

# The Circuiteer



YOUR CIRCUIT.  
YOUR VOICE.

News from the South Eastern Circuit

Issue 33 | Autumn 2011



Melissa Coutinho and Nicholas Hilliard QC

**ANNUAL DINNER**  
GREAT HALL, LINCOLN'S INN  
24 JUNE 2011

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# LEADER'S COLUMN

BY NICHOLAS HILLIARD QC



I am writing this Leader's column in the departure lounge at Phoenix Airport, Arizona. America is the home of positive thinking (and Court TV) and I shall endeavour to reflect my surroundings in what follows.

In the recent past, there has been no relaxation in what the Circuit offers by way of advocacy training. We were again fortunate enough to have places at our disposal for the Florida Criminal and Civil Courses in August and members of the Circuit attended both. At the end of August, the Keble Advanced Advocacy Course took place and over 70 young barristers from civil and criminal chambers had the benefit of training provided by an outstanding cast. This was Philip Bartle's first year in sole charge as Course Director and it was clear to me that the participants genuinely understood and appreciated the enormous efforts which he and all the trainers, expert witnesses and assistants had made to ensure that the Course lives up to the reputation it has enjoyed for so long.

The Circuit dinner took place in June and the guest speaker was Lord Justice Moses. He delivered a devastating critique of some of the regulatory processes to which we are now subject. As well, I hope, as being good fun, the dinner does provide us with a real opportunity to alert and inform the Circuit's guests as to what is really going on. That the dinner happens at all is due entirely to the Circuit Junior, this year Georgina Gibbs. Few people have any idea of quite how much the Junior does for the benefit of everyone else. By way of another example, the CPS grading panels have begun their work. We managed to secure the option of Bar involvement in the panels which is what any barrister applicant would want. Georgina has had the unenviable task of trying to find Silks to sit on a large



*I turned on the Court TV channel and was immediately met with the sight of a witness breaking down in tears...*

number of assessment panels in London and in other parts of the Circuit at short notice. Inevitably, those who were initially free to help out then became committed elsewhere and the process has been extremely difficult and time-consuming to manage. I am very grateful to her and to the Silks who have taken part. Special thanks are due to Ian Wade, Ben Aina, Orlando Pownall, Rosina Cottage, Simon Spence and John Hardy.

By the time this edition of the Circuiteer is published, Sarah Forshaw QC will have

come to the end of her very successful term as Chair of the Central London Bar Mess. During her leadership, the Mess has played a significant part in the affairs of the Circuit and is testament to the potential value of the Bar Mess system where a Mess is active and engaged as her's has been. Sarah has now generously agreed to take on the job of Director of the Circuit's education and training programme when Maura McGowan QC starts work as Vice Chair of the Bar. (It is time that the Circuit organised a training day for cases involving sexual offences. If there is any other subject that you feel should be added to our education and training programme, please let Sarah or me know.)

In July, a packed Court at Southwark witnessed the valedictory proceedings for Judge Geoffrey Rivlin QC. It was an occasion which recalled the very best of the Criminal Bar and the criminal justice system. Geoffrey was without doubt one of the finest advocates of his day and thereafter an equally outstanding Judge. His performance was second to none. No QASA scheme was required in his Court. He was the kind of Judge who ensured that advocates performed at their best. When I was Chair of the CBA and subsequently as Leader of the Circuit, Geoffrey was always prepared to listen to the Bar's concerns and to offer advice, support and encouragement. He will be greatly missed and he has the Circuit's best wishes for his retirement.

Sam Stein QC is a member of the Bar Standards Board and has played a large part in devising the quality assurance scheme for advocates. There has been much unhappiness about this scheme but the Legal Services Board made it plain that one had to be in place. Thereafter, the choice has been between a system which is court-based and reliant upon

# YOUR CIRCUIT. YOUR VOICE.

judicial assessment, and one which requires simulated advocacy to be performed in assessment centres. The former is plainly a significantly more reliable way of assessing an advocate's ability and happens to be much cheaper than the alternative. As matters stand, a court-based process will be the norm for barristers and thanks are due to Sam for the part he has played in achieving this. However, it must be the norm for all advocates if the scheme is to command confidence. There must not be 2 parallel assessment routes. The cost is higher than I would like, even if averaged out over the term of a licence to practise at a particular grade, and I hope that further efforts will be made to keep costs to a minimum. I still do not see any public interest in including Silks in the scheme. If they are included, I suspect that it will be so that in due course it can provide a justification for equating their fees with those of juniors for the most serious cases. We were never given to understand that the scheme would be used for any ulterior purpose and it should not be.

One consequence of the fact that a judicial reference was not in the end required for the CPS scheme is, I suspect, that a CPS grading may not automatically translate into the corresponding QASA grading. It is remarkable that so much time and energy has been spent on the CPS process when it may well become obsolete very quickly indeed. However, with QASA, the fact that the judges are apparently prepared to be involved will at least remove one of the most contentious and arbitrary features of the CPS process. There is still though much work to be done to remove some of the flaws in QASA itself.

That is about as much positive thinking as I can manage before saying something about the meeting of the Criminal Bar



*Nicholas Hilliard QC and Kaly Kaul QC*

which was organised on all the Circuits in July. Attendance across the country was varied but the views of those who did attend were pretty consistent and unsurprising. Christopher Kinch QC indicated at the meeting that the CBA intends to obtain advice as to the lawfulness of a number of possible courses of action which might be open in response to government cuts. That is obviously sensible. Such action, however, may be a hand of cards which can only be played once. In my view, it is the spectre of contracting and OCOF which poses the greatest threat to the existence of an independent referral profession. Whatever happens, without a united approach there is no prospect of success.

I saw a news item recently which said that the Secretary of State for Justice had decided to allow proceedings to be televised when sentence is pronounced in the Crown Court. Perhaps many millions of people will tune in to watch. So far as I am aware, the profession was not asked for its views on this – the Circuit certainly was not – but I hope if any further relaxation is contemplated that we might be consulted. We have, of course, considerable practical


experience of the needs and feelings of victims and witnesses. Whilst in America, I turned on the Court TV channel and was immediately met with the sight of a witness breaking down in tears as she recounted the last moments of her friend who had been murdered. I was reminded of the experience which Mr. and Mrs. Dowler underwent during the trial of Levi Bellfield. There were reasons for that but I suspect they would be thankful that their time in the witness box is not available on the internet to be viewed the world over and for all time.

I welcome your views on this or any matter, and as always I am available to all members of the Circuit for any help or assistance I can give.

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# PRACTISING IN REGULATORY AND DISCIPLINARY TRIBUNALS

BY MARTIN FORDE QC

 The regulation of the professions is a fast moving, stimulating and dynamic area of the law. There is a very real public interest in identifying those who are unable to attain or maintain proper professional standards. There is, however, also a very real public interest in fair, transparent and Article 6 competent professional regulation. The sanctions that can be imposed by those who regulate the professions are usually serious. They can suspend professionals from practice and almost always have a power to prevent them from practising altogether. This is obviously extremely damaging in terms of livelihood and reputation. In the context of medical professionals, it is particularly unfortunate if draconian sanctions are imposed because of the enormous cost to the taxpayer of training such individuals.

Although my practice is primarily in the area of medical regulation, many of the rules of evidence and procedure and relevant case law are common to all areas of law. In recent years there has been something of an explosion in this work although there is no doubt that the medical regulators are looking to move to a situation where there can be more consensual disposal without the need for a hearing. However, I have my doubts as to whether this will mean a substantial reduction in the work available as members of the public, who feel they have been wronged by professionals, often feel very strongly that they should have their day in court.

The scope of the regulation of professionals is extremely wide. At a conference that I recently chaired, there were representatives from the Nursing and Midwifery Council, the General Teaching Council, the General Medical Council, the Law Society, the

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*There is therefore much scope for cross-pollination in my view. I accept that initially this may be in areas where the facts are case sensitive.*

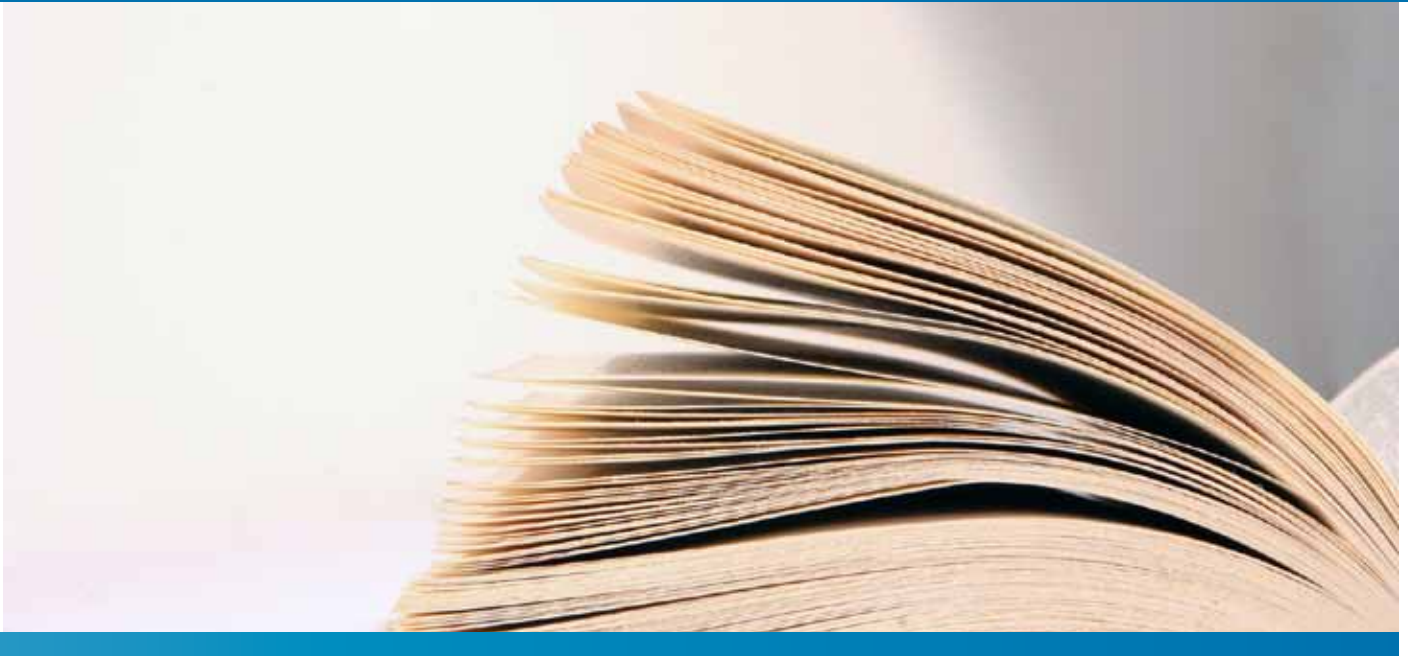
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Amateur Swimming Association, the Taxation Disciplinary Board, the General Dental Council, the Bar Standards Board, the Gambling Commission, the ACCA, the Rugby Football Union, the General Pharmaceutical Council, the Office of Immigration Services Commissioner, the General Optical Council, the Royal College of Nursing and Lloyds. That lengthy list gives something of an impression of some of the areas which are regulated by disciplinary bodies and their tribunals. As I have indicated, my primary practice is in the medical field but many of you will be aware of the activities of the Solicitors Disciplinary Tribunal and the Bar Standards Board. Some of you may have been involved in the area of sports regulation or may have practices which would allow you to consider attempting to develop a practice in the area of sports regulation.

The financial services regulatory work is undertaken mainly by those who practice in the commercial field but I see no reason, for instance, why those in practice in white collar crime, particularly in the prosecution or defence of “insider dealing” cases ought not to consider attempting to develop practices in the area of financial services regulation. The

publicly funded Bar in particular is coming under increasing pressure in relation to fees and the availability of work. This is a very real concern. In my view, many talented practitioners who operate in these fields have highly developed advocacy skills. This is being recognised and some of the criminal sets of chambers have begun to work in the medical regulation fields – predominantly as prosecutors and predominantly in areas which mirror criminal trials.

One of the drawbacks in this area of increasing specialisation has been the ability of the Bar to offer a ‘one-stop shop’. Often solicitors do offer such a service to their lay and professional clients but they deliberately instruct barristers with very specific areas of expertise. When I was first called to the Bar, the concept of the common lawyer was still very real. Many of us would practice in areas as varied as landlord and tenant, sale of goods, crime, consumer credit, personal injury and domestic and commercial contract. If I turn to the position of a health professional, it can be illustrated that arising out of a single set of facts, a doctor, for instance, could find his or herself before no less than five different courts or tribunals. It strikes me that if members of the Bar are able to develop a range of skills, that a client would be better represented by a single advocate able to practice in all relevant areas and fora. All too often, however, counsel will be instructed to conduct the manslaughter case by a medical defence organisation but they will seek the services of a so-called expert in regulation and disciplinary work to conduct the General Medical Council hearing. They may also have engaged a clinical negligence barrister in relation



to the Coroner's inquest and many have sought the services of a public lawyer in relation to any challenge to be brought in the administrative court. Whilst I accept that the skills employed in each of those four areas may need to be different, I do not accept that there are not members of the Bar who are sufficiently skilled and able to conduct hearings at different levels in different courts and tribunals.

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### *... I acknowledge that these are difficult times for the independent Bar.*

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How then can the Bar persuade those who are able to provide this work that my previous proposition is correct? The answer has to be experience and education. There are many conferences arranged in the disciplinary and regulatory field. These not only give networking opportunities but provide valuable education. It may be that members of the Bar should help each other when an interest is expressed and, whilst this may not necessarily be a popular suggestion, I would certainly advocate that those who are serious about entering into this field not only take time off to observe hearings, but seek to familiarise themselves with the relevant rules of procedure and perhaps see if they can shadow a practitioner in the field to see exactly how such cases are conducted.

I have already indicated that those practising in the area of white collar crime may wish to look at the financial services area. Those who defend doctors in relation to claims of indecent assault might wish

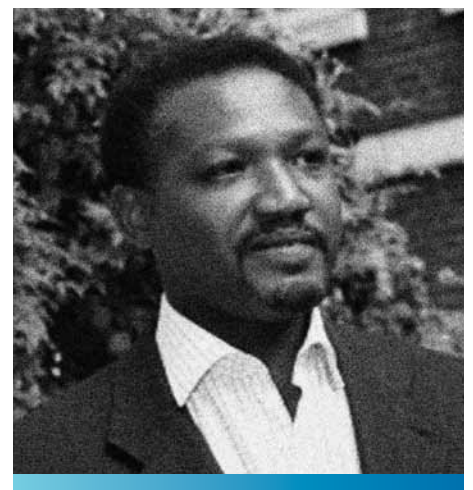
to consider questioning those instructing them as to whether or not they are likely to be instructed in relation to the General Medical Council hearing. I have recently argued unsuccessfully before the General Medical Council that a re-trial of a criminal matter, which resulted in acquittal, would amount to an abuse of process in relation to General Medical Council hearings. This is because the General Medical Council have reduced the standard of proof from the criminal standard to the civil standard. Increasingly, I can see that acquitted doctors will find themselves before the General Medical Council in relation to precisely the same allegations that they faced in the crown court.

There is therefore much scope for cross-pollination in my view. I accept that initially this may be in areas where the cases are fact sensitive. There is no doubt that a background in personal injury or clinical negligence is of assistance if one is acting for a member of the medical profession in relation to a clinical allegation. The handling of expert witnesses is entirely different to the way expert witnesses are handled in a criminal cause or matter. However, there is no reason, why these skills cannot be learned and mastered.

As well as the regulation of the profession by regulatory bodies, there is often a degree of regulation of the employee by the employer. Some practitioners who operate in the employment law field will be aware of this fact. Recent High Court activity, including a recent decision in the Supreme Court means that it is more likely, in my view, that there will be an increasing amount of work in relation to internal disciplinary hearings which can themselves lead to summary dismissal.

These proceedings can then be duplicated before the General Medical Council and in certain instances would lead to a criminal case. Once again, these cases tend to demand good cross-examination skills and are often fact sensitive. The rules of evidence appear at times to be non-existent but a good knowledge of the rules evidence in either the criminal or the civil sphere is a tremendous advantage.

Finally, I acknowledge that these are difficult times for the independent Bar. However, we have shown ourselves in the past to be extremely adaptable. I see no reason why with a pro-active approach and a willingness to be educated in this interesting area of practice, those who do not currently practice in the area could not develop sufficient skills to do so extremely successfully.



*Martin Forde QC is a barrister at 1 Crown Office Row*

# PUTTING DOWN A MARKER

## ANNUAL DINNER 2011

BY LORD JUSTICE MOSES

 For 41 years, and on and off ever since, I have sat here and listened to some remote figure lapse into anecdote, expressing a certain irrepressible regret that nothing would ever quite live up to a glass of lees-clouded, cork-covered, British rail claret in the buffet car coming back from Canterbury East, exhibiting the symptoms of that most British of diseases, a genuine nostalgia for a fake past. But there was one feature of that past that was not fake: our independence. Our clients were on trial; we were not. We were free. Free to make fools of ourselves. Free to persuade. Answerable to our clients, to the law, but free.

If you want to test the quality of a civilised legal system; sorry, that should be to assess the competency of a civilised legal system, if you want a level 4 democracy with a range

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*You and I know that when government reaches for an acronym something has gone seriously wrong.*

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of competencies to an excellent standard, I'll give you the sure-fire kite-mark. It is the independence of the bar. The weapon of choice to destroy that independence is the bludgeon of bureaucracy, the dead, the so very dead hands of quality assurance, of grading, of procurement, of accreditation, of re-accreditation, a system which asserts that effective advocacy is fundamental to the justice system whilst measuring the effectiveness of advocacy by its cost. A system not of quality control but of control.

Let me be fair. There are in the regulatory objectives some faint references to independence. It's point 6 out of 8, but I counted not one such reference in the selection criteria for the CPS advocate scheme, not one reference in the Principles Underpinning a restructuring of the delivery of criminal defence services. Small wonder; control assessment and you control the assessed.

And it is in the attempt of the executive to control with a barely comprehensible thicket of rules and regulations that they reveal their oh so ignorant belief that the questions they pose and the rules they impose will distinguish between the incompetent and the competent, the skilled and the inept, the true advocate and the muttering fooler.

I do not know who those bureaucrats are but of one thing you can be sure. They have never addressed a jury. They have never prosecuted one morning and defended in the afternoon. They have never struggled with the obdurate client, described in the pre-sentence report as lacking learning-skills, and struggled with an even more obdurate judge who certainly lacks learning skills; a judge who gives every sign of having given your opponent an over-effusive report in support of his ambition to prosecute at level 3 where, unlike level 4, you do not apparently need a superior grasp of trial advocacy skills, which is lucky because your opponent doesn't seem to have them. Whilst as for you, the judge doesn't seem, judging by the rolling of his eyes, very likely to have supported you even to level 2 in the application you sent to his room that very morning. Level 2, you will recall, requires appropriate use of language. In describing

those responsible I am afraid I cannot even attain Level 2.

You and I know that when government reaches for an acronym something has gone seriously wrong. It's PAC: Performance of Advocacy Council. It's JAG: Joint Advocacy Group. And of course OFUC: one fee one case; sorry OCOF, one case one fee... That proposal blatant in its pursuit of what the then Lord Chancellor called a much more consolidated market in which larger contracts are let to a smaller number of providers. Or one case and one fee: the most to the cheapest. And don't worry. Soon they will achieve their ultimate ambition, like Sir Humphrey who wanted to ensure that the newly built hospital had no patients, soon the courts will have no barristers. They will be too busy filling out their forms and taking their Recorder exams. Come on, 1,000 this year – shall we say 2,000 the next?

And how will they mark your re-accreditation competencies? Three marks when prosecuting counsel tells the judge, "Oh, your Lordship puts it so much better"? One and a half marks when the defence laughs at the judicial joke? Ten marks for the oleaginous creep? What competency score will they give Marshall Hall, when he defended Madame Fahmy for shooting her husband at the Savoy? When he pointed her pistol at the jury and then let it clatter to the floor of the Old Bailey as it had clattered to the floor of the corridor of the Savoy. What competency was that? Was he acting appropriately to assist the court in the administration of justice as required? Must the art of advocacy, which we celebrate tonight, really be diminished to a performance skill, assessed like the quality control of a supermarket, the Bar measured by bar code?



I'm not at all sure we should blame the red-tape functionary, who will never have so much as untied a pink or white tape. We are reminded, in defensive tones, of consultation with what is described as the senior judiciary. I'm never quite sure who they are. Are they the top judges, the exotic nature of whose sexual practices are from time to time described in the tabloids? Except you must not call them sexual practices. Now that the Bar Standards Board has upped your CPD hours to 24, they are to be known as non-verifiable activities.

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*If there is nothing wrong with a traffic light system for the Bar, there is certainly nothing wrong with a traffic light system for the bench.*

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The abiding characteristic of a top judge is his ability to forget. To forget the late set of papers and the even later train, the non-existent instructions, save to use your best endeavours, and the judge who has never had to face the despotic contract manager, who is not available to give you permission to read anything at all over the weekends, who believes that unused material should be what it says – unused – and that there is therefore no reason why you should be paid to do so, and who believes that a forensic triumph is one where the cost is cut in half.

Yet it is to the judges they look for references, for accreditation and re-

accreditation and, it seems to me, they should respond and give top marks for independence of thought and courage of opinion.

But there remains the problem of assessing the assessor. What about the judges, whose involvement in the QAA quality assurance arrangements scheme, now QASA, is said to be critical? Let's set them a few competencies. Just think of the delight of returning home after a sweaty day at Canterbury or Snaresbrook. Analytical ability? How shall we score that? Interpersonal skills? Oh dear. What about a procure co to bid for and enter into contracts with the Court Service and other large purchasers of legal services to outsource a judgment or two? Forgive the language but it comes from those who wish to mark you for written expression; if there is nothing wrong about a traffic light system for the Bar there is certainly nothing wrong with a traffic light system for the bench.

Let us tonight celebrate those qualities for which there is no measurable competency: curiosity, daring, zest and sheer enjoyment. And courage in the face of all attempts to take away your spirit in a pile of bumf.

We, the judges and your guests tonight, should understand that we can, and should never, never, forgive ourselves if we did not protect your independence and respect it and cheer you on because you are, and should remain, free and independent and we should cheer those shining representatives of the independent Bar... the South Eastern Circuit.



*Lord Justice Moses was guest of honour at the SEC Annual Dinner*

# WHAT PRICE ACCESS TO JUSTICE?

BY MARC WILLERS

Access to justice is under grave attack by the Coalition Government. The Legal Aid, Sentencing and Punishment of Offenders Bill 2011 (the 'Legal Aid Bill') is currently before Parliament and if it is enacted then it will result in severe and swingeing cuts to public funding for advice and representation in a wide spectrum of civil cases.

Our Legal Aid system was created just over 60 years ago, by the Legal Aid and Assistance Act 1949 and has been described as one of the pillars of the welfare state. Those responsible for devising and shaping the Legal Aid system understood that we must ensure that justice is available to all citizens, irrespective of their means, if the rule of law is to have any real value.

*They will inevitably result in more people being unrepresented and as a consequence there will be gridlock of the court system...*

Since 1949 there has been a significant growth in the scope of Legal Aid and the number of cases covered by public funding. It has been very successful – not just for individuals but for the greater good. Many important cases have been taken which would not otherwise have been litigated and landmark decisions have led to improvements in the lives of countless individuals and changes in policy and law which have benefited society as a whole.

There is no doubt that our current Legal Aid system is costly. In 2008-2009 £2.1 billion was spent on the provision of Legal Aid (£1.2 billion of that sum was spent on criminal legal aid). In 1999 the Labour Government took steps to reduce its spending on Legal Aid. The Access to Justice Act 1999 reduced the scope of Legal Aid – specifically removing personal injury cases from cover on the basis that they could be run on a conditional fee basis (where the lawyer could claim an additional fee in the event of a successful resolution). There were other types of cases also removed from scope – though the Legal Services Commission (the body currently responsible for Legal Aid) was given the discretion to grant Legal Aid for such cases in exceptional circumstances, for example, where the client was vulnerable or there was a significant wider public interest or the liberty of the client was at stake.

In November 2010 the Ministry of Justice published a consultation paper entitled 'Proposals for the Reform of Legal Aid in England and Wales'. The Coalition Government suggests that the changes will reduce the cost of the Legal Aid system by £350 million. Those savings will be achieved by a number of controversial measures, which include the drastic reduction in the current scope of Legal Aid by:

- removing clinical negligence from scope – whatever the vulnerability of the individual;
- limiting the provision of Legal Aid in housing to cases where homelessness or loss of home is threatened or where there is a serious risk that disrepair will harm the health of the individual;
- removing employment from scope, save in cases involving discrimination;
- removing education from scope;

- removing debt advice and representation from scope, save in cases where an individual's home is at risk;
- removing welfare benefits advice from scope;
- limiting the provision of Legal Aid in immigration to cases where the individual has been detained, or is fleeing from persecution or otherwise seeking asylum; and
- limiting the provision of Legal Aid in family cases to those instances involving domestic violence, forced marriage and child abduction.

If those proposals are adopted then more than 600,000 cases will be removed from scope (that is, nearly 70% of the cases currently covered by Legal Aid). Bizarrely, the Coalition suggests that the gaping hole left by its proposals can be filled by alternative dispute resolution, mediation and the provision of advice and assistance by the not for profit sector – at a time when their funding is being drastically cut!

There were more than 5000 responses to the consultation paper, the vast majority of which urged the Coalition to protect and conserve Legal Aid in its current form and to find savings and increase revenue elsewhere. Those respondents made many different points but perhaps the most compelling arguments against the Coalition's proposals are that:

- They will inevitably result in more people being unrepresented and as a consequence there will be gridlock of the court system, delays in the dispensation of justice, and increased court costs – thus, the Judges Council stated that: 'The proposals would lead to a huge increase in the incidence of unrepresented litigants, with serious implications for the quality of justice and for the administration of the



justice system in terms of additional costs and delays – at a time when the courts are having to cope in any event with closures, budgetary cutbacks and reductions in staff numbers ... Even if one focuses on cost alone, there is a real question whether the cost savings arising from the proposed cutbacks in the scope of civil and family legal aid would be offset by the additional costs imposed on the system’;

- In many cases litigants in person will not have ‘equality of arms’ and as a consequence may not receive a fair trial, in violation of Article 6 of the European Convention on Human Rights and Article 47 of the European Union Charter of Fundamental Rights which provides that: ‘Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’;
- The provision of Legal Aid often leads to the early resolution of cases and thereby

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*Write to your MP and your local newspaper. Alternatively, lend your support to Justice for All...*

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saves the public purse money – thus, the Children’s Legal Centre said: ‘In many of our cases at the CLC, the provision of legal advice and assistance can help resolve problems quickly and prevent matters from escalating. Removing access to legal advice in many civil and family law matters removes the possibility for problems to be resolved early and efficiently without the need for litigation’.

- A cost-benefit analysis by the Legal Services Research Centre in 2009

demonstrated that the funding of civil Legal Aid represents good value for money (for example, for every £1 of Legal Aid spent on housing advice, the state potentially saves £2.34 and for every £1 spent on benefits advice, there is a potential saving of £8.80) and a report published by the European Commission for the Efficiency of Justice in 2010 showed that the annual budget allocated to our courts and the provision of Legal Aid as a percentage of the Gross Domestic Product per capita in 2008 was close to average budget allocated by 35 other European states.

On 21 June 2011 the Coalition Government introduced the Legal Aid Bill in the House of Commons. The Bill contains all the proposals for the removal of civil cases from scope. The strong arguments for maintaining the current level of provision have been ignored by a Government which is intent on pursuing its policy of fiscal deficit reduction, whatever the cost to justice.

The sad fact is that the reduction in the scope of civil Legal Aid will increase the gap between rich and poor and limit the ability of those most vulnerable members of our society to access justice.

When delivering the Sir Henry Hodge Memorial lecture in June on ‘Equal Access to Justice in the Big Society’ Baroness Hale warned that the Legal Aid cuts will have a ‘disproportionate impact upon the poorest and most vulnerable in society’ and noted that the Legal Action Group feared that the proposals ‘would lead to an underclass of people disenfranchised from civil justice and indifferent to the rule of law.’ Significantly, the Government’s own equality impact statement acknowledged that the proposals will have a disproportionate impact upon women, ethnic minorities and people with disabilities.

What can we do to try to prevent the Government from demolishing much of our Legal Aid system? The Legal Aid Bill is currently being considered by a select committee in the House of Commons and it will be sent to the House of Lords on 13 October 2011. There is still time for us to influence MPs and members of the House of Lords and we must do all that we can to make the case for the retention of Legal Aid in its present form. Write to your MP and your local newspaper. Alternatively, lend your support to Justice for All, a coalition of organisations and individuals that is at the forefront of the campaign against the proposed changes. Let’s do all we can to try to persuade the Coalition Government to place value in our justice system and the provision of civil Legal Aid and not sleepwalk into a situation where access to justice becomes the prerogative of the rich.



*Marc Willers is a barrister at Garden Court Chambers. In June he won the award of Legal Aid Barrister of the Year 2011*

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# FLORIDA CIVIL ADVOCACY COURSE



BY ELIZABETH HUMPHREYS

 In May this year, four juniors from the South Eastern Circuit – Alexander Robson (Littleton Chambers), Andrew Otchie (12 Old Square Chambers), Catriona Stirling (Cloisters) and I (Henderson Chambers) were fortunate enough to be awarded the SEC Scholarship to attend the Florida Bar's Advanced Advocacy Programme in Gainesville at the University of Florida. Simon Browne QC (Temple Garden Chambers) led the group across the Atlantic and trained participants.



The course programme was built around the clinical negligence (medical malpractice) case of *Coker v Z-Mart Inc*, et al. and was structured as a week-long mock trial involving openings, closings and the direct and cross examination of lay and expert witnesses. The facts of the case were drawn from an actual claim in which a 17-year old boy suffered catastrophic spinal injuries at a picnic and games event organised by his father's employers (Z-Mart). There were three co-defendants – Z Mart defending allegations of negligence in their arrangement, supervision and selection of the games, Dr Hoppe – the orthopaedic surgeon who performed two operations on the plaintiff's spine and finally Ecdack – the manufacturer of a metal plate which had been inserted into the plaintiff's spine and subsequently broke.

Two juries were selected to assess some of the presentation of evidence (overseen by a number of Florida judiciary) and to come to a final verdict. Expert witnesses were chosen from the relevant faculties at the University – professors in orthopaedics, psychiatry, engineering and physical education. There were 50 or so attendees, all experienced trial practitioners from a number of cities across Florida.

The course was intensive with working lunches on ethics, an evening gathering on materials science and daily sessions of advocacy critique with video reviews by senior practitioners and judiciary from the Florida Bar.

The nature of jury trial for even the smallest civil cases predictably influences the style of advocacy adopted by trial lawyers. Openings and closings in particular were intriguingly theatrical, advocates pacing the room, using homespun analogies, and relying heavily on Powerpoint presentations to convey issues to a paperless jury. The American advocates were, nevertheless, surprisingly eager to learn about a muted and undoubtedly more formal English approach to persuasion and the exchanging of courtroom cultures was fascinating.

Aside from the formal instruction and training, all members of the English delegation had a fantastic time exploring the University and local area. The campus itself is vast – much like an Olympic park with acres of green space, a lake complete with alligators and astonishingly professional sports facilities. The University of Florida football team – the Gators – is one of the best in the country, and their 90,000-seat home stadium is regularly sold out during the season. Nearby there is an Olympic sized swimming pool and basketball and hockey stadiums all of which tower over the mock-colonial 'fraternity' houses and their mysterious rituals and rites of passage within.

The Florida Bar hosted a fantastic final dinner at the end of the course in which several senior practitioners reflected on their important experiences in England, visiting the Inns of Court, observing criminal and civil cases in the Royal Courts of Justice and the Old Bailey, and in the rigours of advocacy training at Keble College, Oxford. There was no end of speculation as to what mysterious negotiations went on in the fabled 'robing rooms' of which they had heard so much! Simon Browne QC gave the final speech of the evening, discussing the importance of the sharing of techniques, ideas and practice between the English and American Bar, as well as telling some fabulously

British jokes which the American audience loved so much they gave him a standing ovation.

One of the most fascinating aspects of the course was the opportunity to observe the process of jury selection and jury deliberation. We watched two seasoned practitioners work through each proposed juror, asking questions about their education, background and personal experience, rapidly and astutely sizing-up their likely behaviour in the jury room. They then explained the factors which influenced their decision to de-select certain proposed members. At the end of the course all the participants watched video recordings of the two juries debating their verdicts and assessing the appropriate level of damages. The advocates' predictions of the behaviour of the each individual were eerily accurate. With no pain and suffering guidelines, few documents and no comparative case law, the way in which the jury came to a figure for damages was somewhat speculative. One juror proposed a figure of \$100 million, another \$10,000, finally settling on \$18 million.



All of the English cohort had a challenging, rewarding, and absorbing week. It was a wonderful opportunity to expand our professional repertoire, and learn about a narrative style of advocacy and examination which was refreshingly different from our own.

*Elizabeth Humphreys is a barrister at Henderson Chambers*

# FLORIDA CRIMINAL ADVOCACY COURSE

BY JOHN BROWN

As has now become a strong tradition the South Eastern Circuit sends four junior barristers each year to participate in the 'Gerald T. Bennett Prosecutor and Public Defender Trial Training Programme'. The programme has been running now for over 30 years and has been responsible for training some of Florida's finest criminal attorneys. It is held annually in August in the Levin College of Law at the University of Florida in Gainesville.

The course is unique in the United States in that both Public Defenders and State Attorneys are brought together to take part. Whilst commonplace in Britain, such an emphasis on joint training between both prosecutors and defenders is rare in the United States but is something that the course has always encouraged. The course is also unique in having British barristers attend to take part and in addition each year one distinguished Queen's Counsel attends as part of the teaching faculty. This year it was Ann Cotcher QC's turn to represent both the Circuit and the English Bar in that role.

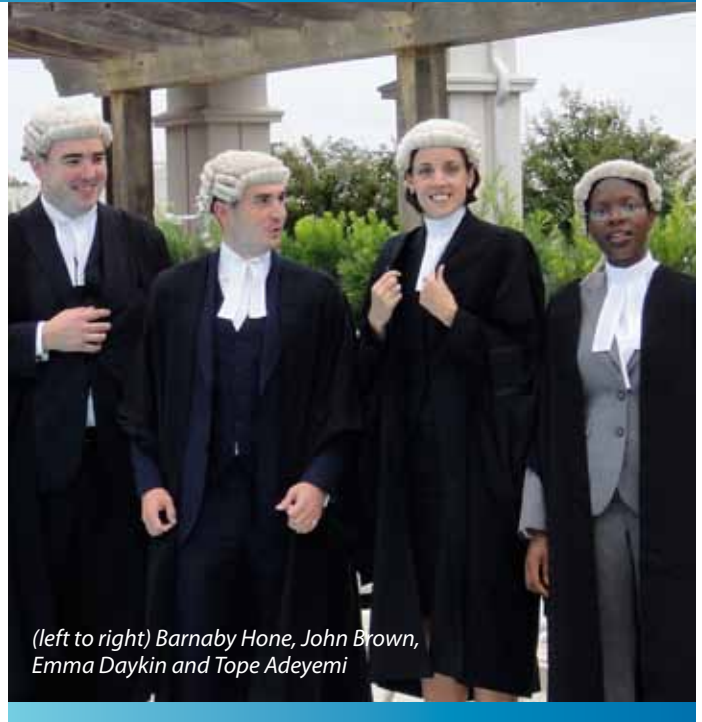
The course is comprised of around 70 students from each of Florida's 20 Judicial Circuits, all of whom are qualified and practising criminal attorneys with less than three years experience. The teaching faculty is comprised of some of the Florida Bar's most highly regarded and experienced prosecutors and defenders, together with judges of all levels. Whilst both enjoyable and immensely beneficial, the course was extremely intensive with advocacy exercises taking place almost continually throughout the seven days. Each student was required to prepare for either for the prosecution or defence in two trials which were then fully presented over the duration of the course. Each part of the course was video recorded and feedback would be received from both those members of the faculty present during the exercise and then by a further member of the faculty during a one-to-one video review session.

It was extremely interesting to compare the differing styles of advocacy between 'the Brits' and the Americans and be given the opportunity to learn from each other. Whilst everything may not necessarily be transferable into Court 4 at Reading Crown Court there was certainly a lot to be learnt from the American approach, particularly their considerations

when explaining and presenting the case to a jury, sometimes involving whiteboards, light tables and even PowerPoint presentations! No clearer was this contrast in styles than when one of the defending attorneys was followed by Ann Cotcher QC in a faculty demonstration. Whilst both demonstrations were superb, the precise, incisive, polite and yet unrelenting nature of Ann Cotcher QC's cross-examination quite simply mesmerised the American audience.

Beyond considerations of style, there were a number of differences between the two justice systems which prompted a great deal of debate and exchange of ideas between both the students and the faculty. The two hottest topics being a British barristers' ability to both prosecute and defend but yet his inability to select a jury. The question often being posed along the lines of 'You mean a juror's mom could have been beaten and robbed the night before and you wouldn't even know?' It was clear that the process of jury selection was seen by the American lawyers as one of the most important parts of the trial process and crucial in order to succeed in any case. However, all appeared extremely impressed at a British system which allows barristers the opportunity to both prosecute and defend. It was appreciated how such system allows for a truly objective approach from a self-employed lawyer free from the constraints which exist when being either tied to the state or a law firm.

Whilst at times hard work, the course was extremely enjoyable and instructive for all those involved. There was also a lot of fun to be had. Florida University and all those involved in running the course showed us exceptional warmth and hospitality



(left to right) Barnaby Hone, John Brown, Emma Daykin and Tope Adeyemi

throughout the whole of our stay. We were also able to enjoy a number of events organised in the evenings to unwind and mix socially with the other students and faculty members. This allowed time for an exchange of ideas and for friendships to be made which I am sure will be maintained for years to come. We also had the opportunity of hosting the traditional Pimms Party to say a big thank you to our American counterparts, which we chose to do fully robed, much to the delight of those attending.

At this point it is also necessary to say a huge thank you to Ann Cotcher QC for her time and generosity during the whole of our stay and also to Kevin Molloy, who gave a great deal of his time to the successful organisation of the trip on behalf of the Circuit and without whom the trip would not have been such a resounding success.

It was of course an honour to take part in the programme but also to represent the English Bar and the circuit at such an event. I would highly recommend the course to anybody considering attending next year and hope that the strong international relations and the tradition associated with attendance on the course by members of the circuit continues long into the future.

*John Brown is a barrister at 4 King's Bench Walk*

# IS THERE SUCH A THING AS SPORTS LAW?

BY THE HONOURABLE MICHAEL J. BELOFF QC

**Following on from the piece featured in our spring issue, 'A Sporting Lawyer Looks Back', Michael Beloff QC turns his attention to the growing discipline of sports law.**

The question of whether there is such a thing as sports law is not purely academic. Those who contend that there is do so partly out of a desire to enhance the status of the subject, which is not to say that those who hold a contrary view have any motive to diminish it. But the proponents clearly adopt the Latin phraseology *lex sportiva* to endow the subject with a spurious antiquity; sometimes using the alternative term *lex ludica*, although that carries with it in mistranslation unhappy overtones of ludicrousness. As an American scholar has opined:

*A fully developed lex sportiva would help apply three values that the principle of stare decisis serves: efficiency of the legal process, predictability or stability of expectations: and equal treatment of similarly situated parties.*

Sports law has certainly adopted the clothing of a recognised discipline. There are many books on sports law, including one by me (second edition, foreword by Sebastian Coe, due out before the Olympics). There are, especially in the United States, courses, with consequent degrees, in sports law where potential agents learn the rudiments of



legal principles which in real life they will conveniently ignore, or those who plan to play sports professionally can find than an excuse for attendance at university at all.

More importantly there are sports specific tribunals, at the pinnacle of which stands the Court of Arbitration for Sport ('CAS') in Lausanne, to whose jurisdiction now all major international sports federations subscribe, and which is the main, but not the only, source of sporting jurisprudence. CAS appears itself to recognise the special nature of sports law by requiring of its members among other qualities "recognised competence with regard to sports law" – something sufficient but not necessary since it continues "and/or international arbitration" (S14 CAS Code 2010). But the Swiss Federal Court has described it as a "true" Supreme Court of world sport and while that same Court can review CAS's decisions, it does so (challenges to CAS's jurisdiction apart) within strict limits reminiscent of those recognised by common law courts reviewing the exercise of an administrative discretion.

A special feature of CAS service lies in its provision of Ad Hoc Panels, a mobile legal unit, now a fixture at Olympic and Commonwealth Games, whose decisions have to be handed down within 24 hours of an application being filed. As the Swiss Federal Court observed:

*In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports related issues.*

Many tribunals have to act swiftly and reach interlocutory decisions: the Ad Hoc Panel has to act especially swiftly and reach final decisions. Their accelerated judicial process may be likened to speed chess: but speed chess is still chess.

Of course sports law is entwined with general law. Sportsmen enter into contracts (since few



are the sports which remain faithful to their origins as a source of fun, not fees), although their contracts will naturally reflect the distinctive features of their occupation. They are subject to the law of tort as well as the criminal law both on and off the pitch, pool, rink, track or court, although both laws have to adjust to the fact that many sports are contact sports, and in most there is at least a risk of contact, and fashion the boundaries of what is or is not acceptable behaviour in that light. Boxing is a sport in which the very purpose is to inflict injury upon another, although Lord Mustill, an English Law Lord, in a case involving the compatibility of prosecutions for sado-masochistic activity with human rights principles, confessed himself defeated in search for a principled explanation of its legality.

Sportsmen enjoy intellectual property rights and sports has inspired some creative development of the law in this area, more on the other than on this side of the Atlantic. Section 195 of the Equality Act 2010 has an exception for competitive sport – the female of the species being adjudged, at any rate in the field of play, to be (notwithstanding the contrary view of the imperial poet Rudyard Kipling) less deadly than the male.

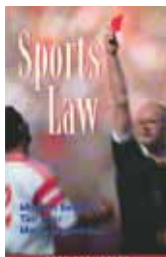
Yet a further indication of the sensitivity of ordinary law to the peculiarities of sport is the line drawn between sporting and economic activity by the European Unions so as to take various sports rules beyond the reach of the pro-competition and freedom of movement provisions of EU law, although the decision of Meca-Medina, saying that the anti-

doping regimes had to be assessed against competition law, has put the cat among the pigeons.

The key test is that the rule in question must be “of a sporting interest only”; so, for example, it embraces restriction on the selection for national teams to nationals – but certainly does not require the selection for local teams to local players only; the galacticos of Real Madrid, come from many countries. Words which bear one meaning in ordinary legal instruments may bear another in instruments governing sport. Taiwan was “a country” for the purposes of the IAAF rules. Monaco was in the European Union for the purposes of UEFA rules. Israel is in Europe itself for the purposes of the FIFA transfer regulations. Changing nationality includes becoming stateless for the purposes of the Olympic Charter; and a distinction is conventionally drawn between legal and sporting nationality, a topic of increasing importance as sporting mercenaries sell their talents to the highest bidder. The well worn concept-the specificity of sport-reflects the fact that in so many areas sport is indeed different.

Sports law has no necessary legislative base; it is substantially untouched by statute, at any rate in the UK as contrasted with the USA but it enjoys an international legal substructure. At the pinnacle is the Olympic Charter and the rules of the major international sports bodies, FIFA, the IAAF, FIA and the like, under whose ultimate authority, regional and local bodies operate in a complex pyramid of interlinked regulations. The World Anti Doping Agency Code 2009 is further evidence of sports law’s globalisation.

In my book, Sports Law, my co-authors and I propounded a distinction between horizontal law – a body of rules which applied across the range of relevant human activity – and vertical law – which was an activity driven body of rules. Torts or trusts fall into the former category. Sports law, like aviation or banking law, falls substantially into the latter. But whether that be so or not, sports law is in no sense devoid of principled foundations. The formula used for the CAS Ad Hoc Panels reflected this character. It directed the tribunal to complement its application of relevant regulations with the “general principles of law and the rules of law, the application of which it deems appropriate”.



In locating these principles and rules, sports law borrows, magpie like, from private as well as public law, appropriately mixing Latinisms with French phrases, and from civilian and common law concepts. It is my personal observation, based on sixteen years with

CAS sharing duties with arbitrators from every region and every legal background that concepts of justice are, at any rate to ethical lawyers, shared across the globe. In substantive law, freedom of contract, pacta sunt servanda, force majeure, clausula rebus sic stantibus, good faith, venire contra factum proprium (or estoppel), ultra vires and the protection of legitimate expectations, equal treatment and proportionality, all feature. Ancillary to substantive law are interpretative guides such as purposive construction, in dubio contra proferentum, nulla crimen sine lege, the presumption against retroactive punishment, the lex mitior, the prohibition on double jeopardy.

This recognition of the international nature of sport finally influenced the shape of the new CAS Code, effective from 1 January 2010, which, while leaving Swiss law as the national law to be enforced, absent agreement of parties to another system, for first instance cases (R45), has now in appellate cases permitted – in echo of the Ad Hoc Panel’s jurisdiction – resort to “the rules of law, the application of which the panel deems appropriate” as an alternative to the relevant regulations, the law chosen by the parties, or the domicile of the decision maker (usually Switzerland) (R58).

But this quilt of principles is not of itself a lex sportiva or ludica, which consists less of the deployment of recognised principles of law in a sporting context (suitably modified) than principles which have their primary function in that context. In AEK v Athens v UEFA, which concerned a rule prohibiting multi-ownership of clubs in the same competition, the Panel observed

*Sports Law has developed and consolidated along the years, particularly through the arbitral resolution of disputes, a set of unwritten legal principles – a sort of lex mercatoria for sports, or, so to speak, a lex ludica – to which national and international sport federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided they do not conflict with any national “public policy” (ordre publique) provision applicable to a given case.*

The Panel spoke yet more generally of “the prohibition of arbitrary and unreasonable measures” as part of such lex ludica.

Some of the sinews of a lex sportiva are the constituent instruments of the sports themselves. These play various roles: regulating the allocation of powers within the sports governing bodies, the regulation



CAS buildings

of competitions and of the game itself. All of these are in principle justiciable, but judicial or arbitral self restraint shows that in practice so called game rules are not. For at the heart of the lex sportiva lies a paradox, namely that one of its key objectives is to immunise sport from the reach of the law, in other words to create a field of autonomy within which even appellate sports tribunals should not trespass. The referee, umpire or other match or competition official must be allowed free play within his own jurisdiction. So he must be free to err, subject only to any corrective mechanism contemplated by the rules themselves.

In Yang v Hamm, a post-Athens Panel had to decide whether to reallocate the medals in the Men’s Gymnastics All Round final when the bronze medalist had been a victim of erroneous marking by the judges as to the difficulty of his parallel bars exercise. The issue arose as to how far the law could intrude on field-of-play official decisions. The general rule of abstention (absent bad faith or corruption), applied in that case, is justified for a variety of reasons: arbitrator’s lack of expertise in the technical side of sport, the inevitable element of subjectivity, resulting in part from different physical perspectives (in judging, for example, whether a tennis ball was in or out), the fear of constant interruption to the course of play, the opening of floodgates and the problems of rewriting a result after the event. The qualified immunity of field of play rule from quasi-judicial review has been extrapolated to challenges to the efficacy of the accuracy of technical equipment. Referees or umpires must, however, apply game rules and not ignore them since, as one CAS panel put it, “a deviation from a mandatory game rule undermines the utility of the rule, and, moreover, may affect the outcome of the game or tournament.” The distinction is not always easy to draw.

The boundary between game rules and legal rules is well recognized, even if, again, the boundary is sometimes blurred. A CAS Panel said

*“The Rules of the Game” (sometimes also called “Technical Rules”) are the rules which are intended to ensure the correct course of the game and competition respectively. The application of such*

*rules cannot, save in very exceptional circumstances, lead to any 'judicial review'. The "rules of law" are of a different nature. They are proper statutory sanctions that can affect the judicial interests of the person upon whom a sanction has been imposed other than in the course of the game or competition. For this reason they have to be subject to judicial review.*

But even where rules of law are engaged, subsidiarity is respected. Common law courts provide numerous illustrations of the reticence of courts to interfere with the decisions of sports regulators which turn on discretion, appreciation, or even construction of their own rules or decisions. Megarry VC famously said:

*Sport would be better served if there was not running litigation at repeated intervals by people seeking to challenge the decisions of the regulating bodies.*

Render unto sports the things that are sports and to courts the things that are legal. Subsidiarity in procedure is linked to finality in substance, another reflection of which is found in time limits, in which matter the *lex sportiva* adopts an attitude more akin to that of the common law than of equity, taking the strict approach of the former rather than the flexible approach of the latter. The logic is impeccable. Absent a strict reliance on time limits, there is anarchy.

If finality is one objective, fairness is another. A key principle of sports law is that participants should be dealt with fairly. This principle includes not introducing a rule affecting a competition after the competition had started. The concept of a "level playing field" or, to use a phrase obscure to those of civilian jurisdictions, "it's not cricket", captures the underlying philosophy.

So important is the principle that it overrides contrary rules or practices. In the AEK/Athens case, the Panel said:

*CAS will always have jurisdiction to overrule the Rules of any sport federation if its decision making bodies conduct themselves with a lack of good faith or not in accordance with due process.*

A third principle is that sports regulators must display fidelity towards their own rules.

In Sydney, the International Weightlifting Federation (IWF) Executive Board decided to suspend the whole Bulgarian Weightlifting Team in the light of three positive tests recorded by Bulgarian weightlifters at the games. The Panel commended the IWF's

objectives in the battle against doping but noted "fundamental and no less legitimate requirement of having a legal basis for disciplinary action".

A fourth principle reflects a bias towards allowing sportsmen to compete if possible. It has been held that a federation or NOC must pursue a policy of transparency in its selection criteria given that "the decision on the selection of an athlete may constitute the opportunity of a lifetime for an athlete". Rules which give a club (but not a player) an option to extend an employment contract are said to offend against such law. So too are disproportionate punishments or suspensions which (unless expressly so provided) run otherwise than from date of the offence.

Fundamental to the idea of fairness to sportsmen and honesty of results is the strict liability rule in doping offences, in which even inadvertent absorption of banned substances is penalised so that it is no defence to an athlete to claim that he was the victim of mislabelling, contaminated stock or faulty advice. But the rigours of the rule are tempered by a number of considerations, each of which operates as a *quid pro quo*. First, CAS demanded that a strict liability standard must be clearly articulated. Second, the regulator has to establish the element of the offence to the level of "comfortable satisfaction". Third, a bright line has been drawn between the sanctions relevant to the competition in which the athlete is proved to have had the presumed benefit of drugs and those relevant to the athletes long term future. The WADC reflects these principles

*In the area of sport the general rules of natural justice are adapted to the special elements of the matter in question. The key hornbook rules are two. First, that both sides should be heard. Second, that a person should be disqualified from determining any matter in which he may or may not fairly be suspected to be biased. In the composition of a tribunal, justice must not only be done, but be seen to be done. Neither the panoply of a court hearing or the technical rules of evidence are engaged.*

There remains the question: should the law intervene in sport at all? To my mind it is not an issue of desirability but of inevitability. Sport, once a recreation is now a business. Not only individual reputation but national prestige can be at stake in a game's outcome. For spectators as well as for participants sport may be a, if not the, major part of their life. In such circumstances lawyers, have a duty, not a choice, to seek to bring order and justice to the table. In that valuable exercise, the

development of a *lex sportiva* will play a vital part.

A few words of advice: Firstly, most sporting bodies do what they want to do first, and only afterwards, if at all, ask if they have power to do it. Secondly, no sporting bodies rules are perfectly drafted. What tends to happen is that amendments are made on a recurrent basis with no thought to their impact on the basic text. Thirdly, most traditional sporting regulators wouldn't know a principle of natural justice if it left a visiting card. Fourthly, few sporting tribunals like lawyers. Like Katherine in *The Taming of the Shrew*, they have to be wooed before won, but by somewhat more dulcet methods. These are rules of experience, not of law – but a lawyer acting in a sports law case will do well to keep them in mind.

A practice in sports law has taken me to the Royal Box at Wimbledon, the President's Lunch at Twickenham (with Iain Duncan Smith), annually the ICC box for the Lords test, the following launch at the Boat Race (with Dan Topolski), the preceding jeep in the London marathon (with Holly Branson), to saying grace (at 30 seconds notice) at the Rugby League Cup Final at Wembley in the exuberant company of John Prescott (it was 6 May 1997 – geddit?), to the directors box at Man United (with Bobby Charlton) and Chelsea (with Ken Bates), four summer Olympics as an expenses paid arbitrator, 8 world championships as a guest of the IAAF and I have a *passé-partout* to any FIA grand prix. So, I ask you – what's not to like?



*The Honourable Michael J. Beloff QC is a barrister at Blackstone Chambers and President of the British Association of Sport and Law*

# RICHARD MATTHEWS QC ON BUILDING A HEALTH & SAFETY PRACTICE

BY BO-EUN JUNG

The second in this year's series of educational lectures organised by the South Eastern Circuit was delivered by Richard Matthews QC. Speaking to a packed audience at the Inner Temple Hall in May this year, Richard told us: "The world of health and safety and environmental crime is one that is open to us all and we should look at exploiting it".

We were given some interesting statistics: the Health and Safety Executive (HSE) prosecute around 1000 offences a year; local authorities prosecute around 300 or more. Although 90% of those cases are heard in the Magistrates' Courts, they are increasingly being committed to the crown court and higher fines are being imposed, particularly where death is involved. In addition, 15,000 enforcement notices are served a year by both the HSE and local authorities. Environmental crime, which is prosecuted by the Environmental Agency (EA), is also on the up in terms of prosecutions and seriousness and is more likely to end up in the Crown Court. There are about 80 to 240 work-related deaths a year. All at present end up before a jury in inquests. Following a fatality, prosecution is now far more likely than ever before.

Richard revealed that his own health and safety practice began with a phone call from the HSE to his senior clerk, asking if anyone had health and safety experience for a trial the following day. Richard Matthews' name was put forward. Luckily the HSE never asked what his experience was and so never found out that it was limited to his father owning a scrap metal yard and being prosecuted for a health and safety offence.

What do we need to know in order to do this kind of work? Richard reassured us that the prosecuting authorities are not looking for health and safety practitioner experts. Nor are they looking for counsel to advise them on best practice; there is a sea of experts out there on that subject. We were advised to start with the Health and Safety at Work etc Act 1974 (HSWA), which sets out the general duties, investigatory powers (which are very different to police powers) and the offences, all in one place. Health and safety cases are also easy to find. Important documents such as "The Enforcement Guide" are easily accessible and downloadable from the HSE website, which was described as



*Richard Matthews QC is a barrister at 2 Bedford Row.*

being superb. Richard also could not resist promoting his own book, *Health and Safety Enforcement: Law and Practice* (3rd edition).

Furthermore, Richard recommended that chambers should be asked to provide accredited training courses on inquests and health and safety for its members. That is what his own chambers did. He also invited barristers to consider joining the Health & Safety Lawyers' Association (HSLA), which holds very good social and educational events and has a mixed membership.

What are the best sources for health and safety work? In addition to the HSE and local authorities, Richard also recommended inquests, which he described as "legal enquiries of the Wild West where coroners have a free rule". He told us that the inquest in particular is a territory that counsel are super qualified in because it is about cross-examination, representation and dealing with difficult situations (such as sitting beside bereaved families).

All employers are obliged to have insurance which tends to give the right to legal assistance. More policy holders are becoming aware of this right and exercising it and so it is a growing source of work. The big insurance companies traditionally used a panel of solicitors, however, the savvy clients are now arguing that there is nothing in the contract that says they have to use a particular solicitor and so the traditional

panel of solicitors are on the back-foot. Local authorities are also coming under pressure to prosecute more individuals because health and safety offences are generally under-enforced. Barristers should advertise themselves to local authorities as being available and qualified for that type of work.

With regard to health and safety defence work, the majority of it is funded by insurance companies. Environmental work is also being increasingly funded by insurance companies and committed to the Crown Court. In order to source this type of defence work, Richard recommended that we start by getting ourselves some advertisable experience. He also recommended joining the Association of Regulatory and Disciplinary Lawyers (ARDL). We were told that the downside of taking on health and safety work or environmental cases is that one has to provide commitment regarding one's diary. Counsel will be expected to turn up to every hearing and be expected to be available. You cannot 'box and cox' with other work. Solicitors expect instructed counsel to be available for everything. But, he said, that is the only downside.

In his closing remarks, Richard stated, "I don't recommend working in a scrap yard. I recommend the HSWA... The work is out there. Our advocacy is the very best. That is what the punter wants. Health and safety cases requires expert advocacy on both sides. There is plenty of work out there and we should try to capitalise on it."




*Bo-Eun Jung is a barrister at 3 Raymond Buildings*

# KEBLE ADVANCED ADVOCACY COURSE

Sponsored by:



BY LAURA TWEEDY

 Advocacy training for most practitioners starts at Bar school, continues during one weekend in the first three years of practice at the compulsory new practitioners program then grinds to a halt. Yet advocacy is the tool of our trade. It is what we rely on to earn money and why we wanted to do the job in the first place. So does it make sense that the nurturing and development of that skill stops at year three?

The Keble Advanced Advocacy Course seeks to remedy this problem. It is a six-day intensive course, which develops the participants' advocacy to the highest level. It is held at Keble College Oxford each year in August and uses the Hampel method of teaching (for further info see [www.advocacytrainingcouncil.org/index.php?option=com\\_content&view=article&id=57&catid=35](http://www.advocacytrainingcouncil.org/index.php?option=com_content&view=article&id=57&catid=35)). It is organised by the South East Circuit, but available to all barristers ([www.southeastcircuit.org.uk/education/keble-course](http://www.southeastcircuit.org.uk/education/keble-course)).

## Cost-Benefit Analysis

The course costs around £2,000.00 (including VAT) for civil practitioners and around £1,350.00 for criminal practitioners. It doesn't feel cheap (although to get it for that price, it is massively subsidised) but you will get the cost back and then some applying the skills you are taught. The Inns now offer scholarships which provide money towards the course and some chambers also offer contributions. Tax and VAT recovery will also reduce the cost.

## Fear Factor

Perhaps the thought of cross-examining in front of your peers fills you with dread? Add to that the teachers being the top lawyers from across the world including judges from the Supreme Court, Court of Appeal and High Court, and, yes, it can be intimidating. However, as soon as you have performed your closing speech on the afternoon of day one, the collegiate and supportive learning environment kicks in allowing this fear to evaporate.

The course lasts six days (including a bank holiday and a Saturday) and requires a minimum of three full days preparation (which is essential) so it does require some potential billing time to be booked out of your diary, but believe me it is worth it. What you learn is invaluable and your advocacy will be advanced by many years.

In my group there was an advocate from Australia who hoped to apply for silk in two years and a fresh-faced tenant, and many in between. It was my preconception that the course was for junior juniors. There were many people there from that bracket but I believe that no matter what your experience this course will advance your advocacy. If you want that final push before you become silk or you are in a 10-year rut with cross-examination or if you think you know it all, each one of you would benefit from this course. The teachers have a passion for promoting outstanding advocacy throughout the profession. I challenge anyone to learn nothing from these people, in fact I defy anyone not to learn their £2,000 worth of knowledge.

## Highlights

I thoroughly enjoyed Keble although it is probably one of the most intensive weeks of my life. One QC told me if you can survive this, you can do any trial handed to you. There were too many highlights to discuss in this short article but the following represent some real gems from the course. Obviously getting cross-examination tips from the top was very useful, just as seeing the effect your body language has on your advocacy. Developing the skills of opening, closing, examination-in-chief, re-examination (and leaning when not to), case analysis, handling experts and skeleton arguments was very useful but the following especially stood out:

- Being taught to appeal by the Court of Appeal – Lord Justice Munby taught me how to appeal. Dos, don'ts, likes, dislikes from the bench itself. It doesn't come much better than that. Practicing submissions in front of Lord Justice Moses and having his critique was equally invaluable.

- Advocacy lecture from Lord Walker – Any talk from Lord Walker, who is a strong pioneer of advocacy advancement which started when he was a barrister, is inspiring. His talk on appellate advocacy was no exception.
- Voice coaching – New to Keble this year was Lucy Cornell, a voice and performance coach. If there was any concern with the pitch or tone of your voice, or even the way you stand, Lucy was able to teach you skills to use your body and voice to be a more persuasive interesting advocate.
- Vulnerable witnesses – No matter what area of law you practice you are likely to come across vulnerable witnesses, whether that be a child, an expert analyst with asperger syndrome or an alcoholic tenant. We were taught special procedures about cross-examining such experts to achieve a result whilst maintaining the utmost respect for the individual.

## Summary

The course is intense but so rewarding and will advance your advocacy. To steal a line from another... Just do it!



Laura Tweedy is a barrister at Hardwicke Chambers

# RESTAURANT REVIEW

## FIELD & FORK, CHICHESTER

BY JEFFREY LAMB

Chichester has more than its fair share of eating establishments, all in close proximity of the crown court ranging from The Vestry Pub and The Slug and Lettuce almost across the road, to not a few 'greasy spoon' cafes nearby. Further into town one can find a delightful French patisserie serving delicious coffees and tantalizing Gallic fancies. However, there is now a hidden gastronomic gem no more than 500 yards or so from the court building, the Field & Fork Restaurant. Set within the Pallant House Art Gallery on North Pallant and, though fairly small inside, it has a very pleasant garden which holds a dozen tables situated under beautifully spreading trees that give the garden a most salubrious atmosphere.

The extensive a la carte menu will give any pedantic gourmet little to complain about. Dishes include Colchester rock oysters and roast suckling pig, Pear Charlotte as well as banana and chocolate chip soufflé. As an alternative, the restaurant offers special set menus: 2 courses plus a 175ml glass of house wine for £17.95 or 3 courses plus a glass of wine for £21.95, which I expect will satisfy the most discerning of diners.

The set menu changes regularly with starters on the day I visited of salad of sea trout, saffron and parmesan gnocchi with roast courgettes, rocket and cockle broth and roasted wood pigeon. All of the starters were mouth watering to read and led to some fairly excited discussion prior to ordering. Those chosen – the sea trout salad and cockle broth – were simply delicious. The salty littoral subtleties of the cockle broth, to my mind, slightly outweighing the texture and delicate flavours dancing over and around the sea trout. Fans of sea food will, I am confident, be enchanted by this most unusual starter.

The main course chosen by my companion was spiced hake with buttered fennel whilst I enthusiastically opted for roast breast of guinea fowl, parsley mash, smoked pancetta with rosemary and olive jus. Other options

available included caramelised onion galette with goat's curd. These too were delicious, with both of us seeking to outdo each other in attempting to describe the wonderful flavours of the respective dishes. The white flesh of the hake dissolved comfortably on the tongue whilst the guinea fowl was roasted to perfection.

The menu informs patrons that the restaurant grows its own vegetables and fruit and strives to obtain all of its produce from local sources whenever possible. The vegetables provided with the main course certainly were prepared to a high standard and delightfully complemented the hake and the guinea fowl.

For bread lovers, on offer is a plate of four bread rolls, served while you await your starters. The four we received were deliciously different; one olive and walnut roll, one pumpkin roll and two varieties of white bread. A small warning: the breads do not form part of the set menus and you will be charged for them.

In addition to the extensive food menu, Field & Fork offers a comprehensive and eclectic wine list. We chose one glass of a German Pinot Grigio bottled at Gehringshof in 2009 and another of Spanish Rose named Estimo la Purisima 2010. Both were excellent wines and were fine accompaniments to the meals. The Pinot was particularly delicious because I enjoyed it ice cold on a warm September day.

Whilst I am sure the art gallery itself is excellent (there was an exhibition of paintings by Frida Kahlo on the day I visited) Field & Fork is undoubtedly worth a visit at any time of the year, but given the delightful garden, especially during the summer months. For those spending any time in Chichester, it would be a shame not to enjoy its many pleasures. Two words of warning though: first, without the garden in working use, the restaurant is quite small and a table booking is essential, second, you are unlikely to get through three courses during the usual court



luncheon adjournment and possibly only just through two. With a five-minute walk either side of the eating experience, either a longer than usual midday adjournment or an understanding – or epicurean – judge, will be required. Find a way. It will be well worth it.

Cost:	£17.95/£21.95 for 2/3 courses + wine
Verdict:	High class, delicious food



Jeffrey Lamb is a barrister at Westgate Chambers

# THE DEATH OF REFERRAL FEES

BY PROFESSOR DOMINIC REGAN



The payment of referral fees in personal injury cases is to be banned. Yet again Lord Justice Jackson has got what he wants. This may presage other seismic shifts. The position in Whitehall in the summer of 2010 was that solicitors who wanted to spend their money to secure work should be free to do so. In his report *Common Sense, Common Safety* last autumn

Lord Young identified concerns:

- Those who paid out the most got the most.
- A firm handing out these fees got one hundred times more cases than those who didn't pay fees.
- There was no correlation between payment and quality of work. Indeed, the higher fee remitted meant that the balance left to cover the cost of doing a proper job for the client was severely diminished.

Earlier this year the Legal Services Board published a report suggesting that since claimants were not bothered about these fees (which were borne by their own solicitor) we should leave be and have another look in 2013 (see *Referral fees, referral arrangements and fee sharing*). This torpid publication failed to meet the trenchant criticisms made by Jackson LJ, which are shared by many solicitors as I witnessed on a Sir Rupert roadshow in 2009.

Why the change of heart? The government was rattled, that is why. Jack Straw, the man who established the claims management regime, disingenuously protested about referral fees, rich since they thrived on his watch. The Times gave him a prominent platform and AXA, an insurer not addicted to referral fees unlike some other big name insurers, renounced the selling of claims altogether.

Then the Daily Mail came onto the scene. The road traffic lawyer John Spencer gave them a two-page interview in which he described the schemes and scams which now inhabit the crooked world of cash for crash (8 June 2011). Put this in the context that there are 31 million car owners in the UK. Road traffic premiums have jumped 40% in the last year. An off the record briefing last Friday intimated that banning fees would cut the cost of insurance by £150

a year, the equivalent of a 1p cut in the basic rate of tax.

Expect the ban to coincide with Jackson implementation, destined for next year. That said, there is going to be some intriguing in fighting in the days ahead. How does one even define a referral fee? The government press notice issued at midnight last Thursday said, accurately, that there is no universally accepted description. What of payments in kind rather than hard cash? Tom Jones at Thompsons told me that his firm gives support, often in the form of free legal advice, to charities which cater for those suffering from industrial diseases.

Unsurprisingly, clients are directed towards a firm that knows what it is doing. The giving of such support generates a referral in as noble a manner as I can think of.

## Intervention

A highly placed judge suggested to me last week that the involvement of the criminal law in road traffic litigation is long overdue. He was not talking about crooked claimants who stage collisions for gain but the insurers, garages and lawyers behind many claims which are based on a genuine collision. Misrepresentation of repair charges and the like is a naked attempt to defraud and a conspiracy to pervert the course of justice.

There are two sides to every story. One solicitor on the south coast told me that without the ability to purchase cases their injury department would collapse. According to The Times on 10 September 2011 the insurer Admiral, a company with a decent record for pragmatism in handling claims, derives 6% of its profits from referral fees. A few law firms issued an angry attack on the proposal, claiming that it would not bring down the cost of insurance, an assertion I suspect would have Sir Rupert shuddering. The introduction of a level playing field is something he thinks beneficial plus he has made the wry observation that claimants (somehow) found legal representation prior to the legitimisation of referral fees in March 2004!

Amid all the froth about alternative business structures there does now arise one serious possibility: might not a claims management company (CMC) overcome the ban by

buying the firm it sold the cases to? It would then direct cases it acquired to itself. Some CMCs have already contacted solicitors to assert that they will be untouched by the ban. Fees will be called marketing or advertising charges instead.

## Solution

A final word of warning for those rash enough to say that banning referral fees will not bring down the costs of road traffic litigation. Some solution is necessary and one certainty is fixed costs. I can think of another measure which would be both guaranteed to reduce costs and overnight destroy the vast majority of injury firms in business today. Increase the small claims personal injury limit to £5,000. You could keep referral fees then for no-one would ever pay out that which they could never recoup. No costs, no referral fees and, oh yes, no solicitors. Is that what they want? It is what they might get. Relent.

Note how the government capitulated in the light of public opinion here. Exactly the same thing could happen to the proposal to remove legal aid from clinical negligence. That battle has yet to start. It will.

This article was first published in the September 2011 issue of *New Law Journal* ([www.newlawjournal.co.uk](http://www.newlawjournal.co.uk))



*Professor Dominic Regan, visiting Professor at City University London, has been helping Lord Justice Jackson & HHJ Simon Brown QC with costs reform.*

# CIRCUIT TOWN CAMBRIDGE



BY DUNCAN O'DONNELL

There can be few people globally who do not know that Cambridge has a new Duke and Duchess. They seem a rather pleasant young couple so there is no need to remind them that Cambridge elected Cromwell as its MP in 1640. His window-smashing activities might explain why we still don't have a cathedral and only got our city charter in 1951. Iron age settlements, Saxons, Vikings and Normans came and went but it was not until 1209 that the first university students escaped from the hostility of the Oxford townspeople and established themselves in Cambridge. The oldest college that still exists is Peterhouse, the model for Tom Sharpe's Porterhouse, founded in 1284.

The centre of Cambridge is one of the most beautiful places in Britain; punting on the Cam, the Kings College Choir, the ancient college and lanes are quintessentially English. Inevitably the city is the fourth most popular tourist destination in the UK, just behind London, Edinburgh, and Bath. It also has arguably the densest student population, combined a recipe for crowds, shoplifting, sweaty nightclubs, punch ups, and cheap, quick food served by ubiquitous national chains and a host of ethnic restaurants of variable quality.

The city remains relatively small with a population under 110,000, including some 22,000 students, and must have seemed an idyllic place before the 1930s when the first of several council estates to contain London overspill arrived making much of the surrounding area look much like anywhere else. The railway and Cambridge station were built in 1845 and it is said that the location, well away from the town centre, was insisted upon by the University so that students would not be distracted from their studies by the possibility of quick trips to London. It is this proximity to the capital (50 miles) that has led to Cambridge developing as a commuter town and that, together with being at the heart of the high-technology industries which has become known as "Silicon Fen" that has led to its astronomically high property prices.

Academics and barristers are increasingly relegated to the surrounding villages. Indeed, the first guided busway in Britain, and the longest in the world, has recently been completed (two years overdue) to bring such paupers into the city centre.

A few years ago the crown court was relegated from the Guildhall in the central Market Square to a new building on a somewhat isolated site near a bleak roundabout where the retail parks commence – about the same distance from the city centre as the railway station is in the other. Most of the better restaurants are some fifteen minutes brisk walk away near the town centre, so you may have to make do with Bella Italia in the somewhat downmarket Grafton shopping centre opposite the court building or the van doing rather nice Caribbean takeaways round the back. Beyond the "bleak roundabout" is Midsummer Common where you might prefer a sandwich by the river Cam, if the fenland wind desists. For a celebratory meal, Midsummer House, the only two star Michelin restaurant in East Anglia, hides away on the common, however the prices are likely to make this only a very occasional fixture for most criminal bar colleagues.

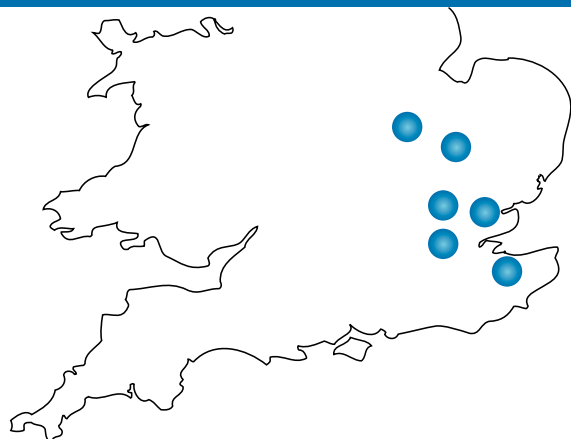
For those with lighter wallets there is a concentration of the quasi 'French' and 'Italian' chains – Cafe Rouge, Chez Gerard and also a rather nice Japanese place called Teri-Aki along Bridge Street and on to the riverfront. Last year Jamie's Italian opened hidden behind the Guildhall off the Market Square (you may be relieved to know that you are unlikely to meet the ubiquitous chef) and there is a good selection of ethnic restaurants along Mill Road. However for an evening meal you cannot do better than Restaurant 22 for quality linked to value and easily missed inside a Victorian terrace house on the unglamorous Chesterton Road (a clue to the number is contained within the restaurant name.)

For those advocates needing accommodation the city is awash with Premier Inns, Travelodges and the like. For those with more expensive tastes the range is narrower, one obvious choice would be The University Arms Hotel located right on Parkers Piece, once the sort of place where the Beatles and the Kray brothers stayed; another would be our example of the boutique chain Hotel du Vin on Trumpington street. That street is also the site of the Fitzwilliam Museum, our very own mini British museum, with the same eclectic selection of exhibits. It is not the only museum (this is Cambridge after all) and one of the remaining pleasures of our profession, the early day, gives you a chance to wander through almost empty halls displaying the great finds of the past in zoology, anthropology, classical archaeology, science and Polar exploration. And if your case ended on the second day and you haven't earned a bean, at least they are free.



*Duncan O'Donnell is a barrister at 1 Paper Buildings*

# BAR MESS REPORTS



## CAMBRIDGESHIRE AND PETERBOROUGH

On Thursday 7 July 2011, our Mess conducted a mock trial for pupils at The Stephen Perse Foundation and Netherhall School. Due to industrial action, the Cambridge Crown Court was unable to provide the usual venue and so it took place at the Stephen Perse Senior School hall, in Cambridge. The students prepared immensely hard and had a great time: it has shown again how these events hugely inform a young aspiring lawyer's decisions. The staff involved have reported that the Mock trials held over the last 3 years have resulted in additional students of ability choosing to apply to study law at University. There is a write up about the mock trial on the Perse school's website ([www.stephenperse.com](http://www.stephenperse.com)), and the 'Court Reporter' has published an inspired article headed 'Is crime losing it's excitement?' Many thanks to all members of the Mess who were involved in making the arrangements and to those who acted as Mentors to the pupils.

The Peterborough and Cambridge Bar Mess are hosting an event on 19 October 2011. A talk will be given by HHJ Madge on Case Management and the Criminal Procedure Rules at 6pm, at The Hawks Club, 18 Portugal Place, Cambridge, CB5 8AF. This talk will be followed by drinks and snacks. This is a free event thanks to funding from the Circuit and the Bar Mess, and it is open to all those who practice at Peterborough and Huntingdon Crown Courts. The numbers are limited to 30, so those who wish to attend should inform Claire Matthews of One Paper Buildings by 19 September 2011.

*Azza Brown*

## ESSEX

The pens have been laid down, the word processors have fallen silent, at least for the time being. Applications for the CPS panels have been submitted, references emailed off into the ether. And the worrying continues. Your scribbler wonders what this process is supposed to achieve – the CPS have always of course been perfectly free to choose able counsel, and quietly ignore those who fail to satisfy. They have been doing just that since time immemorial. Why they should embark on this procedure which threatens the careers of so many is a mystery. Have they forgotten the years of loyal service the Bar has given, and the commitment that most of us still give, unquestioningly? Why there should be a wholly artificial quota introduced at the crucial level 3 is unclear and it is a particularly distressing aspect of the whole scheme. It is fortunate that Nick, our hardworking leader, has helped to secure some measure of bar representation on the CPS panels that will be considering the applications, and he hopes that circuit silks will involve themselves in the process.

Another group of fantastically able lads and lasses had to deal earlier in the summer with the anxiety of waiting to hear whether they had passed the Recorder's exam. Many did not. This the second such competition in recent years and it is perhaps time that the Bar Council and the Law Society approached the JAC to see if a more equitable system could be devised which would be better able to secure the appointment of the best of the pool, not just those who happen to be good at the exam that appears to be the gateway of choice at the moment.

The Courts in Chelmsford and Basildon are bearing up well in these difficult times, under the calm control of HHJ Ball and HHJ Mitchell respectively. The late summer transfer window which is causing such problems for north London's finest (Arsenal, apparently) has left Chelmsford unaffected, the strong team there remaining loyal to their manager, who marked the 10th anniversary of his appointment to the bench this summer. Well done Chris! But over at Basildon, some movement is reported,

with HHJ Robinson looking to move back to central London. Ditto HHJ Saggerson. We shall miss them both. HHJ Black has proved a most welcome addition to the team and HHJ Owen-Jones, recently appointed to the Bench, has been signed up to provide more depth in midfield to HHJ Mitchell's men. Your scribbler remembers with affection many a libation shared with the new Judge and is sure that, as one of nature's true gentlemen, he will prove a popular addition to the Basildon lineup. And breaking news suggests that the charismatic Owen Davies may be heading east out from Fenchurch Street as well. An abundance of Celtic graces!

All of us practicing in Essex are delighted to see that Margaret, list officer extraordinaire at Chelmsford has recently returned to the front line after a period of ill health. Welcome back.

We bid a fond farewell to Alan Moore – stalwart of the Chelmsford office of the CPS for longer than most can or would care to remember. A lot of us owe Alan a great deal in terms of support as our careers developed. Your scribbler certainly does. We wish him well as he embarks on the next stage of life's wonderful mystery tour. His retirement party at the Judge's lodgings was well attended and amongst the glitterati was spotted HHJ Moss, up from the Bailey to raise a glass to Alan.

Good to see our Essex boys and girls doing their bit for the profession – Peter Lodder is proving to be an excellent Chairman of the Bar, with Maura McGowan recently elected as Vice Chair. And Max Hill has already been heard talking sense on Radio 4 and looking resolute in the traditional interview in The Times on taking over as chair of the CBA from the exemplary Chris Kinch. Tough times lie ahead but at least the profession has some big hitters in place to try and save this glorious profession.

See you all at the annual dinner, date and venue as yet known only to our most excellent junior, but he will surely share the news with us soon!

*'Billericay Dickie'*

## SUSSEX

The Sussex Bar Mess continues to go from strength to strength as, together, members rise to the challenges posed by continued cuts and the landslide of bureaucratic changes that threaten us all over the coming months and years. Next year will see the launch of our new website where members will be able to catch up on news and events and keep abreast of all that is happening to the profession.

This year's Summer Garden Party was a tremendous success in spite of the weather. It was held in the beautiful setting of Anne of Cleves House in Lewes, where guests were free to look around the historic house and enjoy a glass of Pimms (or several) in

the garden whilst the children were held in thrall by a magician in Anne of Cleves' apartment upstairs. Members enjoyed a delicious lunch – the Eton Mess vanishing at speed – and a thorough drenching. Most unfortunately, some found themselves entirely stranded under a garden parasol during an extended downpour, with only the contents of the drinks table to sustain them.

As the Recorder of Brighton celebrates 20 years on the bench, the Mess is to hold a dinner in the Autumn with HHJ Brown DL as our guest of honour... assuming he has dried off!

*'Lewes Lane'*

If you wish to contribute any material to the spring 2012 issue of The Circuiteer, please contact:

Ali Naseem Bajwa QC  
alib@gclaw.co.uk

## Images from the Annual Dinner 2011



*Mr. Justice Fulford and Edward Garnier QC, MP*



*Keir Starmer QC*



*Gareth Evans QC and Max Hill QC*



*Peter Lodder QC and Max Hill QC*



*Oscar del Fabbro*



*Stephen Leslie QC, Gareth Evans QC and Edward Garnier QC, MP*



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