

## Chambers news and announcements

### Welcome

William Mousley Q.C., Head of Chambers



Welcome to our summer newsletter.

2018 has been exceptionally busy for 2KBW.

This edition of the newsletter features the obituary of one of our longest serving Members of Chambers—David Jenkins. David sadly passed away in May 2018 after more than fifty years at the Bar. He will be greatly missed by colleagues and staff alike.

We also feature articles on the Financial Remedies Court, the John Worboys case, and the use of disproportionate force in self-defence. I write about my role as Leader of the Western Circuit and Russell Pyne is featured as our profile barrister.

Our support of local charities continues and grows. We participated in the London Legal Walk, and Josh Scouller ran the London Marathon to raise money for London Youth. Chambers sponsored the Horatio's Garden Chelsea Drinks, and Law Rocks played this year with all proceeds going to this charity. In addition to this Dan Wright cycled from London to Paris to raise money for Horatio's Garden.

Our busy Members of Chambers give of their own time to contribute to the newsletters which I hope you continue to find stimulating and useful. As always, we welcome any suggestions for improvements.

2KBW continues to strive to be a progressive and modern set of Chambers, providing an outstanding level of service to professional and lay clients.

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## From the clerks' room

### Time to wake up and smell the coffee

Daren Milton



Thank goodness resolution has been reached between the Criminal Bar and the MoJ over the unseemly cuts in defence criminal legal aid. After months of hard negotiating and stand-offs a compromise was made, and the Bar narrowly decided to return to work and continue to accept defence instructions. Normal service has resumed—for now at least.

The simple truth is that the Bar has for decades failed to recognise its importance not only constitutionally but as a service provider to absolutely everyone. Barristers have been providing expert advice and advocacy since the 13th century and we are in danger of losing something rather special.

The payment structure provides little scope for career progression for criminal barristers. It takes many years of practice and training at the Bar to prosecute and defend complex criminal cases, but if it is unaffordable for young barristers to pursue this line of work, then what next?

We know recruitment at the junior end of the criminal Bar is a real issue. We need to attract intelligent, articulate and enthusiastic men and women into the profession to develop and enhance our legal system and we are in danger of only the wealthy being able to afford a career at the criminal Bar. This cannot be right, nor is it what modern society demands.

Junior barristers become senior barristers, senior barristers become judges. The Judiciary is one of the UK's three constitutional branches sitting independently alongside government and the two Houses of Parliament.

We're heading for a proverbial car crash. From courts across the country quite literally crumbling around us, to judicial pensions being cut and morale at the publicly funded Bar at an all-time low, a failure to invest in the future now can only end in tears. We have to stop papering over the cracks.

Everything in life grows from the bottom up. A sound financial mechanism that attracts talented young barristers to the Bar, remunerated for work properly and reasonably done is needed to secure the profession's future. It's surely time to educate the public about the valuable contribution the profession makes to society day in, day out.

Fortunately, in the six years I've been back at 2KBW the sense of belonging and togetherness, and the effort put in by the staff and the members of chambers alike challenges the feeling that the Bar is doomed. We work hard and we are an exceptional chambers.

If only the decision-makers that view the legal system as undeserving of investment could see how we operate and go about our business, they could perhaps learn a thing or two.

With team-building and industry, it's amazing what you can achieve in times of adversity.

Our morale is high and our future bright.

## Profile: Russell Pyne



*Russell Pyne was called in 1991 and is the Joint Head of the 2KBW Criminal Team. He has 25 years' experience in prosecuting and defending grave and complex cases. He is a Grade 4 prosecutor and is regularly instructed by RASSO on the Western and South Eastern Circuits.*

*He has led seminars and lectures for police officers, and has particular experience in dealing with witnesses with vulnerabilities. He is responsible for co-ordinating and training members of 2KBW in the new Vulnerable Witness requirements.*

### **What was your route to the Bar?**

My route to the Bar was pretty traditional. I wanted to be a criminal barrister from the age of about 10, after regularly watching the lunchtime ITV programme "Crown Court". So, I did debating at school, then did a Law degree at Bristol University. Apart from taking a year out to act as the Vice-President of the Student Union there, I came straight to the Bar.

### **Who would you say is your role model?**

Stephen Sedley QC was still at the Bar when I was doing my first six-month pupillage, which was at 'Cloisters'. He struck me as having an extraordinary combination of a razor-sharp intellect, a passionate commitment to justice and fairness, and a hugely down-to-earth and friendly manner. I would love to be at least a bit like him!

### **Is there anything you would change about your career?**

Nothing at all.

### **What has been your most memorable day as a barrister?**

Early on—when Lord Mackay was Lord Chancellor—I was instructed to appear at the execution of a Bench Warrant. Why hadn't my client turned up at his trial? Well, he told me before the hearing, he had made an honest mistake with the date—he thought it was the 19<sup>th</sup> and not the 13<sup>th</sup>.

I trotted this all out before the Judge, who then asked me whether I had seen the letter from the Lord Chancellor about the case. Eh? What letter? HHJ passed down to counsel's row a hand-written scrawl, dated the 13<sup>th</sup>, which essentially said "Dear Judge, Mr Smith has my permission not to come to court today, signed Lord Mackay."

Inexperienced as I was, I could see that this didn't look good. Could I go to the dock and take instructions? Yes, I could. I showed the letter to Mr Smith and pointed out the implications. After a long pause, he said he could explain.

This letter was obviously written by a friend of his, he said, who may have known of the right date but hadn't reminded him of it. Yes, but why had he signed it 'Lord Mackay'?

Even longer pause. "No, no—his surname IS Mackay; but his first name is ..is.. is ... is LOAD ('Low-Add')".

Do you really want me to say all that to the Judge?! Yes, yes, he did.

My client was remanded in custody.

### What has been your most memorable case so far?

That's probably a case I did 12 years ago, leading a very young Barry McElduff, defending a woman accused of seven counts of child cruelty—the complainants being her own children. It was a memorable case for me for a number of reasons, including the ambit of the case's allegations—historic abuse over decades by a large number of defendants—the fact that my client's husband was also in the dock, although he had earlier been found unfit to plead, and the unusual defence which we ran, that of marital coercion. I was delighted when she was acquitted.

### Why did you join 2KBW?

2KBW agreed to have me when others wouldn't! This was in the days before interviews or tenancy committees. The Head of Chambers in my pupillage set was an old friend of David Owen-Thomas QC, our old Head, from Cambridge days, and so kindly put in a word. Not very democratic, but I have been the biggest fan of 2KBW ever since.

## News

### Barry McElduff appointed Recorder

Chambers is delighted to announce that Barry McElduff has been appointed a Crown Court Recorder by the Queen on the advice of the Lord Chancellor and Lord Chief Justice. Barry has been assigned to the Western Circuit with effect from 4<sup>th</sup> April 2018.

### Josh Scouler runs the London Marathon

Josh Scouler ran the London Marathon on 22<sup>nd</sup> April, finishing in the very respectable time of 3:52:18 in extremely warm conditions. He raised just under £750 beforehand through a sponsored haircut (which had its benefits in the heat!). In total he has raised £2044.

All the money Josh raised will go to London Youth, a charity which supports young Londoners directly and through a network of community youth organisations in every borough of the capital, giving them the chance to thrive and become successful adults. London Youth gives young people access to opportunities they might not otherwise have.



## London Legal Walk 2018



A team from 2KBW joined nearly 13,000 lawyers, judges, colleagues and friends for the annual London Legal Walk organised by the London Legal Support Trust. The walk aims to raise funds and awareness for free legal advice centres in London and the South East. 2KBW walked in support of Harrow Law Centre which provides advice and assistance to vulnerable people living in Harrow.

Harrow has the worst level of low pay in London, the lowest level of council housing and the second highest rate of evictions in London. Harrow Law Centre is the only provider of specialist advice and representation in Harrow. Unlike most law centres Harrow Law Centre receives no funding from the Local Authority and therefore relies on fundraising and what is left of legal aid. Over £1,878 was raised for the centre and donations can be made [here](#).

## Horatio's Garden at the Chelsea Flower Show



*Head Gardener Joe Swift, Chambers Manager Tracey McCarthy, and Olivia Chapple*

2KBW sponsored the Horatio's Garden Chelsea Flower Show Drinks and Secret Art sale on 24<sup>th</sup> May 2018.

William Mousley Q.C. gave a speech to over 300 guests, outlining our support for this important charity.

Horatio's Garden creates and lovingly cares for beautiful accessible gardens in NHS Spinal Centres. They have built gardens in Salisbury and Glasgow, building works have started in Stoke Mandeville, and designs are in progress for Oswestry and London.

2KBW will be supplying a cycle team for the Horatio's Garden Chalke Valley cycle ride in September 2018.

For more information on the charity please see [www.horatiogarden.org.uk](http://www.horatiogarden.org.uk).

*Right (L-R): Elaine Mousley, Victoria Horton (HG Trustee), William Mousley Q.C., Daniel Wright*



## The Bar Mess appear at LawRocks

Chambers band, the Bar Mess, are a group of talented lawyers who formed a rock band to take part in the annual LawRocks competition. LawRocks is a series of music competitions for lawyers which take place across the world. One such competition is the “Battle of the Bands” and each year, six legal musical ensembles compete at The 100 Club.



Last year the Bar Mess won! – and they raised £2,000 for Horatio’s Garden in the process.

They went back to defend their title at the 100 Club (100, Oxford Street) on 21st June.

## Dan Wright cycles from London to Paris

Dan Wright

*“Have you started to bleed on the floor now?”* asked the receptionist.

I looked down and saw spots of blood that led back to the entrance of A&E. It appeared the gash on my forehead had started to gush again.

*“And you say this happened when you fell off your bike?”* she said, handing me a wound dressing.

The nurse who attended to my injuries was equally not impressed when I explained I would be cycling 280 kilometres to Paris in a matter of days. As the third and final stitch went in she offered with some resignation: *“Well if it means that much to you”*.

Head mended (sort of) and armed with advice on a bash to the ribs sustained in the accident (only making it slightly hard to breath), I was otherwise good to go. Right?

Thursday morning came quickly. The bags were packed and in the support van which meant that I was able to cycle to the assembly point from home. I felt incredibly nervous. Was I really going to cycle from my front door to the Eiffel Tower in 3 days?

29 riders in total assembled at the Princess Alice Hospice in Escher and we set off at 9am. The first day was all about getting to the ferry on time and over to France. We took in Box Hill on the way and other than a 10 minute rain shower the weather remained good and dry.

By 4pm we had arrived in Newhaven and checked on to the ferry having completed 110k. 5 hours later and we disembarked at Dieppe. We were told that it was only a “short” 5k to the hotel. We were not told that this was mostly uphill. After so much riding in the day the hill just seemed to go on and on.

Day 2 began with the mist and a 40k ride on the ‘Avenue Verte’, a former railway line turned into a dedicated cycle path. Surrounded by the lush French countryside the route runs all the way to Paris (although we would only ride part of it). It was lovely to start the day without the presence of traffic and by the time we had reached the coffee stop the mist had begun to rise. By the end of the day we would be riding in the sun.



In the second half of the day we were back on the roads in rolling hills but unlike their British counterparts, the French drivers honked in support of the group. To them the peloton was not a source of irritation but a cause for celebration. Instead of angry insults and dangerous overtakes we were treated to shouts of “Allez!” as excited children waved from the back of cars. It was exhilarating to cycle in a large group with miles and miles of uninterrupted riding.

Day 3 presented more rolling hills up to the lunch break. Then followed the final ride into Paris with the highlight of cycling on the cobbled streets around the Arc de Triomphe on the way to the Eiffel Tower in glorious sunshine. In total the team raised over £20,000 for charity and all 29 riders made it to Paris in one piece.

## Legal Aid: 2KBW halts direct action

Following the recent offer of further investment in the Advocates Graduated Fee Scheme, 2KBW has ended the direct action called by the Criminal Bar Association. Chambers will resume accepting instructions in defence cases with a legal aid order dated after 1<sup>st</sup> April. Chambers wishes to thank our loyal solicitors for their support and understanding through this difficult period and will now look to the future, concentrating on providing the highest level of service to those who instruct us.

## General Data Protection Regulations

After much speculation and discussion, and hundreds of emails pleading for continued subscription to mailing lists, the General Data Protection Regulations have come into force. 2KBW has implemented renewed policies and procedures to comply with GDPR. Members’ individual privacy policies can be viewed on their [website profiles](#).

## New sentencing guidelines

The Sentencing Council have published a number of new definitive guidelines in recent months:

[Terrorism offences](#) (came into effect on 27<sup>th</sup> April 2018).

[Bladed Article offences](#) (came into effect on 1<sup>st</sup> June 2018).

[Breach offences](#) (comes into effect on 1<sup>st</sup> October 2018).

## David Jenkins

### Obituary



The untimely death of David Jenkins has profoundly saddened all his professional colleagues. He had been battling illness for several months, during which time he had kept working until this became impossible. Last December, 2KBW honoured David for having achieved fifty years at the Bar, joining a small and distinguished club. He spoke powerfully and kindly of his career and of the one set of Chambers from which he practised for all his career.

That career paints a vivid picture of the life and times of a criminal barrister, practising largely on the Western Circuit, although such was his following, that he was well-known on other Circuits.

Many have spoken of his great skills as an advocate, particularly in front of a jury, with whom he easily engaged and appealed to for his common-sense approach to the evidence and issues in a case. He had ability from the day he started, appearing in serious cases when still comparatively junior but much of his success was down to his hard work and determination. His ability to identify the key points allowed him to mould his questioning and his submissions on the evidence. For many years, he was regarded as one of the finest defence counsel but he could also prosecute to great effect, concentrating on this in the latter years.

Many find it hard to believe that he did not take Silk; some of those who led him might admit that it was David who should take the credit for a successful outcome in a serious case.

As a colleague, he was kind, generous, sympathetic and always willing to proffer a word of advice if it was sought without ever forcing his opinions on anybody. He was modest to a fault.

It has come as no surprise to receive so many testimonials to his ability from so many people. It is testament to his character that the messages have come from barristers, judges, solicitors, court staff, police officers and former clients. The following is just a selection:

David was in a class of his own and we are all fortunate to have shared Chambers with a man who was a legend in his own lifetime.

I had the privilege of knowing David for many years and his company was never less than delightful and amusing. I remember in 2010 we co-defended in a long case in Dorchester. He stayed with me for a few nights during which we managed to add considerably to the profits of the village pub but he invariably charmed my wife into excusing us for being a



little late for our dinner. He then took up residence in The Acorn Inn near Dorchester which has a good restaurant.

The week the case ended I mentioned that we were going there for Sunday lunch as it was our wedding anniversary. When we arrived, he had left a bottle of champagne behind the bar for us and the staff told me that he had become an honorary local even getting himself onto the pub skittles team earlier that week when they were a man short and somehow the evening had become fairly riotous.

And the trial? He glided through it in his usual elegant manner, appearing to notice little but actually missing nothing, made a lovely speech to the jury and secured his client's acquittal despite a suspiciously considerable amount of prosecution evidence.

David was the consummate jury advocate, a barrister who could always get a jury to like him and, through that, view his client more favourably. It was a revelation to me to see how he used humour and charm to such powerful effect. He was also an absolutely integral and loyal member of chambers, through thick and thin. It's a terrible loss.

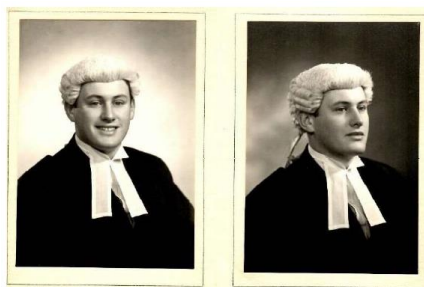
He was a formidable advocate as well as being excellent company.

He will be an enormous loss not only to the Bar, to chambers, to the court and to the many people who instructed him but to all of us a dear friend with a wonderful sense of humour—a true gentleman.

Personally, I learned so much from him. He had already been at the Bar for twenty years when I joined 2KBW. At first, I was a little in awe of him, such was his reputation and it did not take long for me to understand why he had such a following. I never ceased to be amazed at his dedication to his job. To the outsider, it may have appeared that his relaxed method betrayed a lack of preparation but quickly it became clear that his courtroom persona could only be projected as a result of many hours of hard work. His output was phenomenal; big cases and small, all treated with equal importance. He must have been a joy to clerk as he never turned down a brief wherever it was, from Portsmouth to Truro, in London and the South East.

Above all, through all the twists and turns of life at the Bar, he was great fun. We all remember him with a smile and an anecdote.

The Western Circuit and 2KBW has lost one of its finest.



***David Crofton Jenkins***

*17<sup>th</sup> April 1945 – 18<sup>th</sup> May 2018*

*Words: William Mousley Q.C.*

## Criminal update

Case note: “It’s all right—he said I could do that to him!”—*R. v. McCarthy* [2018] EWCA Crim. 560

James Kirby



### Offences against the person – defences – consent

The starting point for relying on the consent of the (injured) victim as a defence to a charge of assault was established nearly 40 years ago in *Attorney-General’s Reference (No.6 of 1980)*<sup>1</sup> where the Lord Chief Justice ruled that

it is not in the public interest that people should cause each other actual bodily harm for no good reason. It is immaterial whether the act occurs in private or in public.

That “public interest” test has been applied ever since, though generally with a paternalistic eye on the public’s interests: rough and undisciplined sport or play, in the playground or the workplace, is acceptable, even if it causes grievous bodily harm such as a ruptured spleen or broken arm (*Jones*<sup>2</sup>) or causes serious burns to a colleague (*Aitken*<sup>3</sup>). This is because there is no intention to cause bodily harm, coupled with a belief in consent (even if mistaken).

Similarly, sports are “*manly diversions, they intend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need*”<sup>4</sup>

Participants in sports are deemed to have given implicit consent to the risk of suffering the kind of injuries that might be sustained, even if inflicted against the rules of the game (*Barnes*<sup>5</sup>). Three boxers have died after fights in Britain in the last 5 years, but that remains “*in the public interest*”.

On the other hand, in *R. v. Brown*,<sup>6</sup> homosexual sado-masochists deliberately inflicting serious injuries (including “*genital torture*”) for sexual pleasure were denied the defence of consent given by the “*victim*”. The distinction was in the purpose for which injury was inflicted:

there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty.<sup>7</sup>

The judgement in *Brown* went on to list a selection of those activities which were in the public interest, and which include

rough horseplay ... tattooing, ear-piercing and violent sports including boxing ... the chastisement of children ... dangerous pastimes, religious mortification.<sup>8</sup>

Amongst all these purposeful activities, Lord Slynn in *Brown* averred that consent cannot be a defence to “*maiming*”.

Whilst the guidance outlined in *Brown* has worked reasonably well for the last 25 years, contemporary notions of “*personal autonomy*” have also flourished. The right to personal choices

<sup>1</sup> [1981] 1 Q.B. 715.

<sup>2</sup> [1986] 83 Cr.App.R. 375.

<sup>3</sup> [1992] 1 WLR 1006.

<sup>4</sup> *Donovan* (1934) 25 Cr.App.R. 1, quoting *Foster’s Crown Law* (1792). (*I would hope that the judiciary would choose a better phrase than ‘manly diversions’ today – Ed.*)

<sup>5</sup> [2004] EWCA Crim. 3246.

<sup>6</sup> [1994] 1 A.C. 212.

<sup>7</sup> *Ibid.*, per Lord Templeman.

<sup>8</sup> *Ibid.*

of sexual orientation, gender, and even the right to die have all been legally asserted. Dr Robert Smith, a Scottish surgeon, claims to have helped apotemnophiles: they felt a sexual or psychological need to fully “*identify as*” or become amputees, and so he has removed healthy limbs to accommodate their needs.

Less radical but sometimes more visually startling are increasingly bold practises in body art or modification, including scarification and mutilation.

The web provides plenty of images of individuals who have chosen to have parts of their ears removed; or have large holes cut in nostrils, lips, cheeks, as well as ears. Sub-dermal implants provide extrusions to the skin (usually to the face or skull), which can then be tattooed with colour or patterns. Or large areas of skin can be lifted and cut in to 3 or more strips and then interwoven to achieve “*plating*”.

None of this had attracted the attention of the courts until May this year. Brendan McCarthy was a registered tattooist and body piercer with a parlour in Wolverhampton who lately added body modification to his services. In the last few years different customers have asked him to remove an ear; a nipple; and to split a tongue down the middle (an increasingly common procedure). Given their consent (sometimes in writing), he performed those procedures without anaesthetics.

The local authority got involved and instigated a prosecution. Three counts of causing grievous bodily harm with intent (s.18) were pursued. At the Crown Court the judge indicated that consent would not be a defence, so an interlocutory application was made to the Court of Appeal against that ruling. The Lord Chief Justice presided, and the judgement is stark:<sup>9</sup>

[*Mr McCarthy*] has no medical qualifications which equip him to carry out these surgical procedures. [*The procedures involved risks of*] severe hearing loss ... facial paralysis ... infection ... an adverse impact on both speech and feeding.

They approved the dicta of Lord Mustill in *Brown* that “*many of the acts done by surgeons would be very serious crimes if done by anyone else ... proper medical treatment is in a category of its own*”. What Mr McCarthy “*undertook for reward in this case was a series of medical procedures performed for no medical reason*”.

The Court ruled that

the personal autonomy of his customers does not provide the appellant with a justification for removing body modification from the ambit of the law of assault ... we can see no good reason why body modification should be placed in a special category of exemption from the general rule.

Mr McCarthy is now due to return to court for sentencing.

So, to put it crudely, the law appears to be that even with consent, you cannot remove a part of someone’s body for “*no good* (such as medical) *reason*”. You can pierce a body, and make increasingly large openings, and can add bits, such as subdermal implants. But you can’t cut bits off.

This may be a disappointment to those who view their own bodies as a work of art in progress. Indeed, the court highlighted “*real questions about rational and informed decision making*” by Mr McCarthy’s clients, and pondered a “*referral to a psychiatrist or psychologist*”.

But we do now live in a society that elevates personal autonomy. And whilst the customer

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<sup>9</sup> [2018] EWCA Crim. 560.

could have cut his own ear off and in doing so would have committed no criminal offence. So too the other customers... the personal autonomy of one individual does not extend to involving another in what would otherwise be a crime.

In this context, consent is no defence.

*At the time of publication, Mr McCarthy is due to be sentenced on 28<sup>th</sup> June 2018. This Newsletter will be amended online to reflect the details of that hearing.*

## Strasbourg Calling...

Matilda Robinson-Murphy



The name John Worboys came back onto our radars earlier this year. He is better known by his nefarious moniker, the “black cab rapist”, and despite only being convicted in 2009 for offences on twelve women, is said to be responsible for hundreds of assaults between 2003–2008.

His reappearance on the news was due to a somewhat unexpected decision from a parole board to approve his release from custody. Reasons for such a decision have been shrouded in mystery and many are calling for an elucidation. Indeed, victims’ lawyers were granted permission to challenge the parole board’s decision. On 27<sup>th</sup> March 2018, the High Court overturned the parole board’s decision to release Worboys.

In February 2014, two of Worboys’ victims brought claims under sections 7 and 8 of the Human Rights Act 1998, on the basis that the Met Police’s failure to effectively investigate Worboys’ crimes amounted to an infringement of their human rights. Green J, in his judgment, found that the Police’s systematic failures amounted to a breach of Article 3 of the European Convention on Human Rights; that “*no one should be subjected to torture or to inhuman or degrading treatment or punishment.*”<sup>1</sup> The police took this decision to the Court of Appeal in May 2015 where their appeal was rejected<sup>2</sup> and on Wednesday 21<sup>st</sup> February 2018, the Supreme Court rejected the same appeal.<sup>3</sup>

The Met Police argued that protection against inhuman or degrading treatment was intended to envisage abuse by the state and the duty to investigate was only engaged where the state itself was purported to be complicit in a breach of Article 3.

The Supreme Court rejected this submission, stating that the duty to investigate was a well-established principle and surmised that the disregard shown to Worboys’ victims was a dereliction of the state’s duty of care to its citizens.<sup>4</sup>

The failures of the police can be said to fall into the wider categories of not providing sufficient training to those dealing with victims of DFSA (‘drug facilitated sexual assault’) and not being thorough in the investigation.

One of the victims was miscategorised as a drunk and a drug user when she attended the police station and, as Green J found, the police “*failed ultimately to take her complaints seriously*”.<sup>5</sup> By a bizarre twist of fate, this same victim was driven to the police station by Warboys himself, where on arrival the police failed to obtain his details or car registration.

<sup>1</sup> *DSD, NBV v. The Commissioner of Police for the Metropolis* [2014] EWHC 436, at 241.

<sup>2</sup> *Commissioner of Police of the Metropolis v. DSD and NBV* [2015] EWCA Civ. 646.

<sup>3</sup> *Commissioner of Police of the Metropolis v. DSD and another* [2018] UKSC 11.

<sup>4</sup> *Ibid.*, 229 – 313.

<sup>5</sup> *DSD, NBV v. The Commissioner of Police for the Metropolis* [2014] EWHC 436.

In relation to the second victim, all three judgments have indicated that if the police sufficiently dealt with the former victim, who was attacked in 2003, then the attack on the second victim in 2007 may have been prevented.

So, what does the Supreme Court’s decision mean for victims of crime?

Critics may argue that this decision opens the floodgates for any person who has felt mistreated by the police to claim that there has been an infringement of their human rights. This point was anticipated but clarified in the Supreme Court judgment:

The recognition that really serious operational failures by police in the investigation of offences can give rise to a breach of article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crimes.<sup>6</sup>

Champions of this decision opine that the precedent set by the Supreme Court is a positive one, particularly given the current movement in recognising ill treatment towards sexual assault survivors – the precedent that the police are accountable if they ignore the law against rape. A precedent that says, ‘time’s up’ on victims not being heard.

*Matilda is currently a pupil at 2KBW.*

## Family update

### Welcome to the new Financial Remedies Court

Beresford Kennedy



#### The need for reform

In number 18 of the President’s View from the President’s Chambers, James Munby sets out that he is going to address one area of the Family Justice System in which he considers “*little has been done*”: Financial Remedies.

The President has been much persuaded by His Honour Judge Martin O’Dwyer, His Honour Judge Hess and Joanna Miles. Judge Hess is a familiar face to many in Chambers as he currently sits as a Circuit Judge in the Family Court in Portsmouth. He was formerly the Head of the Financial Remedies Unit, a specialist financial remedies unit at the Central Family Court.

The President has accepted recommendations of Judge Hess and Joanna Miles as set out in ‘The recognition of money work as a speciality in the family courts by the creation of a *National Network of Financial Remedies Units* [2016] Fam Law 1335, and those of O’Dwyer, Hess and Miles, in *Financial Remedies Courts* [2017] Fam Law 625.

The President points out that he has been ready to support such an initiative from the outset, as set out in his *Note by the President* [2016] Fam Law 1340.

#### The proposals

Munby’s “*core ambition*” is to improve both the “*application of procedural justice*” and “*the delivery of substantive justice*”. Fundamental to his vision, is the appointment of a “cadre” of specialist judges. As seen in Children Act matters, there will be a process of early allocation of cases “*to the right judge*”, “*in the right place*”. Improving efficiency is also important.

<sup>6</sup> *Commissioner of Police of the Metropolis v. DSD and another* [2018] UKSC 11.

The goal of greater consistency of the delivery of justice has already seen the adoption of standard directions and interim orders. The President aims to take this further. In furthering this aim, FDRs are to be allowed more time both for the hearing, and for the judge's preparation.

In addition, there is to more judicial training, and increased reporting of judgments in small and medium cases. The formula of the President is that increased transparency, will lead to greater predictability of outcome, which in turn will lead to a higher rate of settlement.

### **Areas of law covered**

What areas will the FRC cover? The aim to cover "*all types of financial remedy cases*". This means not only claims for a financial remedy, other types of relief under the Matrimonial Causes Act 1973, claims under Schedule 1 to the Children Act 1989, and claims under Part III of the Matrimonial and Family Proceedings Act 1984, but also (in time) claims under the Inheritance (Provision for Family and Dependents) Act 1975, and TOLATA claims (Trusts of Land and Appointment of Trustees Act 1996).

### **The structure**

Each circuit will have at least two 'regional hubs', at which HMCTS and the judicial leadership for the relevant hub area will be based. An experienced financial remedies judge will lead each hub. Nationally, Mostyn J will be the 'national lead', with HHJ Hess as his deputy. Practitioners will, of course, be familiar with Mostyn's role in the creation of the financial remedies omnibus orders.

Hearings will take place at Financial Remedy Hearing Centres (FRHCs) in each region, but may also take place at a court "*for good reason*." Judges who currently undertake financial remedy work will be 'grandfathered in' at their election. New judges will be 'ticketed in'.

The FRC will operate separately from the Regional Divorce Centres, whereby an application for a financial remedy will be to the FRC, rather than to the Regional Divorce Centre.

### **Where it all begins**

The FRC is starting now in three piloting areas in London, the West Midlands (Black Country), and South-East Wales. Further pilots are then commencing in the remainder of the Midland Circuit, the North-Eastern Circuit and parts or the entirety of the South-Eastern Circuit. As the pilots are rolled out the aim is to 'tweak' the procedure. Practice Directions will set out the rules and guidance. The pilot schemes will be governed by practice directions issued further to FPR Rule 36.2.

### **New paperwork**

Mostyn J and HHJ Hess have prepared a paper proposing amendments to the FPR and a revised Form A for use in all types of financial remedy application. A focus is early allocation by a judicial gatekeeper at the regional hub to the appropriate judicial level.

There will also be a revised Form E. A key aim is to 'de-link' divorce and 'money' such that they are 'completely separate processes'. As part of this, the President issued the *Practice Guidance: Standard financial and enforcement orders* [2018] Fam Law 89. The latest version of standard orders can be found at [www.judiciary.gov.uk/?p=77729](http://www.judiciary.gov.uk/?p=77729).

## Initial proposed centres

In London, the Central Family Court will be the Hub, with suggested FRHCs in London as Bromley, Croydon, Edmonton, Kingston and Romford. Applications for a financial remedy will be issued at the FRC hub rather than at the regional divorce centre. The divorce petition and acknowledgement of service are likely to retain the financial question, but in all other aspects, the divorce and application for a financial remedy are separated so that an amended Form A will refer back, where applicable, to the fact that application has been made in the petition and/or acknowledgement of service.

## The way forward

These are undoubtedly substantial changes to the procedure, both in terms of the application process and also to the character of the tribunal. The changes are likely to improve the consistency of judicial indications, in particular at the FDR, which is to be welcomed. Practitioners are now very familiar with the reforms to Public Law Children and Private Law children cases. Now, it is the turn of Financial Remedies...

# Articles

## The Leader of the Pack

Bill Mousley Q.C.



Towards the end of 2015, I was elected as the Leader of the Western Circuit, taking up the position in January 2016. The usual term of office is three years but because my predecessor had been elected as Vice Chair of the Bar (since which, Chair) from that date, necessitating his premature departure, I agreed that I would take up the remainder of his term before starting mine. Thus it will be that, by September 2019, unless someone tells me otherwise, I will have been the longest serving Leader in recent Western Circuit history!

The Western Circuit is an organisation bound by a written Constitution whose membership is made up of practising barristers (full members) and invited members of the judiciary, most of whom were previously full members (dining members). Its origin goes back to the Middle Ages. It covers the largest geographical area of all the six Circuits in England and Wales; from Hampshire (including the Isle of Wight) to Cornwall, taking in Dorset, Wiltshire, Somerset, Gloucestershire, Avon and Devon. Some of our members largely practise “off Circuit”, particularly in London but also in the South East, Wales, the Midlands and the North.

In addition to the Leader, two officers, the Circuit Junior and the Wine Treasurer are elected every three years. We also have a Circuit Secretary, employed by the Circuit, presently the excellent Charlotte Feest.

The Circuit has three general functions: social, educational and political. We are lucky enough to have talented and enthusiastic volunteer members who direct or otherwise contribute hugely in all those areas.

To many, the role of Leader is regarded as an honorary position. If only that were the case. The political role has become far more prevalent in recent years. As one of the six Circuit Leaders, I sit on the General Management Committee of the Bar Council (which meets every fortnight) and am an appointed member of the Bar Council (six-weekly meetings on a Saturday). In addition, with

the Chair, Vice-Chair and the Circuit Leaders we meet monthly with officials in the MOJ and periodically with:

- the Lord Chancellor (sadly now, also the Justice Secretary) and his Ministers;
- the Lord Chief Justice and other senior judiciary;
- the Attorney-General and Solicitor-General; and
- the DPP.

Our campaigns are far-reaching, but all intended to improve the lot of working barristers and to preserve the quality and status of the justice system. Public-funding and capping of barristers' fees, working hours and conditions, equality and diversity, law reform, training, promoting and supporting young barristers are just some of the topics of debate.

When it comes to education, the Western Circuit leads the way, providing high-quality, bespoke advocacy training to pupils in circuit and non-circuit sets of Chambers, to newly qualified practitioners and to established practitioners who must be suitably accredited in different areas to be entitled to practise. Such is the strength of our team of organisers and trainers that I am limited to overseeing their activities and drawing their views and concerns to those in authority.

The social life of the Circuit remains an intrinsic part of our operation. It fosters a collegiate environment which provides a practical, emotional support network for the membership. It creates long-lasting friendships as well as an opportunity to meet members of the judiciary at all levels. In addition to three “Grand Nights” every year (in Bristol, Winchester and Exeter) which are held in prestigious venues with honoured guests and, always, fine wine, various more informal “Bar Messes” are organised for local practitioners and visiting judges. My role is to host these events and to welcome our guests. There is also an annual cricket match involving players from all parts of the Circuit and sometimes a visiting team from elsewhere in the country.

I am also fortunate to be invited to various ceremonial events including the Opening of the Legal Year at Westminster, the Silks ceremony at the Royal Courts of Justice, and Legal Services at Cathedrals all over the Circuit. There are also formal dinners at which I am a guest with international visitors, renowned lawyers and judges and on the other Circuits.

I am delighted to have been given the opportunity of holding this distinguished position. I had never even considered the role and was encouraged to stand. I try to do my best for all my constituents. I am hugely proud of the fact that 2KBW has the Leader of the Circuit in its ranks, for the third time in its history.

It is a demanding role and I still have to make the time “to do the day job” of prosecuting and defending all around the country, occasionally sitting as a Recorder and being Head of Chambers. This would not be possible without the support and understanding of all the staff and members of Chambers for which I am forever grateful.

As a loyal member since joining as a junior tenant in 1987, the strength of 2KBW fills me with pride and I hope that my time as “The Leader” has, in some way, contributed to our success.



## Accountancy Training at Chambers

Mike Mason



Three hours of hard core accountancy—what a way to spend a Sunday afternoon. But this is what we did, me and a number of brave souls, in Chambers at Portsmouth.

We took it seriously because accountancy is a serious and grown up topic. But we enjoyed it and learned a lot—at least they did.

I was the tutor and I have been at this accountancy lark for decades. But I am still fascinated by the topic and teaching it always brings out a facet that I have never seen before.

Firstly, let me say that accountancy is far from being a dull topic and accountants are probably the most rock and roll professionals on this planet. I might be mildly exaggerating here but it is topic worth exploring by all barristers.

Accounts and financial statements can come up in all manner of court cases: criminal (fraud and false accounting), divorce (seeing where the money has been hidden and valuing a business), and in commercial claims accounts often feature. So, having a good understanding of how financial statements actually work and what the balance sheet and profit and loss accounts mean is always a good start.

We began our training with a blow-by-blow explanation of these two pieces of the financial statements—and we took time in deciphering the meaning of the headings and figures contained in the accounts. We also covered ratios such as the gross profit margin and the current ratio: the former measures profitability and the latter liquidity (how well a business is able to meet its debts).

The esoteric concept of “goodwill: how it is valued and how it gets onto the balance sheet” was dealt with, along with an explanation of group accounts (holding companies and subsidiaries) and “management fees”.

I even threw in a bit of double entry book-keeping, like a nip of gin to keep the spirits up.

We then moved onto how financial statements can be manipulated, how to spot that manipulation and what to do about it. This is a massive topic but one that can be consolidated into a number of simple headings and concepts.

For example, manipulation occurs in three main ways:

1. Distorting/ignoring the four accounting concepts (prudence, going concern, matching, consistency)
2. Changing the accounting policies
3. Deliberate under-performance by business owners

Three hours whizzed by as we explored each topic with a brief explanation from me and then case studies to reinforce the learning. All students approached the case studies with enthusiasm and the high level of intelligence expected from members of 2KBW.

I thoroughly enjoyed teaching the session and was appreciative of the enthusiasm and involvement of all those who attended.

I would be happy to do a repeat.

## Chambers cases

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

### **Michael Shaw and Suki Dhadda successfully prosecute two men and one woman charged with multiple historic sexual offences**

Michael Shaw, leading Suki Dhadda, secured convictions for two men and one woman for the sexual abuse and prostitution of six women committed over a period of twenty-two years in the Rugby and Coventry areas.

Young, vulnerable women were targeted by the two male defendants, were sexually assaulted or abused by the two male defendants and in some cases forced into prostitution. For more details including details of sentence see [here](#) and [here](#).

### **Tahir Khan Q.C. and Gary Venturi secure conviction in murder trial**

Tahir Khan Q.C. and Gary Venturi have completed a successful prosecution in the case of Daryl Sampson, who was found to have murdered his father in a stabbing. Further details can be found [here](#).

### **Alex Kettle-Williams secures convictions in multi-handed drugs and firearms trial**

Alex Kettle-Williams secured convictions on all indicted matters in the prosecution of three defendants in a trial heard over three weeks at Luton Crown Court. The defendants were sentenced to an overall term in excess of 33 years. More details can be found [here](#).

### **Barry McElduff and Rob Harding secure acquittal in drugs conspiracy trial**

Barry McElduff, leading Rob Harding, successfully secured the acquittal of his client who was said to be one of eight men running a drugs syndicate in Aldershot. The wide-ranging investigation involved careful examination of over 20,000 pages of data and analysis; Barry's client was one of two defendants acquitted. Barry and Rob were instructed by Penfold & McPherson.

## Editorial

Editor: Kaj Scarsbrook

News Editor: James Culverwell

*As always, I invite articles and submissions from members of chambers for the newsletter. They can be of any length and on any subject, within reason! Articles can be emailed to either myself or Tracey, and we are more than happy to discuss ideas for improvement. The continued aim is for 2KBW News to be a valuable resource for members of chambers, clients, and the public alike.*

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