SWEET & MAXWELL

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Archbold Review

Cases in Brief

Appeal—invalid guilty verdicts—acquittals—application of writ of venire de novo

P [2018] EWCA Crim 2492; 1 November 2018

P was convicted, in accordance with erroneous directions by the judge (Juries Act 1974 s.17(1)) by a majority of nine to two on a number of counts, one juror having been discharged. On others, he was acquitted, in respect of which (in accordance with the Crim PD) no question as to majority was asked. While the direction was a misdirection, and the jury had not been asked if they were unanimous before it was given, contrary to Crim PD 26Q:3, had there been a majority of ten to one the verdicts would have been valid. As it was, the trial concluded without the jury ever having returned valid verdicts in relation to those counts on which P had been convicted.

(1) The court rejected P's argument that the power to issue the writ of *venire de novo* arose where a trial was a nullity, and therefore did not apply where there were invalid verdicts of guilty but the trial as a whole was not invalid. The writ was a remedy available to the court where a conviction was null and void, exercisable by the Court of Appeal on an appeal against conviction: *Stromberg* [2018] EWCA Crim 561, [2018] 2 Cr.App.R 5. The fact that P was acquitted on other counts was of no relevance. In exercising the jurisdiction under the Criminal Appeal Act 1968 Pt.1, the court was concerned only with the convictions. It followed that the court was entitled to apply the remedy of the issue of a writ of *venire de novo*. The court rejected P's argument that it should not exercise its discretion to order a new trial.

(2) In respect of the counts upon which P was acquitted, the court rejected the Crown's argument that the acquittals were also nullities. The remedy of the writ was exercisable on an appeal against conviction and was intended to be used to set aside a conviction. It was not a remedy to set aside an acquittal. Further, even if available, the writ could not be issued in respect of these acquittals. The invalidity of the verdicts of guilty was apparent on the face of the record because the jury stated in open court that they had convicted by a majority of nine to two. The same could not be said of the acquittals. Dicta by Lord Diplock in *Rose* [1982] AC 822 in relation *Crane v DPP* [1921] 2 AC 299 (a "mis-trial" was "actually no trial at all") applied to *Crane*, where the indictment was invalid, but not to P's case, which involved the validity of verdicts at the end of an otherwise regular trial.

Assault on a constable in the execution of duty—officer coming to the aid of officers unlawfully detaining a person—whether independent legal basis for execution of duty—possible conflict between Cumberbatch v CPS*;* Ali v DPP *[2009] EWHC 3353 (Admin), (2010) 174 JP 149 and* Joyce v Hertfordshire Constabulary *(1985) 80 Cr.App.R 298—taking point in Administrative Court not taken in Crown Court—use of common assault as alternative*

DIXON v CPS [2018] EWHC 3154 (Admin); 13 November 2018

Police officers X and Y unlawfully sought to detain D, and D used reasonable force in self-defence. Officer Z then sought to restrain D, who he thought was reaching for a weapon and D bit Z, in respect of which D was convicted of assaulting a constable in the execution of his duty.

(1) The court upheld the conviction. The use of a weapon by D would clearly have involved the use of more force than was reasonable to resist his detention and would therefore have amounted to the commission of a crime of violence against X or Y, and this constituted an independent justification for Z's intervention. D's case could therefore be distinguished from both of those considered in *Cumberbatch v CPS; Ali v DPP* [2009] EWHC 3353 (Admin), (2010) 174 JP 149, in neither of which was there an independent legal basis for the intervention of officer(s) in an unlawful de-

CONTENTS

tention. In both cases, the court had indeed indicated that excessive use of force by those resisting unlawful acts by officers would have constituted such an independent basis. Such a finding did not artificially distinguish between the officers' actions, as D argued: whether a police officer was acting lawfully in the execution of his or her duty depended on the reasonable belief and intentions of the officer, and it would be illogical to reason that because the defendant could not be expected to distinguish between an officer who was acting unlawfully and another officer who was acting in the execution of his or her duty, it followed that the second officer must be treated as also acting unlawfully.

(2) In *Cumberbatch*, the court had distinguished *Joyce v Hertfordshire Constabulary* (1985) 80 Cr.App.R 298 on the basis that in that case, the court was prepared to assume that the first officer, to whose aid the second officer came, was acting legally. The court in the instant case considered that there seemed to have been a transposition (either in the judgment or the report) of the words "illegal" and "legal" in the first two sentences of the third to last paragraph of the report, which may have misled the court in *Cumberbatch*. If so, at some point it may be necessary for a court to decide whether the decisions in *Joyce* and *Ali* were capable of being reconciled with each other and, if not, which was to be preferred.

(3) The court reiterated the call made by Donaldson LJ in *Bentley v Brudzinski* (1982) 75 Cr.App.R 217, 226, that in such circumstances, prosecutors should consider an alternative charge of common assault, on the basis of unreasonable force used in self-defence.

(4) The question arose whether the court should consider the argument that Z had not been acting in the execution of his duty, as the point had not been taken on the appeal by way of re-hearing in the Crown Court. That Z was acting in the execution of his duty was an element of the offence which the prosecution had to establish in order to justify D's conviction. However, if the court had concluded that, on the facts found by the Crown Court and stated in the case, the Crown Court had not as a matter of law been entitled to find that Z was acting in the execution of his duty when he was bitten, then D's conviction ought not to stand, and it would not be right to leave in place a conviction wrong in law because the point was overlooked by Z's representative in the Crown Court: *Kates v Jeffery* [1914] 3 KB 160.

Entrapment—undercover operation—Security Service officers posing as Islamist extremists—Looseley *[2001] UKHL 53; [2001] 1 W.L.R 2060—whether compatible with European Convention on Human Rights*

SYED [2018] EWCA Crim 2809; 18 December 2018

S pleaded guilty to terrorism offences after prolonged virtual and real engagement with Security Service officers posing as Islamist extremists following the failure of his applications for the proceedings to be stayed as an abuse of process (on the basis that a fair trial was possible but offended the integrity of the criminal justice system) or for evidence to be excluded under the Police and Criminal Evidence Act 1984 s.78. On his renewed application to appeal, he argued that the domestic law in relation to entrapment by state authorities, as set out in *Looseley* [2001] UKHL 53; [2001] 1 W.L.R 2060, was no longer in line with European Convention on Human Rights case law on Art.6. Given the binding nature of *Looseley* on the Court of Appeal (*Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465), he sought leave to appeal, and that if the appeal be dismissed then a point of law of general public importance be certified for the Supreme Court. The focus in the Court of Appeal was on the abuse of process application.

(1) The court extensively reviewed and analysed the domestic and Commonwealth authorities (*Mack* [1988] 2 RCS 903; *Latif* [1996] 1 W.L.R 104; *Moore* [2013] EWCA Crim 85; *Asiedu* [2015] EWCA Crim 714, [2015] 2 Cr.App.R 8; and *H* [2004] UKHL 3, [2004] 2 AC 134) and Strasbourg authorities (*Teixeira de Castro v Portugal* (1999) 28 EHRR 101; *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 24; *Ramanauskas v Lithuania* (2010) 51 EHRR 11; *Bannikova v Russia* (2010) 18757/06, 4 November; and *Furcht v Germany* (2015) 61 EHRR 25).

(2) Subject to (6) below, *Looseley* remained compliant with Art.6. This conclusion hinged on a proper understanding of the principles underlying both the common law and Strasbourg jurisprudence.

(3) The rationale of both was essentially the same and rested on a concern for the integrity of the criminal justice system. Accordingly, as a matter of striking the correct balance between the danger of criminal proceedings amounting to an affront to the public conscience and the public interest in combatting crime, while intrusive techniques including undercover operations did not necessarily infringe Art.6, there were limits as to what was acceptable and safeguards must be in place.

(4) Efforts to construct differences between the two approaches on the basis of an unduly literal reading of the language of judgments were misplaced and to be discouraged (*Looseley*, [74]). Instead, when analysing and applying the judgments in both systems (common law and Strasbourg), regard must be had throughout to the purpose or rationale of the doctrine of entrapment. Thus, the requirement for state agents to act in an "essentially passive" manner did not mean they should be only passive observers. Similarly, the emphasis on reasonable grounds for suspicion or predisposition in Strasbourg was aimed at avoiding the vice of random virtue testing, and did not import a necessity for there to be grounds of suspicion of a particular individual.

(5) Differences of terminology and detail aside, there was no material conceptual difference between the requirements for proper disclosure in English law and the Strasbourg jurisprudence. There was nothing to suggest that the English-law disclosure procedures under the Criminal Procedure and Investigations Act 1996 and post *H*, fortified by the prosecutor's continuing duty as to disclosure, were non-compliant with Art.6.

(6) So far as concerned a stay on the basis of the integrity of the criminal justice system (ordinarily the preferable remedy for entrapment), the burden in the law of England and Wales rested on the accused to make good the charge of abuse. At first blush, the Strasbourg authorities suggested that – provided there was an arguable allegation of incitement – the burden of proof lay on the state to show that there was no incitement: *Bannikova,* [48]; *Veselov*, [94] and [109]. However, the citation of *Ramanauskas* in those later authorities was, at best, partial, yet *Ramanauskas* was invariably advanced as the foundation for the proposition. The court did not find the key paragraph

[70] in *Ramanauskas* entirely straightforward ("It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention"). Paragraph [70] was contained not in that part of the judgment which dealt with principles but in the later section concerned with the application of the relevant principles to the facts. While the first sentence dealt unequivocally with the burden of proof, the second sentence was not easy to follow. It appeared to suggest that if the state failed to discharge the burden of proof, the failure may not be fatal, as the Court must go on to examine the facts and, presumably, must be free to reach a conclusion either way. The third sentence was also difficult to reconcile with the apparently bald proposition in the first sentence. In S's case, the burden of proof point was irrelevant – even if it lay on the state, the court was entirely satisfied that there was no arguable case for concluding that the Security Service officers went beyond providing S with an unexceptional opportunity for committing the offence. Thus, further exploration of the burden of proof in the Strasbourg jurisprudence must await a case where it would be necessary for the decision.

Having a bladed article—folding pocket knife—whether applicable to relevant article

SHARMA v DPP [2018] EWHC 3330 (Admin); 14 November 2018

S was convicted of having a bladed article in a public place contrary to the Criminal Justice Act 1988 s.139. The article was the size and shape of a credit card, from which the two-and-a-half-inch blade could be folded and locked in position by the folding of those parts of the card which constituted the handle, which was then secured using small plastic poppers. S argued that, while the blade could not be folded without another operation (the folding of the handle pieces back into place), the knife as a whole could be, that is, by the two folding operations. The requirement in *Harris v DPP* [1993] 1 W.L.R 82 and *Desmond Garcia Deegan* [1998] 2 Cr.App.R 121 before an article came within the exception for a "folding pocket knife" with a blade of less than three inches (s.139(2) and (3)) was that the *knife* should be readily foldable. The court rejected the argument. Although the authorities used the term "knife" as that which should be readily foldable, giving a sensible and purposive interpretation to s.139, the requirement that *the blade* should be immediately foldable at all times reflected the mischief at which the provision was aimed because an article with a blade which was capable of being secured in position so that it could not be immediately folded simply by pressing the blade in general had a greater potential to be used as a weapon than one whose blade was immediately foldable in that way. Further, the poppers had to be unsecured to fold the knife, albeit that was a mechanism requiring little strength or pressure.

[*Comment: the court had the article itself available. A Google search suggests it was the "CardSharp Credit Card Knife", and the helpful YouTube video available makes the court's description of its operation easier to understand. R.P*]

Homicide—gross negligence manslaughter—obvious and serious danger of death

WINTERTON [2018] EWCA Crim 2435; 6 November 2018

W was the site manager of a building site in which an improperly dug trench collapsed, killing a worker. On appeal against his conviction for gross negligence manslaughter, he argued that the judge had been wrong to leave the case on the basis (as an alternative to actual knowledge of the trench which constituted an obvious and serious risk of death), that if he did not know that the trench had been constructed in an unsafe way, he should have known. W relied on *Rose* [2017] EWCA Crim 1168, [2018] QB 328. Dismissing the appeal, the court said that the ratio of *Rose* was that "The question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, not but for the breach" [80], and that the "factual matrix is critical" [85]. The evidence was that the trench clearly demonstrated dangerous workmanship that posed a real and significant risk of death. The jury could have convicted on the basis of actual knowledge of, or wilful blindness as to, the obvious risk. The factual matrix was that it was a question of "when" not "if" the trench would collapse, and this was or should have been apparent to anybody. Consequently, there was reasonable foreseeability of serious and obvious risk of death to anyone in or near the trench. W's breach of duty was not able to be cast as that in the case of the optometrist in *Rose*, and the GP in *Rudling* [2016] EWCA Crim 741, (2016) 151 BMLR. 79. They were not sufficiently alerted – and had no cause to be – to the risk of death on the facts available to them at the time of the breach of their respective duties of care, and which when objectively assessed should have alerted them to the serious and obvious risk of death. In both cases, the prosecution had been inviting the jury to a retrospective scrutiny of foreseeability of death on the basis of the ultimate and fatal outcome of the progress of a disease that could have been detected sooner but for breach of their duty of care. Rather, W was in the position of the anaesthetist in *Adomako* (1994) 98 Cr.App. R 282 and the doctors in *Misra and Strivastata*, [2004] EWCA Crim 2375, [2005] 1 Cr.App.R 21 – the serious and obvious risks of death were there for them to see. They either did see them and ignored them, or failed to do so in circumstances that would provoke an objective observer to say, "but on the facts and in their position they should have done".

SENTENCING CASE

Converting criminal property

AGUILAR [2018] EWCA Crim 2639, 16 November 2018

The appellant appealed against a sentence of two and a half years' imprisonment imposed following his plea of guilty to the offence of converting criminal property contrary to s.327 of the Proceeds of Crime Act 2002.

The appellant's offending involved frauds against a company called Sheaf Power Limited. The financial controller of the company had been tricked into transferring sums of

money to five individuals. The total amount transferred was £100,000.

The appellant pleaded guilty on a basis which accepted that £15,000 had been transferred into his bank account; he made transfers knowing that the money was not his and thus acted dishonestly; he played no role in stealing or defrauding the company and that his criminal culpability began from the point when he saw that the money had arrived in his account. A victim personal statement made clear the significant impact of the fraud on the company. The appellant had no previous convictions, and was 19 at the time of the offence and 22 at the time of sentence.

Counsel for the appellant submitted that the judge took too high a starting point and that the sentence should have been significantly less than two years' imprisonment, meaning that the judge could and should have passed a suspended sentence.

Allowing the appeal, the Court stated that although the Sentencing Guidelines for this offence are primarily structured around value, they require a broader evaluation of harm. The sentencing judge was correct to consider the impact of this and associated offending upon the complainant company. The judge was right to have particular regard to the fact that two people had lost their employment in the circumstances of the fraud. The guideline for a Category 5B offence provides a starting point of eighteen months' imprisonment for an offence involving £50,000, with a sentencing range of 26 weeks to three years. A case involving a little over £10,000 with no additional evidence of harm might attract a starting point towards the bottom of the sentencing range. In this case, the evidence of harm justified taking a significantly higher starting point. The correct starting point was around eighteen months' imprisonment.

Having regard to the mitigation advanced, the proper sentence after trial would be around sixteen months' imprisonment. After credit for plea (which had been entered shortly before trial), the proper sentence was thirteen months' imprisonment. Such a sentence could have been suspended, but the appropriate punishment for this offending was an immediate custodial sentence.

Feature

Dangerous Dogs – dangerous owners

By David Tucker[1]

I was once bitten by a dog, whilst delivering door-to-door. As my hand slipped a leaflet through the letterbox I felt a sudden pain like an electric shock. I located the owner of the offending snappy Jack Russell Terrier, an elderly lady, and asked her the dog's name. "Nipper," she replied, and laughed. I arranged for a Police Community Support Officer to visit her and persuade her to put up a warning sign on the front door.

There are about nine million dogs in the UK and they are an increasingly popular pet. As a companion, a dog can raise the wellbeing and health of its owner and family. But man's best friend can also be a powerful enemy.

Figures from the Office of National Statistics show an alarming rise in deaths from dog attacks: 11 between 1981 and 1990, 17 between 1991 and 2000 and 32 between 2001 and 2010, with a peak of six deaths recorded in 2009. Between 2011 and 2015 18 people were killed, an average of 3.6 a year. At least half the victims of fatal attacks were children.

Dogs also injure many people, especially the very young and the elderly, inflicting cosmetically unsightly scars, or finger amputations, plus deep psychological injury.

Defra, one of two government departments with a dog agenda, has estimated that there are some 200,000 incidents involving dogs every year.

A child's face is always likely to be close in height to a dog's teeth, and several thousand children a year require plastic surgery. Postal and delivery workers (an increasing breed, courtesy of Amazon and similar) are highly at risk. These attacks represent a substantial cost to the NHS. It all casts a shadow over responsible dog owners.

As well as delivery workers, police officers are also at special risk when entering private places for the purposes of law enforcement. In a recent incident, West Yorkshire officers entered a garden; a dog described as an American Bulldog appeared and its behaviour prompted the officers to fear for their safety. They therefore tazered the dog; it died.

Various circumstances can trigger an attack. The dog may perceive that its owner is threatened or under attack, or that a small child is an animal of the type that historically the dog hunted. It may be frightened by the action of an adult or child, injured, or ill.

Dogs also attack other animals, including assistance dogs, and sheep. SheepWatch UK estimates that in 2016 up to 15,000 sheep were killed, often by straying or uncontrolled dogs. Injured sheep are not always found and attended promptly and may suffer for some period before being treated or put down or dying in the field.

Existing law and enforcement patterns are failing. The House of Commons Select Committee on the Environment, Food and Rural Affairs in its report "Controlling dangerous dogs" HC 1040 published in October 2018 called for major and urgent changes.

1 David Tucker is a retired litigation lawyer and Senior Crown Prosecutor with a special interest in dangerous dogs. This article is dedicated to the memory of his tutor the late John Hopkins (1936-2018) "who set me on the path to being a lawyer".

The dogs we have

Dogs come in a remarkable range of shapes and sizes, with more diversity than in any other species of mammal (compare cats). Many breeds have a relatively recent history as working animals, cross-bred to develop specific characteristics. For example, the Staffordshire Bull Terrier, as its name suggests, was created in Staffordshire by crossing bulldogs and terriers to bait bulls and bears. That was in an age when cock-fighting was also regarded as entertainment. Today, breeds developed to do work more often live as companion family animals, no longer called on to earn their keep and do what they were built to do. The dog has become an honorary human, yet still retaining their work-related characteristics.

The law we have

The problem of dog attacks has been with us for some time without a sufficient remedy. That wonderful snapshot of mid-Victorian urban anti-social behaviour, the 1847 Town Police Clauses Act, penalised (and still penalises)

> every person who suffers to be at large any unmuzzled ferocious dog, or sets on or urges any dog or other animal to attack, worry, or put in fear any person or animal.

That is a good description of the problems we still face today.

The current law – I hesitate to call it the modern law – begins with the Dogs Act 1871 which for a remarkably long time provided the only dedicated remedy after a dog attack, in the form of a civil law order that the owner of the dog keep it under adequate control for the rest of its life. A change of ownership before a court hearing completely frustrates this process as there is no point in making an order against the former owner who no longer has control of the dog or against the new owner who has done nothing wrong to merit an order. Breach of an order attracts only a summary penalty – s.1(3) of the Dangerous Dogs Act 1989.

The flurry of legislation since 1989, all following the "bolt-on bits" pattern of English legislation, has failed to halt a catastrophic trend. The present law is scattered through as many as 14 Acts of Parliament, in the following principal forms:

(1) The criminal offence in s.3 of the Dangerous Dogs Act 1991 ("DDA") discussed in greater detail below.

(2) An order under the 1871 Act as clarified by s.3(5) of the DDA. A court has the power to impose conditions, in particular, that a dog is muzzled and kept on a lead in the hands of someone at least 16 years-old when in public, or neutered.

(3) An almost complete ban on certain types of dog in s.1 of the DDA. This section was introduced with the aim of rapidly reducing the number of dogs classified as bred for fighting, and may have succeeded. Who knows. Banned types include the American Pit Bull Terrier. However, there is sufficient visual affinity with the Staffordshire Bull Terrier and various crosses to facilitate mis-description of the pit bull as a bull terrier or cross, thereby evading the ban. There is also increasing concern that criminalising a breed leads to the unnecessary destruction of some dogs.

(4) The power to order the immediate or contingent destruction of a dog – ss.4 and 4A of the DDA.

(5) The power to ban an irresponsible person from owning or having charge of any dog for a period of time, after conviction – s.4 of the DDA.

The principal offence of owning or being in charge of a dog which was dangerously out of control is contained in s.3 of the DDA, which once looked quite straightforward but now stands repeatedly amended with the intricately tortuous "householder defence" wedged in as subss.(1A) and (1B) and designed to exonerate the owner (whether present or not) of a dog which bites a trespasser who is in a dwelling. There is also a cross-reference to ss.76(8B) to (8F) of the Criminal Justice and Immigration Act 2008 regarding the degree of force and the nature of the premises. Do we have to write legislation in this way? (No!)

The core concept of "dangerously out of control" was originally defined in s.10(3) of the DDA but in wording that focused entirely on the risk to humans: "grounds for reasonable apprehension that it will injure any person, whether or not it actually does so" and which appears to echo the test for affray in s.3 of the Public Order Act 1986

> conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

This enables a court or jury to translate the test into: how would you have felt, as a reasonable person, had you been at this incident? The words "or an assistance dog" were added after "person" by s.106(6)(b) of the Anti-social Behaviour Crime and Policing Act 2014, However, it fails to relate to an incident where any other sort of animal is the target of aggressive canine behaviour.

The maximum penalties, originally insufficient, now place the basic s.3 offence on a par with ABH at five years and for the aggravated offence of causing injury or death on a par with GBH at 14 years. For an offence in which an assistance dog is injured, the figure is three years. The mischief in an assistance dog case is that the victim dog may well not be able to flee or fight back, the assisted, and by definition, disabled, person will suffer considerable trauma, plus the cost and difficulty of promptly replacing an assistance dog which is either killed or otherwise unable to continue its special role.

Apart from the s.1 DDA ban, all control measures are imposed after a specific event involving a specific dog, the "deed not breed" approach, intended to prevent the recurrence of an unacceptable event. Even the recent amendment to s.3(1) of the DDA to include incidents in a private, as well as a public, place represents another instance of "after the event" control (but without thinking through how a dog in a private place is to be assessed as dangerously out of control).

There is no power to require training for owners or dogs, however targeted, constructive and enforceable this might be.

The inconsistency in the logic of s.1 of the DDA, banning all dogs of a particular class regardless of their actual temperament, may explain the striking failure ever to implement s.2 of the DDA. This creates a power to require dogs of a particular type which are assessed as presenting "a serious

danger to the public" to be muzzled and on a lead when in public, thereby increasing the use of cheap and widely used means of control. It could be brought in quickly and cheaply as delegated legislation with no licensing or record-keeping infrastructure required, and would be largely self-policing, as well as making "trophy dogs" (see below) less attractive and useful to their owners. Although s.2 relates only to control of dogs in public places, it would also have a positive though indirect effect on the incidence of dog attacks in private places.

In 2014 a range of general new powers for the police, local authorities and social landlords were introduced in the Anti-social Behaviour Crime and Policing Act 2014; these powers can be employed in cases of poor control of dogs. The process can start with simple informal advice, then a written warning. Next comes a community protection notice served in a case where the behaviour of a dog is having a detrimental effect on the quality of life of those in the locality, the behaviour is persistent or continuing and is unreasonable. The notice sets out the unacceptable behaviour and what is required to stop it.

Criminal proceedings would then take their place as the ultimate remedy after other measures have failed or been ignored. Unfortunately, the evidence before the Commons Committee (see above) was that local authorities and the police lack the money, staff and resources and, therefore, the will to put effort into these provisions.

The owners we have

To entitle an Act "Dangerous Dogs" could imply that some dogs are, and therefore some dogs are not, "dangerous". Banning types identified as bred for fighting reinforces this concept. This is, I suggest, a misconception, albeit one held by many dog owners. Any dog has the capacity to instil fear or to bite and cause injury. Those with large teeth and strong jaws can kill. Equally, almost any dog can be safe in the right conditions. The crucial difference lies in the proper control of the animal, and that requires training both of the owner and of the dog in order to develop safe practice. A well-trained dog is also likely to enjoy better welfare and a more contented life if the owner is systematically aware of the needs of his or her dog. Dog attacks, like drink driving and driving while phoning, are avoidable offences and evidence of a selfish or neglectful attitude to community responsibility. As with motoring offences, the immediate level of human short-coming and the degree of harm are not correlated. Having a dog can be akin to having an offensive weapon or firearm. Indeed, the owners of so-called trophy dogs who use them as an extension of personal machismo or to enforce their drug supply business, use them as such. A better title for the Act might well be the Dangerous Dog Owners Act.

Animal welfare organisations promote the concept of dog and owner training. The significance of this for investigators, prosecutors and courts is to ask: had the owner or person in charge previously undertaken training and was the dog adequately trained so that the owner or person in charge could exert a sufficient level of control to ensure the safety of those around it?

Mens rea revisited

The relevance of control and the ability to impose it on a dog is reflected in the important case of *Robinson-Pierre*[2]. Section 3(1) of the DDA creates offences of strict liability, and in consequence mens rea had been treated as irrelevant: cf *Bezzina*[3]. However, there was no direct authority on the position if a dog became dangerously out of control through the intervention of a third party until this was considered in *Robinson-Pierre* and the following new statement of law formulated

> on analysis of section 3, we do not consider that it was Parliament's intention to create an offence without regard to the ability of the owner (or someone to whom he had entrusted responsibility) to take and keep control of the dog.

This added a new element to those which had previously been considered necessary to secure a conviction.

The facts of *Robinson-Pierre* were that D owned a Pit Bull Terrier which he had in his locked house. Police officers lawfully broke into the house in order to execute a search warrant. The dog attacked a number of officers, initially inside the house and then out in the street when they retreated. D became aware of the incident and did nothing to restrain the dog, taking the attitude that there was nothing he could do and the officers should have knocked first and he would have let them in.

Robinson-Pierre was convicted of offences under s.3(1) relating to the injuries suffered in the street, the trial judge not unreasonably ruling that this was an offence of strict liability and the jury had simply to ask if he owned the dog, if it was dangerously out of control in a public place, and if the complainant suffered injury as a result.

The Court of Appeal identified a distinction between an offence of strict liability and an absolute offence. An investigator, a prosecutor and the court have to take account of the defendant's ability to take and keep control of the dog in the situation being examined. Was he there? Was he asleep? Was he able to do anything to prevent or stop or abate the dangerous situation? If so, did he do what as the owner of that dog he should have done? This places a continuing burden on the owner or person in charge, one that continues even after the intervention of a third party:

> There must in our view be some causal connection between having charge of the dog and the prohibited state of affairs that has arisen.

A break in the causality means there is no s.3(1) offence. An example would be that D leaves his dog securely at home, but while he is out an intruder releases it and the dog runs off and bites someone

> In our view section 3(1) requires proof by the prosecution of an act or omission of the defendant (with or without fault) that to some (more than minimal) degree caused or permitted the prohibited state of affairs to come about.

The prohibited state of affairs is that the dog is dangerously out of control, or that in addition, it injures someone.

2 [2013] EWCA Crim 2396.
3 [1994] 99 Cr.App.R 356.

On the facts of *Robinson-Pierre* the court indicated that, had the trial court applied the law as the Court of Appeal declared it to be, the question for the jury would have been: did the defendant by failing to intervene and take control of his dog do an act or omission which to a degree greater than minimal caused or permitted the dog to be dangerously out of control in a public place and injure the officers? The Court of Appeal would have answered Yes. The apparently callous and anti-police attitude of the dog owner would have founded criminal liability.

It will be a question of degree as to what an owner is to be expected to do to avoid criminal liability after a third-party intervention. Does the owner have to put himself at risk? As the dog is, by definition, dangerously out of control and therefore likely to cause injury, the mere fact of risk to the owner is arguably not a sufficient reason for inaction.

How soon does the owner have to intervene? What priority must an owner give to regaining control of a dog once he learns that an unforeseen situation has arisen through the intervention of a third party? It will be for the owner to explain and justify what he did or did not do.

Robinson-Pierre is a decision on s.3(1) when it was limited to incidents in a public place, but since its amendment by ss.106 and 107 of the Anti-social Behaviour, Crime and Policing Act 2014 an offence can now equally be committed in a private place, such as a home. That extension of criminal liability is limited by the new householder defence designed to exonerate the owner of a dog which attacks a trespasser in a dwelling. However, the principle of active responsibility in *Robinson-Pierre* is not constrained by the narrow criteria in the householder defence, and may, therefore, be relevant as a bar to prosecution in circumstances not covered by the householder defence.

Section 3(1) is modelled on the responsibilities of a dog owner when in public. A dog is under control when it is on a lead or has been sufficiently trained to respond to instructions from the owner. That is clear evidence of control. When a dog is in the owner's home, the situation is different. It may well be allowed to move about the house freely. It may be left unattended and untethered in a secure part of the house or an outbuilding; indeed, such freedom of movement promotes the welfare of the animal.

Does control now need to be measured not in terms of direct control by being on a lead or subject to oral instructions, but rather in terms of the degree of restraint afforded by the physical properties of the area where it was allowed to be? Does this create a distinction between a dog in a building and a dog on private land? Thousands of postal and delivery workers are threatened and injured by dogs every year in gardens. The arrival of the post is predictable and to be expected. What burden now attaches to the owner of a dog? There is a responsibility on a dog owner to take appropriate steps to ensure that injury or fear of injury does not occur.

Reform

The Commons Select Committee in its recent report referred to earlier advocates urgent government action, including:

- an independent review of the effectiveness of the DDA and wider dog control legislation;
- an investigation into whether s.1 of the DDA banned dogs are inherently more dangerous than other breeds and, if not, the repeal of the automatic ban;
- the development of a modern law based on prevention, the education of owners. and children, early intervention, and mandatory training courses on a par with speed awareness courses for drivers;
- giving the police and local authorities the resources they currently lack to make existing powers work.

I advocate reform and consolidation to produce a single, comprehensive, consistent system, one that is easy to understand for the average dog owner. Motoring law offers a good analogy: a comprehensive Act with a separate Code for the Welfare and Control of Dogs akin to the Highway Code, so that courts could examine individual cases against the standards in the Code. Breach of the Code would allow a court to infer criminality. Police and prosecutors have seen too many photos of avoidable injuries. There is a strong case for radical reform.

Book Review

Of beer and West Coast Main Lines: a review of "Stories of the Law and How It's Broken" by the Secret Barrister (Macmillan, London, 2018)

By Matthew Dyson[1]

> On 19 March 2014, two months after the Innocence Tax took its current form, the government in the Budget proudly announced a 1p cut to duty on a pint of beer, and a freeze to duty on cider and spirits. The cost to the taxpayer of this largesse was estimated at £300 million per year. The figure that *had* to be cut from criminal legal aid, that could *not* be avoided, that meant it was *necessary* to punish the wrongly accused and increase the risk of innocent people going to prison, was £220 million per year.[2]
>
> Despite the fact that payments under the [miscarriages of justice] compensation scheme were already scant – out of forty to fifty applications

1 Matthew Dyson is an associate Professor at the Faculty of Law, University of Oxford and Tutorial Fellow of Corpus Christi College; and an Associate Member of 6 KBW College Hill.

2 P. 200.

> each year, around two or three are deemed eligible for compensation, and the maximum payments have been restricted ... it was decided to make it tougher [in the Anti-Social Behaviour, Crime and Policing Act 2014, s. 175] … In October 2016, reborn as Secretary of State for Transport, Chris Grayling announced that he was introducing a new, more generous compensation scheme for passengers whose trains were delayed by fifteen minutes. It was only fair, he said "to put passengers first" and to "make sure that they receive due compensation" for inconvenient events outside their control.[3]

Forensic yarns tend to be thrillers, brain-teasers or autobiographies from the great and good. The leading authors are also commonly well-known, either as writers, or advocates and judges, and their purpose is more to entertain than enlighten about the criminal justice system. The Secret Barrister upends all this. We do not know the author as a person, only as a title, but the purpose of the book is overtly stated: to show what the criminal justice system is like today and offer insights on how it got so dire (while only sometimes railing against the politicians and populace that allowed it to).[4] If there is one silver lining from the litany of under-resourcing and miscarriages of justice set out in the book, it is that the criminal justice system can still produce criminal lawyers as capable, readable and pithy as the Secret Barrister.

For many engaged in criminal justice, the stories will be familiar, though the telling adds much to them. But the book is aimed at a wider audience, laypeople, certainly, but also, on the back of a fundraising campaign by members of the Criminal Bar Association and Young Legal Aid Lawyers,[5] every one of 650 MPs sitting in April 2018. For present purposes, it does not seem sensible to list the more eye-popping stories or figures, so after a brief selection of those that are particularly poignant from an academic criminal lawyer's perspective, the focus will rather be on how this book, itself a piece of advocacy to an extra-curial audience, fits into wider events in society. The Secret Barrister makes many apt juxtapositions, and the above quotes pick out just two. They highlight how, politically, criminal justice is faring no better in today's civic consciousness than Juvenal said of the early Roman Empire: the masses are merely bought off, now not with bread and circuses,[6] but with beer and compensation for train delays.

The Secret Barrister uses the phrase "Innocence Tax" for the cost of proving you did not commit a crime you are interviewed about or charged with. In the last six years, since the Legal Aid, Sentencing and Punishment of Offenders Act 2012, this "tax" has become the reality for anyone whose household earns more than £37,500 a year, and in a host of other ways besides. For example, according to the charity Transform Justice, a person wrongly accused of criminal damage paid more to be acquitted than he would have done through the fine he would have paid on conviction.[7] Similarly, it is now almost impossible to receive any money from the state to restart your life after decades in prison, notwithstanding the flaws in evidence that got you there.

What, then, might one take away from the book's many stories about the criminal law in action?

First, the criminal justice system has been savaged. This most obviously has taken the form of cuts. Legal aid rates are so low, they are officially considered to be not a "proper professional fee" by the Bar Council.[8] That is, the rates are so poor that they establish one of the rare occasions on which barristers can refuse to take on a case, thus ignoring the "cab rank" rule. At the same time, we pay private prosecutors' costs, still possibly even at the full rate incurred.[9]

The savaging has also taken the form of metrics of assessing success. The book has many worrying stories of the CPS following targets or the media value of success, as their only refuge against limited resources and their place in the public's consciousness.[10] Recent sources outside the book bear this out. The Home Affairs Select Committee reported at the end of October 2018 that while recorded Crime had risen by 32% in three years, charges or summonses were down 26% while the police have faced 30% cuts in funding since 2010-2011.[11] The recently retired DPP, Alison Saunders, once freed from her official position, confirmed that the Police and CPS just cannot cope with the low prioritisation they have received.[12] The Law Society showed in April 2018 that in five to 10 years' time there will be insufficient criminal duty solicitors in many regions of England and Wales because insufficient young lawyers are joining the field and the average age nationally is 47, with much higher averages in some regions.[13] The Bar Council published on 1 November 2018 a study by Professor Martin Chalkley showing that while the economy had grown 13% from 2008 to 2018, the funding for the Ministry of Justice had declined by 27%, and CPS funding had been cut by 34%; legal aid funding had been cut by 32% and court services by 17%.[14] While the Criminal Bar Association emails its members about how to try to engage with the Government on the Advocates' Graduated Fees Scheme, one of the most recent battlegrounds of the cuts, the public continues to underestimate and fail to engage with the drains on lives and the risks for the future those cuts cause.

Second, the system still manages to turn, fuelled by the overwork and under-remuneration of lawyers of all kinds, court staff, judges, police and many others. This human element is key to the claim that, while the common law might not overtly prioritise truth-finding, it is the dedication of two sides, the state and the properly armed defendant, which best makes a crucible for the truth.[15] Readers will certainly be left with the impression that we, the public, owe a great deal to many within the criminal justice system, and that we do them a disservice by not acting on that debt.

3 Pages 316-319.
4 See, for example, p. 9.
5 Which are likely to include many of the readers of this journal.
6 Juvenal, Satire 10.77–81
7 P. 220.
8 P. 216.
9 Pages 217-8.
10 See, for example, pp.105, 156-157, and on wider disclosure failings, *passim*.
11 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/515/51502.htm.
12 https://www.theguardian.com/law/2018/oct/27/cps-alison-saunders-justice-system-cannot-cope-resources.
13 *https://www.lawsociety.org.uk/policy* campaigns/campaigns/criminal-lawyers/.
14 https://www.barcouncil.org.uk/media/688940/funding_for_justice-_the_last_10_years_version_-_professor_martin_chalkley.pdf.
15 P. 270.

Third, we can take away that substantive improvements could be made to the law. While the merits of an inquisitorial or adversarial system could be debated (and are debated amongst academics and policy makers), the Secret Barrister proposes some simple enough changes to the substantive law. For example, witnesses could use their witness statement and then be questioned on it, as happens in civil cases and in some ways in sex trials, rather than have to give everything as evidence in chief.[16] Juries could give reasons for their verdicts, as is done by other lay people (magistrates) and juries in inquests, and indeed in full criminal cases in some other legal systems.[17] The magistracy, though very cheap, and often incredibly well-meaning and dedicated, is said to have significant space for improvement rather than further empowerment in sentencing.[18] The book is nonetheless not so much about what could be improved about the criminal law in substance, and there is a strong suggestion that we could accept many of the flaws of the law if the procedure had the proper space and resources to put it in its proper setting.

It's obvious that, despite the significant evidence that the criminal justice system has been brutally and mendaciously stripped of essential funding, money is not actually the entire answer. There had been money in the system, the Secret Barrister notes, particularly prior to the 1990s. The problem is rather one of priorities. And the process of prioritisation is not new, it's as old as Rome's seven hills, but it might fairly be thought that we in the modern world might have managed to engage in it a little more impressively than we have.

A number of rhetorical techniques by those allocating the money stand out, and both involve filling the limited mental space that the average person spends considering policy. To begin with, an "option" will lose to a commonly accepted "necessity". Thus, the criminal (or civil) justice system can be portrayed as something the state can choose to support, whereas we might more easily accept that the NHS is a necessity.

Second, accusation of money being misspent can be sufficiently toxic to bring down an option despite that misspending being statistically tiny. This can be seen clearly from outcry about "fat cat" legal aid lawyers, a very rare breed indeed. It can also be seen the claims, made at around the same time, that too much was lost to "benefits" fraud, when the government's own estimates put that at 0.7% of the system, and half as much as was lost through government and claimant error (also the general public believed that 24% of benefits payments are fraudulent).[19]

Third, it is always easier to state a rule, such as that a case must proceed on time, than it is to make that rule achievable; it is even easier to require someone other than yourself to enforce that rule since that person becomes the decision-maker of the downstream decisions. Thus, while it is true that "the reasons for cases requiring additional hearings and parties seeking adjournments will not and cannot all be judicially managed away" by firm case management,[20] that's not the only valid criticism of that particular example of buck-passing. Indeed, one might wonder whether the purpose in setting that overriding objective was to solve the underlying problems of why the hearings and adjournments were necessary, or more to have a different body to which to redirect questions, and blame.

These three techniques of persuasion also give rise to some key lessons from the book. Those who care about criminal justice have to show society why it should give just a little bit more of its attention to questions of priorities, thereby increasing the attention pool. Furthermore, we have to show what the real comparisons are, and not to give away the precious resource of our attention-spans without a fight. A key motivator for intellectual effort seems to be personal self-interest. We seem both to lack empathy for those who are charged with criminal offences and think that we will never be so charged so never think that sympathy will be relevant either. It won't happen to us, it's something that happens to *them*, a wide and unspecific class of "other".[21] Numerous examples in the book show how this is simply not so. One obvious example is the case of the man who was convicted despite evidence that he did not own a paisley shirt or have a lump on his head – unlike the alleged attacker.[22] But the stark choice the Secret Barrister's Book presents us with is whether to simply re-prioritise criminal justice, or whether we need to improve our ability to prioritise across the board. How much can the law be an example to educate and improve society, through legal actors improving the law? Perhaps, not enough. In fact, the very ignorance that even quite well-educated members of society show should be harnessed to that end. It turns out, we are ignorant in the wrong ways. If we could persuade the public to imagine themselves, ignorant of background and standing, facing injustice, they might make better decisions. This veil of ignorance,[23] a rational device, particularly when an emotion like empathy can be cultivated, might help the public to see criminal justice without techniques of persuasion and other tricks of the political trade hiding its importance. For example, it can only be hoped that a sensible person would accept a penny more on a pint of beer, thinking that it was a good investment if it increased the two pence per person per day spent on the criminal justice system; that's all the more so when that person might be accused by the system, and have to experience that strain.[24] That's the kind of message anyone in criminal justice can take to the public, and many have been doing so for a long time. We can each open the way a little, with everything from anecdotes in passing to direct action campaigning. The first step is for each of us to engage with the public enough to get them asking the right questions: for further reading we can suggest this accessible, engaging and authoritative text.[25]

16 P. 273.
17 Ibid.
18 See generally, Ch 2.
19 https://publications.parliament.uk/pa/cm201314/cmselect/cmworpen/1082/108205.htm
20 P. 78.

21 See especially pp. 338-343.
22 Pages 308-9. The case of *Nealon* [2014] EWCA Crim 574. Nealon's attempt to claim compensation under s.133 of the Criminal Justice Act 1988 failed; and on 30 January 2019 the Supreme Court, by a majority, dismissed his appeal: *R (Nealon) v Secretary of State for Justice* [2019] UKSC 2.
23 John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 137 (and Ch.24 more generally).
24 Pages 129-130.
25 As indeed, is it already being recommended to law students.

Editor: Professor J.R. Spencer, CBE, QC
Cases in Brief: Professor Richard Percival
Sentencing cases: Dr Louise Cowen
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