

## Chambers news and announcements

### Welcome

William Mousley Q.C., Head of Chambers



Welcome to our latest newsletter. We hope you find it instructive and useful. Please do give us your feedback to our Chambers Manager, Tracey ([TMcCarthy@2kbw.com](mailto:TMcCarthy@2kbw.com)) as we are keen to continue to deliver the sort of information which may help you in your daily practice.

I am very grateful to all those who have contributed to this edition and trust that you enjoy reading it.

*This is the second edition of the 2 King's Bench Walk Newsletter. The newsletter is produced quarterly, in April, July, October and January.*

*In this newsletter, there is something of a theme of 'returning'. Kelly Brocklehurst writes about coming back to the Bar after time in-house, whilst Natalie Wood, Suki Dhadda, and Kate Fortescue give their views on returning after maternity leave.*

*Elsewhere, Daren Milton provides an insight into the Clerks' Room, Matthew Farmer writes about s.119 of the Criminal Justice Act 2003, David Fardy examines future losses and vicarious liability, and Beresford Kennedy writes on the implications for proprietary estoppel following Liden v. Burton.*

*There are also the usual case updates, team news, and upcoming events.*

*If you have any comments or thoughts about the Newsletter you would like to share, or if you would like further information about the articles or authors, please email [TMcCarthy@2kbw.com](mailto:TMcCarthy@2kbw.com).*

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## From the clerks' room

### Middle man, Mediator or Machiavellian? A Clerk's Tale

Daren Milton (Senior Clerk)



Little is known about barristers' clerks but the role we play and have always played in the idiosyncratic legal world is vital. I've heard it said that being a barristers' clerk isn't just a job, it's more of a calling.

Whilst the days of the exchanging of briefs over a glass of "Chateau Fleet Street" at Pomeroy's wine bar still form part of my living memory they are, to all intents and purposes, consigned to history. In the past, a senior clerk—Mr Ten Percent—would have a handful of members of chambers and effectively act as a personal agent to each of them. Two fees were agreed: Counsel's fee plus the clerk's fee. If only.

The role of barristers' clerk has changed immeasurably in the 28 years I've been involved in the job, yet the symbiotic relationship between a barrister and their clerk doesn't alter.

When a barrister starts out he or she has very little control over their progress. It's down to the clerk and watching a young barrister's career evolve knowing that you've had an input and influence in the development of their practice is something I'll never tire of.

The modern day clerk is a manager; a counsellor; an administrator; a consort; a broker; a mentor; a financial advisor; a risk taker; someone who manages expectations and seeks new opportunities. A clerk is an integral part of the legal system whose relationship with solicitors, the courts, fellow clerks and judiciary helps to maintain the smooth running of the courts and judicial system.

Informal relationships are an extremely important feature of our world, which fosters interdependence rarely seen in other occupations.

The cliché is when a barrister is successful it's down to individual brilliance, when they're not it's down to their clerk's wrong doing. Ever was it thus and ever shall it remain I suspect but the truth lies somewhere in between. As a clerk we want our barristers to be diligent and obedient! We always assume a level of excellence. Much as good advocacy depends not only on a knowledge of the law, but on personality and a nimbleness of mind, good clerking isn't just about filling diaries, it requires forethought, integrity, sound judgment and a thick skin!

In today's times chambers functions more like a coalition than a collection of individuals and whilst members of chambers are self-employed everyone understands the business requirements. Our clerks no longer do a little bit of everything but have defined roles and understand the part they have to play in the running of a modern set of chambers. The team spirit we have at 2KBW is exceptional.

When I joined 2 Kings' Bench Walk in 1988 as their junior clerk, William Mousley was the junior tenant. Little did we know that 24 years later, I'd return as his senior clerk, he would have become Queen's Counsel, our Head of Chambers and the Leader of the Western Circuit.

My only solace is that if I feel I'm getting old, I can't be alone...

## Barristers on Bikes—2KBW cycles for Horatio's Garden

As Chambers' nominated charity for 2016, we are fundraising for Horatio's Garden by taking part in a sponsored cycle ride in the Chalke Valley, Salisbury, on Sunday 25 September, 2016. This promises to be great fun and an ideal opportunity to raise Chambers' profile.



There are 3 distances on offer, 18, 25 or 45 miles. There is mechanical support and the route is fully signed with feed stations. All routes share the first 8 miles so everyone will set off together.

More information on the ride is available [here](#).

Please follow [this link](#) to the charity page to sponsor the team!

## 2KBW in the News

News of chambers' Portsmouth expansion [has been featured in The News in Portsmouth](#).

## Criminal update

### New sentencing guideline

There is a new guideline on offences involving dangerous dogs, in effect from 1 July 2016. It is available [from the Sentencing Council](#).

## Legislation note: the *Psychoactive Substances Act 2016 (c.2)*

**Kaj Scarsbrook**

### Drugs; legal highs; new legislation

*Royal Assent: 28 January 2016; commencement: 26 May 2016*

The *Psychoactive Substances Act 2016* ('the Act') provides new provisions relating to psychoactive substances. The intention of Parliament was, in effect, to provide a 'blanket ban' for formerly legal highs.

### Definitions

Section 2 of the Act defines a psychoactive substance as any substance:

- (a) capable of producing a psychoactive effect in a person who consumes it, and
- (b) [which] is not an exempted substance (see *post*).

A 'psychoactive effect' is produced, according to s.2(2), when a substance affects a person's mental functioning or emotional state by stimulating or depressing the person's central nervous system.

### Offences

Sections 4 to 9 create offences related to psychoactive substances. Section 4 creates the offence of intentionally producing such a substance, intending to consume it or knowing or being reckless to whether it will be consumed. Section 5 creates the offence of supplying or offering to supply a substance. This offence is aggravated (s.6) if committed in the vicinity of school premises; a courier used was under 18; or committed in a custodial institution. Section 7 makes possession of a substance with intent to supply an offence. Section 8 criminalises the importing or exporting

of a substance. Finally, there is a separate offence (s.9) for possessing a substance in a custodial institution.

All the offences are triable either way. The offences under ss.4-8 are punishable summarily by imprisonment for a maximum of 6 months (rising to 12 months after commencement of s.154(1) of the Criminal Justice Act 2003) and/or a fine, and on indictment for a maximum of 7 years and/or a fine. The offence under s.9 is punishable the same summarily and on indictment, with 2 years' imprisonment and/or a fine.

### **Exceptions and exemptions**

Schedule 2 to the Act gives exceptions to the offences, insofar that a person carrying out any activity which would usually be an offence under ss.4-9 will not be committing an offence if they are a healthcare professional carrying out the activity in the course of their employment, or if they are a person engaged in approved scientific research.

Substances are also exempted from the remit of the Act. These are controlled drugs (under the Misuse of Drugs Act 1971); medicinal products; alcohol; nicotine and tobacco; caffeine; and food (when not itself containing a psychoactive substance).

### **Powers**

Various powers are given (ss.12-35) for dealing with activities prohibited under the Act. These include, *inter alia*, prohibition orders (which may be made on conviction and prohibit a person from certain activities) and premises orders (which require the owner of a premises to take steps to prevent activities from taking place on it). There are offences of failing to comply. Stop and search provisions are included or widened to take psychoactive substances into account.

### **Amendments**

There are various consequential amendments. The most important are that:

- offences under ss.4-8 of this Act are made lifestyle offences under the *Proceeds of Crime Act 2002*;
- the *Licensing Act 2003* is amended to allow entry and search of club premises if an offence of supplying a psychoactive substance has taken or is about to take place;
- the offences under ss.4-8 are made serious offences under Part 1 of Schedule 1 to the *Serious Crime Act 2007*; and
- *Armed Forces Act 2006* amendments to extend the provisions in the Act to the Armed Forces.

### **Guidance**

Given the perhaps wide definition of a 'psychoactive substance'—would smelling a perfume which made one happy, for example, fall foul of the act?—the Home Office has published Forensic Guidance on the assessment of psychoactive substances and their effects. The full guidance can be found [here](#).

It follows criticism from the Advisory Council on the Misuse of Drugs that the definitions in the Act were unworkable as the psychoactivity of a substance could not be equivocally proven in a clinical setting. In addition, following advice from the ACMD, alkyl nitrates (poppers) were accepted by the Government as not meeting the definition in the Act.

The Explanatory Notes to the Act elaborate on the definition by adding:

by speeding up or slowing down activity on the central nervous system, psychoactive substances cause an alteration in the individual's state of consciousness by producing a

range of effects including, but not limited to: hallucinations; changes in alertness, perception of time and space, mood or empathy with others; and drowsiness.

The Guidance states that in-vitro testing should be used to demonstrate that a substance is capable of producing a psychoactive effect. Expert witnesses will be required to give an opinion where such testing is not available, as will factual witnesses to the behaviour of an individual.

The Guidance goes some way to helping clarify the definition. An expanded definition including reference to scientific testing was proposed by the ACMD during consultation stages of the Act but for reasons unknown, it was not put into the Act, then published in full in the Guidance.

## Civil update

### The continued development of vicarious liability

David Fardy

The Supreme Court considered the scope of vicarious liability in its landmark decisions in *Cox v. Ministry of Justice* [2016] UKSC 10 and *Mohamud v. WM Morrison Supermarkets* [2016] UKSC 11. The issues were twofold: what relationship is required between an individual and a defendant to make a defendant vicariously liable to a claimant (*Cox*), and how does the conduct of an individual need to relate to that relationship (*Mohamud*)? Although the former question is evidently of great importance—incidentally the court held that the MoJ were vicariously liable for the negligent acts of a prisoner undertaking paid work within the prison, applying the *Christian Brothers* principles—it is the answer to the latter which will arguably have the greatest ramifications, particularly on the premiums for employers' liability insurance.

Mr Mohamud had gone into a petrol station kiosk operated by the defendant and asked to use a printer. An employee of the defendant, Mr Khan, used foul, racist and threatening language to order him from the kiosk before following him and subjecting him to a sustained violent physical attack, telling him never to come back again. At first instance, the trial judge applied *Lister v. Hesley Hall* and concluded there was not a 'sufficiently close connection' between what Mr Khan was employed to do and his tortious conduct. The Court of Appeal upheld this decision.

In allowing the appeal and finding Morrisons vicariously liable, the Supreme Court restated the test for vicarious liability as follows: 1) what is the nature of the employee's job and 2) is there a sufficient connection between the position of employment and the wrongful conduct, to make it right under the principle of social justice to hold the employer liable? They held that Mr Khan's role included responding to customers' enquiries; what he had done was inexcusable but was within that 'field of activities' assigned to him. The following sequence was an unbroken chain of events which remained part of the role of keeping unwanted customers away, albeit in a grossly abusive manner. His motive—seemingly personal racism rather than an active desire to benefit the defendant business—was irrelevant.

Given that both the first instance and Court of Appeal decisions were overruled by the Supreme Court, this decision is likely to be met with a degree of scepticism. One might question whether Mr Khan's motives are as irrelevant to the question of vicarious liability as the Supreme Court held, particularly given the finding in relation to him telling Mr Mohamud never to come back that "*in giving such an order he was purporting to act about his employer's business*". Context must surely be considered, and this order almost certainly resulted from Mr Khan's personal racist attitude, yet the Supreme Court seem to presuppose that Mr Khan had somewhere in his mind the notion that he was acting in his role as an employee whilst beating up Mr Mohamud and telling him never to return.

Nevertheless, employers (particularly those in the retail and customer service sectors) must be aware of the risks of a substantial claim against them if they employ, whether knowingly or

unwittingly, someone who has a propensity to be violent or to expose their personal feelings at work. Background checks and references have never seemed more important.

## Family update

When can paying ‘rent’ in respect of a property give the payer an interest in that property? The implications for the doctrine of proprietary estoppel following the recent case of *Liden v. Burton* [2016] EWCA Civ. 275

Beresford Kennedy

### Introduction

*Liden v. Burton* is an unsuccessful appeal against the decision of a first instance judge who awarded a former partner, Ms Liden, an interest in a home owned solely by the appellant, Mr Burton.

The case focuses upon the extent to which the judge was permitted to extrapolate the existence of the necessary elements of proprietary estoppel (in order to establish an interest in the property) from the evidence.

Ms Liden and Mr Burton had lived for twelve years in the property, ‘Willow Beck’. Originally, Willow Beck was in the names of Mr Burton and his then wife. Following their divorce it was transferred into his sole name, and, as part of the settlement, a mortgage was secured on the property (and there was later borrowing). At the time of the transfer, Ms Liden and Mr Burton were already living there.

### Proprietary Estoppel

The essence of the appeal is the complaint regarding how the first instance judge applied the doctrine of proprietary estoppel and whether this was supported by the claimant’s evidence.

The judge had observed that “*there is no definition of proprietary estoppel which is both comprehensive and uncontroversial*”.

He set out the essential elements of proprietary estoppel from *Megarry and Wade* (8<sup>th</sup> edition) at pages 711-712:

“Without attempting to provide any exclusive definition, it is possible to summarise the essential elements of proprietary estoppel as follows:

- (i) An equity arises where:
  - (a) The owner of land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the owner’s property;
  - (b) In reliance upon this belief, the claimant acted to his detriment to the knowledge of the owner; and
  - (c) The owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he is expected to receive.”

The judge heard the conflicting evidence of the parties and then made the following findings:

“(1) Ms Liden’s income was from a pension paid by the Swedish authorities on account of her having suffered an injury.

(2) During Mr Burton's divorce proceedings he was concerned that he might not be able to afford to keep Willow Beck and Ms Liden agreed to help out. This initial conversation was even before they left Sweden.

(3) It was represented to Ms Liden that the property was expensive to run and that they could only afford to live there if she made some payments.

(4) On this basis she began the payments of £500 per month, which was half approximately of all her pension.

(5) Ms Liden was initially unaware of the mortgage. When she asked Mr Burton how the money was spent he would describe it as rent and other outgoings. She challenged the description of rent and he apportioned it in response to that challenge as "£200 towards the house".

(6) When she found out about the mortgage in 2002 he again agreed that it was "towards the house."

Ms Liden's witness statement had also made reference to Ms Liden having made the financial contributions because Mr Burton had told her on numerous occasions that they would be together for the future, that this would be their home, and that he would look after her forever.

A document was produced during the proceedings, typed by Ms Liden, which stated that "*this is to verify that Kristina Liden pays rent of £500 per month. This payment has been made every month since 2001*". Notwithstanding the use of the term 'rent', the judge accepted Ms Liden's case that these were the terms that Mr Burton was prepared to sign, but that this did not represent a waiver of any rights Ms Liden might have in the property.

The judge concluded that Mr Burton had induced, encouraged or allowed Ms Liden to believe she was obtaining an interest in the property, and that she had made the monthly payments relying on this, and that it would be unconscionable for Mr Burton to deny Ms Liden an interest in the property.

On appeal Mr Burton submitted that:

- (1) The assurance that the payments were going "towards the house" is (a) not sufficiently clear and unambiguous, and (b) does not amount to an assurance of beneficial interest;
- (2) This assurance was given after the payments had commenced and therefore there is no sufficient link for reliance.
- (3) There can be no basis for an assurance conferring an interest in property once the "rent" document was signed in 2002.
- (4) £200 per month is too insubstantial an amount to constitute detriment.

In the lead judgment, Lord Justice Hamblen concluded that 'context' was 'hugely important' and that the judge was best placed to evaluate that issue. The judge was therefore entitled to find that Ms Liden reasonably understood that her payments were in return for an interest in the property.

The combination of reliance and detriment led to, and justified, the conclusion of 'unconscionability'.

He found that the judge was not bound by the use of the word 'rent' in view of the fact that the exchanges between the parties showed that the payments were towards ownership of the house.

Lord Justice Hamblen also concluded that a court has a wide discretion in deciding how best to give effect to the equity.

## Discussion

Most landlords can therefore breathe a deep sigh of relief. Mere payment of rent will not in itself give the payer an interest in a property. However, those who lead their partner to believe that they are gaining an interest in a property, but seek to protect themselves by getting their other half to sign a document describing the partner's contributions as merely being 'rent', cannot be quite so confident...

It is therefore clear that in deciding whether or not the test for proprietary estoppel is established, provided there is some evidence of each of the limbs, a trial judge is entitled to draw his or her own impressions of the parties' evidence. This includes finding that even where there is apparently contradictory evidence written by the claimant (the payment of 'rent'), this does not necessarily impede the finding that the claimant understood that he or she was achieving an interest in the property.

Potentially this authority opens the door to an increase in claims of proprietary estoppel given that so much turns on the persuasive quality of the parties' evidence.

In view of the judge's acceptance that the literal terms of a written document were not binding, this authority may also be of interest to *TOLATA* practitioners.

## Articles

### The Bar and maternity

Natalie Wood, Suki Dhadda and Kate Fortescue



*Three members of chambers have recently returned from maternity leave. Here, they give their views on the challenges and experiences the combination of a young family and practice at the Bar can bring.*

*Kate Fortescue and Suki Dhadda have both been in chambers for nearly 10 years. They both prosecute and defend in London and the South East. They are grade 3 prosecutors and are on the list to prosecute serious sexual offences. They are also mothers of two children under the age of 5.*

Going back to work having had children is always a difficult decision whatever the profession. There is an array of factors to weigh up on top of the financial considerations. You are worried about the effect on your children if you work, the fact that you won't see them for long stretches during the week and the unpredictability of hours at the bar. On the other side of the coin we are professionals who have invested a lot in our careers and our sense of identity is largely based on what we do. We also feel it is important to be role models for our children and for them to see that it is possible for their mum to work and still enjoy and spend quality time with them.

Being a mother of two and working full time at the Bar is not an easy feat. The balls are thrown into the air and you are expected to be able to juggle them without letting them fall. Time management and the ability to work under pressure are only but two of the skills that are employed in perfecting the juggling act.

Chambers is thriving and work life has never been busier. However, since returning we have found that our profession can be one of the most flexible and compatible with having young

children. We are able to plan our diaries in advance to take time off during the school holidays, to make it to nursery sports day or attend important appointments. We have been fortunate enough to have had the support of a fantastic clerking team to help make the transition back from maternity leave as seamless and 'pain free' as possible. They have worked hard in ensuring that geographically we work in areas that are relatively close to home so as not to miss too many bed and bath times!

Our commitment to 2KBW and developing our careers has not wavered and if anything we are more determined than ever to progress in our chosen profession. I am so pleased that Chambers has, and continues, to support us both as barristers and mothers. Doing a job that we enjoy and being a member of a Chambers that is forward looking, highly regarded and lots of fun to be in is what keeps us sane!

*Natalie Wood has a mixed common law practice with an emphasis on Family Law, and is mother to Benjamin (8), Matilda (5) and Jemima (1).*

The remark that I come across most often as a working mother of three at the Bar is “I don’t know how you do it!”

The answer lies, I believe, in a strong combination of the following:

- (i) Enthusiastic tenacity and desire to succeed as a professional in my chosen field;
- (ii) excellent time management and organisational skills (well—sufficiently adequate time management and organisational skills);
- (iii) good old fashioned hard work;
- (iv) a handbag big enough to hold as many rattles as post-it notes;
- (v) a good family planner (I find the Gruffalo and accompanying stickers particularly useful); and
- (vi) oodles of caffeine.

Only this morning on the 6.30am train out of Bournemouth heading in the direction of Oxford, I found myself asking “why do I do it?”

This is, at first blush, more difficult to answer in as much as there are other jobs that would be arguably better suited to working around a family: one that finished in time for school pick up perhaps; one that could be undertaken from home or at least based solely in my home town thereby reducing the hours spent travelling; one with fixed working hours so that I am not tempted to check my emails in the middle of bath-time.

However, I do it because the same reasons that drove me to come to the Bar in the first place apply just as much now that I have children as before, if not more so.

I have the variety of acting for a Mother in an application for a Child Arrangements Order one minute and an Intervenor in a non-accidental injury Fact-Find in Care proceedings the next—keeps me sharp for those dinner table debates about whether Rooney or Ronaldo would be a better choice in the FIFA 14 world cup squad. I have the flexibility of being able (for the most part) to set aside time for those all-important Sports Days and Christmas plays. I can play a part in the justice system that forms the basis of our civilised society and explain to my children the benefits of following the “Golden Rules” and—with insight—set out what might happen if they don’t!

And the truth is that however much I might (be known occasionally to!) whinge about picking up the brief and starting again at 9pm, I love nothing more than “donning the wig and war paint” and going into battle for a client.

There may be challenges to overcome at times. A recent example was the need to appeal a decision not to be “passported” onto a panel when the effect of a period of maternity leave had not been taken into account. However, this was quickly resolved demonstrating an appreciation in the profession of the position that working mothers often find themselves in.

It goes without saying that it would be impossible to manage without my 90s man at home and the enduring support, understanding and can-do attitude of the 2KBW clerking and administrative team. Since my return from maternity leave, I have continued to feel a valued and respected member of chambers. I will always remember that the first message of congratulations I received on the birth of Jemima was from my Head of Chambers welcoming her to the “2KBW family”, of which I hope we will all continue to be a part for many years to come.

## Back to the Bar

Kelly Brocklehurst



At the end of 2012 I took a difficult decision to leave 2KBW and the self-employed bar. The key reason will, I anticipate, be all too familiar to many; with a wife soon to take maternity leave and every mortgage application simply laughed at, I just couldn’t get the maths to add up. It was against that background that I accepted an offer of an in-house counsel role in the commercial sector.

However, this is not just another story about a junior barrister forced out of the profession by the diminishing returns of legal aid work; in spite of these continuing pressures I chose to come back to the self-employed bar and chambers in February this year.

What I had missed in my three years in the often-tedious wilderness of commercial and company law was the variety, humanity, and ‘buzz’ that comes with advocacy and criminal jury trials in particular. Of course I have become quickly re-acquainted with the reality of warned lists, of defendants not being produced, and the occasional judicial haranguing, but I have also returned with a new-found tolerance. Even a bad day at court can be contrasted quite favourably to commuting to the same office day in day out, to sit at the same desk, and re-draft yet another contract for services or rework page after page of warranties in a share purchase agreement.

Of course fair recompense for one’s efforts remains important and an issue of some concern, but so is retaining a desire to get up in the morning and go to work. A day in the Crown Court might be many things, many of them infuriatingly frustrating, but it is rarely dull.<sup>1</sup>

What has also made my transition back to the self-employed bar immensely smoother than might otherwise have been the case is a chambers, and in particular a clerks’ room, that has not been beaten by the recent challenges to the profession but has re-aligned and re-focussed itself to take them head-on. As a returning prodigal son I was expecting to find myself spending at least a little time in penance sweeping up unwanted mentions in various hinterlands, but from week one of my return Daren and his team helped me quickly rebuild a practice far better than the one I left behind three years ago.

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<sup>1</sup> I look forward to being reminded of this sentiment when I am next struggling through my third PTPH form of the morning,

I am also grateful to the other members of the chambers' criminal team, and I use the word 'team' pointedly. I have always known 2KBW as a very supportive family with a strong *esprit de corps* but I have returned to see that more than ever before this is proving a distinct advantage in ensuring high quality advocacy services continue to be provided, even in these interesting times.

## Section 119 of the *Criminal Justice Act 2003*, the limits of hearsay: evidence of out of court statements made by third parties

Matthew Farmer



"Write me an article that is headline grabbing, impossible to ignore. Something that screams for attention above the humdrum news of the day!"

So shouted my editor, Lord Beaver gnome (*bears no relation to anyone living or dead – Ed.*), a month ago when he requested a pithy article limited to one page in 2KBW news. Too screechingly busy to be able to put finger to key until today, I reflected on the enormity of the task ahead. Brexit, the resignation of the serving Prime Minister, and—hot off the press this afternoon—the news that Theresa May will soon be our new Prime Minister couldn't hold a candle to ... section 119 (1) of the *Criminal Justice Act 2003 (CJA)*.

My interest arose in this way: at the beginning of June I appeared for the defence at Newcastle Crown Court, expenses paid by HM Government. I was representing a man accused, with two others, with conspiracy to rob the safe of a drug dealer in Gosforth. Let's call them by fictitious names to make it even more fun: Hodgson, Rooney, and my client, Sterling. Hodgson and Rooney both live in Liverpool. Sterling, my client lives in Southampton. The evidence against them was formidable and included CCTV of them all together at service stations between Liverpool and Newcastle on the day in question; they were all plainly travelling in the same car. The car was a distinctive one, with a distinctive designer number plate. Let's call it ICELAND2 for the purposes of anonymity.

As well as CCTV we have the car entering Newcastle (ANPR evidence), and the phones of Hodgson and Rooney cell siting at the exact time of the crime in the same street as the crime, Wembley Street. Uncannily accurate descriptions from the victims of three men matching the descriptions of the defendants complete the picture.

Both Hodgson and Rooney admit they are in the car in Newcastle. However Sterling is having none of it. He insists that he never left the South Coast. So the case against Sterling is one of trying to prove he was in the car with the others. The prosecution rely on CCTV footage showing a bald man with similar gold teeth and features to my client. Sterling admits that he knows the other two, and that Hodgson is related through marriage to him. However, Sterling asserts, not unreasonably, that he is probably not the only bald man with gold teeth and a Scouse accent known to Hodgson.

Section 119 arises because the two co-defendants assert in their Defence Statement that they 'accepted that on ... (the relevant date) they travelled to Newcastle in company with ... (their) co-defendants Hodgson/Rooney and Sterling. In evidence, however, in line with Sterling's defence, they both denied that Sterling was with them at all.

Hodgson stated that his solicitor had misunderstood his instructions, and Rooney stated that he had simply assumed the person in the car on the day in question was Sterling, a man he had never met before.

The common law rule used to be that a previous inconsistent statement was not evidence of its contents, but went merely to the weight to be given to the witness's oral evidence. Furthermore an out of court statement by a defendant could not be evidence against a co-defendant unless it was adopted by him in evidence (*Archbold* §§ 11-35, 15-341). However, s.119(2) *CJA* 2003 reverses the common law rule.

Section 119(1) provides:

“If in criminal proceedings a person gives oral evidence and— (a) he admits making a previous inconsistent statement, or (b) a previous inconsistent statement made by him is proved... the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.”

Section 119 was designed to help combat the problem of witness intimidation. The aim was to allow the jury to treat pre-trial statements as evidence of the truth of their contents even when at trial their maker failed to adopt that version of events (*Billingham* [2009] 2.Cr.App.R. 20). Plainly this evidence was highly prejudicial if it was admissible against Sterling. It was certainly admissible against Hodgson and Rooney as evidence of a previous inconsistent statement.

Following submissions, HHJ Harriet Kane wished to rely upon the statute and put the statements before the jury as admissible evidence that Sterling was with the others in Newcastle. Section 119(1) appears to mean that the judge is entitled to do this. However, there is still a discretion under section 78 of the *Police and Criminal Evidence Act* 1984 not to admit it.

The submissions against had to appeal to judicial discretion, that to allow the evidence to be construed in this way was highly prejudicial and unprobative in the circumstances of this case. Furthermore, to allow the jury to rely on this evidence in the way now prescribed by the statute would allow them to circumvent the weightier evidence as to the identity of the bald man, which was best decided by looking at the CCTV, the defendant's phone that never left the Southampton area, and the evidence of the defendant Sterling himself.

The judge should surely direct the jury to not take into account an out of court statement made by co-defendants which they subsequently disavowed in evidence? Section 119(1) is a revolution consistent with the dizzying times within which we live. To rely upon it in this case would be to decide the whole case against Sterling based on these disavowed co-defendants statements. The judge, finally and apparently reluctantly, exercised her discretion to direct the jury not to use this (unreliable) evidence against Mr Sterling.

Were Messrs Hodgson, Rooney, and Sterling acquitted? Would you acquit them?

## Organising Ogden—calculating the future losses of victims of negligence

David Fardy

In contrast to the flexible attitude adopted by family law courts in identifying financial relief for parties post-divorce, the civil courts are focussed on establishing with precision the losses suffered by victims of negligence, both in the past and in future.

In *Knauer v. Ministry of Justice* [2016] UKSC 9, the Supreme Court considered how to calculate future losses accurately to ensure that victims of negligence were not left undercompensated. The appellant died from exposure to asbestos in the course of employment with the respondent. The appellant's partner therefore suffered loss in the form of the income the appellant would have earned had he not been killed by the respondent's negligence.

Future loss is calculated by multiplying the net annual loss as a result of death (the ‘multiplicand’) by the normal life expectancy for the victim (the ‘multiplier’). In *Knauer* the parties were agreed on how much the annual loss was; the question was whether the multiplier was to be calculated from the date of death (August 2009) or from the date of trial (July 2014). Although it may be thought the impact of such a decision is minimal, the difference between the two calculations was over £52,000.

Matters were complicated as previous House of Lords authorities—*Cookson v. Knowles* [1979] A.C. 556 and *Graham v. Dodds* [1983] 1 W.L.R. 808—established clearly that multipliers are taken from the date of death. At the time of these decisions, calculations were imprecise: counsel in *Knauer* agreed that the old practice of identifying a multiplier was to halve life expectancy and add one year, with a cap of 16-18 years. In modern practice, multiplier calculations are done using Ogden actuarial tables which factor in a number of considerations (including the possibility of the victim dying anyway through non-negligent means).

The court determined that the date of trial was the correct calculation. The old approach was now illogical and unfair given the material changes in the legal landscape with the use of Ogden tables; claimants in modern cases were being undercompensated because the Ogden discount applied for possibility of early death was factored in before the claimant actually received any money. As the original House of Lords decision was effectively judge-made law, it could be reversed through judicial intervention rather than requiring recourse to legislative action by Parliament.

Arguably this decision forecasts the use of increasingly precise methods of calculation of future losses. With an ever-changing legal landscape, it would not be surprising to see decrement tables, APVs and other mathematical and financial tools deployed in personal injury claims, and lawyers seeking to avoid numbers in practice may be best advised to steer clear of PI.

## Chambers cases

See [2kbw.com/home/news](http://2kbw.com/home/news) for the most up to date news of chambers cases

### Crime

#### **Becky Watts murder trial conviction upheld**

William Mousley Q.C. represented the prosecution at the Court of Appeal to resist applications by the two defendants to appeal their convictions in this case, having previously appeared in the trial at Bristol Crown Court. The appeals were dismissed.

More information can be found [here](#).

#### **Ed Hollingsworth prosecutes serious dangerous driving case**

Ed Hollingsworth represented the Crown at Luton Crown Court in a case where the defendant, driving dangerously and under the influence of crack cocaine, caused serious injuries to the occupants of another vehicle following a head-on collision.

More information can be found [here](#).

#### **Members of Chambers instructed in high-profile murder trial**

William Mousley Q.C. and Kelly Brocklehurst appear for the defence in a trial underway in Winchester, instructed by Denleys Solicitors.



The prosecution allege that the defendant murdered the victim days after he was arrested for harassing her. Further details of the case can be found [here](#).

### **Michael Williams secures convictions in gun factory case**

Michael Williams prosecuted a trial at Woolwich Crown Court where the defendants were charged with operating a gun factory from a flat in south east London. The defendants had obtained deactivated firearms and were using specialist skills to reactivate them.

Police searched the address and found heavy machinery, being used to convert and adapt firearms within the flat. A shortened shotgun and ammunition was found nearby. Two rifles and seven pistols, in varying stages of construction, together with multiple live rounds were found.

The two defendants were convicted on all counts, including possessing a firearm with intent to endanger life. Passing sentence on 13 July 2016, HHJ Hehir described it as a sophisticated firearms operation whose aim was to supply weapons what would allow murderers, gang members, rapists and terrorists to kill, maim and terrify. The two defendants were sentenced to a total of 28 years' imprisonment.

## **Training and Events**

Chambers offers a variety of training opportunities, both in the form of seminars and in-house training to address specific requirements. Please contact 2KBW for further details.

### **Forthcoming events**

#### **15 September 2016—Borough of Poole training**

John Ward-Prowse and Fiona McCreath will deliver in-house training for Poole Borough Council, covering section 20 of the *Children Act*.

#### **Autumn 2016—Expert Evidence in Infant Fatalities**

Sally Howes Q.C. will conduct an in-house seminar for 2 King's Bench Walk on presenting expert evidence in Infant Fatality Cases.

#### **3 October 2016—Borough of Poole training**

John Ward-Prowse will deliver in-house training for Poole Borough Council, focussing on care proceedings

### **Editorial**

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