of common characteristics shared by effective advocates". He went on to list what he called "ten rules or suggestions" that provided "a starting point for advocates wishing to refine their advocacy skills before appellate courts:

1) Know the court or tribunal that you are appearing in;
2) Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before;
3) Use the opening of your oral submissions to make an immediate impression on the minds of the decision-makers;
4) Conceptualise the case, and focus the attention of the court directly on the heart of the matter;
5) Watch the bench;
6) Give priority to substance over attempted elegance;
7) Cite authority with care and discernment;
8) Be honest with the court at all times;
9) Demonstrate courage and persistence under fire. You will generally be respected for it; and
10) Address any legal policy and legal principles involved in the case".

In Justice Kirby's view "the central aim of advocacy being to persuade a decision-maker has remained the same throughout history. It will remain the aim of advocates in the future. The need for advocates to be able to communicate complex ideas and arguments will always constitute the touch-stone by which an advocate is judged. In these remarks I am therefore addressing eternal verities. I do so with proper modesty remembering that what impresses me may not necessarily impress others."

It is perhaps every barrister's nightmare not only to perform badly in Court but for that fact to be broadcast outside the four walls of the Court. On that topic, Justice Kirby had some uncomfortable news for the listeners: "In a collegiate court it is common, virtually inevitable, for the judges, on leaving the courtroom, to comment on the performance of the advocates of the day. I regret to tell you that sometimes the comments are less than flattering. One colleague of mine in an earlier time used to keep a list of the 'First Eleven' – not the best advocates but the worst. He delighted in promoting new members to his list – and not a few judicial colleagues joined in with enthusiasm".

Procedural Changes

Justice Kirby believed however that the art of advocacy was changing: "Significant changes have occurred to the environment in which appellate advocates, in particular, must work". He cited such examples as "changes to court procedures and the arrival of increasing numbers of female advocates and advocates from ethnic and other backgrounds …also… significant developments in the tools available to assist advocates…through technological advances such as the internet and other computer technologies." Two of the most significant procedural changes, to his mind, were the "increasing use of written submissions and the introduction of time limits for oral submissions".

The increasing use of written submissions had been accompanied by the introduction of time limits in the High Court on applications for special leave to appeal, though not yet for the appeal hearings themselves: "Applicants and respondents are limited to twenty minutes each for oral submissions. The applicant then has a maximum of five minutes in reply. Green, amber and red lights directly in front of the Bench and Bar table to warn of the time advocates have left to complete their oral submissions." Somehow, I could not picture these 'traffic lights' on the judges' bench in the somewhat rarefied atmosphere of our High Court or Court of Appeal.

Generally, this system has worked well. It requires "a concentration of mind and focus of advocacy in a way that open-ended time does not. But it also demonstrates that most cases are susceptible to efficient presentation, so that their importance in legal and factual terms can be explained to experienced decision-makers in twenty minutes".

Justice Kirby spoke too about the development of electronic technology and its "great implications for the justice system and the shape of advocacy within it". These included the more familiar (to us) use of video-link technology, but also covered the more fundamental changes in technology that were changing the way in which advocates are presenting information to decision-makers. He talked of "electronic hyperlinked briefs, being briefs recorded on CD-ROM and containing not only the text of submissions but hyperlinks to all cited references, already being filed in the United States", since 1997. Occasionally (very rarely), we were told, such CD-ROMs had been offered to the bench in Australia: "So far the response had generally been the same puzzlement, and even lack of welcome, that to the first attempts, thirty years ago, to hand up written submissions occasioned". There was however recognition that multi-media briefs open up the possibility that in the near future "… a judge need no longer put down a printed brief to pull a law book from a library shelf. No longer will he or she have to dig through a multivolume appendix to find a documentary exhibit or set up a VCR to play a videotaped excerpt of testimony".[3] In addition such technology "may allow an appellate judge to experience aspects of the original trial almost as if he or she were there" with for example "a direct hyperlink to a video-recording of the critical moments in the trial, as opposed to being confined to written references to the transcript page". For those of you who struggle daily with the Herculean task of getting a trolley bag into the

Appellate Advocacy – New Challenges (continued)

boot of your car or carrying it down tube station steps, an answer it seems could be in sight.

Furthermore "the use in Australia of internet-based research tools has revolutionised legal research. Research can now be conducted more quickly and more thoroughly. The internet provides every advocate and every judge with a practically unlimited pool of information. Indeed, it is the very immensity of the sources that presents a new challenge to the advocate".

The arrival of female advocates

Justice Kirby had left to last "a development exemplified by the life of Ann Ebsworth…the arrival of female advocates". It was "not until 1905 that Grata Flos Greig became the first woman admitted to legal practice in Australia. It would take a further 52 years before Miss Roma Mitchell, in Adelaide, became the first woman to be appointed as Queen's Counsel". She was also the first woman to speak in the High Court, as a junior in 1937, though it was only the next year that Miss Joan Rosanove actually had a 'speaking part' in a High Court hearing.

In many Australian law schools, women now account for over half of the graduating law students: "Nevertheless, in the sphere of advocacy this change is happening slowly… there is still a considerable disparity between males and females in terms of numbers at the Bar. In New South Wales, for example, only 14.7% of barristers and 3.2% of senior counsel are female.[4] A recent study in Australia showed that male barristers were significantly more likely than female barristers to nominate appellate work as an area of their practice".

In the ten years that Justice Kirby had served on the High Court of Australia there had been "comparatively few female advocates with 'speaking parts'". The numbers appeared "if anything, to be declining". In 2004, fewer than 7% of the advocates appearing before the Court, in appeals, summonses or special leave applications, were women. Justice Kirby found it "difficult to understand why one hundred years after the first woman was admitted to legal practice in Australia, there is still such a gap between the numbers of men and women appearing as advocates before the highest court". The reasons, he thought, seemed "to lie deep in legal cultural and professional attitudes". When he served as President of the Court of Appeal of New South Wales, the position was "no better than in the High Court… proportionately, it was probably worse. In 1996 there were no women Judges of Appeal in New South Wales. Now there are two in a court of thirteen, although women judges of the State Supreme Court sometimes participate as Acting Judges of Appeal in the State Court of Criminal Appeal".

He thought that "factors such as the prevailing masculine culture of the Bar, the difficulties of reconciling some aspects of life at the Bar with family responsibilities, and the continuing impact of patronage on briefing decisions" combined "to produce a sometimes aggressively male environment in which it is not entirely surprising to find a lack of women". It need not be so, however. As Justice Mary Gaudron used to say "although there may be genetic factors at work in skills of communication, there is no evidence that the relevant genes reside on the Y chromosome". Justice Kirby said "the standard response to these statistics is simply to counsel the need for patience. But how much time is required?" Furthermore "does this disparity matter?" In his opinion, it does: "At its most basic level, discrimination of any form should be a matter of concern to every member of the affected profession". But additionally "we should

Dame Ann Ebsworth, 1937-2002.
Barrister, Judge, Friend. A passionate supporter of good advocacy.

be concerned about gender disparity because it does have significant practical implications. Women bring a different perspective to the practice and content of the law. Inevitably it is reflective of their different life experiences. The lack of senior female advocates also has important ramifications for the composition of the judiciary. This has consequences for public confidence in the judiciary…and…for the way cases tend to be viewed in court". It is no coincidence in Justice Kirby's view, "that a recent comprehensive survey of homophobia in Australia revealed that such attitudes are markedly less prevalent amongst Australian women than they are amongst men[5] – especially older men of the type who are now occupying, or aspiring to, judicial appointment". He did not know whether the same was true in Britain, however, "as a homosexual man himself, and a judge, it is data that makes me sit up and pay attention when I consider the composition of the judiciary".

So what can be done to improve the number of women advocates? Clearly there is no single easy solution that will ensure equal opportunities for women as advocates. A number of recent initiatives have been tried in Australia addressing some of the practical issues confronting female advocates such as "the push for equitable national briefing policies in the large legal firms and by government clients and the introduction of an In-Home Emergency Child Care Scheme launched by the New South Wales Bar Association". It is also important he believes "to examine practical ways of modifying the culture at the Bar so that it becomes a more welcoming environment for female advocates". It is a big task in Justice Kirby's view to just "keep telling female advocates to steel themselves and be a little brutal back".

New challenges in advocacy

Justice Kirby's recurrent message was clear. Whatever the challenges of globalisation and technological developments and despite the many changes affecting appellate advocacy, "the fundamental purpose of advocacy remains the same. The tools at hand will continue to develop beyond contemporary recognition or imagination. Yet the fundamental challenge of an advocate is constant and never-changing – to persuade the minds of others to meet in agreement with one's argument. The terrors of advocacy, especially for the young or inexperienced, remain the stimulus of each succeeding generation of advocates as they rise to address decision-makers. The joys of advocacy, after a day in court when the tasks have been well and skilfully done, particularly when crowned with success, are greater than virtually any other vocation can promise – a heady mixture of intellect, emotion and drama - sure to get the adrenalin flowing. The challenges of advocacy are greater today than ever – because of changes in the law, in society, in its values and in technology".

"It was timely", for us "in honour of Ann Ebsworth, to gather to reflect on these terrors, joys and challenges. She like all of us, knew them all in due season. That we can do this together, as advocates and judges from the opposite sides of the world, and still share so much in common, is a tribute to the barristers and judges of this city over eight centuries…For her contribution by example and teaching, we honour a vital vocation by honouring Ann Ebsworth".

It was a thought-provoking address well received by all present. It was also, without a doubt, a fitting tribute to the woman and jurist that so many had come to honour and remember.

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[3] F Gindhart quoted in: F I Lederer, "The effect of courtroom technologies on and in appellate proceedings and courtrooms" (2000) 2 Journal of Appellate Practice and Process 251, at p. 263.

[4] Ibid, at pp. 25-26.

[5] M Flood and C Hamilton, "Mapping Homophobia in Australia", Australia Institute Webpaper (July, 2005). Accessed at <www.tai.org.au>.

Giving a Good Name to Bad Character

Professor David Ormerod of Leeds University, editor of the Criminal Law Review, author of Smith and Hogan, and hailed as 'the quintessential "practitioners' academic"', last year provided Circuiteer readers with a guide to the hearsay provisions of the Criminal Justice Act 2003. He now turns his attention to 'bad character' with the added benefit of a further year in which the Act has been in force

The character provisions of the Criminal Justice Act 2003 are among the more controversial not only of that Act but of recent criminal justice legislation. After over a year in force, and with some 20 odd cases decided by the Court of Appeal what can we learn?

Preparation

From the outset the Court of Appeal was anxious that the provisions will generate delaying and costly "satellite litigation" (e.g. as to proving convictions and their detail).

Is a failure to comply with notice fatal?

So far the CA has upheld convictions where there was no prejudice from the failure. It would be dangerous to expect that generosity to continue. The Court's discretion to extend the time limit under CPR 35.8 is not limited to exceptional cases. Two factors to consider in any application will be whether there was a good explanation for the delay and whether D suffered any prejudice: *R (Robinson) v Sutton Coldfield Magistrates Court.*[1]

Proving that the convictions relate to D

Practical difficulties arise where D denies that the recorded convictions relate to him.[2] Three solutions have been advanced:

- s.117 of the 2003 Act admits documents recording the fact of D's convictions where that is all that is to be proved: *Humphris;* [3]
- the coincidence of dates of birth or unusual names and addresses may suffice: *West Yorkshire Probation Board v Boulter;* [4]
- Even in a case where the personal details are not uncommon, a match will be sufficient for a *prima facie* case, which in the absence of evidence to the contrary, will be sufficient. D's failure to give evidence in rebuttal will be a matter to take into account and may trigger an adverse inference under the CJPOA 1994, s.35: *Pattison v DPP.* [5]

Is the evidence "bad character"?

Under ss. 98 and 112, "bad character" is evidence of misconduct or of *disposition towards misconduct,* and ""misconduct" means the commission of an offence or other reprehensible behaviour." In *Renda*[6] the Court held that the word "reprehensible" carries with it "some element of culpability or blameworthiness." Counter-intuitively, it would sometimes seem better for the defence to argue that the evidence is bad character so that the prosecution must pass through one of the seven gateways to admissibility. For example in *Manister,*[7] it was held that a 34-year-old having consensual sex with a 16-year-old was not per se reprehensible and that evidence was admissible under the general rules of relevance. Other interesting issues include:

- Are *allegations* of criminal conduct bad character? The early cases doubted this *(Bovell and Dowds*[8]*)*, but in *Smith*,[9] the CA admitted allegations of sexual offences made against D in cases which were stayed as an abuse of process. The CA relied on Z[10] where the HL allowed acquittals to be admitted as similar fact under the old law. Are acquittals distinguishable because unlike mere allegations they involve enough evidence for a prima facie case?
- Evidence that a person was an alleged victim is not usually "misconduct" or "bad character": *Hong Qiang He.* [11]
- If the bad character has to do with the alleged facts of the offence with which the defendant is charged, (s. 98(a)) it is not caught. See *Duggan*,[12] where a racially aggravated public order offence occurred minutes after the alleged assault being tried.

What constitutes bad character is a difficult and fact dependent question. Prosecutors and need to err on the side of caution by complying with the notice requirements if in doubt.

Bad Character Evidence of Non-Defendants

The Act is designed to protect non-defendants, whether witnesses or not, from having their character revealed unnecessarily at trial. Note in this regard the Prosecutor's Pledge to:

> *"Protect victims from unwarranted or irrelevant attacks on their character and seek the courts intervention where cross-examination is considered to be inappropriate or oppressive."* [13]

A structured approach to admissibility might be suggested:

- Is the evidence relevant?
- Is it evidence of bad character? (s. 98);
- Have all parties agreed to the use of the evidence? (s. 100(1)(c)) If not, leave is required (s. 100(4));
- Is the evidence important explanatory evidence? (ss. 100(1)(a));
- Is it of substantial probative value? (ss. 100(1)(b) and (100(3));
  - ➢ Where substantial probative value is being considered, has the court had regard to all the factors in s. 100(3)?
- Is this a sexual case? If so the restrictions in s.100 operate cumulatively, with those under s 41 if the YJCEA 1999 to protect the complainant.
- Have the jury been directed as to the significance of the evidence?

There are several cases which have already fleshed out the bones of s. 100.

- The prosecution are not obliged to investigate their proposed witnesses in response to defence "questionnaires" about witnesses' life histories: *R v (Gleadall) v Huddersfield Magistrates' Court.*[14] The disclosure rules are designed to ensure that D has sufficient information.
- With joint trials there may be tactical decisions about who is prepared to attack the witness' character: *Razaq.*[15]
- Section 100 (1) does cover matters of the witness' credibility: *Yaxlev-Lennon.*[16]
- Section 100 will only allow for the admissibility of bad character evidence where that evidence is relevant to some issue: Osborne.[17]
- The trial judge must explain the uses to which the evidence might be put under s.100: *Razaq.*

The Defendant's Bad Character

Again a structured approach might be suggested:

- Is it evidence of bad character? (s. 98)
- Does it relate to this defendant?
- Is it evidence which proves the fact only of a conviction or does it prove the manner of the commission/reprehensible conduct?
- Is a relevant gateway open? (s.101);
  - ➢ Parties agreed? (s. 101(1)(a));
  - ➢ Intentionally given / elicited by D? (s. 101(1)(b));
  - ➢ Important explanatory evidence? (s. 101(1)(c));
  - ➢ Important matter in issue between defendant and prosecution? (s.101(1)(d)); if so should the evidence be excluded under s 101(3)?
  - ➢ Substantial probative value in relation to an important matter in issue between D1 and D2? (s. 101(1)(e));
  - ➢ Correcting a false impression given by the defendant? (s. 101(1)(f));
  - ➢ D has made attack on another person's character? (s. 101(1)(g)) If so should the evidence be excluded under s 101(3)?
- Should the evidence be excluded under s.78 of PACE where applicable?
- For what purpose is the evidence being used – to attack credit or for propensity?
- Have the jury been warned to avoid conviction on prejudice rather than evidence?

Unsurprisingly, there have been more appeals under s.101. Some have proved more controversial than others, in particular, *Highton*[18]

which held that once evidence of bad character is admitted under one of the gateways, it may be admitted for any purpose for which it was relevant. This has been applied by the CA in *Somanthan*[19] and in *Edwards.*[20]

Section 101(1)(a)
This should not present problems for any party.

Section 101(1)(b)
Although straightforward, the judge must be careful to direct the jury properly on the uses to which previous convictions might be put: *Edwards.*[21] Beware: once admitted under this gateway evidence can be relied on as propensity evidence: *Enright and Gray.*[22]

Section 101(1)(c)
Defence advocates were rightly wary of "background evidence", as it used to be called, since it served "as a vehicle for smuggling in otherwise inadmissible evidence for less than adequate reasons": *Dolan.*[23] Caution should still be exercised: see *Chohan.*[24]

Section 101(1)(d)
Evidence of bad character is admissible where it is probative of a matter in issue between the prosecution and defence. This can include, but is not limited to propensity. There is no additional hurdle as with similar fact evidence; if the evidence of D's bad character is relevant to an important issue between the prosecution and the defence, it is admissible unless challenged:

> "The 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria … the approach is no longer one of inadmissibility subject to exceptions."[25]

The CA has on one occasion at least held that the evidence of a previous conviction was not relevant to an important matter in issue: *Van Nguyen.*[26]

Where propensity to commit the offence is relied upon, according to Hanson, three questions need consideration: 1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged? 2. Does that propensity make it more likely that the defendant committed the offence charged? 3. Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?[27]

Propensity can be proved by evidence of a conviction for an offence of the same description as the one with which he is charged (s. 103(2)(a)), and can be proved by evidence of a conviction for an offence of the same category as the one with which he is charged (s. 103(2)(b)).[28] Where propensity is relied on, the case law *(Hanson, Edwards, Highton, Renda and Weir)* makes clear that the prosecution can rely on the bad character which demonstrates a propensity of the kind charged even where it is not "similar fact", and where the earlier bad character is not an offence of the same description, and where the earlier bad character is not an offence of the same kind as described in s 103.

Some things to bear in mind in s.101(1)(d):

- Even when considering offences of the same description or category, it is important to examine each individual conviction;
- Unless there is evidence of the detail of the earlier offence, even if it is of the same kind, it will not necessarily be admissible under this gateway: *R v L.*[29]
- Sentences passed will not normally be probative for the Crown, but may be for the defence;
- There is no minimum number of events necessary to demonstrate a propensity. One event (from 12 years previously) was sufficient in *Pickstone;*[30]
- The fewer the number of convictions the weaker is likely to be the evidence of propensity;
- A single previous conviction for an offence of the same description or category will often not show propensity, but it may do so e.g. in child sexual abuse or arson: *Hanson;*[31]
- The prosecution can cross-examine D on his bad character as adduced under s 101(1)(d). This will usually be to drive home the similarities in the conduct with that now charged: *Smith.*[32]
- Propensity for untruthfulness is not proved by dishonesty convictions per se. It requires proof either that by showing that D was demonstrably disbelieved by the jury or by showing that the manner in which the offence was committed shows a propensity for untruthfulness, e. g., fraud, e.g. *Fysh.*[33]

Two Judicial Discretions!

Section 101(3) provides that evidence must not be admitted under s. 101(1)(d) where "it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." A judge might take into consideration: the respective gravity of the past and present offences; the date of the offences (commission rather than conviction, if different) the strength of the prosecution case; the presence of other evidence (where there was no or very little other evidence against a defendant, it was unlikely to be just to admit his previous convictions, whatever they were). In addition, following Highton, the discretion in s.78 PACE also applies.

Judicial warnings

The judge's discretion under this gateway is a broad one:

> *"The judge's job is to police the gateway not to embark on the jury's job of evaluating the evidence."* [34]

Most recently, in *Clarke*[35] the Court of Appeal allowed an appeal against a murder conviction in part because the judge had failed to explain to the jury the significance of the evidence adduced under this gateway.

Section 101(1)(e)
"Simply because an application to admit evidence of bad character is made by a co-defendant, the judge is not bound to admit it": *Edwards.*[36]

Section 101(1)(f)
Merely denying the offence will not trigger s.101(1)(f): Somanathan. If D gives an elevated account of e.g. his military service or of his employment, the section may be triggered: Renda. Under s.105(3) D can withdraw or dissociate himself from a false impression, but not by merely conceding in cross-examination that he has lied: *Renda.*

Section 101(1)(g)
Section 101(1)(g) allows relevant evidence to be adduced whether or not D testifies. It has the potential to operate harshly. In Ball, D in interview under caution calling the rape complainant a "slag" was sufficient to trigger s 101(1)(g). Earlier authorities continue to provide guidance whether an attack has been made on another's character: Hanson. This gateway is subject to the discretions in s.101(3) and s.78 of PACE. *In Bovell and Dowds,*[37] the CA explained that fairness in s.101(3) is not dictated solely by D's motive in attacking the witness. Applying Highton, once evidence has been admitted under this gateway it may be relied on for propensity where relevant. This operates harshly where the earlier offences are of a similar nature to that charged: see e.g. *Carp.*[38]

Jury Warnings

Conscious of the danger in admitting character evidence before the jury, the CA has been insistent on adequate warnings:

> "Where evidence of bad character is admitted, the *judge's direction is likely to be of the first importance.* .. It may .. need to pull threads together on an issue where the ground may have shifted considerably since the evidence was admitted. *In an appropriate case, the judges direction may need to underline that given the course taken by the trial, the evidence of bad character is by then of very little weight indeed*" (emphasis added).

Is the Court of Appeal striking the right balance?

This is difficult to assess at this early stage. It was clear from the first appeal on substance in *Hanson*[39] that the Court was not going to tolerate "routine" prosecution applications to adduce evidence of bad character simply because a defendant had previous convictions. There was a welcome emphasis that convictions must be based on the *evidence* not *prejudice.* Although the CA is giving effect to the statutory intention by allowing more bad character to be adduced, it counter-balances that by emphasising the need for detailed scrutiny of the bad character to assess its probative force, by superimposing the s.78 discretion on the statutory scheme and by insisting on careful jury warnings.

[1] [2006] All ER (D) 28 (Feb).
[2] *R v Derwentside Justices exparte Heaviside* [1996] RTR 384.
[3] [2005] EWCA Crim 2030.
[4] *The Times,* October 11, 2005, D.C.
[5] [2005] EWHC 2938.
[6] [2005] EWCA Crim 2826.
[7] [2005] EWCA Crim 2866.
[8] [2005] 2 Cr. App. R. 27 para 21.
[9] [2005] EWCA Crim 3244.
[10] [2000] 2 Cr. App. R. 281.
[11] [2005] EWCA Crim 2866.
[12] [2005] EWCA Crim 1813.
[13] CPS website.
[14] [2005] All ER (D) 437 (Jul).
[15] [2005] EWCA Crim 2826.
[16] [2005] EWCA Crim 2866.
[17] [2005] EWCA Crim 2826.
[18] [2005] EWCA Crim 1985.
[19] [2005] EWCA Crim 2866 [45].
[20] [2005] EWCA Crim 3244.
[21] [2005] EWCA Crim 3244 [104].
[22] [2005] EWCA Crim 3244.
[23] [2003] Crim LR 41.
[24] [2005] EWCA Crim 1813.
[25] *Somanathan* [2005] EWCA Crim 2866.
[26] [2005] EWCA Crim 1985.
[27] [2005] EWCA Crim 824 [7].
[28] *Criminal Justice Act 2003 (Categories of Offences) Order 2004* SI No. 3346.
[29] [2006] All ER (D) 238 (Jan).
[30] [2005] EWCA Crim 824.
[31] *Ibid*
[32] [2006] All ER (D) 280 (Feb).
[33] [2005] All ER (D) 358.
[34] [2005] EWCA Crim 3244 [82].
[35] [2005] EWCA Crim 3244 [82].
[36] [2005] EWCA Crim 3244.
[37] [2005] EWCA Crim 1091.
[38] [2005] EWCA Crim 1985.
[39] [2005] EWCA Crim 824.

Treatment, Therapy and the Children Act

Jonathan Cohen, Q.C.

Last year, the House of Lords provided important guidance to family public law practitioners for some of the most difficult children cases. Jonathan Cohen, Q. C., and Charles Hale, who argued the case before their Lordships here summarise the outcome

Charles Hale

By now all public law family practitioners should be aware of the decision of the House of Lords in **Kent County Council v G and others (FC) [2005] UKHL 68.** The result was the reaffirmation of the line of decisions which drew a distinction between 'treatment' and 'assessment' for the purposes of determining whether an assessment fell within the provisions of Section 38 (6) of the Children Act. The background to the case is sadly not unique. The result for the family was exceptional.

The family background

E (the child at the centre of the appeal) was born in May 2003 and was the subject of care proceedings issued almost immediately upon her birth. The local authority had grave concerns because the mother's second child R had died following the infliction of a series of non-accidental injuries. In consequence J her eldest child, had been the subject of care proceedings and was at the time of E's birth, living with his paternal family.

In determining that a care order was necessary in respect of J, the court had been unable to determine which of R's parents was responsible for the injuries. R's father was neither the father of J or E and by the time of E's birth was no longer in the picture. Whilst not being able to find on the evidence whether the mother was or was not the perpetrator the court was forced to conclude that at that time the mother represented a substantial risk to J if he was returned to her care.

E's father was regarded as a far better prospect. He had no previous relevant history and nothing suggested that he was a threat to E's well being. Notwithstanding that, the Local Authority's very first care plan was to remove E from both her parents with a view to eventual adoption.

The beginning of the assessment

After a series of contested proceedings where the local authority sought to remove E from the mother's care under an ICO, E, at seven weeks, was eventually admitted with both her parents, and with their consent, to the Cassel Hospital. The purpose was a six to eight week in-patient assessment, but in the event this was extended for a further six to eight weeks when the court found that the initial report from the Cassel did not sufficiently address the risk which the mother posed to E. This extension was, again, consensual.

At the end of the three month period, the Cassel and the psychologist instructed by the local authority agreed that there was a significant shift in the mother's ability to address her involvement in R's death. Both agreed that with appropriate therapeutic intervention, the mother would be likely to develop responses sufficient to enable her to safely parent E and that this intervention would best take place by continued work with the Cassel Hospital. Although the psychologist thought that a community-based programme could be devised, there remained a real possibility that the therapy might not achieve success.

Further assessment

The parents sought a further direction for a residential assessment under Section 38 (6).

Dr. Kennedy, the Clinical Director of the Cassel Hospital, advised that a further four month period would be likely to be sufficient to conclude whether the mother was safe to parent E, with support, in the community.

The Council demurs

Kent County Council opposed that on the grounds that the court did not have the jurisdiction to order them to pay for what was treatment and in any event the cost was prohibitive. Like many local authorities, they argued that they were cash-strapped, and the costs of the Cassel proposal were disproportionate given the limited budget.

Their alternative plan was for E to be placed with her paternal grandmother and father (if he did not choose to live separately with the mother) with daily contact with the mother (who was without any accommodation) whilst the parents received some form of therapeutic treatment, the nature of which was inchoate. Johnson J. acceded to the local authority proposal.

The six month stay, and why

In the event, the further stay in the Cassel Hospital lasted for six months. This happened because (i) the programme became stalled until the outcome of the Court of Appeal proceedings was known, and (ii) at the end of the programme, the local authority had failed to secure accommodation for the family, who had nowhere to go. However, so successful was the programme at the Cassel that three months after discharge the care proceedings came to an end. All parties and the court agreed that no order was appropriate. Given E's history, it was a remarkable result. The family has remained settled in the community and is thriving. J now has staying contact with his mother and his half-sister, E. However, the total cost of the nine and a half month placement in the Cassel was in the region of £200,000.

The point of law

Given the outcome for the family, the local authority appealed on a point of general public importance only. It submitted that the statutory construction of S38(6) could not be extended to cover treatment. It asked the House to reinstate the judgment of Johnson J.

Much of the argument centered on the statutory purpose of S38(6) within care proceedings and the division of responsibility between the Court and the local authority in the determination of such proceedings.

Their Lordships conclude

The House of Lords concluded as follows:-

(i) The Court's powers are limited to permitting a process that can properly be characterised as "assessment" rather than "treatment" although all treatment is accompanied by a continuing process of assessment.

(ii) The powers are limited to a process which bona fide involves the participation of the child as an integral part of what is being assessed.

(iii) It is no part of an assessment under Section 38 (6) to conduct a continuing assessment

over an extended period to see if a parent can improve his or her capacity so as to safely parent. Per Lord Scott at para 24, "*There is no Article 8 right to be made a better parent at public expense*".

(iv) The court's jurisdiction is confined to obtaining information about the current state of affairs but that might include a forecast of what future progress might be possible. It does not extend to a continuing survey of the effects of treatment.

(v) The threshold criteria are drafted with reference to the present tense. Where the threshold is found or conceded but the proper order is in issue the capacity to change, to learn and to develop may well be part of the capability of a parent to meet the child's needs but it is still the present capacity with which the court is and must be concerned.

(vi) The Act did not contemplate that an examination or assessment ordered under Section 38 (6) would take many months to complete. It would be unusual if it were to last more than three months.

(vii) In summary, what is directed under Section 38 (6) must be an examination or assessment of the child, including where appropriate the relationship with the child's parents, the risk that the parents may present and the ways in which those risks may be avoided or managed, all with a view to enable the Court to make the decisions which it has to make with the minimum of delay. Any services which are provided for the child and family must be ancillary to that end. Per Baroness Hale at para 65, "*…the purpose of section 38(6) cannot be to ensure the provision of services either for the child or his family. There is nothing in the 1989 Act which empowers the court hearing care proceedings to order the provision of specific services for anyone*".

Having regard to the emphasis placed by the House of Lords on delay, it is ironic that the process of rehabilitation proceeded infinitely faster and more successfully as a result of the Cassel's intervention than would have been the case of the local authority plan had been accepted. That had envisaged a (less expensive) process in the community, which was likely to last for at least twelve months, during which time mother and child would have been living apart.

The effect of the decision

The effect of the decision is to place a considerable burden on the local authority in terms of parents' expectations. It is increasingly likely that an assessment will conclude with a prognosis that there is a capacity for change but which is yet untested at the date of the court decision. All would depend on the ability of the parents to match the expectations of what was necessary in order for them safely to parent with the assistance of such help as may be provided for them in terms of rehabilitation in the community.

The care plan provided by the local authority will in many cases have to provide for twin track planning as the capacity of the parents to change will be uncertain. Thereafter, the local authority will be under a heavy obligation to provide the services that are deemed necessary in order to see if the parents can make the changes. If an expert assessment centre has determined (through a S38(6) ordered assessment or otherwise) that the parents have the potential, it cannot be unreasonable for such parents—in the absence of local authority help or support—to refuse their consent to a child being permanently removed from their care. The onus is clearly upon local authorities to deal with such an obvious dilemma.

With the result of the parental capacity to change being still an open question at the time of the court decision, it is suggested that the court will want to examine particularly closely the care plan. The court will want to know what provision is being put in place so that this capacity can be assessed and determined and the child's ultimate future decided upon within a reasonable time frame.

It is important to remember

It is important to remember that the ability of the parent to change is not something that the House of Lords has determined is an irrelevant question to the assessment exercise. What is not permissible is the continued assessment of that capacity over an extended period.

Take for example the common situation of care proceedings initiated where the mother is herself a child/young person. Local authorities will have to satisfy the court that adequate provision has been made available to demonstrate her ability or otherwise to safely parent a child before it could properly be asked to dispense with her consent to adopt. That may take some considerable time. The fact that their Lordships have now determined that a court cannot order such services beyond initial assessment does not, we suggest, equate to a green light to authorities not to provide them.

Despite Lord Scott's obiter dicta about the state's non-duty to make better parents, **Re G** does nothing to water down European human rights jurisprudence in respect of the duties of the state and state bodies to take active steps to preserve and/or rehabilitate family life. The rights and duties enshrined in the cases of **K and T v FINLAND [2001] 2 FLR 707 and P,C. and S v UK [2002] 2 FLR 631** remind us that local authorities must be able to show in care plans that they have taken all reasonable steps in order to preserve/rehabilitate family life.

It will remain the case that in most assessments the ability to initiate change will be under review. It will be a rare assessment, of which **Re G** was an example, where there is no issue about the adequacy of the relationship between parent and child, the ability to bond or where the ability to cope with the child in stressful circumstances is not in question, and thus not in need of assessment.

Interim hearings

Baroness Hale indicated that in her view the Court should not be spending a full day hearing an application for an assessment under Section 38 (6). The process in **Re G** was relatively unusual, in that oral evidence had to be heard.

The case was further unusual, although not in the context of reported cases, in that it involved the Cassel Hospital. The Cassel conducts a two stage assessment. There is an initial period of six to eight weeks, after which those families thought unlikely to make progress are weeded out. In the second stage, which lasts about as long, the process is continued. Because of the 'half time eviction', the success rate of part two has traditionally been very high. To these authors' knowledge, this midway vetting process is unique to the Cassel. It has led, perhaps in retrospect unwisely, to the Cassel having described its stage one as assessment and its stage two as rehabilitation when in reality the same procedures and assessments are carried out in both phases.

Funding

The LSC has made it quite clear that public funding will not be available for anything that can be regarded as therapy or treatment (see Public Law Children Act Proceedings the Costs of Treatment, Therapy or Training, Legal Services Commission Focus December 05 Issue 49). It is absolutely essential, however difficult it may be, for any unit which seeks public funding for its work to make clear in any forecast exactly which part of its programme is therapy and which is not. Public funding will be provided only for that part of the assessment which is not therapy.

The House of Lords kept open the question of whether or not a Local Authority can be compelled to fund that part of an assessment which would not, for the reasons set out above, be picked up by LSC funding. This question will of course now only arise in those cases where the therapy or treatment is ancillary to the assessment of the child (with his/her family). In some instances the Health Authority may be persuaded to pick up that element of cost. In the view of these authors, there is nothing in **Re G** which should prohibit or inhibit the Court from ordering that element of the assessment costs which cannot otherwise be funded, but which are a necessary part of a legitimate assessment within Section 38 (6), should be paid by the local authority.

The last word on the difference between fixed and floating charges? In re Spectrum Plus

Our civil law 'correspondent', Tim Akkouh of New Square Chambers, explains why the question of fixed and floating charges is a matter of substance and not form, and means a great deal to businesses and banks alike

Spectrum Plus Ltd carried on the business of a manufacturer of dyes, paints and pigments for the paint industry. In 1997 it opened a new account with National Westminster Bank with an overdraft facility of £250,000. The overdraft was secured by a debenture, which included a 'specific charge [of] all book debts and other debts … now and from time to time due or owing to [Spectrum].' Furthermore, Spectrum was required to pay into its account with the bank "all moneys which it may receive in respect of such debts and shall not without the prior consent in writing of the bank sell factor discount or otherwise charge or assign the same in favour of any other person … and shall … if called … to do so … execute legal assignments of such book debts and other debts to the bank." Spectrum duly paid the proceeds of its book debts into its account, which remained overdrawn. The overdraft was never called in, nor was any demand made by the bank for Spectrum to assign the book debts.

When Spectrum entered into voluntary liquidation in October 2001 its account was overdrawn by £165,407. The bank sought to leapfrog Spectrum's preferential creditors in the insolvency hierarchy by asserting that their debenture over Spectrum's book debts was fixed and not floating; if successful, this argument would have yielded the bank an additional £16,136. Despite the comparatively small amount at stake, the appeal to the House of Lords raised a point of considerable importance. Several hundred liquidations had been put 'on hold' pending their Lordships' decision. In **In re Spectrum Plus [2005] 2A.C.680(HL)** a seven member House of Lords unanimously reversed a unanimous Court of Appeal and held that the charge created by Spectrum over its book debts was floating and not fixed. In the process, the House overruled the decisions of both Slade J in **Siebe Gorman & Co Ltd v Barclays Bank Ltd [1979] 2 Lloyd's Rep 142** and the Court of Appeal **In re New Bullas Trading Ltd [1994] 1 BCLC 485.**

(i) The importance of fixed and floating charges

At paragraph 95, Lord Scott gave a useful historical introduction to the importance of the distinction between fixed and floating charges: "*By the middle of the 19th century industrial and commercial expansion in this country had led to an increasing need by companies for more capital. Subscription for share capital could not meet this need and loan capital had to be raised. But the lenders required security for their loans. Traditional security, in the form of legal or equitable charges on the borrowers' fixed assets, whether land or goods, could not meet the need. The greater part of most entrepreneurial companies' assets would consist of raw materials, work in progress, stock-in-trade and trade debts. These were circulating assets, replaced in the normal course of business and constantly changing. Assets of this character were not amenable to being the subject of traditional forms of security. Equity, however, intervened [by permitting the creation of floating charges over such circulating assets].*"

Thus a floating charge has the potential of 'stepping in and sweeping off' virtually all of a company's moveable and intangible assets, leaving little or nothing for other creditors. To ameliorate this, the Insolvency Act 1986 introduced the categories of preferential creditors (who rank in priority to the holders of floating charges) and of unsecured creditors (eg company employees, in respect of certain claims to unpaid wages: see s. 175). More recently, a requirement that a proportion of the sums realised by some floating charge holders be made available to a company's unsecured creditors (see s. 176A). Hence, a chargee has a considerable incentive to argue that his charge is fixed and not floating. This is exactly what the bank sought to do in **Spectrum.**

(ii) The distinction between fixed and floating charges

Their Lordships held that if a company could deal with assets covered by a charge in the usual course of business, then that charge was floating and not fixed. Again, Lord Scott: "*…the essential characteristic of the floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future [crystallising] event. In the meantime the chargor is left free to use the charged asset and to remove it from the security.*" (para. 111)

On the facts of the case, the chargor could deal with book debts in the course of business. Although precluded from selling, factoring, discounting, assigning or charging them, it was not precluded from calling them in and paying them into its trading bank account. The House agreed that parties could not create a fixed charge over book debts and only a floating charge over their proceeds because "*the essential value of a book debt as a security lies in the money that can be obtained from the debtor in payment…*" (per Lord Scott at 110). He rejected the artificial dichotomy of book debts pre- and post-realisation: "*The categorisation depends upon the commercial nature and substance of the arrangement, not upon a formalistic analysis of how the bank clearing system works. If part of the arrangement is that the chargor is free to collect the book debts but must pay the collected money into a specified account, the categorisation must depend, in my opinion, on what, if any, restrictions there are on the use the chargor can make of the credit to the account that reflects each payment in*" (at para 116).

The ***Spectrum*** charge was, therefore, merely of the floating variety, as the chargor was free both to collect the charged asset and then to remove it from the security by making withdrawals from its bank account. In Lord Walker's words, the charge "*did not in any way restrict [the chargor] from taking the most natural course for a trader in the ordinary way of business, that is collecting the debts and paying them into its current account*" (at para 145). Nor did it matter that the bank *could* have exercised its contractual rights to terminate Spectrum's overdraft facility and demand that payment of proceeds from the book debts be made to a blocked account. In fact, it had not.

The House's analysis will make grim reading for banks wishing to maximise their security. Lord Hope, however, provided the banks with some solace by considering instances in which a charge over book debts would be fixed. At paragraph 54 he gave three such scenarios, namely: (i) where a chargor is under an obligation not to deal with book debts at all, (ii) where a chargor is under an obligation to pay the proceeds of those book debts to the chargee, or (iii) where a chargor is under an obligation to pay the proceeds of the book debts into a specific blocked bank account. However, their Lordships made it clear that it was not enough for the debenture to provide that payment was to be made to a blocked account, if in fact it was not operated as such an account.

(iii) Conclusion

The House's unanimous overruling of the Court of Appeal's decision in **Spectrum Plus** is to be welcomed. Expanding the situations in which fixed charges can be created is not only intellectually dubious, but is contrary to the intention of Parliament in implementing concessions for both preferential creditors and, more recently, unsecured creditors.

Mistaken Experts and Immunity from Suit

Some experts are beginning to have feet of clay but what can an aggrieved party do about it? Penny Cooper, Associate Dean at the Inns of Court School of Law and author of several articles on expert witnesses, sums up the current legal position.

What happens to an expert if he gives an opinion in court that turns out to be plain wrong? It is 'trite law' that witnesses including expert witnesses have complete immunity against civil actions in respect of evidence which they give in court **(X (Minors) v Bedfordshire CC [1995] 2 A.C.633]).** But what about a complaint to their professional body, on the basis that giving incorrect evidence in court is serious professional misconduct? That is what Frank Lockyer, former Chief Superintendent and Divisional Commander of South Wiltshire Police did in respect of the evidence given by Professor Sir Roy Meadow at the trial of Mr. Lockyer's daughter, Sally Clark. On 15 July 2005, the Fitness to Practise Panel (FPP) of the General Medical Council found those allegations true and struck off Professor Meadow. In January 2006, Collins, J. sitting in the Administrative Court quashed the findings of the FPP.

1 in 73 million

In 1998 Professor Meadow was asked by Cheshire Constabulary to provide a medical opinion on the deaths of the two Clark babies. Based on the medical evidence available, he concluded that these deaths had not been natural. He was relying on the findings of the prosecution pathologist, Dr. Williams, who did not reveal the fact that one of the children, Harry, had in fact been suffering from a staphylococcus aureus infection.

The general question of sudden unexpected deaths in infancy caused the Department of Health to commission what became known as the CESDI study, which had examined 472,823 live births over a three year period. It stated that the incidence of such deaths varied depending on family circumstances; that the likelihood of SIDS in a 'low risk' family was 1 in 8543, and that the risk of two infants dying by SIDS 'by chance alone' in such a family is 8543x8543 or 1 in 73 million.

Making the error

Early in October 1999 Professor Meadow was asked to attend a prosecution meeting where there was a discussion about the question of SIDS. It was then that he appended a handwritten supplementary statement which gave the chances of two infant deaths within a family of the Clarks' social circumstances as 1 in 73 million. In fact the figure 8543 should not have been squared: it could not be assumed that the deaths were independent of one another because families carry certain genetic and environmental pre-dispositions.

What the defence knew

The defence however were aware of these doubts. In response to Mrs. Clark's solicitors, Professor Fleming, a co-author of the CESDI report, faxed to them a letter which concluded that 'because of the extreme rarity of sudden death in families with none of these risk factors, the use of this risk score for such families is potentially much less reliable'. The letter arrived the day before Professor Meadow gave evidence. One of the defence experts was a joint author of the CESDI report.

In evidence, Professor Meadow did not volunteer that he was not an expert in statistics, but neither did Julian Bevan, Q. C. for Mrs. Clark challenge his expertise in this field. What Bevan did instead was first to suggest that the chance of the baby dying is the same each time, and then ask, 'Have you heard—I hope it's not too frivolous a remark to make but have you heard the expression "Lies, damned lies and statistics"?' In the event, the thrust of the second and successful appeal against conviction was the non-disclosure by the pathologist; 106 of the 133 paragraphs of Clare Montgomery Q. C.'s skeleton argument dealt with that. The Court however said that Professor Meadow's evidence might have been grounds as well if they had needed to consider it.

The appeal

Following the finding of the FPP, Professor Meadow appealed to the High Court. Collins, J. first looked in general at immunity from suit for a witness, including an expert witness, for the evidence he gives in court:

> *"Immunity from suit extends to the honest as well as the dishonest witness. It is based on public policy which requires that witnesses should not be deterred from giving evidence by the fear of litigation at the suit of those who may feel that the evidence has damaged them unjustifiably."*

This immunity does not extend to a report, even though it is used as the basis for later evidence. Collins, J. noted the specific difficulty in finding expert witnesses willing to be instructed in child protection cases:

> *"There can be no doubt that the administration of justice has been seriously damaged by the decision of the FPP in this case and the damage will continue unless it is made clear that such proceedings need not be feared by the expert witness."*

Not total immunity but . . .

He would not exclude complaints to professional bodies but they could only come as a referral from the trial judge (or, possibly, a later Court of Appeal)--not from a disgruntled party.

> *"Such a referral would not be justified unless the witness's shortcomings were sufficiently serious for the judge to believe that he might need to be removed from practice or at least to be subjected to conditions regulating his practice such as a prohibition on acting as an expert witness. Normally, evidence given honestly and in good faith would not merit a referral."*

Of the evidence on statistics, Collins, J. said that Professor Meadow made one mistake, "which was to misunderstand and misinterpret the statistics" but it was a mistake which was easily and widely made. Lapses must be serious to lead to a finding of serious professional misconduct in the absence of bad faith and "I am satisfied that the lapses in this case did not justify the finding"'. Professor Meadow's appeal was successful.

Experts meanwhile remain liable in one other respect, namely, costs. In **Phillips v Symes EWHC 2330 (Ch) [2004])** Mr Justice Peter Smith ruled that "in appropriate circumstances a third party costs order can be brought against somebody who was a witness and as a result of the manner in which he gave evidence". In this particular instance the witness was an expert.

The issue remains live

With these cases fresh in their minds, experts already think twice before accepting instructions notwithstanding the reassuring words of Collins, J. Already the GMC has said it is appealing the judgment though it is not seeking to reinstate its findings against Professor Meadow. David Pannick, Q.C. writing in The Times (14 March 2006) criticised the judgment: "regulation of the medical profession is the business of the GMC, not the judge" and the ruling is wrong because it "would make the proper regulation of professional standards dependent on whether the trial judge knows about and understands the relevant professional rule."

Immunity from disciplinary action may well be short lived for court experts.

Beautiful Guildford

Rowan Morton of Guildford Chambers provides the latest guide to a Circuit town and reveals the pleasures of being in this fine part of Surrey.

Guildford holds the perfect balance between bustling town life and rural tranquillity. The picturesque cobbled High Street holds the 16th century Guildhall and the impressive Abbot's Hospital, built by the Archbishop of Canterbury in 1619. Leaving the main town on foot you will soon stumble upon the rolling hills of Guildford and the beginnings of a beautiful National Trust countryside.

Getting to Guildford

Guildford has got excellent transport links, with up to eight trains an hour to Waterloo, half of which are fast services taking little over half an hour. If you arrive by train the court is a pleasant 5 – 10 minute walk away over the River Wey footbridge. If you are coming by car, the A3 is a great link from Southampton to London. The nearest car parks to the court are Bedford Road and Mary Road. The York Road car park is a convenient and cheap long stay car park (50p per hour £4 all day) that allows you to avoid the one way system and pay on your return, always a bonus when in court for an indeterminable time.

The Courts

The crown court in Guildford is not huge so you won't get lost. The Advocates' area is immediately to your right as you go through the security. It consists of a long corridor with small rooms branching off. Sadly one of these rooms is still a smoking room, with no ventilation, so of course every room feels like a smoking room. Go through the last door into the robing room and things are a little fresher, but often (not surprisingly) over crowded. You must sign in as with most crown courts now. The CPS and Probation rooms are further over the right hand side of the building, as are the cells. Don't be surprised if you don't find anyone in the CPS room; just ask the front desk to tannoy for you.

The magistrates' and county courts are part of the same building and just across the car park from the crown court. You will have no trouble navigating your way around there. The only confusing parts are that the Magistrates' Youth Court is not always a Youth Court (Court 4) and the Magistrates' Court 7 is in fact on the County Court side.

A quick bite

The crown court has an average café, but the magistrates' and county courts have no catering facilities. Being so close to the town there is no excuse not to take advantage of it. I would recommend heading across the road towards the church. At the top of Leapale Road tucked away in the alley between North Street and the High Street is the Juice Bar which serves fantastic fresh sandwiches and will make you up pretty much anything. Alternatively you could try The Eclectic Theatre's Café Bar & Riverside Terrace towards the river at the bottom of the High Street. It is hard to imagine eating outside in Guildford after the bitterly cold few months we have had, however the terrace at the Eclectic is an ideal meeting place in the summer months.

A more substantial feast

If you are planning on entertaining clients or you have a bit more time on your hands there are some great restaurants in Guildford. Here are just a few that come highly recommended:

Olivo, Italian cuisine on 53 Quarry Street (01483 303535) Dinner £30, lunch £15.
Mathari, Far-East cuisine on Chapel Street (01483 457886) Dinner £25, lunch £10.
Thai Terrace, Thai cuisine on Sydenham Road (01483 503350). Dinner £30, lunch £13.

At the end of the day

If you are looking for something a little livelier at the end of the day there are plenty of bars in Guildford. I would suggest avoiding the cluster near the station and heading slightly further in to town for a better quality of venue. A usual jaunt is the Five and Lime on Leapale Road (01483 568979). They do good bar snacks and a large wine which I swear gets bigger every time I go. After time at the bar, still about 11pm in Guildford, your choices are limited. Guildford's nightlife is not much to speak of, but of course with a case the next day and work to be done, that won't be a huge disappointment to most.

Places to Stay

If you are coming from far away and are toying with the idea of staying in Guildford I would recommend the much loved Asperion Hotel. It is a contemporary luxury small hotel, privately owned and passionately run. It has recently undergone half a million pounds' worth of renovations and has been awarded its fourth AA star rating. Only a 5 minute walk from the station means it is ideally located for the court as well. Prices are very reasonable at £50 single and £85 double with breakfast (01483 579 299). There is a very decent Holiday Inn a bit further out, towards the cathedral but still only 1.5 miles from the centre at similar rates. At the other end of Guildford, still a walk into town is Blanes Hotel (01483 573171), also fairly well recommended.

Haven of Rural Tranquillity

Guildford has 31 countryside sites to visit from Scheduled Ancient Monuments to Local Nature Reserves. If you really do have some spare time on your hands the real enthusiast should try the 39 mile Fox Way circuit of walks through the beautiful and varied countryside of Guildford.

You would be hard pushed not to walk over the River Wey whilst visiting the town. It was one of the first British rivers to be made navigable, and opened to barge traffic in 1653. If rivers are your thing then the National Trust visitor centre at Dapdune Wharf will give you an insight into Surrey's secret waterway. Alternatively in the summer why not hire a narrow boat from the Millbrook boat house and stop off at the popular Weyside public house (01483 568024).

Guildford's cathedral is the only cathedral to have been built on a new site in southern England since the Reformation. It can be seen for miles around, from its commanding position on Stag Hill and is only a minute in the car from the A3: University turn off. The interior is even more impressive than the exterior and guided tours cost only £3 but must be booked a couple of weeks in advance, which of course is a lot of notice for members of the Bar.

This really does only scratch the surface of what Guildford has to offer but it hopes it gives a useful insight into this beautiful town. Just be sure to venture further than the rail station and the court.

Don't Miss Belfast

Belfast ironically is not the obvious place to celebrate St. Patrick's Day but for Tetteh Turkson of 23 Essex Street, who grew up there, it was a fine homecoming and an experience he recommends to us all.

Over St Patrick's weekend I rekindled my love affair with the city in which I grew up - Belfast.

Getting there

Getting to Belfast is extremely easy from the south east. Cheap flights are available from most UK carriers to two Belfast destinations. Belfast International Airport is as much in Belfast as Gatwick is in London. As a result, flights to it are often cheaper than to the other airport which I will always call Belfast City Airport, but which has been recently renamed George Best Airport. I was born in Carrickfergus and the most common flight path to the City Airport comes down Belfast Lough offering a splendid view of Carrickfergus Castle.

Where to stay

The great theme of Belfast today is development and that is nowhere more apparent than in the availability of hotel rooms. New hotels have sprung up as part of the peace dividend. Jury's, Hilton and Malmaison have all opened hotels in the city since the 1994 ceasefire. Older hotels include the Europa Hotel - infamous as the most bombed hotel in Europe, but spruced up just before the ceasefire. The Wellington Park Hotel and the Stormont Hotel are also long established. As I stay with friends in Belfast, I am not in a position to give a personal recommendation, although I have heard good things said about the Stormont Hotel.

What to see

With an eye on this article I tried to do some of the things that one might like to do as a tourist. A weekend just is not enough. Nor do I have the space to cover everything here. If you hire a car, favourites such as Carrickfergus Castle, the Antrim Coast Road, the Glens of Antrim, the Giant's Causeway and the Bushmills Distillery are all within reach and rewarding.

Stormont: No legislating but great gardens

The handicap of having grown up somewhere is that you tend to take things for granted. One example of this is St Anne's Cathedral. Many days I passed it without realising that it has Ireland's largest Celtic cross; this trip marked the first time I went inside. Although I may be biased I found St Anne's beautiful. The interior's mix of red, white and dark stones and maple and redwoods have a wonderful effect. St Anne's is currently raising money for a spire and the immediately surrounding area is in the grip of development. When completed the Cathedral Quarter is intended to be the focus of Belfast's arts and cultural scene.

In those moments when Northern Ireland has been trusted to pass its own laws, the Stormont Buildings have been the centre of government. Sadly the buildings are seldom open to the public and not at all to tourists. Nonetheless the mile long avenue up a hill to the neo-classical main building is impressive. There is public access to the substantial gardens and there is a children's play area, somewhat incongruously in the shadow of the buildings. In contrast Belfast City Hall, in the very centre of the city is open for public tours from Monday to Friday during office hours.

Take the bus

The one tourist trip I had always meant to take was the open bus tour. For £10 you can hop on and off the tour bus with its helpful and knowledgeable guide for 24 hours to your heart's content. The tour takes in the murals of West Belfast, the crumbling and currently empty site of Crumlin Road Courthouse and Prison, the Victorian splendour of Queen's University, and the developing Titanic and Cathedral Quarters. The total bus tour took about an hour and a half, and with the delay of our very own Orange Parade holding up traffic on the Shankill Road. It was well worth while and brought home to me how much of the city is being - and has been - redeveloped. The Waterfront Hall, a performing arts venue, is a great facility, as is the Odyssey Centre - described as an entertainment and education venue.

The view from the tourist bus

St. Patrick's Day in Belfast is, compared to many cities with Irish communities, a muted affair. The main problem is that the symbolism of St Patrick's Day is also the symbolism of Eire. A sizeable minority of Belfast residents consider anything Irish as pretty toxic. As a result, this year marked the first council-sponsored official parade and concert in Belfast.

Rugby at home

I wanted to do something that was more traditionally Belfast. One St Patrick's Day tradition is the Ulster Rugby Schools' Cup Final. Whilst the other forms of football also have their finals on St Patrick's Day, the rugby competition is the second oldest in the world, having been fought over for some 130 years. I went to watch along with an estimated crowd of 10,000 at Ravenhill - the home of Ulster rugby. The atmosphere is perhaps most akin to the Boat Race. The crowd is a mixture of schoolchildren, former pupils (of which I was one), those who have a link to the schools involved (however tenuous), rugby fans, and various random other people who just go for the day out. As a rugby fan and a partial observer I loved it. If you miss the once a year treat and want to watch some rugby in a great but no frills atmosphere then check to see if Ulster are playing at home - most games are on a Friday night.

Where to drink—and eat

The intervention of the 6 Nations meant that I spent most of Saturday in a bar. Bars are something that Belfast has never been short of and it seems that there is always another new one opening. Amid the constant change and development there has been one constant - The Crown. The only public house owned by the National Trust and found in the city centre opposite the Europa Hotel on Great Victoria Street, The Crown is a rare delight. It is a traditional bar, complete with snugs, and although firmly on the tourist trail, is well loved by locals.

The city centre is increasingly the centre of pub and night life. With different areas being touched by development, places like McHugh's on Ann Street are coming into their own. McHugh's has a great cellar bar (with ample screen for sport) and a good restaurant at its top. I had a beautiful T-bone steak with whiskey sauce and mash with bits of black pudding in it. For pub food it was exemplary - easily surpassing a similar meal I had at The Eagle on Farringdon Road.

Quality food is probably not what people think of first when they think of Belfast, but Northern Ireland is still mainly covered in agricultural land and so local ingredients make for excellent meals. I went to the fairly new James Street South for lunch on a previous return to Belfast and recall it having an excellent range of modern European dishes and equally good wine list. Elsewhere is Restaurant Michael Deane, boasting Northern Ireland's only Michelin star.

Don't miss it

The pull of home is unique. For me it is not so much the things to see and do, as the friends I made and still have there. However the wry sense of humour that allowed McHugh's Bar to have a chess set with combating pawns modelled on bowler-hatted Orange men and balaclava-ed terrorists tends to mean that visitors are welcomed. When I lived in Belfast it was pretty rare to see tourists – now there are people from all over the world. Don't miss it yourselves.

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 30th June 2006 at 7:00 for 7:30pm.

Guest of Honour:

THE HON. JUSTICE ANTHONY GUBBAY

Former Chief Justice of Zimbabwe

Dress:	Black Tie	
Cost:	Silks	£90 per person
	Juniors	£70 per person
	Under 7 years call	£45 per person

Those who wish to attend should apply **AS SOON AS POSSIBLE.**

Places will be allocated on a first come first served basis and all applications, accompanied by a cheque, must be received by Sarah Montgomery the address below by **Friday 26th May 2006.**

Please mark the envelope **"Circuit Dinner". Please retain this part of the form.**

You will be informed nearer the time whether or not your application has been successful.

Sarah Montgomery (Administrator)

289-293 High Holborn, London WC1V 7HZ

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

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Name.....

Chambers.....

DX.....

Telephone .....

Email .....

I was called to the Bar on.....

I AM A FULLY PAID UP MEMBER OF THE CIRCUIT

I enclose a cheque made payable to the South Eastern Circuit Bar Mess for £.....

* If possible I would like to sit next to.....

* I have no seating preference

* I require a vegetarian meal Yes/No

** Please delete as applicable*

From Around the Circuit

Central London Bar Mess

The Committee of the Central London Bar Mess is delighted to announce the election of Joanna Korner CMG, Q.C., to the position of Chairman. A dinner for the resident judges and other guests including Lady Justice Hallett, Mrs Justice Rafferty, the Directors of the SFO and of Revenue & Customs was held at the Garrick Club on 9th February 2006. The Committee was pleased to express their gratitude on the same occasion to His Honour Fabyan Evans who retired as resident judge of Middlesex Crown Court last year and to the immediate past Chairman of the Mess, Anthony Leonard, Q.C. who had presided over the CLBM for four years. If any issues arise in respect of the courts included in the Mess (Blackfriars, Inner London, Middlesex, Southwark and Woolwich Crown Courts, and the Central London County Court) please contact the Secretary, Gareth Patterson, at 6, King's Bench Walk (0207 583 0410).

Gareth Patterson

The Central Criminal Court Bar Mess

The last report of the CCC Bar Mess referred to a consultation exercise being undertaken by the Mess with its membership on the vexed question of how smoking should be regulated, if at all. That matter has rather been taken out of our hands by recent Government legislation. The second subject of consultation was the robing room arrangements, and the task of finding more room for the female members of the Mess without doing structural damage to the building. We await similar intervention by the Government in relation to this thorny issue, which has provoked a diversity of very strong views, and no clear solution.

On the subject of space restrictions, the Mess is also having to deal with the limited number of tables for use by members of the Mess at lunchtimes. The Mess is very busy most days, not least since the caterers introduced a range of toasted paninis. Whilst various options are under consideration, the immediate and necessary step is again to ask members of the Mess not to bring their solicitors' clerks into the Mess. This, sadly, is still a problem.

The activity of the Mess is only possible because of the financial support of its members. As another way of dealing with space limitations, the Mess is seeking to ensure that the facilities for which the members pay are used only by them. Any freeloading court users with an attack of conscience can, as ever, obtain a membership application form from Duncan Atkinson at 6, King's Bench Walk.

Duncan Atkinson

Kent Bar Mess

A great favourite of the Bar, HHJ Anthony Balston hung up his judicial wig in October of last year. As many of you will know, he had been unwell for a considerable time. It was with great sadness that Bench, Bar and court staff bade him farewell. The era of the "20 minute" summing-up has gone, never to return. HHJ Lawson, Q.C. has inherited Anthony's court, Court 3; but the good old days of Judge Balston "sits in Court 3, but never after 3", seem to have gone too. He will be greatly missed.

Our Annual Dinner was held this year in Middle Temple Hall. We were delighted to have HHJ Jeremy Carey as the speaker after dinner. The "Peter Pan" of the judiciary had us in tucks of laughter for much of the time, or at least until he mentioned Danny Moore in a pair of "Speedos", not a pretty sight you may think. December continued to be a busy month socially for the Mess with the Bar and judges past and present, being entertained by the High Sheriff and Mrs Wells in their home to mark the retirement of Mr. Justice Bell. The final festive fun was a combined Christmas lunch enjoyed by the Bar and Bench in Maidstone...but who invited HH Keith Simpson? Clearly missing the fun of court life, he has taken to nicking party poppers and blowing them as hard as he can at any given opportunity.

The New Year has brought changes again to Maidstone. HHJ Patience, Q.C. having lost four of his "Dinosaurs" ("Big Dave", "Mick Neligan", "Kleptomaniac Keith", and the previous occupant of Court 3), is now about to lose HHJ McKinnon. His /our loss is to be Croydon's gain, as Warwick takes up his new position as the resident judge there. Warwick's mischievous sense of fun and good humour, not to mention his excellent qualities as a judge, will ensure that many amongst our number will try whenever possible to get the odd case transferred to Croydon, if only to pay him a visit. (Get the sherry in, Warwick.) HHJ Nash has been in the press yet again, only this time it's over a boiler. It appears that the central heating system is, let's say, temperamental in Canterbury. "It seems there are only two choices boys and girls"...early bath (favoured by HHJ Williams) or long johns(O'Sullivan again).

February 25th and 26th was a busy weekend for the Mess. On the 25th, HHJ Patience Q.C., and Simon Russell-Flint, Q.C., and other celebrities were "locked in" the cells for the day to raise money for Witness Support. They had to pay for everything from the basic essentials (hair care products for SRF Q.C.) to the more luxurious.. (conjugal visits from HHJ Williams were not permitted notwithstanding the offer of the customary fiver). We appreciate their efforts. My spies tell me that between sponsorship, donations, and "daylight robbery" from "the screws", approximately £6000 has been raised. On 26th HHJ Carey was "installed" as the Honorary Recorder of Maidstone, The Bar however is now extremely confused. He used to be a Recorder, then he became a judge, and now he is a Recorder again. How should one address him? (Answers on a postcard please).

On a sad note, we have just learned of the tragic death of Neville Willard on 17th March. Neville was involved in a car accident, and although initially it was thought he would recover from his injuries, it was not to be. HHJ's Patience and Webb in Maidstone and Canterbury respectively, along with the Bar and court staff, paid tribute to Neville's ability as an advocate, his sense of fairness, whichever side he was on and his gentle sense of humour. We send our condolences to his family and to the members of 6 Pump Court.

Fiona Moore-Graham

Surrey and South London Bar Mess

Since the last edition of the Circuiteer, quite a lot has happened; some bad, but much good.

We extend our warmest congratulations to Lord Justice Moses upon his appointment to the Court of Appeal. He has been a loyal friend to the Mess and we wish him success in his new post.

We are delighted to report that our very popular Judge Peter Moss, who we still regard as ours despite his post at Woolwich, has made an excellent recovery from an illness and operation suffered last summer. Judge Moss is back in harness and looking his old self.

We welcome the appointment of Nicholas Price, Q. C., as a circuit judge assigned to Kingston Crown Court. Judge Price was very popular at the Bar, and we are delighted that he is sitting as one of the Mess courts.

The Annual Dinner was held at the Crypt on 2nd March 2006. Despite an unfortunate clash with a retirement dinner for the well regarded Judge Roger Sanders, we are pleased to report a resoundingly successful evening.

One hundred and sixteen attended, to enjoy a splendid dinner arranged by the professional staff of the Bleeding Heart and excellent wines chosen by the Committee. Among our guests were Lord Justice Auld, Lord Justice Moses, and Mr. Justice Calvert-Smith. The guest speaker was Ian Glen, Q.C., who has recently joined London chambers from the Western Circuit. His innovative and very witty speech was very well received, and he deserves our warmest thanks for making the trek from Exeter to join us.

The Mess is always grateful to the large number of circuit judges who regularly attend and support us. The turn out from Kingston and from Croydon was impressive and as high as ever.

It was also good to see the immediate past Chairman, Hari de Silva, Q. C.

Finally, a date for your diaries: we have traditionally been the only Mess to host a summer event, and this year's Garden Party will be held on Wednesday, 19th July at Middle Temple. Please come, bring your friends, and enjoy another happy evening.

Sheilagh Davies

Sussex Bar Mess

After many years of dedicated service, Camden Pratt Q.C. has decided to stand down as Chairman of the Mess. Without doubt his contribution has been immense and his leadership at this difficult time in the Bar's history has been invaluable. Although he will no longer be an executive member, we all hope that he retains a keen interest in the Mess.

The election for Camden's replacement took place on the 16th March at the AGM. Jeremy Gold Q.C. was elected unopposed as the new Chairman of the Mess. A worthy successor! We wish him well in his new post.

We had the pleasure of welcoming Tim Dutton Q.C., Nick Wood and Fiona Jackson to a meeting at Lewes Crown Court last month to report on the 'Carter Review'. This was exceedingly informative and useful. We are grateful to all three for making the time to come down and talk to us.

We await the opening of the two further courtrooms at Lewes Crown Court in April. However, beware these are located at the Brighton and Hove Magistrates Court, so check listings carefully before heading off in the morning to Lewes.

We welcome Mr Justice Calvert-Smith to Lewes Crown Court in April. He will be sitting from April 26th to May 12th. Mr Justice Calvert-Smith is taking over as one of the Presiding Judges.

Finally, at this rather bleak time of year, I remind you to make a note in your diary of the Bar Mess Garden Party which is taking place on the 9th July 2006. This is always a wonderful occasions and should not be missed!

Tim Bergin

Thames Valley Bar Mess

'EXHIBIT' has rolled out across Thames Valley. Regulars at Aylesbury regret the departing of Carol, the only leopard-print and leather-clad usher on circuit. At least when you signed in, you were offered tea or coffee.

Carol retired last October and a good time was had by all at her retirement party. Guests included His Honour John Slack, His Honour Daniel Rodwell, Q.C., and His Honour Roger Connor. The latter retired last summer, being replaced by His Honour Judge Tyrer. It is all change at Aylesbury, as Judge Maher is retiring at the end of March. We all hope that after some six months or so of travelling, that Judge Maher will return to sit at Aylesbury.

It is change also at Reading. Judge Spence is also retiring at the end of March. Judge Zoe Smith is to take over as resident judge—a popular appointment. The Bar Mess is holding a dinner in honour of Judge Spence on Friday, June 30 (7.30 for 8, black tie).

Finally, on a personal note, may I thank the many members of the Bar who sent me their best wishes whilst I was 'on remand' in Hammersmith Hospital for most of last year. For those who don't understand what it is like to be returning after such a long time off, I suggest that you watch 'Life on Mars' on BBC 1 on Mondays—at least I know the words of the caution!

Kate Mallison

Cambridge & Peterborough Bar Mess

'Two distinguished men of the law ventured into the freezing world of the Fens during February. Am I the only one who asks whether it's all worthwhile [Carter and all that] when you see the temperature gauge hovering between -7 and -8 at 6 o'clock in the morning knowing full well that someone in the trial will stay in bed and cause the day to be aborted? Still the prospect of another £46.00 warms the cockles/fingers or whatever!!!

I digress. Gross, J. arrived in Cambridge to preside over a murder trial in the "new" crown court. A warm welcome was extended to this "man of Oxford". He may have learnt some robing room gossip after it was discovered that conversation in the robing room was filtering through the air conditioning system into court 1. Be warned on your next visit! I had considered not alerting people to this problem in the hope that someone would "go over board" thereby providing extra material for the next edition. Then I thought it could be me [Carter and all that]!

Great supper held for Gross, J. at Trinity. We really do know how to throw a party. Come along next time.

The Lord Chief Justice visited on his progression through East Anglia. Interesting constitutional matters were discussed but I've forgotten them. I do recall however that the judges now have their own "internet helpline press office" just in case they determine to cut loose and embarrass themselves in the eyes of the media when passing sentence. Spin doctors are alive and well!!

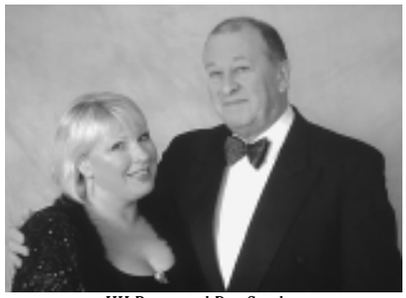
Enough of my ramblings. My fingers have thawed now helped in part by opening that good bottle of wine that has cost me the remainder of my £46.00!

Cromwell

North London Bar Mess

We welcome two new Judges to Snaresbrook Crown Court, HHJ Byrts and HHJ Collender, and congratulate HHJ Greenwood on his appointment as resident judge at Harrow, and HHJ Birtles on his appointment to the Mayor's and City County Court. On a sad note, Bench and Bar were deeply upset at the death of HHJ Angelica Mitchell, for whom we all had great affection and respect. Our condolences to her husband, HHJ Nick Brown, her family and her many friends. Many members of the Circuit will be aware of the large increase in the number of CPS Higher Court Advocates (HCA's) to be deployed at Snaresbrook Crown Court. HHJ Radford would like to place on record his commitment that the arrival of the new CPS HCA's will not lead to them having any privileges that are not equally available to members of the Bar, (as to listing etc…) and that the same has been said to the CPS.

We welcome two new Judges at Wood Green Crown Court, HHJ Nick Brown and HHJ Anna Guggenheim. HHJ Linda Stern is grateful for all the cards and messages she has received, her treatment is continuing and we all wish her a speedy recovery. We mourn the death of a popular North London practitioner, Martin Lickert, who died suddenly in March 2006. Our condolences to all his colleagues and friends, and especially to his wife and children.



HH Roger and Dee Sanders

The Mess welcomes HHJ Greenwood, as the new resident judge at Harrow Crown Court. The Retirement of HHJ Sanders was marked by a Valedictory address on the 22nd of December 2005, Court 1 was packed with members of the Bar, CPS, Court staff, solicitors, friends and family. John Coffey, Q.C., and Nigel Lambert, Q.C. spoke on behalf of the Bar and the Mess. One of Judge Sander's first instructing solicitors spoke movingly about her experiences of instructing him many years ago. A representative of the CPS spoke of their respect and affection. A message was read out from the DPP as was a letter from our Senior Presider, Rafferty, J. Many of us have never experienced such warmth, affection and genuine regret at the retirement of a judge. Even our Linda (Benjamin) had tears in her eyes. The dinner, at Middle Temple in March, was a sell out. Arlidge was Master of Ceremonies, Judge Barrington Black spoke, and the dinner was attended by Rafferty, J., Tim Dutton Q.C. and many other friends and [judicial] colleagues. At both Harrow and at the dinner, Judge Sanders in addition to giving his thanks, gave a serious message in relation to DTTO's [now 'Community order with a DRR'] which he believes are the best and most effective sentencing reforms effected by the Government. He will be sorely missed by all, as a judge who was

always tough but fair, retained a great sense of humour throughout his career, never forgot that he was once one of us or succumbed to the scourge of 'Judge –itus'. He was never afraid to show mercy, and he promoted diversity long before it was considered important to do so. When told that his next review would be before a different judge, a defendant said to Judge Sanders, 'You can't go Guv, you're one of the good 'uns' . How true. We wish

HH Roger Sanders and Mrs. Justice Rafferty

him a long and happy retirement with Dee and his family. We look forward to seeing him at Mess and Circuit events. He has been a true friend.

Our Spring Cocktail Party is on May 3rd at Lincoln's Inn. £20 in advance, £25 at the door, contact Dee Connolly, 020 7353 3102, 3 Temple Gardens.

Kaly Kaul

Squirrel in the Robing Room

I am in trouble with Arlidge for having accurately predicted, in my last column, that he would soon become known as Mr Briscoe, and so it came to pass on a recent book tour in Europe as he accompanied Constance, following the very successful publication of her first book, 'Ugly' which topped the bestseller list. Film rights in relation to the book are currently under discussion, who should play Constance? She suggested Halle Berry. Arlidge, who has yet to appear in any of her books, hissed 'Whoopi Goldberg and Dawn French more like'. He was punished, badly. Very badly. The poor man is still sulking at a description of him in a recent book written by Belinda Brewin, a main witness in the Chohan murder trial and the former best friend of the late Paula Yates, in which she recounted her recollection of being cross examined and described Arlidge as a 'wily old fox' and as lacking a sense of humour, this from a woman who found Mendelle lovely, Gledhill charming, and Horwell handsome and head and shoulders above the other Counsel in the trial. It hasn't gone to Horwell's head however, as the publishers cut out the part describing him! Liz Marsh never fails this column and recently reported that she had been sitting on Martin Shaw's bed (Judge John Deed), with a real High Court Judge. I tried to get the identity of the latter, after all, we need to know, but she thinks I am not discreet enough. Outrageous…. We know however that she is a generous person and as an indication of that our Liz and our Kim (Hollis) have offered themselves for a 'night out with Liz and Kim' for the charity raffle/auction being organised for the Association of Women Barristers Dinner in October. Second prize is a 'night in' with our Liz! She chooses the activity…. The AWB confidently expect that the number of men attending the dinner will rise from 30% to 95% and are considering organising an on line auction for those who can't come! Stephen Leslie is donating a dinner cooked by him and to be eaten with him, Trollope is considering his donation but doesn't want to compete with Leslie, ideas please? At present poor Trolley is rather bemused at being asked to participate in the lavish Indian Wedding of Neelie Sharma, one of his junior tenants, at Blenheim Palace in the summer. He has expressed himself willing to wear Indian clothes, but is being constantly teased by the many bridesmaids in his chambers as to what he is expected to do! He looked frightened when told he would be expected to dance 'Bollywood' style and sing an Indian song, possibly a duet with Philip King. His attempts to be invited to the 'Hen Weekend' have failed thus far, but knowing past form, he won't give up. The focus of attention is certainly on the Women of the Circuit at the moment. Did you know that the Learned Recorder of the Circuit, Fiona Jackson, is an accomplished Bhangra dancer? and with her partner John Black, danced the night away at the Asian Women Barristers Dinner, however both were easily eclipsed by the star of the night, Laila Dutton the daughter of Tim and Sappho, who danced expertly in a choreographed set, came first in the whole country in her recent exams, is beautiful, can sing brilliantly as we know from Circuit Dinners, and worst of all, is nice. It was a brilliant evening, Kim Hollis and Suki Johal looked stunning, the speeches were interesting, the food excellent and the prizes for the raffle included two tickets on Lufthansa. Guess who won? Our very own Fiona Jackson and John Black. In the never ending quest for gossip for this column (that's the excuse I use) I made a special pilgrimage to the centre of the gossip universe, yes the Women's Robing Room at the Old Bailey, upon which a brilliant 'sit com' could be based. The air is frequently blue and usually all the colours of the rainbow, men are dissected to within an inch of their lives, careers made and probably ruined, lives taken apart and put back together, pregnancy care organised, fashion, handbags, diets, affairs considered and alibis constructed. I learned a great deal but all that I am able to put into print is that there is a new fashion amongst women counsel at the Bailey to do pelvic floor exercises. If you hear any strange clinking sounds, you will know it's the little balls that are worn internally! Yes I do know which women are wearing them but it will cost you……..

Essex Bar Mess

As the daffodils burst into bloom along the A12 and the A127, there is also uncertainty in the air as we wonder about the future for our profession; what figures will Carter put in those boxes, more importantly what figures will the DCA put into those boxes? Every member of the Mess knows and appreciates the incredible efforts being made on our behalf by Geoffrey Vos, Q.C. and his committee, by Nick Wood and Andy Hall Q.C. in particular. We just hope that those efforts are met with appropriate success.

Perhaps we will be pleasantly surprised; we have already, upon learning of two new appointments to the Essex bench. Peter Fenn needs no introduction, a very popular advocate in East Anglia, a talented musician and one time owner of a rather fine vintage Rolls that always looked just a little incongruous in the car parks of Basildon, he already looks as if to the manor born in his court at Chelmsford. Many congratulations to Peter and Max. But over at Basildon, there is a new Essex girl to welcome – more of a gal really, Deborah Taylor comes from a remarkable stable. Her late father Peter was of course one of the most distinguished Lord Chiefs of modern times. He was due to open the court at Basildon in 1996 but was sadly unable to do so due to his final illness. His daughter had a large and increasing commercial practice along with a young family; she is now a new judicial star in the Essex firmament. A hearty welcome from us all.

Our new Chair, Trish Lynch Q.C. is settling in well – she may to have to speak to one of her predecessors, was it Bill Clegg Q.C. whose mobile phone went off (twice) in HHJ Ball's court in Chelmsford recently ? Though she should be gentle and instead congratulate him upon the wonderful news of his engagement to Gay.

Well done 2 Bedford Row; they may not yet be the total masters of the CJA 2003 but those boys and girls sure know their trivia – winning the recent Chelmsford CPS quiz night against some strong competition.

All of her many friends are keeping Roz Mandel-Wade and her family in their thoughts and prayers as she fights valiantly against serious illness. We wish her a speedy recovery.

2 Pump Court suffered a recent tragic loss with the untimely death of Martin Lickert, former bass player with Frank Zappa, racehorse owner, occasional trainspotter and wonderfully laconic advocate who was always a popular visitor to Essex. Our condolences to Martin's wife and children.

On a happier note, one of the old boys of this finest of counties, Warwick McKinnon, has recently been appointed headmaster at Croydon after much success at Maidstone. We still miss him, but at last he will be working somewhere vaguely close to home.

Look out for details of the Chelmsford summer Garden Party which our industrious junior is planning – although the weekend tasting trip to Epernay seems a little over the top Alan.

'Billericay Dickie'

SEC

CIRCUIT TRIP 2006
BARCELONA—28-30 JULY

Barcelona is the Circuit's destination city this year—for all Chelsea FC fans this is a must! For some of the Circuit it will be an opportunity to re-visit the venue of one of the finest Circuit weekends in recent years. For the rest of us the weekend will provide the usual opportunity to mix a little business with masses of pleasure and fun.

We will meet local lawyers with whom the Bar has developed a strong relationship over the years. Barcelona is a cosmopolitan city at the cutting edge of modernism and development in Europe. We need to find out more about the way in which the legal profession has coped with the surge and vitality of this development in less than a generation since the tumultuous reforms in Spain, perhaps learning something along the way, as we seek to find a new order for our professions. It is also a chance to meet with colleagues, their spouses and partners all in a great social setting. Past experiences suggest that this will be yet another enjoyable and memorable trip for all. Come and join us on this weekend away.

Proposed itinerary:

28/7	BA Flight—Gatwick (1825 hours arriving Barcelona 2130 hours)
29/7	a.m. Meeting with Barcelona Lawyers
	p.m. Cultural Tour
30/7	BA Flight—Barcelona (1800 hours arriving Gatwick 1915 hours)

Cost: ***An absolute bargain of*** **£350 per person** (on basis of a couple sharing a room)

First Class hotel accommodation for 2 nights, transport to and from the airport and dinner on Saturday night included.

PLEASE NOTE:

A small 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 refund 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

Running Away from Home

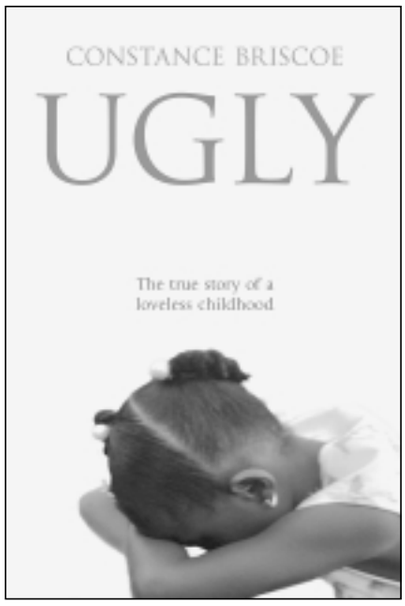
The National Gallery's **Americans in Paris 1860-1900** (until May 21) celebrates the achievements of the largely East Coast émigré painters, a third of whom were women who appreciated the freedom of being in Europe. It is a hugely enjoyable show, nicely displayed in the otherwise claustrophobic basement of the Sainsbury Wing. It is also very 'accessible', with landscapes and domestic scenes predominating. They all, in effect had run away from home, but even those who went back to the States to live (their works appear in the last room) and tended to paint people, lakes and the countryside pretty much as they had done so in France.

The first room launches you well, with a group of portraits by and of the artists, and marvellously shows them as they wanted to be seen. There are William Walton, John Conway and Kenneth Cranford, as aesthete dandies, with a cigarette in hand. There is the boyish, impudent-looking Ellen Day Hale, asserting herself as very much her own woman. There is Thomas Hovenden, sprawled in front of his easel, with the palette hanging on the wall but a violin in his hand.

From this delicious hors-d'oeuvre one turns the corner, and finds oneself face to face with Whistler's mother. Or rather the portrait of his mother, famously posed in profile and famously looking patient with her fate. There are some very good painters in this show—Mary Cassatt, the only American and almost the only woman to be part of the Impressionist circle; Winslow Homer, Childe Hassam, the precocious Dennis Bunker who died at 29—but there are only two geniuses. Whistler is the elder, and is here represented by Arrangement in Grey in Black, The White Girl, Coast of Brittany and Harmony in Blue and Silver: Trouville.

What justifies the price of admission alone are the eight works by John Singer Sargent. Sargent was a true cosmopolite. His parents were expatriates and he grew up in Italy and France. His name conjures up creamy Society portraits of the Edwardian era, but those here remind us that in fact he understood his subjects all too well. Mrs. Henry White is painted full length in an elegant white dress, but with a look of steely determination. 'Madame X' which caused a sensation in 1884 shows Madame Gautreau from Louisiana, beautiful, elegant, strong, but like others who try to crash into foreign society, sweeping all before her while getting it all just a bit wrong. 'In the Luxembourg Gardens' creates an elegant but ghost-like world in white, black and green. And then there are The Daughters of Edward Darley Boit, here from Boston and not to be missed. The Boits, like the Sargents, spent their time in Europe; their four daughters are portrayed in their Paris salon with the Chinese vases (taller than the girls) which travelled back and forth across the Atlantic along with the children. The sisters are not seen playing together or even in a group but in isolation, with one facing away, and one in shadow. The little girl playing on the floor said later that Sargent kept them amused by painting his nose red. None of them 'belonged' anywhere and none ever married. It reminds us that no painter had the insight into children that the bachelor Sargent did.

Running away from home was eventually the solution for Constance Briscoe. Her auto-biography **Ugly** is best known for its vivid depiction of the physical abuse she suffered at home as a child and adolescent. The dustcover though strikes a slightly different note. It describes it as the story of 'a loveless childhood'.



One indeed comes away with the picture of a young life spent in isolation, lying in bed in her own room, waiting for the inevitable night time bed wetting to set off the bed alarm, and then ominously for her mother to come in. It is not what one expects from a house with 11 children; there is no sense of a family teeming with life. We do not see the narrator playing with any of her siblings, eight of whom are scarcely mentioned. Instead, there are unrelenting years of household chores, along with Saturday or early morning jobs in a dress shop, cleaning offices, and cleaning bed pans in a hospital.

The chapters centre round specific incidents, with long passages of dialogue. Fortunately, she writes like a writer and not like a barrister. She also displays, amidst the horror, a brilliant talent as a comic writer. There are two superbly drawn funny episodes—one in which she crawls on the living room floor, trying to find her aunt's false fingernail during a family tea party; and another where the pastor of a Pentecostal church lays hands on her head while she is terrified that he will come away with her Michael Jackson wig in his hands.

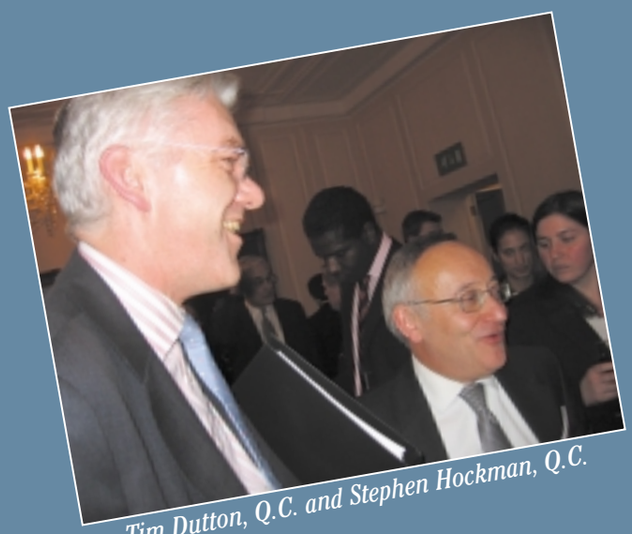
Unlike other descriptions of family abuse, though, this is not a story of the failure of the caring services. Teachers and doctors begged to know what was wrong; but she did not tell them. At one stage she asked social services to take her into care but did not explain what was happening at home. She does describe taking out a summons at the magistrates' court against her stepfather alone.

Which leaves the tantalising question, Why? We are sadly familiar with the terrible cycle of violence, with its various psychological roots and manifestations, but the book provides no insight on why Constance kept silence. 'Constance', although the name on her birth certificate, was unknown to her until she was 18. In the family she was known as 'Clare' (or 'Clearie') and the discovery that it was not her real name was shattering.

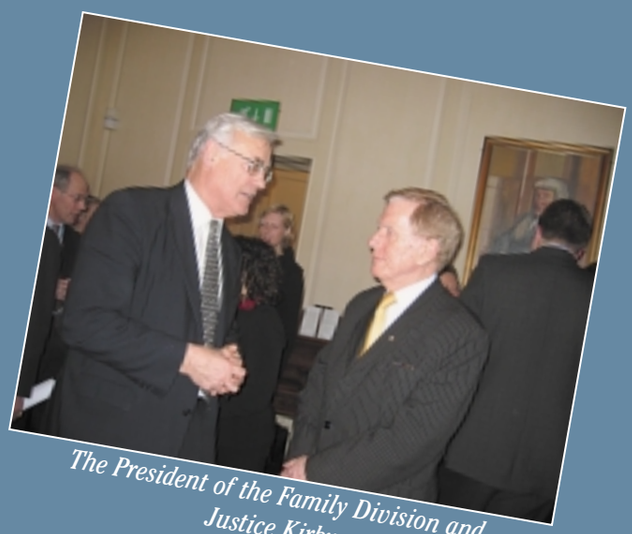
Emotionally, she had run away from home long before that. At the end of the book, she prepares to run away in fact. She packs for her departure to Newcastle University, to get an education and to spend the rest of her life with people divorced from everyone and everything she has ever known. She declares to her sister that she is never coming back. She has already been to her mother's house to tell her that she does not even like her and to ask 'what did I ever do to you?' Having left her childhood diaries on a chair, and with her mother and sister alone with them in the house, Constance goes out. When she returns, the diaries are in her mother's handbag. There they remain. 'They had my life in them. The life of Clearie.' The life of Constance was about to begin.

D.W.

The Ann Ebsworth Memorial Lecture



Tim Dutton, Q.C. and Stephen Hockman, Q.C.



The President of the Family Division and Justice Kirby

Sapho Dias and James Turner, Q.C.

Philip Bartle, Q.C.

Lord Justice May and Justice Kirby

Baroness [Brenda] Hale and a namesake