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# Archbold Review

## Cases in Brief

*Aggravated vehicle taking—strict liability*

**TAYLOR [2016] UKSC 5; February 3, 2016**

Aggravated taking without consent (Theft Act 1968 s.12A) required there to be fault in the quality of the driving that caused injury.

(1) *R v Hughes* [2013] 1 WLR 246 was not distinguishable. *Hughes* applied to the offence under the Road Traffic Act 1988 s.3ZB, and the Supreme Court in that case had left open the question of how far its reasoning applied to the offence in s.12A. However, while there were relevant differences between the offences, the essential point made in *Hughes* was common to both offences. The wording of both posited a direct causal connection between the driving and the injury. If the requirement for causation was satisfied by the mere fact that (in the s.12A case) the taking of the vehicle accounted for its being in the place that an accident occurred, then the anomalous consequences identified in *Hughes* applied equally to the s.12A offence.

(2) Even without authority, the Crown's argument invited the Court to treat s.12A as imposing strict liability for the aggravating factors. Such imposition required the clearest statutory language, or to be necessary for the achievement of the statutory purpose, the latter being confined to regulatory or quasi-criminal offences which (a) were founded on collective convenience rather than a moral imperative, and (b) were apt to encourage the relevant party to take positive steps to prevent the penalised outcome in advance (*R v Tolson* (1880) 23 QBD 168, *Sweet v Parsely* [1970] AC 132. Neither applied to s.12A (although (b) did apply to the imposition of strict liability by clear words on a person a party to the basic offence and in or near the vehicle at the time of the injury).

*Corruption—Prevention of Corruption Act 1906—whether applied to a foreign principal or foreign public body before amendment by the Anti-Terrorism, Crime and Security Act 2001—statutory construction*

**AIL AND OTHERS [2016] EWCA Crim 2; January 15, 2016**

Reversing a ruling at first instance following a prosecution appeal, the Court held that, prior to the coming into force of the Anti-Terrorism, Crime and Security Act 2001, it had been an offence under the Prevention of Corruption Act 1906 s.1 to corrupt an agent of a foreign principal or a foreign body. The 1906 Act was not confined to public bodies, unlike the Public Bodies Corrupt Practices Act 1889. The two Acts created different species of offences, the one limited to public bodies (and not foreign public bodies), the other not so limited and utilising the concepts of "agent" and "principal", which were widely (and non-exhaustively) defined to embrace their normal language as well as legal meaning. Legislators at the time would have had no difficulty with these concepts embracing both foreign and domestic people. Had Parliament intended to exclude foreign principals from the scope of the Act, it would have done so. The Court rejected arguments that the Prevention of Corruption Act 1916 had restricted the definition of "agent" in the 1906 Act as ignoring the clear words of both statutes, noting that the mere fact that an Act provided that a number of statutes covering the same area could be cited collectively (s.4(1) of the 1916 Act) did not mean that the basic rules of statutory interpretation could be ignored. Nor did the fact that it had been felt necessary to amend the 1916 Act in 2001 lend weight to the contrary view. While, following the enactment of s.108(2) of the 2001 Act, it was beyond argument that foreign agents and principals fell within the scope of the offence contrary to s.1 of the 1906 Act, the amendments were enacted *ex abundantae cautelae* to address concerns expressed

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by the OECD in a 1999 Review of the implementation of the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. This concern was notwithstanding the view expressed by the government and a Law Commission report (Law Com 248, para 3.18), both of which were right.

*Money laundering—conversion of criminal property—Proceeds of Crime Act 2002 s.327(1)—illegal drugs–whether conversion required "benefit" to be realised—conspiracy to convert*

**OGDEN AND OTHERS [2016] EWCA Crim 6; January 26, 2016**

O, a drugs wholesaler, and those to whom he supplied drugs, were properly convicted of conspiring to convert criminal property.

(1) A conviction for the underlying offence of converting criminal property contrary to the Proceeds of Crime Act 2002 s.327(1) required two elements – that the property be "criminal property", and that it be converted. Proving that the property was criminal required proof that it was the benefit of criminal conduct (i.e the definition in s.340(3)); but it was not necessary to prove "benefit" in respect of the conversion (or the other s.327(1) offences). Illegal drugs by their nature always represented criminal property. "Conversion", undefined in the Act, bore its natural meaning (see e.g *R v Montila* [2004 UKHL 50, *R v Middleton* [2008] EWCA Crim 233, *R v Fasal* [2010] 1 WLR 694, *R v Martin* [2012] EWCA Crim 902 and *R v Rogers* [2014] EWCA Crim 1680). It was not necessary for the criminal property to change its form for it to "convert". The *obiter* illustration given by Clarke LJ in *R v Loizou* [2005] EWCA Crim 1579, [32] should be "treated with caution" – the Court quoted Professor Ormerod QC's comment [2005] Crim. L.R. 885, which suggested that, contrary to Clarke LJ's assertion, offences were committed in his example.

(2) As to conspiracy, where A and B made an agreement for the sale of illicit drugs, they were both guilty of conspiracy to convert or transfer criminal property because they were both involved in arranging, agreeing and effecting the conversion or transfer.

(3) While it was true that, as a result, every person who bought illicit drugs for personal use would be guilty of an offence under s.327, the Court had no doubt that good sense would prevail and prosecutors would only resort to charging the offence in appropriate circumstances. The instant case was a "paradigm example" of when such a charge was appropriate, because, while there was evidence that O was selling drugs wholesale, the Crown faced difficulty proving the type and quantity involved.

*Procedure—note-taking by members of the public—default position—approach of judge*

**R (EWING) v CROWN COURT AT CARDIFF AND NEWPORT [2016] EWHC 183 (Admin); February 8, 2016**

The judge hearing an appeal in the Crown Court had been wrong to hold that, as a matter of convention, members of the public required the permission of the judge to take notes in open court, and to refuse E permission to do so. The default position was that members of the public should be free to take notes, as a feature of the principle of open justice. For any number of reasons a visitor to a court may wish to have a record of the proceedings for later use or out of interest, and there was no good reason why the starting point should be that note-taking was not allowed unless permission has been sought and granted. Note-taking by members of the public was unlikely, without more, to interfere with the due administration of justice. The reasons for a distinction being drawn between ordinary members of the public and journalists and legal commentators in connection with live text-based communications in Criminal Practice Direction 2015 Part 6C (Amendment No 3 [2015] EWCA Crim 430) did not apply to ordinary note-taking. The default position was subject to the control of the court which, for good reason, may withdraw the liberty to make notes. The paramount question for the judge if considering withdrawing that liberty would be whether the note-taking in question would be likely to interfere with the proper administration of justice, such as the danger that the isolation of witnesses before they give evidence would be prejudiced. There were no such dangers in E's case.

*Procedure—proceedings heard in camera—constitutional role of DPP and of court—approach of the court—duty of the executive—importance of review and assistance for judge—presence of accredited journalists during in camera proceedings—availability of previous closed judgments to the Court*

**GUARDIAN NEWS AND MEDIA AND OTHERS; R v INCEDAL [2016] EWCA Crim 11; February 9, 2016**

After I's trial for terrorism offences, media organisations sought to appeal (Criminal Justice Act 1988 s.159) the Crown Court's refusal to lift restrictions on the reporting of what took place during hearings in private during the trial, but in the presence of accredited journalists. A s.159 appeal against an earlier order had been largely refused by the Court of Appeal ([2015] 1 Cr. App.R 4). Judgment was given by the Lord Chief Justice.

(1) In assessing the principles in relation to ordering a departure from open justice in national security cases, it was necessary to distinguish on constitutional principles the respective functions of those involved. (a) The DPP: The decision on prosecution under the constitution was to be made by the DPP independently of the Executive: see for instance *R v DPP ex p Manning* [2001] QB 330, [23], *A* [2012] EWCA Crim 434 and *Moss and Sons Ltd v CPS* [2012] EWHC 3658 (Admin) at [26] to [30]. Where the police or the Security and Intelligence Services put evidence before the DPP, and took the view that some or all of the proceedings should be held *in camera*, it must be for the DPP, and the DPP alone, subject to the superintendence of the Attorney General and the ultimate supervisory jurisdiction of the court in exceptional cases, to determine whether to prosecute and, if so, whether to make an *in camera* application. (b) The Court: When the DPP made the application to the court, the court proceeded on the basis that the principle of open justice was fundamental (see the eloquent formulations of the principle in *Scott v Scott* [1913] AC 417, esp at 437-9 and 476-8); but that equally there were exceptions, as set out in *A-G v Leveller Magazine* [1979] AC 440 at 449-450. It was for the DPP, as the party seeking to curtail the principle of open justice, to make a very clear case: it must be shown that a hearing *in camera* was "strictly necessary" and "that by nothing short of the exclusion of the public can justice be done" (*per* V. Haldane in

*Scott v Scott*), and the principle could only be departed from in unusual or exceptional circumstances (*In re S (a child)* [2005] 1 AC 593, [18]). (c) The court's decision: Where the reason for departing from the principle of open justice was based on reasons relating to national security, it was for the court and the court alone to determine if the stringent test has been met. It alone decided whether the evidence or material in question should not be heard in public, albeit paying proper high regard to a Home Secretary's certificate: *R v* (*Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, [50] to [57]). A prosecutor's view as to whether or not the prosecution would continue without an *in camera* hearing was not the determining factor, given the constitutional roles set out above. In the first s.159 appeal, the Court of Appeal had determined the issue by considering whether there was a serious possibility that an insistence on open justice would deter the prosecution from prosecuting, and held that if the prosecution did not prosecute, there would be serious prejudice to the administration of justice ([17] and [18]). While observations in *R v A* [2006] 2 Cr App R 2, [11] and [42] and *R v Wang Yam* [2008] EWCA Crim 269, [7] could be said to support such an approach, on analysis, in both cases the Court came to its decision on the basis of a consideration of the evidence in issue. But in any event, the constitutional position made it clear that it was for the court itself to determine whether the evidence in issue should be heard *in camera* by consideration of the nature of the evidence. Determining the matter on the basis of the DPP's view removed from the court its proper constitutional function, and resting on the implied threat of the DPP not to prosecute unless the court were to defer to his or her view, which did not satisfy the test of necessity. In effect, it transferred the decision on whether to depart from the principle of open justice to the DPP. (d) Duty of the executive to provide evidence: if the DPP decided to proceed with a prosecution, no part of the Executive could refuse to provide the evidence required by the DPP on the basis that it perceived that it was not in the interests of national security to provide it. The court had made its decision and the Executive must abide by it. It must also abide by the decision of the prosecutor. If the DPP decided on continuation, then the Executive must give the prosecution its full cooperation and assistance. (e) Importance of the principle in relation to review: The decision of the court to hear evidence *in camera* or to withhold information from the public and/or the press was subject to continuous review during the trial. Such a duty imposed a very substantial burden on the trial judge. In most cases, the judge would have the assistance of counsel for the parties. However, in some national security cases, a judge might be assisted by the appointment of an independent lawyer with the appropriate security clearance, and the Court would expect one to be appointed if requested by the judge.

(2) The orders in this case allowed the attendance of accredited journalists during some parts of the trial from which the public in general and other journalists were excluded. Their presence made the management of the trial much more difficult than it would otherwise have been. It was not possible to have foreseen the difficulties, but the Court had been led to the firm conclusion that "a court should hesitate long and hard" before making such an order.

(3) Applying the correct approach, the application was dismissed.

(4) The Court concluded by observing that it was not satisfactory that a court considering an *in camera* application was not able to consult closed judgments in previous cases, and asked the Registrar of Criminal Appeals to establish a working party to advise the Court on a course of action to remedy this.

*The next edition of Archbold Review will carry an article on R v Jogee [2016] UKSC 8; Ruddock v The Queen [2016] UKPC 7.*

# SENTENCING CASE

*Confiscation; tainted gifts*

**R v JOHNSON [2016] EWCA Crim 10; January 3 2016**

The appellant appealed against a confiscation order made under the *Proceeds of Crime Act* 2002 (the 2002 Act) requiring her to pay £20,000 with a 12-month prison term in default of payment. The benefit figure adopted included a £20,000 tainted gift to the appellant's daughter. This gift was equity in a property which the appellant sold to her daughter. When the confiscation order was made, it was expected that sale of the property would leave the daughter owing a debt to the mortgagee. This expectation proved correct and the daughter could not repay the gift of £20,000. The court was required to assess the value of the tainted gift and to include it in the available amount. At the date of the confiscation hearing the value was nil, but s.81(1) of the 2002 Act required the court to take the greater of the value of the property given at the date of the gift or the value of the interest at the date of the hearing. The Judge accepted that the value of the property at the date of the hearing was less than the sum outstanding on the mortgage and that the appellant had no other assets. The order would therefore not be paid and the term of imprisonment would be served in default. The appellant appealed to the Court of Appeal, submitting that the order was unjust and should be quashed. The Court of Appeal stated that a finding of criminal lifestyle has two consequences: the tainted gift provisions apply and four statutory assumptions are made. As regards the four assumptions, s.10 of the 2002 Act provides that the court has a duty not to make an assumption if it is shown to be incorrect or creates serious risk of injustice. There is no such duty (or power) in respect of tainted gifts. They must be included in the available amount and at a value which may be higher than the value of any identifiable property held by the recipient of the gift to which the person against whom the order is made may have access.

Where the Crown seeks an order to recover the value of a tainted gift which appears to be worthless at the date of the Order, the Judge should consider three things:-

(i) The robustness of the evidence of the value of the tainted gift;

(ii) The proportionality of making an order in the sum sought; upon which see the guidance given at paras 20, 21 and 24 of *Waya* [2012] UKSC 28;

(iii) The appropriate term of imprisonment to be imposed in default.

Where the court is satisfied that enforcement is impossible that may be a reason to make a substantial reduction in the term imposed in default. This will be a wholly exceptional course.

After concluding that the Judge was right to assess the recoverable amount at £20,000, the Court considered whether an order in that sum must be made, or that the term of imprisonment in default should be fixed without taking into account the fact that the only available asset was, at the time of the order, worthless. The Court also considered the issue of proportionality. Reviewing *Waya* (above), *Jawad* [2013] EWCA Crim 644 and *Harvey* [2015] UKSC 73, the Court concluded that the categories of disproportionality so far recognised appear to be cases where, unlike this one, the offender's conduct has extinguished or reduced the loss. Here the amount gained was not reduced by any value flowing from the appellant. The amount gained from the crime was £20,000. The amount deemed to be available was also £20,000. It was, in fact, nil perhaps because the appellant had over-valued the gift but certainly because of a fall in property values and the accrual of mortgage arrears. None of those factors effected any reduction in the amount the appellant had obtained from crime. The statutory aim is the recovery of that amount and the means used were proportionate to it. The decision of the Judge was therefore not manifestly excessive or wrong in principle.

# Case in depth

## R v GB [2015] EWCA Crim 1501

By Charles Falk, Drystone Chambers[1]

Defendant GB, aged 67 at sentence, pleaded guilty to historic incest and two specimen indecent assaults on his sister, who was 15 months younger than him, approximately 53 years ago when he was 14/15 and she was 13/14. (He was originally charged with rape.) They were the eldest of four siblings who lived with their parents in a two-room apartment in North London in the early 1960s. The whole family slept in a single room and it was common ground that the children would wake up and witness their parents regularly having sex. The family was uneducated and of limited means. Over a six-month period, when he was 14 and she was 13, the defendant began to experiment with his sister and digitally penetrated her vagina on numerous occasions. That stopped when they moved house and she was given her own room. On a single occasion just after her 14th birthday, when the defendant was 15, he went into her room and had vaginal intercourse with her, without ejaculation, and then gave her a £1 note. There were no further incidents after that.

The complainant went on to have a troubled adult life and later blamed her brother's actions for the breakdown of her three marriages. In 2008 she confronted him about the abuse with a hidden recording device. He made some admissions and apologised to her. She eventually reported the offences in 2013. He was interviewed and again made partial admissions. There were negotiations over plea but it was treated as a full credit case.

The sentencing judge looked at the current Sexual Offences Definitive Guideline applicable to sentences after April 1 2014 and using the equivalent offence of Sexual Activity with a child family member (s.25 SOA 2003) he found this to be a category 1B offence with a starting point of three and a half years with a range of two and a half to five years custody. The judge then significantly reduced it to take account of the fact that he was dealing with a then 15 year-old child and imposed a sentence of 15 months immediate custody for the incest with eight months concurrent for the indecent assaults.

The Court of Appeal found that the judge should not have used the current guideline at all. The current definitive guideline specifically states that it is only applicable to offenders aged 18 and older. Page 151 of the same guideline states that, "Definitive Guidelines for the sentencing of offenders under 18 years old are **not** included." Youth guidelines for sexual offences were always intended to follow later and presumably will at some point do so. The current position, however, is as follows:

The Court also observed in their remarks that when sentencing an offender under 18, regard has to be had to the welfare of the young offender as stated in s.41(1) of the CYPA 1933 and the definitive guideline of the Sentencing Council's overarching Principles on Sentencing Youths, which emphasises the importance of rehabilitation rather than to impose retribution.

The Court of Appeal read this as meaning that the previous guideline (i.e. the *Sentencing Guidelines Council Sexual Offences Act 2003 Definitive Guideline* for offenders sentenced after May 14 2007) has only been superseded by the 2014 guidelines as far as adults are concerned, but is still in force as far as sentencing Young Offenders.

Part 7 of the previous guideline (unlike the current one) has specific starting points and ranges of sentences for various sexual offences committed by youths. In GB's case the starting point for the equivalent offence of penetrative sexual intercourse with a child family member (maximum 14 years for an adult, but five years for a child) is a community order with a range of non-custodial sentences, absent aggravating features:

> "[T]he purpose of sentence being to educate, repair damage and effect rehabilitation rather than to impose retribution."

The Court of Appeal therefore quashed the sentence of imprisonment, replacing it with a three-month community order with the least onerous condition of seven days residence due to the time spent in custody prior to appeal.

The Court drew no distinction as to whether, in this type of case, the defendant was being sentenced for an offence that was recent or historic. If a defendant is sentenced for certain sexual offences committed at the age of 17 or younger, they must be sentenced according to the previous guidelines.

1 Charles Falk was defence counsel in this case.

*Comment by the editor*

It is one thing to prosecute decades afterwards an adult sexual predator who habitually abused children in their vulnerable early teens. But what is the purpose of prosecuting a man of 67 for improper sexual behaviour with a sister of a similar age when they were 13, 14 and 15? The only sentence available, as we saw, was the one that would have been imposed if he were of that age today, the primary aim of which is reformation: a needless exercise here because his adulthood had been exemplary. The judgment describes his life-time of honest work and devotion to his family – including the complainant, whom he had supported financially and whose teenage daughter he had cared for at her request. The judgment acknowledges the "substantial harm" the offences caused and expresses hope that the complainant may "derive some comfort from her brother's belated acknowledgement of his behaviour". But if his teenage misbehaviour really was the cause of her unhappy life it is hard to see how ruining his life by prosecuting him at this late stage does anything to put it right. For offences committed by juveniles a range of special rules apply; and to them, surely, should be added a prescription period.

# Feature

## Unfitness to Plead The Law Commission's Report

By Laura McDavitt*

On January 13 2016 the Law Commission published its report on the reform of the unfitness to plead framework. The recommendations made in the report build on an earlier Consultation Paper[1] and an Issues Paper[2] published in May 2014 which sought to refine the proposals for reform.

The recommendations seek to modernise the test for unfitness to plead, bringing it into line with today's psychiatric and psychological thinking. The Commission has made recommendations with an accompanying 70-clause draft Bill which would reform the way vulnerable defendants are dealt with in criminal trials in both the Crown Court and magistrates' including youth courts.

### Problems with the current position

The current law in this area is outdated, misunderstood and inconsistently applied thus it is the aim of the recommendations to modernise the law in making it fair, effective, and accessible. The extensive consultation and research undertaken by the Law Commission highlighted the following key issues:

1) There is an insufficient awareness and understanding of communication difficulties and how they can be identified and addressed among some legal practitioners and judges. This is compounded by the limited statutory entitlement to assistance for vulnerable defendants at trial, in comparison to that which is available for vulnerable witnesses.

2) The current common law test for unfitness to plead, as established in 1836 by *Pritchard*,[3] is outdated and uncertain. The widely criticised test[4] fails to take into account the range of mental illnesses and conditions which could hinder a defendant's engagement with the trial process.

3) The requirement for expert evidence to determine unfitness to plead can lead to delays and the generation of numerous expert reports at great expense due to the restrictive evidential requirements.

4) When a defendant has been found unfit to plead, the court *must* then proceed to a determination of facts hearing to establish if the individual "did the act or made the omission charged against him as the offence".[5] At that hearing the prosecution is not required to establish the fault element, but only the external elements of the offence. There can be difficulty in the division of these elements and in explaining this to the jury. It is of no great surprise that the law in this area has developed in a piecemeal and inconsistent manner.

5) The current disposals available to the court when an individual is found to have done the act are ineffective, both in support for the individual who lacks capacity and in protection for the public when that is required.

6) The unfitness to plead framework does not apply in the magistrates' and youth courts. The processes available in these courts for addressing capacity issues are limited and the available disposals are inadequate.

### Key recommendations for reform

The recommendations made by the Law Commission are numerous and reflect the complex procedural nature of the modern criminal trial process. The principle underlying all of the recommendations is that the full criminal trial process should be available to the defendant where that is fair and practical with diversion from this to a hearing of some other form occurring only where absolutely necessary.

### Facilitating full trial through trial adjustments

The Commission recommends better training for the judiciary and legal practitioners in order to improve the ability to recognise which defendants might have participation difficulties. In addition, there is a recommendation for a statutory entitlement for intermediary assistance for defendants where that is required for a defendant to have a fair trial. This would be supported by the introduction of a registration scheme for defendant intermediaries to regulate the cost of such assistance and to bring the training, conduct and qualification of defendant intermediaries in line with that for witness intermediaries.

* Laura McDavitt is a research assistant in the criminal law team at the Law Commission.

1 *Unfitness to Plead* (2010) Law Commission Consultation Paper No 197.

2 *Unfitness to Plead: An Issues Paper (2014)*, http://www.lawcom.gov.uk/wp-content/uploads/2015/03/unfitness_issues.pdf.

3 *Pritchard* (1836) 7 C & P 303, 173 ER 135.

4 See, for example TP Rogers et al, "*Reformulating fitness to plead: a qualitative study*" (2009) 20(6) *Journal of Forensic Psychiatry and Psychology* 815 and responses to the consultation paper and issues paper, available at: http://www.lawcom.gov.uk/project/unfitness-to-plead/.

5 Criminal Procedure (Insanity) Act 1964, s.4A as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004.

**A new statutory legal test**
In line with the views of a majority of consultees, the Commission recommends a statutory reformulation of the legal test to prioritise capacity for "effective participation in trial" rather than focussing on a "fitness to plead" test. This test would take into account the defendant's decision-making capacity and consider the context of the particular proceedings faced by the defendant and any assistance available to him or her.

**Assessing the defendant**
The Commission recommends including registered psychologists in the category of experts who can provide the court with expert evidence as to the capacity of the accused. This recommendation is supplemented by procedural improvements which guarantee early service of reports, joint instruction of experts where appropriate and the use of screening to consider effective participation difficulties earlier in the process. These measures together would go some way to alleviate the inefficiencies and expense of the current arrangements.

**The alternative finding procedure**
With resounding support from consultees, the Commission recommends that the prosecution be required to prove all elements of the offence at a fact-finding hearing. The proposed "alternative finding procedure" would allow for verdicts of acquittal as well as "allegation proved" and a not guilty by reason of insanity verdict for which the same disposal options would be available. The recommendation also introduces a judicial discretion to divert an individual who lacks capacity out of the criminal justice process where the available disposals are not appropriate or where the individual might be dealt with as effectively in the community.

**Effective and robust disposals**
To provide a balance between effective support for an individual against whom an allegation has been proved and protection for the public, where that is necessary, the Commission has recommended the introduction of constructive and robust measures that can be included in supervision orders. Restrictive as well as constructive requirements can be made. The recommendations also provide the court with the optional power to monitor the order and to take action when an order is breached.

**Magistrates' and youth courts**
The Commission recommends the introduction of procedures, comparable to those proposed for the Crown Court, to address capacity to participate effectively in trial in the summary jurisdiction. The early identification of capacity issues amongst young defendants would enhance the effectiveness of such procedures thus the Commission recommends the screening for participation difficulties of all defendants appearing for the first time in the youth court.

**Impact of the recommendations**
These recommendations have been made in the context of a reduction of funding within the criminal justice system. The Law Commission's report is supported by an Impact Assessment[6] which has identified that many of the recommendations, particularly regulating the cost of defendant intermediaries and introducing more robust disposals, would result in substantial long-term monetary savings. This is in addition to the non-monetisable benefits that a fairer and more accessible process would bring.

**Conclusion**
The recommendations made in the report have been developed through an iterative consultation process and have broad support from an extremely wide range of consultees. Over the course of the project around 100 responses were received from a wide range of stakeholders. The project also benefitted from views expressed at conferences and specialist seminars as well as from meetings with judges, legal practitioners, leading academics, non-governmental organisations and members of interested government departments. In addition, the recommendations have been informed by direct engagement with stakeholder groups such as family members of victims of homicide in cases involving unfitness issues and a group of consultees with autism spectrum condition. This provided valuable insight into the experiences and perspectives of those who may be directly involved in, or impacted by, the current procedures.
It is hoped that the Government will welcome the Commission's recommendations for a modern, fair and cost-effective reform to the unfitness to plead framework.

6 Appendix B to the report is available at: *http://www.lawcom.gov.uk/wp-content/uploads/2016/01/lc364_unfitness_impact.pdf*.

# Using Force on Burglars

## By J.R. Spencer

How much force is a householder permitted to use against a burglar? On this topic myths abound; and, sadly, it seems to be in response to these myths rather than the law itself that Parliament has twice intervened in recent years to meddle with it.
The first myth is that, in "the good old days", before Europe, human rights and other evils, burglars could be slain on sight – and with the warm approval of the state.
To this effect, old editions of Dicey's *Law of the Constitution* quoted the remark attributed to Willes J who, when someone asked him what he should do if he found a burglar in his house, is said to have replied "Take a double-barrelled gun, carefully load both barrels, and then without attracting the burglar's attention, aim steadily at his heart and shoot him dead".[1] And seemingly to similar effect is the footnote that used to appear in every edition of *Kenny's Outlines of Criminal Law*. "In 1811 Mr Purcell, of co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife."[2]
Kenny's incident indeed took place, but the facts were not quite as his note suggests. From the evidence given at the

1 Quoted, with sceptical comment, by R.F. Heuston in his 14th edition of *Salmond on Torts* (1965), at 187.
2 In the18th ed (1962) it was note 4 on p137.

trial of the surviving burglars, published in a contemporary journal,[3] Purcell woke in his bedroom in the early hours to hear burglars breaking into the room next door: a gang of nine, armed with a sword and the early nineteenth-century equivalent of a sawn-off shotgun. Picking up a knife left over from his supper, which he had eaten in his bedroom, he waited in the pitch darkness and when the first burglar burst down the nailed-up intervening door he stabbed him, thereby killing him. The man with the gun then fired, but missed, whereupon Purcell attacked him with the knife as well, driving him off wounded. The swordsman then attacked, but Purcell got under his guard and grappled with him and in the process stabbed him too, also fatally. Now armed with his assailant's sword he was able to retreat in safety while the burglars, abandoning the attempt, departed with their dead – just two, not Kenny's four – and wounded. Far from slaughtering his burglars in cold blood, as Kenny's note seems to suggest, Purcell was clearly using reasonable force in the face of a murderous attack. And interestingly, the contemporaneous report describes him as "Sir John" throughout, with no mention as to how and when he got his title; so raising doubt as to whether he was really knighted to reward him for his exploit.[4]

So what, in the "good old days", really was the law as to householders using force on burglars? Some of the classic writers do indeed suggest that householders could kill burglars with impunity. Blackstone, for example said:

> "If any person attempts a robbery or murder of another, or attempts to break open a house *in the night time*, (which extends also to an attempt to burn it,) and shall be killed in such attempt, the slayer shall be acquitted and discharged."[5]

But implicit in this, I suspect, was the requirement that the force be used against a burglar who was himself using force to steal or to resist arrest. As authority for his statement of the law Blackstone cites Sir Matthew Hale – who makes this clear in the passage Blackstone relied on[6]. So even in the best of the good old days, it seems that – pace Willes J – the common law did not endorse a policy of "shoot to kill".

The common law (whatever it was) was based on the fact that burglary[7] was a felony; and was therefore coloured by the fact that felonies, or most of them, were originally capital. The Criminal Law Act of 1967 abolished the distinction between felonies and misdemeanours, and as part of the package, also replaced the common law on the use of force for what is commonly called "public defence". Section 2 is as follows:

(1) A person may use such force as in reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

In parallel, the courts then decided that the same test of "reasonableness" now applies to the common law on self-defence, defence of others, and defence of property, insofar as these defences have any existence independent of the statutory provision. They also decided that what degree of force constitutes "reasonable force" in any given set of circumstances is a question of secondary fact; and hence, in jury trials, a matter for the jury. In so holding, they also held that, in deciding whether the actions of a given defendant were reasonable according to this objective standard, the defendant is to be judged on the facts as he honestly believed them to be.[8] They also said that there was no legal duty, as such, to retreat[9]. And further, they also made it clear that in deciding what is reasonable, allowance should be made for possible misjudgement "in the heat of the moment". As Lord Lane put it, "one does not use jewellers' scales to measure reasonable force";[10] echoing the graphic words of Holmes J in a famous American case, "Detached reflection cannot be demanded in the presence of an uplifted knife."[11]

It was against this legal background that, rather surprisingly, the second myth emerged: the theory that, unlike in the good old days, it had now become illegal for householders to use any degree of force against burglars, because of "human rights". This happened as a result of the Tony Martin case[12]; or to be more precise, the way in which it was misreported by sections of the media.

As readers will remember, this was the case in which a Norfolk farmer shot two burglars, killing one – for whose death he was convicted of a murder. Though Martin claimed to have fired his gun in self-defence, the prosecution case was that he shot them not in order to defend himself, but in cold blood, and with intent to kill, because it was his personal belief that burglars deserved to die: a case supported by evidence of the things he said, and by forensic evidence showing that he had shot the deceased burglar in the back. The Court of Appeal thought that he was properly convicted of murder on the case presented at the trial, but on hearing new evidence of his mental state it substituted a conviction for manslaughter by reason of diminished responsibility; and five years' imprisonment for the mandatory life sentence.

The tabloid newspapers, by contrast, presented Martin as a hero: a martyr to the cause of home ownership, sacrificed on the twin altars of political correctitude and Europe. Their clamour intensified when the surviving burglar later instituted a civil action against Martin for damages (though he did not proceed with it). One example of the coverage is a long letter printed the *Cambridge Evening News*, which contained the following:

> This ruling concerning Tony Martin was supposedly in keeping with the European Court of Human Rights. What about Tony Martin's human rights? In a just society he would never have been sent to prison, and his actions would be held up as an example to criminals of what they might expect if they were to continue their style of life. If this judgment is an example of the sort of pathetic rubbish we can expect from Europe, then I for one want no part of it.[13]

3 *Gentleman's Magazine*, October 1811, 274-277.
4 William Leitch, writing about the case in (1967) 18 NILQ 322-329, says this comes from *Burke's Landed Gentry of Ireland*, p.589. I have not investigated further.
5 Blackstone, Comm. IV, 180.
6 Hale, *Pleas of the Crown*, 488.
7 In those days, narrowly defined as breaking and entering dwelling-houses in the hours of darkness.
8 *Williams (Gladstone)* [1987] 3 All ER 411, (1984) 78 Cr.App.R 276; *Beckford* [1988] AC 130.
9 *Bird* (1985) 81 Cr App R 110.
10 *Reed v Wastie*, *Times*, February 10, 1972.
11 *Brown v United States*, 256 U.S. 335 (1921).
12 *Martin* [2001] EWCA Crim 2245, [2003] QB 1.
13 I have the cutting, but unfortunately not the date.

In response to the outcry in the media, the Conservative Party, then in opposition, began to agitate for the law to be changed to put householders in a stronger position. At first the Labour government, then in power, defended the existing law; but at the Labour Party conference in 2007 the Justice Minister, Jack Straw, pledged to overhaul it, saying that "The justice system must not only work on the side of people who do the right thing as good citizens but also be seen to work on their side."

Having pledged to overhaul the law, the government then looked at it and decided it was sensible. But having "pledged", some action had to follow and the result was s.76 of the Criminal Justice and Immigration Act 2008: a lengthy provision which initially just put the existing judge-made rules into legislative form. This was presented as a major step because it "clarified" the law; though the Conservatives were derisive.

In 2012, after the Coalition had superseded Labour, Chris Graying succeeded to the office Jack Straw had once held under Labour and at the Conservative Party Conference in 2012 he set out his stall as "the new tough Minister of Justice". His wares included a "pledge" to do what Labour had failed to do: give householders what the *Daily Telegraph* described as "the right to attack burglars". The result was a series of amendments to s.76, the key parts of which were two new provisions:

> 76(5A) In a householder case, the degree of force used by D is not be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.
>
> 76(6A) In deciding the question mentioned in subsection 3 [whether the force was reasonable], a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty of retreat.

With this the scene was set for the emergence of the third myth – which is really a resurrection of the first one: namely that householders are now free to use any degree of force they like on burglars. And like the second myth, this is derived from the media's misunderstanding of the latest case: this time *Collins v Secretary of State for Justice*[14], decided by the Administrative Court on January 15 2016.

Collins was foolish enough to burgle a house in Gillingham, Kent, where the householder was a 15 ½ stone builder who had spent the evening drinking with his friends. When challenged by the householder, Collins did not enhance his popularity by saying that he was Fred West and had come to see the Queen. At this the builder grabbed him and held him in a headlock with the words "I'll fucking kill you", telling his wife to call the police "… or else I'll break his fucking neck". When the police arrived some six minutes later Collins was no longer breathing. With medical attention he survived, but suffered severe brain damage, in consequence of which (according to the press accounts) he is now in a permanent vegetative state.

The Collins family, who deny – implausibly – that Collins was actually a burglar, wanted the householder to be prosecuted; but the CPS refused, on the ground that the law now precludes prosecution in such a case unless the force the householder had used was grossly disproportionate. The family, dissatisfied, sought to challenge the decision by judicial review. Having obtained leave to do so they then abandoned the judicial review application, accepting that the CPS decision was reasonable in the light of the latest amendments to s.76; and instead asked the court to use its powers under the Human Rights Act to declare that the amended s.76 incompatible with Art.2 of the European Convention on Human Rights (the right to life). Though now being asked (in effect) to judge the grin after the disappearance of the Cheshire cat, the Court rose to the challenge.[15]

As the first step the Court had to decide what the new provisions mean. In particular, was the CPS correct to read the new s.76(5A) as saying that a householder can now only be prosecuted for killing or maiming a burglar if the force he used was grossly disproportionate? The Court held that it was not. What the provision actually says, and means, is that in a householder case, force is *not* to be regarded as reasonable if it *was* grossly disproportionate: not that a householder is permitted to use disproportionate force, provided that it was not grossly so. In consequence:

> [20] … s.76(5A), read together with s.76(3) and the common law on self-defence, requires two separate questions to be put to the jury in a householder case. Presuming the defendant genuinely believed that it was necessary to use force to defend himself, these are:
>
> (i) Was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer is "yes", he cannot avail himself of self-defence. If "no", then;
>
> (ii) Was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he has a defence. If it was unreasonable, he does not.

In other words, s.76(5A) is limitative, not permissive. And so contrary to what the media imagined Parliament and the Minister had done – and perhaps what they too imagined they were doing – it does not liberate householders to inflict any violence on burglars short of being grossly disproportionate. Insofar as the amendments change anything, it said, the effect is "[23] to allow for a discretionary judgment in householder cases, with a different emphasis to that which applies in other cases", in particular in relation to the duty to retreat. And so the law, essentially, remains as it has been since 1967, if not before. The question, in each case, is whether the degree of force was reasonable in the circumstances as the householder in question understood them.

From this point, the Court had no difficulty (of course) in finding that the current English law on the right of householders to use force against burglars to be compatible with Art.2 of the Convention.

After an extensive review of the case-law, from Strasbourg and the UK, it concluded that the right to life enshrined in Art.2 requires contracting States to operate a system of criminal justice that deters private citizens from killing one another. But this is no more than a "framework obligation". As Richards LJ put it in an earlier case,[16]

> The emphasis in respect of the framework is on reasonable safeguards, not on regulation of such detail as to minimise to the greatest extent possible any risk to life or risk of ill-treatment.

In general terms, it said, the UK satisfies this obligation by maintaining a system of criminal law that imposes criminal liability for homicide and bodily injury; and it is not in breach of this obligation by reason of a rule that qualifies these offences by allowing householders (and other people)

14 [2016] EWHC 33 (Admin).

15 See James Richardson's comment in *Criminal Law Week* (CLW/16/03/3).

16 *R (FI) v Secretary of State for the Home Department* [2014] EWCA Civ 1272.

to use reasonable force in self-defence. And so the request for a declaration that s.76 was in breach of the Convention was refused.

The full text of Art.2 of the Convention is as follows:

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In the past, some people have suggested that contracting States are obliged to frame their detailed rules on private citizens and self-defence so as to take account not only of the general rule set out in Art.2(1) but also the more specific rules set out in Art.2(2): which, if correct, could mean that these detailed rules cannot permit citizens to use lethal force in protection of their property, as against their lives. But this analysis the Court rejected. Article 2(2), it said, exists to regulate the extent to which extreme force may be used by agents of the state, not to regulate the broader question of the use of force by private citizens.

As we have seen, the Administrative Court in *Collins* ruled that the Grayling amendments to s.76 of the Criminal Justice and Immigration Act 2008 do not give householders *carte blanche* to use disproportionate force against burglars; it says that they may never use force that is grossly disproportionate, and may only use disproportionate force if the circumstances make it "reasonable" do to so. But grasping only that a human rights challenge to the "new tough law" had failed, sections of the media, and many online commentators, have garbled the case as having decided the exact opposite. An extreme example is the summary of the case that appeared on a website called PJ Media:[17]

> **Good News for British Homeowners: Okay to Use Lethal Force on Intruders**
>
> Maybe a man's home is once again becoming his castle: Householders can use a "disproportionate" level of force to protect themselves against intruders in their home, the High Court has confirmed in a landmark ruling.

To similar effect, on January 15 the *Daily Mail* informed its readers that

> Under the rules, a person is permitted to use "disproportionate force" to challenge an intruder in their home, which could include the use of lethal force. Only "grossly disproportionate" force is illegal.

And scarcely less misleading was the same day's coverage in the *Independent* (r.i.p.):

> **Homeowners can beat up burglars using "disproportionate force", rules High Court**
>
> Homeowners have a right to take tough action or use "disproportionate force" if faced with an intruder in their home, the High Court has ruled.

This and similar media coverage seems likely to give rise to a widespread belief that it is now once again in order for householders to kill burglars. A myth which is, of course, bad news for burglars; but almost as bad news for householders who kill or main them with unreasonable force, believing as Tony Martin did that burglars deserve to die, and that it is now lawful for householders to kill them. All of which could well lead, at some future point, to a new *cause célèbre*, a new outcry in the media, and a new round of pressure to rewrite the law. Which prompts the question: what, if anything, is wrong with it?

In my opinion, there is nothing much the matter with the current rules as to the degree of force householders may use, as interpreted in *Collins*. However, there are least three things badly wrong with some other aspects of it.

The first, indentified by the Court in the *Collins* case, is that s.76(5) requires the court, when looking at the circumstances through the eyes of the defendant, to disregard "any mistaken belief attributable to intoxication that was voluntarily induced." This restriction applies not only to louts who are aggressively drunk in a public places, but also to the householder (like the one in *Collins*) who had spent the evening drinking peacefully at home; which seems unreasonably severe.

The second is that, as the law stands (or seems to), a householder who breaks the criminal law by using excessive force on a burglar thereby makes himself civilly liable to the burglar in the law of tort. Even if the householder deserves to be punished, the burglar, surely, deserves no compensation.[18]

The third, and worst, is that the householder who is convicted of murder for killing a burglar gets a mandatory life sentence, like the burglar if he kills the householder. In such a case the court should surely have a discretion as to sentence. But the mandatory life sentence for murder is an area where myths and misconceptions abound and the media and headline-hungry politicians make intelligent discussion difficult; like, alas, the law on using force against burglars.

17 https://pjmedia.com/trending/2016/01/19/good-news-for-british-homeowners-okay-to-use-lethal-force-on-intruders/.

18 According to *Revill v Newbury* [1996] QB 567; on which see the comment by Tony Weir, "Swag for the injured burglar", [1996] *Cambridge Law Journal* 182. On s.329 of the Criminal Justice Act 2003, which makes an inept attempt to limit such claims, see *Adorian* v. *Metropolitan Police Commissioner* [2009] EWCA Civ 18, [2009] 1 WLR 1859, and the comment in [2010] *Cambridge Law Journal* 225.

# In the News

In Issue 8 of last year Jodie Blackstock and Alex Tinsley described the European Supervision Order, enabling courts to transfer bail arrangements between Member States. Richard Saynor, of 23 Essex Street, informs us that the UK's first such order was made by HH Judge Edmunds QC in Isleworth Crown Court on December 23; thereby enabling his client, a Spaniard, to go back home and await his trial in liberty.

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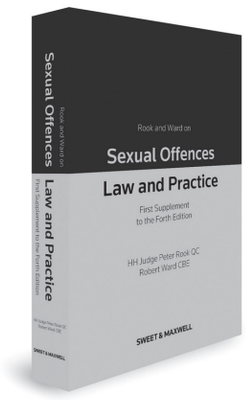


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