2 KING'S BENCH WALK NEWS

Issue 3 – Winter 2016

Chambers news and announcements

Welcome

William Mousley Q.C., Head of Chambers

Welcome to our Winter Newsletter; I hope that you find it interesting and useful. I am delighted to announce that 1 Inner Temple Lane, the Chambers of Marion Smullen, will be merging with us on 1st January 2017. I shall continue as Head of Chambers with Marion Smullen becoming a deputy. Daren Milton will continue as Senior Clerk with Simon Duggan as a deputy. 2KBW will comprise 75 barristers practising in London, the South and South West, Thames Valley and the Midlands in the fields of Crime, Family, Immigration and Civil Law, from our refurbished premises in London and in Portsmouth. Our increased numbers will enable us to provide an even higher level of service to our existing clients as well providing an opportunity to develop new working relationships.

I hope that you enjoy a well-earned break over the Christmas period and wish you a happy and prosperous new year.

This is the third edition of the 2 King's Bench Walk Newsletter. In this issue, we welcome Marion Smullen as well as all members of 1ITL; Daren Milton gives more thoughts from the Clerks; we hear reports from the Reading CC open day and the Horatio's Garden sponsored cycle ride; Nicholas Barnes writes on liability for damage by trees; John Ward-Prowse writes on an FGM case in which he was involved; and Michael Williams gives a topical insight into the pupillage process.

There are also the usual case updates and team news.

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.

In this issue

Profile: Marion Smullen

My route to becoming a barrister was a rather accidental one and not the result of any amazing amount of planning! I had left the London School of Economics with a degree in History in 1972 and had become a teacher in Central London. In 1980, for a number of reasons, I decided to start an evening course in Law and it transpired that this led to an external degree from London University. I had absolutely no intention of practicing law when I started the course and it was simply meant to be a "hobby", albeit one that took four years. I obtained my law degree and in 1985 I was called to the Bar. This career change was very much due to Selwyn Shapiro who taught evidence on the law course. Selwyn encouraged me to consider a career as a barrister and with considerable backing from my husband I decided to switch careers. It is a decision I have never regretted.

My first pupillage was in a mixed set but in 1986, I started pupillage at 4 Brick Court. My Pupil Master was Anne Rafferty who is now The Right Honourable Lady Justice Rafferty. One of the young tenants at 4 Brick Court was Sally Howes Q.C. I am pleased to say that both she and Selwyn Shapiro have remained life long friends.

I have generally defended during my career at the Bar and have covered a wide range of cases from murder to serious sexual offences. I was very fortunate when I started at the Bar to have a lot of support from a wide range of people and I think my career as a teacher has helped me enormously.

Moving on to the present day, I was recently led by Sally Howes Q.C in a high profile murder case in Luton. After one very long day in court we adjourned to the local ice cream parlour—there is not a great deal to do in Luton! We were discussing what I wanted to do in the future and how I saw Chambers developing. One thing led to another and we both felt that further discussions might prove beneficial to both sets of Chambers. A meeting was arranged with Sally, myself, Daren, and my senior clerk Simon. It was obvious from that initial discussion that we had a great deal in common and a great deal to offer each other. There was then a meeting with Bill Mousley Q.C. and it quickly became apparent that our two sets of Chambers had a very similar ethos and work ethic.

I am delighted with the proposed merger and really excited about the future of the combined Chambers. I know it's rather unfashionable to be optimistic about the future of the publicly funded Bar but I think there are still tremendous opportunities if you are prepared to work hard and you work with great people. Here is to a very successful 2017!

From the clerks' room

When two become one – embracing change

Daren Milton

June and July of this year marked the start of an eventful summer. In those months Sally Howes Q.C. led Marion Smullen of 1ITL which led to a serendipitous meeting between Simon Duggan and myself.

It very soon became apparent that our respective Chambers shared uniquely similar attitudes, from barristers and clerks alike, in the way that we operated. Unofficial talks of a merger began. Each of us took our idea to our respective management teams. Each team was enthusiastic, bringing forward new ideas to the plan.

In no time at all an agreement was in place. The response from both sets was overwhelmingly positive and in a few short months, unified in our principles, two firmly established chambers decided to unite. By adopting a modern, adult commitment to our joint future, our premises in London have been totally refurbished and now provide a modern working environment for all our staff and membership alike including excellent conference facilities – a far cry from our once Dickensian surroundings.

Through careful financial management this year we've absorbed the refurbishment costs and reduced our overheads which has led to a reduction in expenditure for members of chambers. So here we are in early December and our relationship with the staff and members of 1ITL has begun with excellent rapport and huge enthusiasm from all sides. We are all committed to staying abreast of current changes and are perfectly placed to deal with those to come.

Since my return to 2KBW in late January 2012, those changes have come thick and fast. Thanks to our clear direction and a modern attitude we have grown stronger year on year. Now my "little chambers" boasts a membership of 75 barristers practising in London, the South and South West, Thames Valley and the Midlands in the fields of Crime, Family, Immigration and Civil Law. We now have first class facilities for our clients in both London and Portsmouth, staffed by 10 enthusiastic, hardworking and ambitious people, with a desire to succeed.

If the past 5 years are anything to go by I know we shall continue to improve and offer an unrivalled service to all of our clients old and new. I'm extremely proud of 2 KBW's recent and continued achievements and the merger with 1ITL reiterates our commitment to the profession. On a personal level I feel very fortunate to have Simon and his team of Charlie and Chloe in the 2KBW clerks room and 2017 can't come soon enough.

Season's greetings and prosperous New Year to all from the clerks' at 2KBW.

L-R: The conference room; SHQC and SH help out; everything including the kitchen sink!

News

Party celebrates chambers merger

2KBW celebrated the recent expansion of chambers – and Christmas – with a party at Sea Containers House in London on 9 December 2016.

Daren Milton and Marion Smullen

Bill Mousley Q.C. and Marion Smullen

Simon Duggan and Jeremy Wright

Elizabeth Bussey-Jones and Marion Smullen

Barry McElduff and Mumin Hasim

Bill Mousley Q.C., Daren Milton, Simon Duggan, Marion Smullen, Jeremy Wright

Chambers welcomes Tahir Khan Q.C. as door tenant

2 King's Bench Walk is delighted to announce that Tahir Khan Q.C. has joined as a door tenant. Tahir is a long-established and well-respected silk, and has been involved in a large number of very serious criminal cases across the country.

Please see his profile at http://2kbw.com/barrister/tahir-khan-qc/.

2KBW welcomes new pupils

2 King's Bench Walk welcomes Hayley Manser, James Culverwell and Charlene Richer as their new pupils for 2016/2017.

They will be based in both London and the Western Circuit and will be trained in Crime, Civil, Family and Immigration Law during their Pupillage.

Left to right: Kaj Scarsbrook and Philip Allman, 2KBW's most recent pupils who have accepted tenancy; Hayley Manser; James Culverwell; Charlene Richer; Pupil supervisor Barry McElduff.

Reading CC Open Day

Daniel Wright

When Edward Marshall Hall addressed the jury in closing in the trial of Robert Wood ('The Camden Town Murder") the chances of an acquittal for his client may have seemed somewhat remote. Hall had made great progress with the prosecution case by way of cross-examination but his client had proved to be hard going, in and out of the witness box.

The year was 1907 and the trial had caused a sensation. As Hall's final words echoed through Court No.1 at the Old Bailey a crowd had gathered outside. Queues had formed on a daily basis for entry to the public gallery. In the face of strong evidence and his rather poor performance in the witness box Robert Wood would have to rely on the persuasive skills of his barrister. Marshall Hall was not afraid to use drama to great effect—it was said sometimes tears would roll down his cheeks in his pleadings before the jury.

The jury retired at 7:45pm and returned at 8:00pm with a verdict of not guilty. The crowd erupted into a cheer outside. Robert Wood had been spared the gallows.

Edward Marshall Hall K.C. was amongst the most famous and gifted advocates of his time frequently drawing crowds to the trials he was instructed in but it was not uncommon at the beginning of the 20th Century to see similar sights at even the most modest public galleries across the country. Such sights would seem alien to those of us who regularly appear the Crown Court now.

On a rainy Saturday in September at the Reading Crown Court open day that was to change, to revert back to this time when a queue did indeed form at the court. Kaj Scarsbrook and I had volunteered to assist at the mock trials. We were to examine and cross examine four witnesses (two for the Crown and two for the defence) open and make closing speeches with the expectation that our jury would return five minutes later with a verdict. All in the space of 45 minutes! We were then graciously allowed five minutes to catch our breath before doing it all again in total three times…

We were ably assisted by a team of 11 and 12 year olds who played our witnesses, the complainant and the defendant (with the exception of a real police officer who played a real police officer… and still fluffed their lines). They had been given scripts but by the third trial had started to become creative with their answers as their confidence grew. A notable performance came from the "mother" of the defendant played by a plucky 11yr old who could barely see over the microphone of the witness box but could give as good as she got in cross examination.

At each trial the court was packed, with standing room only in the public gallery. Demand was so great that the spacious dock in Court 1 was often full of spectators. I was truly surprised by the genuine interest displayed by these crowds who were inquisitive and appreciative of our efforts in equal measure. It is perhaps easy to think in this time of ever reducing legal aid rates that the work carried out on a daily basis by all those who take part in our justice system is somewhat under valued. If the response received at the open day was anything to go by then I am happy to report that this is not the case. Long may it remain a fixture.

As a foot note I would like to add that Kaj proved a formidable opponent, exuding a natural confidence that one might observe in a far more experienced advocate. I was amazed to find that this had been the first time he had addressed a jury and it was easy to forget that he had only just completed pupilage. Kaj acted for the defence in the last two trials we conducted that day. The defendant had been acquitted twice by then but in the final trial, perhaps with the evidence more evenly balanced and the result harder to predict, Kaj addressed the jury in closing with a particular delicacy pleading on behalf of his client. I could have sworn there were tears in his eyes…[1]

Kaj Scarsbrook, Scott Heptinstall and Daniel Wright

…and they duly acquitted in 5 minutes (outdoing Marshall Hall by 10 minutes).

2KBW Cycle Ride

Report—Richard Sedgwick

On a dry and sunny morning, assorted members of 2KBW journeyed down to Salisbury to take part in the Horatio's Garden sponsored cycle ride. The aim was to raise as much money as possible

[1] *I make it clear I had no part in writing this article! – Ed.*

for the chosen charity of Chambers, and to that end the entire crew was kitted out in glorious navy and orange tops which gave the whole affair a misleadingly professional air.

Given that three lengths of varying hardness were offered, the initial plan was to ride together and get progressively faster as riders of the shorter routes were siphoned off – the organisers were at pains to remind everyone that this was not a race. That plan lasted about 15 seconds from setting off, when Brocklehurst put the hammer down and dragged Wright, Sedgwick and Scarsbrook with him to the front leaving all other team members behind. I'm told it was a lovely ride; all rolling hills and vividly green pastures, but truth be told I don't remember much of it. The frantic effort to keep up the punishing pace meant all of my efforts went into trying to stay on Brocklehurst's wheel rather than taking in the view. Somewhere on a hill we lost Wright, and somewhere on a ridge we lost Scarsbrook – the headwinds taking their toll on his 6 stone frame.

Despite this not being a race all were left behind, and the four man breakaway hurtled towards the finish. Unfortunately a podium finish was not to follow due to Brocklehurst springing a puncture (and there being no podium as this was not a race). While waiting for the not-at-all competitive team leader to repair his wheel, we were joined by Scarsbrook and the three of us shot off towards the finish. Despite leading from the front throughout the course of the non-race Brocklehurst was to be pipped to the finish by your humble correspondent in a moment of tactical genius/ungallant swinery. Total ride time; a little over two hours.

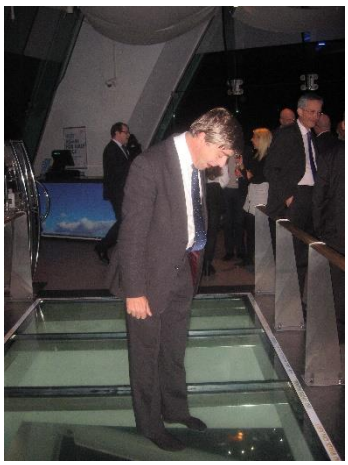
Happily the benefit of finishing before most of the others meant the unholy trinity were able to put a not insignificant dent in the cake spread laid out by Horatios Garden. We were also able to take in the frankly stunning grounds, and chat with the volunteers and patients. In no particular order Wright, Foster, and Sellers all finished. Special mention must go out to Tracey McCarthy and Ruth Hitschmann who bravely opted to do the 45 miles as well and crawled in a smidge under five and a half hours. Ride completed, and money raised.

Eddy Mercx award for hardness – Kelly Brocklehurst. Like a combination of the terminator and Liam Neeson from Taken, Kelly kept up a remorseless pace throughout, leading from the front for much. Cruelly denied a 'win' by a puncture and me abandoning all gallantry.

The team: (L-R) Richard Sedgwick; Kaj Scarsbrook; Kelly Brocklehurst; Ruth Hitschmann; Robin Sellers; Tracey McCarthy; Daniel Wright; Simon Foster.

3@3 party

On 14 October 2016, chambers held a party to celebrate three years of 2KBW in Portsmouth at 3 Guildhall Walk. The celebration had a fantastic venue in the Spinnaker Tower. Chambers were also featured in the Portsmouth News.



Clockwise from above: Daren Milton and Bill Mousley Q.C.; Caroline Kinloch-Jones and Jeremy Wright; Simon Foster; (L-R) Geraldine Barker, Suki Dhadda and Fiona McCreath; Bill Mousley Q.C. and Russell Pyne; Russell Pyne, Richard Sedgwick and Adrian Fleming.

Criminal update

Case note: 'a substantial question' – *R. v. Golds* [2016] UKSC 61

Kaj Scarsbrook

Diminished responsibility – meaning of "substantial impairment" – homicide

The Supreme Court dismissed the appeal and upheld the decision of the Court of Appeal that a judge need not direct the jury beyond the terms in the statute, and should not attempt to define the meaning of 'substantially'.

The appeal

The appellant was convicted by a jury at the Crown Court at Chelmsford of murdering his partner. He had admitted killing her and the issue at trial was whether he made out the defence of diminished responsibility. He had attacked his partner with a knife at home after an argument and inflicted 22 knife wounds as well as blunt impact injuries. There was a history of mental disorder; two consultant psychiatrists agreed at trial that there was an abnormality of mental functioning arising from a recognised medical condition but disagreed as to what that condition was.

The judge did not direct the jury as to what the word 'substantially' meant in the legislation (see *post*), other than to say that he would offer no additional explanation.

When appealing to the Court of Appeal (Criminal Division) (*R. v. Golds* [2014] EWCA Crim. 748), the appellant argued that the judge had been wrong not to direct the jury as to what 'substantially' meant and that the jury may have applied a more stringent test than it should have done. The court dismissed the appeal but certified in relation to two questions of general public importance.

The questions for the court

The following questions were identified by the Court of Appeal:

> 1. Where a defendant, being tried for murder, seeks to establish that he is not guilty of murder by reason of diminished responsibility, is the Court required to direct the jury as to the definition of the word "substantial" as in the phrase "substantially impaired" found in section 2(1)(b) of the *Homicide Act* 1957 as amended by section 52 of the *Coroners and Justice Act* 2009?
>
> 2. If the answer to the first question is in the affirmative, or if for some other reason the judge chooses to direct the jury on the meaning of the word "substantial", is it to be defined as "something more than merely trivial", or alternatively in a way that connotes more than this, such as "something whilst short of total impairment that is nevertheless significant and appreciable"?

The law

Section 2 of the *Homicide Act* 1957 as amended by s.52 of the *Coroners and Justice Act* 2009 defines the partial defence of diminished responsibility as follows:

Persons suffering from diminished responsibility

2(1) A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

(a) arose from a recognised medical condition,

(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are—

(a) to understand the nature of D's conduct;

(b) to form a rational judgment;

(c) to exercise self control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

The phrase 'substantially impaired' appeared in the section as originally enacted and was carried over into the current formulation, which makes clearer the focus on the ability of D to do three specific things (s.2(1A)), questions which were frequently the focus of trials before the amendment.

The Court went on to consider the authorities, considering, *inter alia, R. v. Byrne* [1960] 2 Q.B. 396; *R. v. Simcox* [1964] Crim. L.R. 402; *R. v. Lloyd* [1967] 1 Q.B. 175; *R. v. Egan* [1992] 4 All E.R. 470; and *R. v. Dietschmann* [2003] UKHL 10.

Conclusions

There was a suggestion in the case of *Egan* that judges should use as guidance the case of *Lloyd* (both *ante*). According to the decision of Watkins L.J. in *Egan*, *Lloyd* authorised a 'double-meaning' for the word 'substantial', that

> (1) the jury should approach the word in a broad commonsense way or (2) the word meant 'more than some trivial degree of impairment which does not make any appreciable difference to a person's ability to control himself; but it means less than total impairment.

The Court reviewed the authorities and concluded that this was based on a misconception (which was repeated in subsequent Crown Court Bench Books). The central thrust of the decision in *Lloyd* was that an impairment of consequence or weight was required. There are two dictionary definitions of 'substantial', either "*present rather than illusory or fanciful, having some substance"* or *"important or weighty, as in a substantial meal or salary".* The expression has always been held to be used in the latter terms.

Dimished responsibility radically alters the offence of which the defendant is convicted and it is appropriate for the reduction to take place only where there is *"a weighty reason for it and not merely a reason which just passes the trivial."* [36].

It followed that the answers were, in summary:

(1) The judge need not direct the jury beyond the terms of the statute and should not attempt to define the meaning of 'substantially'. The question of substantial impairment is an issue for the jury to resolve.

(2) If the jury has been introduced to the question of whether *any* impairment beyond merely trivial will suffice, or if it has been suggested that there is a spectrum between the trivial and the total, the judge should explain that it is not the law that *any* impairment beyond the trivial will suffice. It is not necessary nor wise to attempt a re-definition of substantially before the jury, neither was it proper for the Supreme Court to mandate a form of words in substitution for those used by Parliament.

G's appeal was dismissed.

Obiter comments – medical evidence

During the appeal attention was drawn to *R. v. Brennan* [2014] EWCA Crim. 2387, a Court of Appeal authority decided after the trial and appeal in *Golds*. That case involved the application of the principle of a submission of no case to answer (per *R. v. Galbraith*) to a trial where the sole issue was diminsished responsibility.

Where it is clear that a defendant was suffering from a relevant medical condition, the prosecution are entitled to accept a plea to manslaughter. The principles from *Galbraith* are capable of application to such a trial – in this context the judge must be satisfied that no jury could fail to find that the defendant has proved diminished responsibility – but the court must be cautious about applying them.

Where uncontradicted medical evidence supports the plea, the Crown must explain the basis on which it invites the jury to reject that evidence and ensure the basis advanced is on which the jury can adopt. The evidence is theirs to accept or reject although the jury will probably wish to accept undisputed evidence.

Case note: 'proving propensity' – *R. v. Mitchell* [2016] UKSC 55

Charlene Richer

Propensity evidence – standard of proof – non-conviction propensity evidence

In a judgment handed down on 19th October 2016 by Lord Kerr, the Supreme Court considered the correct approach to directing a jury on the issue of propensity evidence based on misconduct that has not resulted in convictions or findings of guilt.

Background

On the 20 October 2010, Ms Mitchell was convicted of murder in the Crown Court at Belfast. It was accepted that Ms Mitchell had obtained a knife and stabbed her partner, Mr Robin. At trial, Ms Mitchell claimed that she had acted in self-defence, had been provoked and did not have the requisite intention for murder.

By a combination of agreement and ruling by the trial judge, evidence of the Defendant's bad character was admitted for the purpose of showing a propensity to use knives in order to threaten and attack others. None of those 7 incidents had resulted in a conviction. During the course of the trial Ms Mitchell denied that the incidents had happened, or had happened in the way alleged.

The trial judge did not direct the jury on whether they needed to be satisfied as to the truth of the evidence or whether the evidence established the particular propensity.

Court of Appeal

The Court of Appeal (N. Ireland) quashed the conviction and a re-trial was ordered.

Gillen L.J., giving judgement, indicated that the correct position was as stated in *Archbold*, namely that where non-conviction evidence was relied upon to establish propensity, the jury must be directed not to rely on it unless sure of its truth.

The question for the Supreme Court

On appeal, the Supreme Court identified the issue as:

> Should the jury be directed that they have to be satisfied beyond reasonable doubt of the veracity and accuracy of the individual facts?

or

> Alternatively, is the real issue not this: what requires to be proved is that the defendant did have a propensity?

On examining the authorities relied upon in the Court of Appeal (*R. v. Ngyuen* [2008] EWCA Crim. 585 and *R. v. O'Dowd* [2009] EWCA Crim. 905), the Court did not consider that there was any clear definitive statement on the issue now raised.

The Appellant argued that evidence in relation to propensity did not call for any special examination by the jury and should not be considered in isolation from other evidence. Further, there was nothing in the *Criminal Justice (Evidence) (Northern Ireland) Order* 2004 (an exact mirror of the bad character provisions in the *Criminal Justice Act* 2003) that required incidents relied on to establish propensity to be proved beyond reasonable doubt.

The Respondent argued that prior to the 2004 Order, disputed bad character evidence had to be proved beyond reasonable doubt. This principle had not been abolished by that order and it was a function of the jury to evaluate the evidence of bad character in the conventional way.

The correct approach

The Supreme Court unanimously dismissed the appeal, agreeing that the failure to direct the jury rendered the conviction unsafe. However, the Supreme Court did not agree with the interpretation of the Court of Appeal that each incident capable of demonstrating propensity was required to be proved to the criminal standard.

In particular, in cases where several incidents were relied upon to show propensity, it was not necessary to:

- prove beyond reasonable doubt each incident had happened in the precise way alleged; or

- consider each individual incident in isolation [paragraph 39].

The proper issue was whether the jury were sure that propensity had been proved.

In reaching this decision, they were not required to be convinced of the truth and accuracy of each aspect of those instances as alleged, but were entitled to and should consider propensity evidence in the round [para 43].

The Court noted two reasons for favouring this approach:

- the improbability of a number of similar incidents being false is a consideration that should naturally inform a jury's deliberation; and
- obvious similarities in various incidents may constitute corroboration for each other.

Conclusions

A jury should be directed that, if they are to take propensity into account, they should be sure that it has been proved. This exercise does not require each item to be proved to the criminal standard, but that all material touching on the issue should be considered when reaching a conclusion as to whether they are sure propensity has been proved [para 44].

Of note, the Court also stressed the following:

The jury is not being asked to return a verdict on previous misconduct and should be reminded of that [para 53];

Propensity is at most, an incidental issue. It cannot be regarded as a satisfactory substitute for direct evidence. Excessive recourse to past incidents may skew the trial and distract attention from the central issues [paras 53 and 55]. It was noted that *O'Dowd,* a trial lasting 6 ½ months, revealed the practical difficulties of dealing with each individual instance.

Finally, on the decision in *Ngyuen*, the Court stated that it was significant that it related to a single previous incident. It was not surprising that that there was a need to be convinced that incidents had taken place as alleged in those circumstances, otherwise there would be no factual basis to find that propensity existed [para 42].

Civil update

Liability for damage by trees

Nicholas Barnes

Introduction

I chose this area because of Christmas and many recent cases involving our local councils.

Liability for damage by trees is as per modern tort, especially nuisance:

1. What is the *duty* between neighbours regarding the trees?
2. Did the tree roots *cause* the damage?
3. Was that damage reasonably *foreseeable*?
4. What practicable *measures* were there to minimise or avoid the damage?

5. Was there a reasonable *response* to the damage?

Duty

A property owner owes a duty of care the owner of neighbouring land:

> A private nuisance may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by: (1) causing (or continuing) an encroachment on his neighbour's land, when it closely resembles trespass; [1] (2) causing (or continuing) physical damage to his neighbour's land or building or works or vegetation upon it; or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.[2]

Damage

The Claimant must prove that damage has been caused by the tree root by materially contributing to it[3] or being an effective and substantial cause of it.[4]

Forseeability

The duty does not arise unless the defendant has (or ought to have had) knowledge of the defect *and* its danger.[5]

The Claimant must prove that there was a reasonably foreseeable risk of property damage by the tree.[6] The risk must be real rather than ambiguous,[7] a theoretical[8] or an outside chance.[9] A defendant is entitled to take a view based on known environmental circumstances[10] and the age of the property.[11]

Measures

Part of whether the harm reasonably foreseeable is if there are any practicable measures that could have been taken to minimise or avoid the damage.[12]

In *Berent*[13] the defendants owed no duty to the claimant because, before notification in 2010 that damage had occurred in 2003/2004, there was nothing that caused them to consider further steps to the trees beyond routine management. Before 2010, the defendant only knew that the trees were large, close to an older property and on shrinkable soil. The only workable answer was

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[1] *Davey v. Harrow Corporation* [1958] 1 Q.B. 60.
[2] *Thompson-Schwab v. Costaki* [1956] 1 WLR 335, per Lord Evershed M.R. at 558, citing paragraph 970 of Clerk and Lindsell's book on *Torts* (1954), 11th edn.
[3] *Loftus-Brigham v. Ealing LBC* [2003] EWCA Civ. 1490, 103 Con. L.R. 102, per Chadwick L.J. at 24.
[4] *Berent v. Family Mosaic Housing* [2012] EWCA Civ. 961, per Tomlinson L.J. at 17.
[5] *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485.
[6] *Solloway v. Hampshire County Council* [1981] 79 LGR 449; (1981) 258 EG 858.
[7] *Ibid.*, per Dunn L.J.
[8] *Ibid.*, per Sir David Cairns, cited with approval in *Berent v. Family Mosaic Housing* [2012] EWCA Civ 961, per Tomlinson L.J. at 23.
[9] *Ibid.*, per Dunn L.J.
[10] *Ibid.*
[11] *Siddiqui v. London Borough of Hillingdon*; *Sohanpal v. London Borough of Hillingdon* [2003] EWHC 726 (TCC).
[12] *Delaware Mansions Ltd v. Westminster City Council* [2001] UKHL 55; [2002] 1 A.C. 321.
[13] *Berent v. Family Mosaic Housing* [2012] EWCA Civ. 961.

to remove the trees. The defendant did that after notice of the damage. The claim failed on foreseeability and the absence of practicable steps the defendant could have taken.

When thinking about practicable measures to reduce or evade damage, you should consider (*Berent*[14] and *Denness*[15]):

1. Is it practical to prevent or minimise any damage?
2. If so, how simple or difficult are the measures that could be taken?
3. What is the extent, cost and duration of the work involved?
4. Has there been sufficient time for defensive action to be taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant and the time where the damage occurred?

Response

The reaction by any potential claimant must be reasonable.

> …as a general proposition, I think that the defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise.[16]

This is not an absolute rule[17] and notice need not be immediate.[18] The tree owner carries the burden of proof that there was insufficient time to abate the nuisance.

Remedies

A claimant can seek the remedies of injunction (abatement and prevention) and damages. They can also use their common law right to abate that nuisance.[19]

Family update

A case of suspected Female Genital Mutilation

John Ward-Prowse

Friday 16 October 2015 was a normal school day at a school in a Hampshire town on the south coast. At the commencement of the school day a pupil's Mother asked to speak with her child's teacher. The Mother was distressed. She explained to the teacher that her husband (the child's Father) was currently in Africa and that whilst he was away she wanted to 'treat' the children.

The Mother went on to explain that she was very worried about her daughter (the pupil) R aged 7 ½. She stated that she had put R and her siblings into one room to sleep. Following what was described as a 'sleepover' another daughter, L (aged 9 ½) had reported to her that during the sleepover R had

[14] *Ibid.*
[15] *Denness v. East Hampshire District Council* [2012] EWHC 2951 (TCC).
[16] *Delaware Mansions Ltd v. Westminster City Council* [2001] UKHL 55; [2002] 1 A.C. 321, per Lord Cooke of Thorndon at [34].
[17] *Kirk v. Brent London Borough Council* [2005] EWCA Civ. 1701; [2006] Env. L.R. D7.
[18] *L.E. Jones (Insurance Brokers) Ltd v. Portsmouth City Council* [2002] EWCA Civ. 1723; [2003] 1 WLR 427.
[19] *McCombe v. Read and Another* [1955] 2 Q.B. 429.

gone under a duvet to look and touch L's genitalia. The teacher offered an explanation that this was perhaps nothing more than childlike curiosity, however the Mother viewed it as sexualised behaviour and inappropriate. It was suggested to the Mother that if she was concerned the school could offer her support.

The Mother then expressed concerns that R had entered early onset puberty describing how she was exhibiting secondary sexual characteristics. The teacher told the Mother to seek the advice of her General Practitioner as this type of scenario was not uncommon, and other girls had, in the past, been assisted by a visit to their doctor.

The Mother's upset and distress heightened on hearing this and she was very concerned about how the Father would react to these 'situations' (the incident at the sleepover and his daughter's physical development) expressing concerns that he would take R to Egypt to be 'dealt with' whilst pointing to her genital area saying "I don't know the word – cut'. It was agreed with the Mother that she would meet further with the teacher and someone else from the school on the Monday (19 October 2015).

On Monday 19 October the Mother consulted her General Practitioner and requested that both R and L be prescribed medication to delay the onset of the menarche. This request was refused.

Immediately following that consultation the Mother attended the school. She was upset as to how she had been treated by the General Practitioner. The Mother was very concerned that the General Practitioner was Muslim as were his partners and that they would be talking about her request and would tell her husband and that she couldn't trust them. Once again during this conversation the Mother expressed her concern about the children's Father and in particular what he would do if R had entered puberty inferring that he would take her to Egypt to have it 'corrected' stating that 'he would have her stalk removed' whilst pointing at her genitalia.

On the 2 November 2015, the children's General Practitioner wrote to Children's Services raising his concerns about his consultation with the Mother on the 19 October when she had requested that he prescribed medication to delay the onset of puberty in R and L. He felt that the request raised suspicions to her having a 'hidden agenda', hence why he was making the referral.

And so the hare was set running. On the 5 November 2015 the Local Authority applied on behalf of R for a Female Genital Mutilation Order (FGM) Protection Order. The reason stated by the Local Authority in its application for applying on behalf of R was that R's General Practitioner had advised that whilst R was not showing any evidence or obvious signs of having commenced puberty, the Mother had shared her concerns with the school, police and social worker that she believed R was at risk of being taken by F to Egypt to undergo a FGM procedure. The application set out that there were in fact five children of the family, four of whom were female, and FGM Protection Orders were requested in respect of all four female children.

The Social Worker's statement in support of the application made for concerning reading. The social work chronology revealed that the family had been known to Social Services for 9 years and was littered with references to incidents of domestic violence between the Mother and Father. In addition it showed that the police knew the Father due to him being involved in drug offences. The Mother in sharing her concerns about the Father had stated that she feared he would do all he could to inhibit sexual urges in R and would take her to Egypt to undergo FGM. The Mother showed insight as to the effect such procedure would have on her daughter, however, she made it clear that should her concerns be disclosed to the Father she would deny any such concerns for fear of repercussions from him.

The Local Authority's concerns were heightened as the Mother had informed Social Services that she would be going to Saudi Arabia in either November or December 2015 and intended to leave the girls with the Father. Not surprisingly the Local Authority took the view that if the Mother did that she would be exposing her daughters to the risk of them undergoing FGM. The Mother had refused the Local Authority's request to provide copies of the children's passports which would

have been forwarded to the Border Agency thus preventing the children from leaving the country, and moreover had refused to sign a working agreement relating to the her travel plans.

The Local Authority's application came before Mrs. Justice Theis *ex parte* on the 5 November 2015. The Local Authority did not want to alert the parents of its application. A FGM order was made and in addition all four female children were made Wards of Court and Tipstaff passport orders were made. At the time these orders were made the Father was believed to be in the Sudan.

My involvement in this case commenced at the 'return' *inter partes* hearing before Mr. Justice Peter Jackson on the 12 November 2015. The Mother was in attendance. The Father was not. The Local Authority had not located him. The Mother's instructions were that the Father was in the Sudan and that she had spoken with him on two occasions and had informed him of the proceedings. The Father was due to return to the jurisdiction on the 16 November 2015.

Peter Jackson J. made an order in the following terms:

1. All four children were to remain Wards of the High Court during their respective minorities or until further order.

2. The parents, whether by themselves or by permitting, encouraging, assisting or agreeing with any other person whatsoever, be forbidden from entering into any arrangements in relation to genital mutilation of (the four children).

3. The Father, must not himself, or by encouraging, permitting or causing any other people to use or threaten violence against the Mother or the four children and must not intimidate, harass, threaten or pester the Mother or the four children. The order to continue until further order.

Permission was granted to the Local Authority to serve copies of the order on the children's school, on the FGM lead at the Forced Marriage Unit and upon the police.

The matter was directed to return for the Court's further consideration on the 30 November 2016. On that day the Father attended and had filed a statement indicating that he denied any thought of having R or any of his daughters undergo FGM. The Mother on this occasion presented as though she had been 'got at' by the Father and although initially denying that was the case subsequently accepted that he had. Directions were given and the matter is now listed for a final hearing over two days in December 2016.

It is understood that the Mother and children are now resident in a Refuge following the Father causing them further problems.

FGM and the Law

FGM is an abhorrent practice. It causes the victim serious pain and physical injury and serious adverse psychological consequences. The actual procedure varies from it being undertaken by a medical practitioner in a sterile surgical setting to be undertaken by family members using glass or a blade in non-sterile settings – risk of infection in the latter is high and consequentially death.

FGM is rooted in gender inequality, attempts to control women's sexuality and ideas about purity, modesty and aesthetics. It is usually initiated and carried out by women, who see it as a source of honour, and who fear that failing to have their daughters and granddaughters 'cut' will expose the girls to social isolation.

FGM is a criminal offence by virtue of the *Prohibition of Female Circumcision Act* 1985, as amended by the *Female Genital Mutilation Act* 2003, section 1 of this Act creates the offence:

> (1) A person is guilty of an offence if he excise, infibultes, or otherwise mutilates the whole or part of a girl's labia majora, labia minora or clitoris.

The provision therefore crminalises all form of FGM. These have been classified into different types by the World Health Organisation and in a statement it produced in 2003 it refers to four types – Type I to Type IV.

The term 'mutilates' is not defined in the Act but was considered by the President at § 12 in *Re B and G (Children No 2); sub nom Leeds City Council v M, F, B, G (B and G by their Children's Guardian)* [2015] 1 FLR 905*:*

> The Oxford English Dictionary defines 'mutilation' as meaning 'the action of mutilating a person or animal; the severing or maiming of a limb or bodily organ'; 'mutilate' being defined as meaning 'to deprive a person or animal of the use of a limb or bodily organ, by dismemberment or otherwise, to cut off or destroy (a limb or organ); to wound severely, inflict violence or disfiguring injury on'.

In infibulation is the process of effectively closing the vulva so as to leave a small opening to allow micturition and menstruation. The opening is widened in the event of childbirth. The concentration of this procedure is practiced in 27 countries in Africa as well as Indonesia, Iraqi Kurdistan and Yemen. Over 200 million women and girls had been subjected to FGM in those 30 countries as of 2016.

FGM remains a criminal offence regardless of whether it is inflicted directly or whether someone else is instructed to inflict it, and, regardless of whether the FGM is conducted in this jurisdiction or outside of it.

Section 73 of the *Serious Crime Act* 2015 came into force on the 17 July 2015 (the commencement being brought forward to coincide with the school summer holidays when the risk of FGM is particularly high). Section 73 inserts section 5A into the *Female Genital Mutilation Act* 2003. Part 5A(1) states that Schedule 2 provides for the making of Female Genital Mutilation Orders.

The relevant sections of the *Female Genital Mutilation Act* 2003 can be summarised as follows:

Section 1:	Offence of female genital mutilation;
Section 2:	Offence of assisting a girl to mutilate her own genitalia;
Section 3:	Offence of assisting a non-UK person to mutilate overseas a girl's genitalia; &
Section 3A:	Offence of failing to protect a girl from risk of genital mutilation.

It is apparent in our multi-cultural society that incidents of FGM or threat of FGM will arise and social workers no doubt in certain areas of this country where the risk is higher e.g. London & Leeds will have to be vigilant in this regard.

Indeed in September 2016 the Metropolitan Police began urging the Home Secretary, Amber Rudd, to prevent a woman from Sierra Leone who carries out FGM from entering the UK. The Metropolitan Police applied for an FGM Order preventing the woman from entering the UK, however, Holman J. said that it was for the Secretary of State to determine the issue. It appears that there is a loophole in the protection regime because an order is required to be for the protection of a named individual. Hopeful this loophole will be closed so that a 'class' i.e. all women and children can be protected form such individuals.

Articles

Pupillage at 2KBW

Michael Williams

Historically, some fortunate individuals secured pupillage by virtue of who their father was. Others tried the *El Vinos* approach and attended the Temple wine bar on successive afternoons in the hope of meeting a red-nosed silk who would invite them to join his set. Whilst some remarkable advocates did emerge from this unconventional recruitment process, it was perhaps not the best way to identify those who would do well at the bar. The ability of a young man (and it invariably was "a young man") to see off 3 bottles of Chablis was not always indicative of how well he could cross-examine. The Bar realised that the well-off and well-connected were over-represented within its ranks and things needed to change. Gone were the days when a pupil could offer chambers money to train him or her and the bar embarked upon establishing a fairer and more open pupillage selection process.

Leaving the connection of brothers aside (Her Majesty couldn't choose between them either), 2KBW has long been a chambers which has sought to recruit purely on merit, offering funding long before it was a requirement and well in excess of the minimum even when savage cuts were made to the publicly-funded bar. Chambers recognises that our future relies upon attracting the very best pupils and offering them an environment in which they can develop into first-class advocates.

Chambers is proud to introduce Charlie Richer, Hayler Manser and James Culverwell as the pupils of 2016, three exceptional candidates who commenced their applications to us back in the spring of 2015. Along with more than 300 other applicants they submitted their online forms to us on the Pupillage Gateway (the website through which all pupillages must be advertised). They had to answer a variety of questions including why they think they would make a good barrister and why they wanted to undertake pupillage at 2KBW. A dozen members of chambers reviewed the forms, from which the top ten per cent of applicants were selected for interview. The quality of candidates was exceptionally high, which made selecting those for the final-round interview an almost impossible task. However ten candidates did make it through to the final panel on a Saturday in July last year. The Chablis drinking competition was replaced with an advocacy exercise and the panel were barred from asking candidates, "Who's your daddy?". Charlie, Hayley and James emerged victorious and are a superb addition to 2KBW.

What lies in store for them now is six months of intensive training under the watchful eyes of their pupil supervisors. All will be gaining experience in crime, family, civil and immigration, to give them a broad foundation upon which to build their chosen areas of practice. As well as becoming their supervisor's shadow for six months, they will undertake drafting, legal research and attend residential advocacy courses. In April, they will find themselves on their feet, joining the ranks of 16,000 self-employed barristers competing for work. Why, you might think, would anyone put themselves through this gruelling process? Each will have their own answer, however what must be true is that each is determined and extremely capable. We wish them every success in their pupillage and hope that it is the start of a life-long career with 2KBW.

Chambers cases

See 2kbw.com/home/news for the most up to date news of chambers cases

Crime

Sally Howes Q.C. and Michael Williams secure murder convictions

Three defendants—a woman, her ex-husband and their 16-year-old son—were convicted of the murder of the woman's former lover following the end of an affair. The son was detained for a minimum of six years and the others were sentenced to life with minimum terms of 27 and 25 years' imprisonment. Sally Howes Q.C. and Michael Williams appeared on behalf of the Crown Prosecution Service. Further details can be found here.

Michael Shaw and Barry McElduff secure acquittals in high profile fraud case

Michael Shaw and Barry McElduff, instructed by Yousaf Kalim of ST Law, secured the acquittal of Mohammed Akram who was accused of being a trusted lieutenant in a gang responsible for a multi-million pound 'phishing' fraud. Mr Akram was one of 13 defendants who were charged with the conspiracy, arising from the largest ever Metropolitan Police investigation into cyber fraud. He maintained his case that he was an innocent dupe throughout and was acquitted following a two week trial at Southward Crown Court. Further information about the case can be found here.

Jeremy Wright secures important rape acquittal

At an Army Court Martial in September, Jeremy Wright secured the acquittal of a Lance Corporal accused of raping a female colleague after a night of drinking. The board of the Court Martial acquitted the Defendant at the end of a 5 day trial at the Bulford Military Court Centre. The response of the Defendant was: "You saved my life".

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

Vulnerable Witness training

Jeremy Wright will now be training advocates in the new rules for questioning vulnerable witnesses. All advocates have to be "trained" in half-day seminars, which will start to take place at about the end of March 2017.

Editorial

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