2 KING'S BENCH WALK NEWS

Issue 4 – Easter 2017

Chambers news and announcements

Welcome

William Mousley Q.C., Head of Chambers

Welcome to the April Newsletter. It is now 3 months since the new "2KBW" came into existence when we joined forces with The Chambers of Marion Smullen at 1ITL and I am very happy to report that, as we expected, the transition has been a smooth one and the future looks very positive. The collective ethos which we all share is demonstrated by the fact that three of our contributors in this edition are from 1ITL.

I think that you will find all the articles interesting and useful; they cover a broad range of topics and are provided by a whole range of members and from two of our excellent pupils, all of whom will shortly be taking their first steps into the courtroom as instructed advocates. My thanks to all.

Please let us know if we can improve our content as we continue to strive to be a relevant and progressive set of Chambers, providing a high level of service to our professional and lay clients.

This is the fourth edition of the 2 King's Bench Walk Newsletter. The newsletter is produced quarterly, in April, July, October and January. In this issue, Tobias Eaton writes an interesting and informative piece on taxi touting; there are two articles from James Culverwell and Hayley Manser; Richard Hutchings writes on the recent appeal of Marine A and the Courts Martial in general; and there are all the usual updates and 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

From the clerks' room

The Digital Age

Daren Milton (Senior Clerk)

When I started at 2KBW in 1988 I was in awe of the clerks' room, watching them juggling cases, switching briefs, telephones seemingly stuck to their ears, throwing a leather bound diary around the size and weight of a small child, as I ran around at their beck and call making tea, buying their breakfasts and polishing their shoes on a Friday morning because that was my job as the junior clerk.

To do as I was told, to listen and to learn.

A difficult concept at times as I seemed to spend half my time out of the office on trips to the post office weighing and sending packages: late evenings traipsing to Waterloo and Paddington stations, to the "Red Star" parcel office, sending briefs to far flung places like Truro and Plymouth. Not to mention the two, sometimes three trips to the DX every morning and every evening with a couple of sports bags laden with papers – and of course my memory says it was always raining. How proud I was when I persuaded the Senior Clerk to buy me a trolley. He was not one to part readily with his hard earned cash.

Members of the Bar enjoyed seeing their name on a backsheet, a voluminous brief squeezed into a pigeon hole and the clerks loved the old ways too. The brief arriving, untying the pink or white ribbon to see what the charge was, weighing the papers, assessing the fee. "Righto, DX this one down to Pompey for old Ponsonby, Daron, he's not had anything decent for a while". I didn't know what on earth it all meant at first but I just did as I was told.

How times have changed.

Following Sir Brian Leveson's report Review of Efficiency in Criminal Proceedings in January 2015, Better Case Management (or BCM) was formulated with the aim of efficient compliance with the Criminal Procedure Rules involving robust case management, direct engagement, case ownership and entirely digital working with every element designed at reducing the number of court hearings.

The Digital Case System (DCS) was born and kicking and screaming the Bar and their clerks had to adapt, conform and acclimatise. In October 2015, BCM was implemented at "Early Adopter Crown Courts" and we were fortunate at 2KBW in that two of our primary courts at Reading and Portsmouth were Early Adopters. From the beginning clerks and members of chambers attended regular Local Implementation Meetings, helping iron out issues, raising concerns, learning and assisting with this inordinate change.

Now, 15 months after BCM and DCS's national implementation, 2KBW members and clerks alike are engaged, compliant and, despite the odd speed bump, find the whole system easy to use. So gone are the days of the old style junior clerk running around, pushing trolleys in the rain. No longer do they collect a brief from somewhere at 5:45pm, sprint up to the DX office only to find it had closed 2 minutes ago, then jump on a bus to Waterloo to put the thing on a train. No more charging around wrapping parcels, stuffing envelopes only to be told the next day you'd sent it to the wrong person or address, or that it hasn't arrived at all and when you look under your desk…

Oops.

At first the concept of DCS was viewed gloomily but the Bar and those lucky junior clerks are now embracing the change and enjoying its potential. Briefs being DX'ed overnight is a thing of the past as those that instruct us "invite" us onto the digital file. If we help out other sets and vice-versa with late unexpected return briefs, we all press, click, type in an email address and Counsel has the papers at his or her fingertips, all from the warmth of our clerk's room.

Whilst some of us may occasionally miss the more traditional ways of the Bar – the thrill of a brief landing on your desk – DCS is upon us, it is relevant and it is good. Generations of lawyers to come will see this period in our legal profession's development as something akin to the industrial revolution of the mid-19th century.

Next stop the Common Platform and virtual hearings. Change is upon us and it's coming fast.

As for those lucky junior clerks… Well they've never had it so good!

Profile: Matthew Farmer

Matthew Farmer is joint head of the Criminal Team at 2KBW and was called in 1987. He is a Grade 4 prosecutor, regularly instructed in the CPS' most serious and complex cases and those involving specialist police squads.

He has a successful high-level defence practice and has had numerous successes in the Court of Appeal including successful appeals against convictions for murder and rape.

He has acted as a trainer for the Bar Council in respect of the Human Rights Act and the ECHR; is an advocacy trainer for Inner Temple; and is qualified to train practitioners in the cross-examination of vulnerable witnesses.

What was your route to the Bar? The same route I take to all Bars. A straight one. In fact there was a slight deviation via history at London University, then conversion and Bar Finals. Had you asked me *why* I went to the Bar, I would have had a fascinating and complex answer.

Do (or did!) you have any particular role models? I think, like most people, I have tried consciously and, no doubt, subconsciously, to emulate certain aspects of the many brilliant men and women I have been lucky enough to see in action. If I have to name one outside the law, it would be my first school sports teacher, Willie Wilson, who taught me the importance of never answering the umpire's question as to the 'guard' you wish to take at the wicket, by saying "middle'. "*It's centre'! Not 'middle'! Middle's a weak word boy*". Great advice, in cricket, as in life. It's probably why I joined the 'Inner' Temple.

Is there anything you would change about your career? It is hard to keep to the spirit of this question without answering in the affirmative. I possibly regret that it took me so long to learn that in order to have a successful career, it is no good just being the best possible advocate you can be in court. You must communicate with those instructing you before, during, and after your performance. Especially in criminal law. It is unlikely that many of your solicitors will have any real idea about your performance in court. However if you seem efficient, keep them up to date, and report back promptly, then you can really impress.

What is your most challenging case to date? Having a historic murder conviction overturned in the Court of Appeal. I worked with my solicitor on the case for a year and a half. There were

many set backs along the way (including having to suffer an angry verbal assault from a very, very senior appellate Judge). For the final hearing I was led by Tim Owen QC who was quite brilliant. I was delighted that he used my grounds and skeleton argument in their entirety with the single addition of one footnote.

What has been your most memorable day at the Bar? Being asked by my former pupil to answer questions for a profile in 2KBW news.

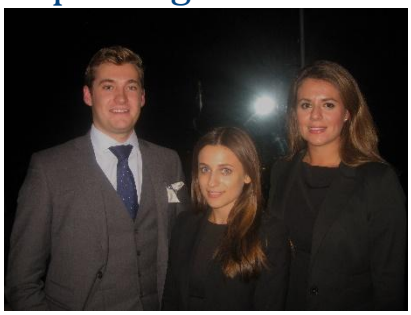
Are you being serious? No. There was one better occasion. A long time ago I made a comic closing speech when representing a defendant charged with a conspiracy to supply drugs. One of the impersonations I used in the course of it was of the rugby commentator Bill McLaren. At the case dinner the trial Judge confided in me that he thought it was good until I "*did that awful Scottish commentator*". *Per curiam*. One of the many counsel in that case was a (then) young man who has gone on to be the Leader of the Western Circuit and Head of our Chambers.

What attracted you to 2KBW? I have known and liked 2KBW for the last 25 years. Although I had spent 17 happy years at 2 Harcourt Buildings, I was ready for a fresh challenge and could see that 2KBW was moving forward on modern–thinking lines. With a clerks' room second to none and some great barristers, it was a logical step. The speed of reform and development has, however, been remarkable. With 1ITL on board, Chambers has a broader base. The front corner room in London has views that command the Temple. I think our clerks and our barristers are under the right leadership to try and do the same.

Matthew was talking to Kaj Scarsbrook, his former pupil. For more details on Matthew, please see his chambers profile.

News

Pupils begin their second six



James Culverwell, Charlene Richer and Hayley Manser (*l-r*) begin their second six and are available to accept instructions on 3 April 2017. They have undertaken pupillage training in criminal, family and civil law and work both in London and on the Western Circuit.

The Bar Mess to play at Law Rocks 2017

2KBW's garage rock band, *The Bar Mess* (hitherto competing under the 1ITL banner), will play at the 100 Club on Thursday 22 June 2017.

The Bar Mess: *(l-r) Raphie Bailly; Richard Witcombe; Richard Hutchings; Pedro Grayde*

The band is formed of members of chambers Richard Hutchings and Richard Witcombe; Raphie Bailly (formerly practising from Gray's Inn); and Pedro Grayde. Law Rocks is a battle of the bands contest established by Nick Childs, then head clerk at Keating Chambers. Every year there are a number of gigs at the 100 Club on Oxford Street and The Bedford in Balham.

The Bar Mess is scheduled to play on 22 June. On their last outing in November 2016, they saw off Clifford Chance and Cameron McKenna to come second of eight bands. In 2015, the band raised £1,600 by playing two gigs, splitting the proceeds between Save the Children (Syria) and MacMillan. In 2016 they raised £1,500 for Harrow Law Centre.

This year all proceeds raised by *The Bar Mess* will go to Horatio's Garden.

For more information on Law Rocks please visit their website at https://lawrocks.org.

Obituary
Jeni Ross

It is with much sadness that Chambers announces the death of Jeni Ross who died on the 24 January 2017.

Jeni's early life was spent in Mauritius where she was an accomplished diver, opening a number of diving schools there. Having qualified as a solicitor, Jeni opened her own firm in London undertaking a number of high value ancillary relief cases. It was during this time that her expertise was built in that area of family law.

Jeni came to the Bar and undertook her pupillage with Pump Court Chambers, subsequently securing a tenancy with Kings Bench Chambers in Bournemouth. She joined Chambers in 2014 and soon thereafter became unwell and underwent major surgery. Despite having only recently been discharged from hospital, Jeni was back on her feet again appearing in a five day care trial in Bournemouth, travelling daily with John Ward-Prowse.

Unfortunately Jeni's health problems returned necessitating her to undergo further surgery and subsequently aggressive treatment. Throughout this time, Jeni continued working. Despite being in great discomfort she remained cheerful, retaining her great and infectious sense of humour throughout.

Finally Jeni was admitted to St. Wilfred's Hospice in Chichester where members of chambers and other members of the legal profession, who offered her great support in her final days, regularly visited her.

Jeni faced her plight with tremendous stoicism. She finally lost her battle on the 24 January 2017, passing peacefully in her sleep.

Jeni's funeral took place on the 4 February 2017 and was very well attended by family, friends, members of chambers and the legal profession including the judiciary. Jeni was a popular and hard working member of Chambers and is sadly missed. She will be remembered with affection.

Jeni is survived by her son Adam.

Words: John Ward-Prowse

Criminal update

Don't Truss-t everything you've heard: pre–recorded cross–examination of rape victims

James Culverwell

On 19 March 2017, the Lord Chancellor, Elizabeth Truss MP, announced that "[a]*lleged rape victims will no longer face cross-examination live in court*"[1] because "*from September juries across the country will watch the pre-recorded cross-examinations during a trial*".[2] The following day, Truss confirmed in parliament that the government is "*bringing forward the roll-out of reforms to allow rape victims to pre-record their cross examination*".[3] Anyone would thus be forgiven for thinking that, as of September, juries in rape cases would be presented with a video of the cross-examination of complainants instead of live evidence. This is, in fact, not the case, so what is the position on pre-recorded cross-examination?

The power to pre-record cross-examination

Section 28 of the Youth Justice and Criminal Evidence Act 1999 ('the Act'), which is not fully in force, sets out the power of the court to direct that the cross-examination and re-examination of eligible witnesses is pre-recorded. This power can only be used where a section 27 direction has been made for a witness's ABE interview to be admitted as their evidence in chief.

Section 16 of the Act makes anyone under the age of 18, or anyone with an incapacity, eligible for this measure. Section 17(4) also makes the complainant in respect of a sexual offence eligible for this measure, unless they elect not to so be.

The current use of section 28

The pre-recording of cross-examination under section 28 has been piloted in three Crown Court centres (Kingston-upon-Thames, Leeds and Liverpool) since April 2014, but only in respect of witnesses under the age of 18. The scheme requires potential section 28 cases to be identified at an early stage and for preliminary hearings to take place in order to make the relevant special measures direction, then to set ground rules and finally to record the cross-examination. These hearings, which are sometimes merged for efficiency, aim to record the evidence as close to the time of the offence as possible.

The pilot scheme is reported to have been a success and Truss has stated that it resulted in more early guilty pleas.[4] It should be noted that the process evaluation of the pilot scheme admits that the section 28 cases were monitored from an earlier stage than the comparison section 27 cases, and there may have been early pleas in section 27 cases that were not recorded.[5]

There are of course numerous practical challenges in implementing this measure. For example, the initial hearings are likely to take place at a time when the case has not been fully prepared by the crown, or before the defence have received full disclosure. There will also inevitably be developments in some cases after the recording has been made. Whilst there is power to reopen

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[1] 'Rape victims to be spared court ordeal', *The Sunday Times*, 19 March 2017.
[2] 'Rape victims to be spared court cross-examination as Government brings forward plans for pre-recorded video evidence', *The Daily Telegraph*, 19 March 2017.
[3] HC Deb 20 March 2017, vol 623, col 664.
[4] *Ibid.*
[5] 'Process evaluation of pre-recorded cross examination pilot (section 28)', *Ministry of Justice Analytical Series*, 2016.

the cross examination if new matters arise, this is likely to cause substantial delay and increase the costs of the trial, which is already an expensive process.

In spite of these issues, pre-recorded cross-examination of witnesses under 18 will be introduced in other Crown Court centres from September 2017, although only on a carefully phased basis.

Complainants in sexual offence cases

The measure announced by the Lord Chancellor will indeed be introduced, although not nearly on the scale that she suggested. At the same time as the careful rollout of the special measure described above, the three pilot courts (Kingston-upon-Thames, Leeds and Liverpool) will begin using pre-recorded cross-examination of complainants in cases relating to sexual offences. The procedures are likely to be the same and thus the practical issues above will affect this scheme as well.

Conclusion

When the Lord Chancellor said that rape victims would be pre-recording their cross-examination from September, this was clearly misleading. However, the wheels have been set in motion for a carefully phased roll-out of pre-recorded cross-examination of witnesses under 18, and juries in Kingston-upon-Thames, Leeds and Liverpool will be dealing with the evidence of complainants of sexual offences in this way from September 2017. Despite the enthusiasm of the Lord Chancellor, it remains to be seen whether the procedure will stand the test of time.

Black Taxis and Touting

Tobias Eaton

Reading the title of this article might lead one to think it is concerned with both licenced and unlicensed taxis. It is, in fact, solely concerned with licensed black cab drivers that are charged with touting offences.

Consider this real case (with name change) from 10 years ago: Mr Cabbie was driving his licenced black taxi along the Strand at 1am. He goes past the Savoy but sees a queue of taxis outside so continues on. He then turns into the Aldwych whereupon he is confronted by the steely stare of a man standing outside the Novello theatre in a bow tie. Nearby is a woman in evening dress. There was something strange about the man's glare. Maybe they had fallen out. Mr Cabbie pulls up next to them and lowers his window and leans over whereupon the couple approach.

He enquires to the male "*Where you going guvnor?*"

"*Archway*," the man replies.

"*Jump in.*"

In they go. The doors close. Just before Cabbie departs there is a tap on his internal window. Change of direction maybe - back to hers? No. The lady is pressing some sort of card to his window.

"*We are police officers*." she says. "*We are arresting you for the offence of soliciting for hire. Anything you do say will be taken down…* "

Mr Cabbie was subsequently prosecuted on a charge of soliciting persons to hire a vehicle to carry them as passengers contrary to section 167(1) and (5) of the Criminal Justice Act 1994

("s.167") and a charge of driving without insurance, which was entirely contingent on the touting charge.

Mr Cabbie was fortunate to have some sort of legal costs indemnity policy by virtue of his membership of an organisation called the Cab Club. The consensus at the Club seemed to be that Cabbie was 'bang to rights'. They nevertheless viewed it to be harsh on Mr Cabbie and so undertook to finance his representation. I was told to 'get him off on a technicality'. Entrapment was the suggestion. So I sat with the president of the club and we scoured the abstract of laws and Stone's Justices' Manual looking for some meaningful way to defend him.

As it so happens we did come across a technicality, to which I shall return in due course, but the more significant outcome of our search was that we found the rudiments of an argument that prosecutors were inviting an overly restrictive definition of the concept of *plying for hire.*

The case law we found mostly concerned unlicensed taxis and whether or not certain conduct, such as positioning a vehicle in a way where it was obviously available for hire (but without any sign confirming the same) could amount to plying for hire.

There was no direct authority relating to licensed taxis and what their position was.

The question of whether licensed taxi drivers are capable of committing an offence under section 167 was considered, albeit *obiter dicta,* in the case of *Robert David Oddy v. Bugbugs Ltd* [2003] EWHC 2865 (Admin) where Pitchford J commented that

> "The government recognised the current touting problem was created by the drivers of unlicensed cabs. It is not the case, in my judgment, that Parliament had any intention of exempting licensed cab drivers altogether. In my view, had that been the intention then Parliament would undoubtedly have said so… I do not consider… that the terms "plying for hire" and "soliciting" are co-terminous."

Herein is the problem: Judges were being invited to apply a narrow definition of *plying for hire* which in my view had no proper statutory foundation, or any other justification for that matter.

The Crown often sought to rely on evidence given by officers for Transport for London who suggested that a cab driver may not *ply for hire* elsewhere than at some standing place or place appointed for that purpose. They relied on section 33 of the London Hackney Carriages Act 1843 as providing authority for that proposition.

Section 33 provides that:

> "Every driver of a hackney carriage who shall ply for hire elsewhere than at some standing place or place appointed for that purpose, or who by loitering or by any wilful misbehaviour shall cause any obstruction in or upon any public street, road or place… (shall commit an offence)."

The prosecution thus invited an interpretation of the clause *shall cause any obstruction* that is disjunctive from the previous clauses in the section, thus making four separate offences, these being: plying for hire elsewhere than at some standing point; loitering; willful misbehavior; and obstruction.

A more careful reading of the statute clearly shows that the premises in the section are supposed to be read conjunctively: that is one offence of obstruction is created and the previous clauses are merely intended to describe the circumstances (of the obstruction being caused) in which the section will apply. This much is obvious from the short title to the section,

summarised in Stone's Justices' Manual as: *Penalty on Drivers for loitering or causing any Obstruction etc.* (copied from the original text). The intention of *Section 33* (which is still relevant today) is merely to prevent taxis parking or amassing in a way that causes an obstruction (and which otherwise might be legal) such as outside a popular nightspot or event. When the statute is read in the correct way it becomes obvious that the authors clearly perceive there to be circumstances other than when a taxi is on a rank or place appointed for that purpose where a driver might *ply for hire*. When this legislation was promulgated, licensed hackney carriages were still horse drawn so there can be no question of it being devised in tandem with the current system of lighting on taxis (and lighting on taxis didn't come into being until the 1950s long after motorised taxis had taken over from their equine counterparts).

So I take the view that there is scope for a licensed driver to *ply for hire* and with several methods including the use of a sign, calling out and approaching people. In fact there is no legislation that limits the scope of the concept of *plying for hire* and there is certainly no legislation that limits a driver to the use of a taxi light or taxi ranks as was (and still is) suggested by Transport for London.

On the contrary the only legislation, which addresses the issue of *plying for hire*, was enacted with the sole intention of expanding the scope of its interpretation. This is the purpose of section 35 of the London Carriage Act 1831 which provides that:

> "A Hackney carriage standing in a street or place and not already hired shall be deemed to be plying for hire;"

Essentially, s.35 of the 1831 Act is designed to prevent licensed taxi drivers from parking in a busy area and cherry picking from the enquiries they receive by leaving their light off (or formerly their sign not on display) and feigning that they aren't obliged to take a fare as they were not plying for hire. Because they are deemed to be plying for hire they are bound by the cab rank rule in terms of accepting any fare within the standard limits.

This was the technicality upon which was relied upon in respect of our Mr Cabbie, because the undercover police officers actually approached Mr Cabbie's vehicle before he'd said anything and so he was able to rely upon s.31 to demonstrate that he was *deemed to be plying for hire.*

Both before and after Mr Cabbie's case there were a spate of similar prosecutions. Some in the cab community thought there might be more sinister motives than preventing black taxis from touting. They based this idea upon the fact that s.167 was a trigger offence for the collection of DNA and at that time there was a man-hunt going on for the infamous serial rapist known to be John Worboys (this was suggested long before Worboys was apprehended).

Maybe that was the reason for lots of black cab drivers being arrested. Whatever the reason I repeatedly submitted a skeleton argument arguing against the crown's approach and always succeeded in securing an acquittal (though not always on the basis of a half time submission).

I have recently been instructed in a number of cases and, lo and behold, Transport for London is adopting the same approach it always has.

This is what prompted me to write this article and to explain my rationale for what I describe as a permissive approach to *plying for hire.*

Another motivation is that I also hope it to be one of a series of articles designed to discuss the unfairness of the new regulatory regime.

Permissive approach to Plying for hire

As there is no statutory definition, I will list my reasons for inviting courts to take a permissive approach.

Not the intention of parliament.

Black cab drivers are defined and regulated by statute. There is no statutory limitation on *plying for hire*. The issue of defining *plying for hire* has been a perennial issue in taxi law. Parliament's failure to legislate has not been an oversight but a deliberate decision and in any event there is now a recommendation that touting offences are abolished and replaced with a new system of offences that rest on the principal prohibition of carrying passengers for hire without a licence (see House of Commons Briefing Paper SN02005, 10 August 2016)

Not supported by case authority.

On the contrary the authorities describe *plying for hire* as including situations where drivers expressly invite members of the public to use their cabs (see Stone's Justices' Manual and *Rose v. Welbeck Motors Ltd [*1962] 2 All E.R. 801 and *Cogley v Sherwood* [1959] 2 Q.B. 311.

No mischief to be prevented.

One of the reasons that parliament has not sought to curtail the ambit of *plying for hire* in respect of licenced taxi drivers is because there really is no problem to correct. It is rarely necessary for a black cab driver to approach customers because it is usually more convenient to *ply for hire* by use of their light. In circumstances where the light isn't used then there still is no real problem. They are licensed. They are not usurping the role of other licensed taxis like mini cabs do. They are regulated, safe and dependable. They are prohibited from overcharging and they may actually save a passenger from travelling in a less safe unregulated unlicensed taxi. This must be preferable. They can also provide an often much needed service of showing passengers where taxis are located and perhaps assisting with luggage.

Unnecessary interference.

There are multifarious situations where individuals might want a taxi but might not hail in a typical way. It is submitted in such situations it is entirely reasonable for a black cab driver to enquire whether a member of the public might want a cab. Common examples are:

- A person with their hands full with shopping or children etc;
- a foreigner not familiar with how to hail a cab
- a person standing near to a rank but not at a rank
- a person standing at a rest rank rather than a ply for hire rank
- a person standing at a bus or train stop where the last bus or train has already departed
- a vulnerable person such as a woman alone at night; ande
- a disabled person

This list is not exhaustive but in all of these situations a black cab would be guilty of an offence under the restrictive approach suggested by the prosecution. Drivers are faced with situations every day where they have to inquire as to whether someone wants a cab. If the restrictive approach were adopted it could cause a huge interference with a black cab's every day activity.

Finally I should point out that when a taxi driver is found guilty of an offence of touting not only does he bear the usual burden of the court costs, fine and victim surcharge; not only does he

face a contingent conviction of driving without insurance, but he will also be banned for a year from being licenced by Transport for London. It has huge consequences and in my view is entirely unfair in a legal context which necessitates an arbitrary approach by a court.

The rapid advances in technology with smartphone apps such as Uber have already brought the black cab trade in London under serious pressure. Were the court to adopt a restrictive approach of *plying for hire* it would render no clear service to the public but would rather make the already besieged army of black cab drivers ever more cautious in providing the helpful and dependable service that they are famous for.

Family update

Implacable hostility – is what a child wants best?

Hayley Manser

We've all witnessed those moments when a child throws a tantrum when asked to do something innocuous like eat their vegetables, or when a teenager's inexplicable annoyance at you culminates in irrational anger because tidying your room is simply demanding the impossible! But what do you do when a child is vehemently refusing contact with a parent? For practitioners, this can be an incredibly difficult situation trying to balance the wishes and feelings of the child on one hand with those of the parents on the other, often where one or both parents are implacably opposed to contact with the other.

Section 1(3)(a) of the Children Act 1989 neatly states that when considering the welfare of any child, a court shall have regard to a child's wishes and feelings. However, this can form a bit of a misnomer, especially for those not familiar with the law, who take and use this at face value. How many times have we as practitioners heard "but they [the child] said they don't want to see them!"?

How far should a child's wishes and feelings dictate the contact that takes place?

The rule of thumb has long been that the older the child, the greater weight their wishes and feelings carry. Whilst this is generally true, case law suggests that practitioners should look at the 'ascertainable' wishes and feelings of the child rather than their 'expressed' wishes and feelings, meaning a holistic evaluation of the child's actions and behaviour as well as their words (see *H (Children)* [2014] EWCA Civ. 733 at [75]).

What is also clear from the case law is that the wishes and feelings of a child need to be viewed in context of the overall welfare of the child. In *Re. H (A Child)* [2014] EWCA Civ. 271, Ryder LJ emphasised the need for the family courts to proactively consider the strategy that had been set in cases of implacable hostility. He said at [13]:

> "The child's wishes and feelings are not determinative … welfare is."

This is especially important for cases of an intractable nature where the hostility and views of a party may significantly impact on a child's understanding of his or her own circumstances and thus their own wishes and feelings. The impact is made even more profound where the child suffers emotional harm as a result and/or becomes alienated from one parent.

Parental alienation – what does it even mean?

Parental alienation has only recently become a term that has begun to be recognised and it is, arguably, not fully understood. Parental alienation, in summary, is where a parent knowingly or unknowingly psychologically manipulates their child causing that child's wishes and feelings to

become intrinsically linked to their own with regard to contact with, or even their views on, the other parent. Although parental alienation is not illegal in this jurisdiction, nor is parental alienation a syndrome that is defined by the World Health Organisation, it is viewed by some as tantamount to psychological abuse.

Re. A (A Child) [2015] EWCA Civ. 910; [2015] 3 F. C. R. 165 concerned a child ('B'), whose parents had separated when he was 2. Proceedings had been brought by the father for contact, after contact was stopped by the mother. The father subsequently withdrew his application because of concern about the level of stress the mother was under and the consequential effect this may have on the welfare and upbringing of his child. The father applied again for contact three and a half years later; however his application was vehemently opposed by the mother, who had formed and consolidated her view that the father was dangerous to her and B. Moreover, B had also adopted his mother's view. Psychological reports diagnosed the mother as having severe depression and anxiety amounting to post-traumatic stress disorder, but indicated she would not be motivated to receive treatment if she perceived that its purpose was to make way for the father to have contact with B. Furthermore, the psychological report also reported that the mother was regularly communicating to B that the father was dangerous and that B did not want contact, which had consequently caused B to suffer significant emotional harm. Despite this, the court made an order for limited indirect contact between the father and B, facilitated by CAFCASS, and no direct contact.

On appeal, McFarlane LJ in his judgement stated that the starting point was the welfare of the child, which should be the court's paramount consideration, taking into account the provisions of s. 1(2A) of the *Children Act* 1989[6]:

> "(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.
>
> (2B) In subsection (2A) 'involvement' means involvement of some kind, either direct or indirect, but not any particular division of a child's time. "

Notwithstanding the above, McFarlane LJ in the context of the whole case – the mother's mental health, the mother's reluctance to engage with any therapeutic or mediational services, the significant emotional harm B had already suffered, the high level of harm B would suffer if direct contact was forced upon him and B's refusal to have any direct or indirect relationship with his father – conceded with regret at [52]:

> "Some family situations are simply not amenable to the blunt instrument of a judge sitting in a law court making an order. "

For many, this outcome has been seen as wholly unsatisfactory. Was the Court really powerless to do anything? Moreover, what recourse does a parent have if the courts cannot assist?

Re. W (Children) (Direct Contact) [2012] EWCA Civ 991, an authority considered in *Re. A*, lays out guidance for practitioners dealing with implacable hostility cases. Whilst I do not consider it necessary to outline the whole judgement, it is pertinent to note that the Court stated at [75]:

> "[Where] however, it is plainly in the best interests of a child to spend time with the other parent then, tough or not, part of the responsibility of the parent with care must be the duty and responsibility to deliver what the child needs, hard though that may be. "

With this in mind, it is therefore hard to understand how a court could be rendered powerless to intervene and establish contact with the father, as well as put in measures to prevent any

[6] Note that by the time the case came to appeal these provisions had only just come into effect.

further harm being caused to the child by his mother, when the law is clear that it is in the best interest of a child to spend time with the non-resident parent.

In the case of *Re. A* the judge was of the view that the situation had been left for too long, so much so that any court intervention would be futile and would likely cause further emotional harm to the child.

In conclusion

Family law is never black and white, especially when children are involved; each case will invariably turn on its own facts. However, what is clear from recent case law is that practitioners need to be wary of a child's wishes and feelings, especially where one parent may be implacably opposed to the other. A child's wishes and feelings, whilst not irrelevant, need to be viewed as secondary to the child's overall welfare. Indeed a robust approach is required by practitioners, especially when faced with a child who is vehemently refusing contact. Early intervention appears key. If a situation is left to fester for too long, the courts can find themselves in the impossible situation where intervention can cause as much harm as allowing the status quo to continue and the Court can be rendered powerless to act, creating situations where alienation of a parent becomes entrenched and lasting emotional harm to the child can be caused.

Articles

Marine A – lessons to be learnt?

Richard Hutchings

'To die, to sleep - to sleep, perchance to dream; aye, there's the rub, for in that sleep of death, what dreams may come, when we have shuffled off this mortal coil, must give us pause' – *Hamlet*

On 15 March this year, the Court Martial Appeal Court ('CMAC') overturned Alexander Blackman's conviction for murder. (By analogy: the CMAC is to the Court of Appeal what the Judicial Committee of the Privy Council is to the Supreme Court). Blackman is known widely as 'Marine A'. He had stood trial in 2013 at the Court Martial in Bulford alongside two other marines, the three of them having initially been granted anonymity on security grounds - hence the nomenclature. The killing had occurred whilst Blackman, then an acting Colour Sergeant, was on active duty in Helmand Province in September 2011 in charge of a group of the Royal Marines. Their patrol base had come under fire from two insurgents, one of whom became severely injured by gunfire from an Apache helicopter sent to provide air support. The Marines found him lying incapacitated in a field. Blackman then shot him dead with a 9mm pistol, saying "shuffle off this mortal coil, you c***. . . I've just broke the Geneva Convention". The case gained notoriety because the events were recorded in real time footage from a camera affixed to another Marine's helmet.

What, then, was the basis for the CMAC overturning Marine A's murder conviction? Why was a manslaughter conviction substituted by the court? What does it mean for the Court Martial system? And what lessons can be learnt?

The appeal judgment (*R. v. Blackman* [2017] EWCA Crim. 190) bears reading in full. The CMAC had a particularly strong composition, comprising the Lord Chief Justice, the President of the Queen's Bench Division, the Vice President of the Court of Appeal Criminal Division, Openshaw J and Sweeney J. The appeal, which was a reference by the Criminal Cases Review Commission (there had already been a previous, unsuccessful, appeal against conviction in 2014 following the guilty verdict), was founded on fresh evidence. There has been much negative comment in

the mainstream press since the judgment's publication with the scatter-gun firing at the original trial judge (the Judge-Advocate General, the most senior military judge in our jurisdiction), the original defence team, the appellant himself, and even the Court Martial system. Much of the criticism has been wide of the mark.

"Once more unto the breach. . . " – *Henry V*

The first appeal, in 2014, was advanced on a different basis to the recent (second) appeal. That first appeal (*R. v. Blackman* [2014] EWCA Crim. 1029) followed a long line of cases arguing that the Court Martial system breaches the European Convention on Human Rights. It was argued by the appellant that Article 14 had been contravened, as the Court Martial requires only a simple majority verdict of the Board (the Court Martial equivalent of the jury, comprising between 3 and 7 members), even for serious cases. The first appeal was dismissed - it was held that there was no breach of Article 14. The Court Martial system has indeed proven resilient in weathering the ECHR storm over the years. As a report of the House of Commons Select Committee (2005-2006) concluded, a system of military justice in this country is necessary for supporting the operational effectiveness and morale of the armed forces; assisting in the maintenance of discipline; reflecting the unique nature of the armed forces by placing offences into context; and extending the law to armed forces personnel serving overseas.

What about the original decision to try Blackman in the Court Martial system rather than the Crown Court? Allocations of cases such as Blackman's are governed by a protocol between the Director of Public Prosecutions, Director of Service Prosecutions and the Ministry of Defence. Whilst the civilian legal system would have been well equipped to deal with such a case, the unusual facts here illustrate the reality which underpins the existence of the Court Martial system: the peculiar, unique pressures that service personnel typically endure, especially in a war zone. The Board are non-lawyers, but with a service background: it truly is trial by one's peers.

Fast-forward then to the recent CCRC referral (the second appeal). What was the basis of this appeal, and what conclusions were reached? Perhaps of more significance are the conclusions which were not reached. The CMAC made no criticism of the Court Martial system, nor of the original defence lawyers, and nor was it concluded that the Judge-Advocate General had been at fault in the original proceedings. Given all that has been written in recent weeks in the press, let alone in the Twittersphere, that will surprise many.

"We are not ourselves when nature, being oppressed, commands the mind to suffer with the body" – *King Lear*

In a client conference in June 2013 (four months prior to trial), a possible psychiatric angle was discussed. Being entirely fit to provide cogent instructions, Blackman expressly advised his counsel that any such angle would be "a created scenario". At trial he fought the murder charge on the basis that he had thought the insurgent already dead when he shot him. This was unrealistic, as the video footage had shown the insurgent at various stages with his eyes open, writhing, and making noises. That being so, the original conviction for murder was unsurprising. It was only subsequently that the appellant's adjustment disorder came to light. The adjustment disorder is a recognised medical condition, in which the subject's ability to form rational judgment or exercise self-control is substantially impaired. The subject may not realise (as in Blackman's case) that they have it. Such a condition of course allows for a verdict of manslaughter by diminished responsibility: exactly the verdict which the CMAC substituted. At the outset of the latest (second) appeal, the appellant confirmed that he would accept a verdict of manslaughter by diminished responsibility and in the event would abandon all other grounds of appeal, explicitly now accepting that he had had an intention to kill, albeit whilst labouring under the adjustment disorder.

There has been a lot of sound and fury in the press about the recent appeal. Some have suggested that anything less than a murder conviction is completely unjustified; whilst at the other extreme, some have expressed outrage that a serviceman in Marine A's position was even charged. There is enough in the judgment to bayonet both extreme views.

"Put in their hands thy bruising irons of wrath, that they may crush down with heavy fall the usurping helmets of our adversaries" – *Richard III*

To Marine A's detractors, it was made abundantly clear in the judgment that he genuinely perceived that he had been severely let down by his chain of command; was under intolerable, exceptional pressure at the time (paragraph 99 of the judgment is jaw-dropping in terms of the factors bearing on him); and was suffering from a widely recognised, mind-altering psychiatric condition such that those who have never been in the crucible of war could scarcely imagine. He was of impeccable character: a good man whose offence that day was emphatically not murder.

"A bloody deed, and desperately dispatch'd!" – *Richard III*

Conversely, to those who have zealously questioned why anyone on operational deployment should ever be prosecuted, it is worth pointing out that Marine A now stands convicted of manslaughter: a verdict which he accepts. The adjustment disorder had put him "in the state of mind to kill", and that is what he did. His responsibility was greatly diminished in this exceptional case: but not absolved entirely. The description in the judgment at paragraphs 20 - 22 of all 6 minutes of the video footage is chilling and not easily forgotten. The injured enemy combatant was dragged across the field, still moving, his eyes open; he was abused; Blackman made sure the helicopter had gone; and then he shot the insurgent in cold blood - and that, frankly, is a highly sanitised description.

"Oh just but severe law!" – *Measure for Measure*

Despite the grand, sweeping statements made and broad conclusions that others have read into the judgment in recent weeks, the main lesson may well be as prosaic and simple as this: that there is life left yet in the Court Martial system.

Year one at 2 – moving to the independent Bar

Dan Wright

In mid January 2016 I was invited by Daren to come into chambers to meet the clerking team and to go for an introductory drink. I had been granted tenancy in December following a successful application to chambers and I was a few weeks away from joining chambers proper.

It was a Thursday evening and at the time I was employed as in-house counsel in a large firm of solicitors in West London. I was used to the usual busy afternoon listing for Friday court but perhaps not quite prepared for the frenetic activity that was clearly coming from the clerks' room. At the time I was 5 years fully qualified but had always worked in house. I was moving to the independent Bar and there was perhaps no better introduction to what I was about to experience.

Daren found a moment to give some advice and an idea of what to expect. I'm sure we discussed many things but he was very clear about one thing: "You are going to really appreciate your holidays".

Cut to two months later and just over five weeks since I started. My first holiday did indeed beckon, booked long before I had even applied for tenancy. At the time I think I was amidst my closing speech in my sixth back-to-back trial (for some reason in my first few months ALL my

trials were effective). I remember feeling that my feet had not touched the ground since starting and by Friday everything would stop for ten days. Daren was right, I was going to appreciate my holiday but at the same time, I was going to miss the buzz of court; miss the unpredictable instructions received daily at 5 o'clock, or later… and then revised.

Life at the independent Bar is of course different from the employed Bar but that is not to say in any way that my experience as an employed barrister was not a rich and rewarding one. I was lucky to be part of two very good in-house teams and trained and mentored by some very fine advocates. In addition to this I was a qualified police station representative and gained valuable experience representing hundreds of clients in the police station (often in the early hours of the morning). Despite never prosecuting before February last year (and now mainly prosecuting) this experience assisted me no end. I knew what it was like, amongst other things, to speak to a custody sergeant at 3 in the morning after dealing with a particularly difficult detainee. In reality I had been dealing directly with police officers for years.

I'll never forget seeing the suspects in a fraudulent wedding being checked into custody one summer's evening as I was waiting for my client prior to disclosure. The bride in a full white wedding dress still clutching her bouquet as the custody staff searched her and took her details. All the smartly dressed (and rather bemused) guests in the holding rooms…

Twelve months on and I am happy to say that life at the independent Bar (and 2KBW) suits me. I travel more and further than I did before but strangely find myself home earlier more frequently than before. On the whole I am spending more time in court and as a result I've learnt a lot. It has been great working with Scott, Stephen, Megan, Alice and Chris and now Simon, Charlie and Chloe. Not forgetting of course Tracey and Daren who have been there and ever supportive from the beginning. My fellow tenants have been equally supportive and it has been exciting joining in the year 2KBW merged with 1ITL.

Chambers cases

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

Crime

Sally Howes Q. C. opens murder trial at Winchester

Sally Howes Q. C. has opened the prosecution case in a trial at Winchester Crown Court where a soldier is accused of murdering his former partner. The case is reported in the national media.

Joshua Scouller succeeds at the Court of Appeal

Josh Scouller successfully appealed against a sentence at the Court of Appeal, reducing a sentence of 6 years' custody, concurrent on two counts of robbery, by one year. Josh was instructed by Peter Boyle of GT Stewart.

Sally Howes Q. C. represents senior Army officer at Court Martial

Sally Howes Q. C. represented a serving Brigadier charged with negligently performing a duty in relation to keeping the Army updated in relation to school fees being paid. Further details can be found here. Sally was instructed by Paul Krahl of Rahman Ravelli.

Michael Williams secures conviction in firearms trial

The trial of a defendant charged with firearms offences, having been found with a working firearm and over 30 rounds of ammunition, concluded yesterday with the jury returning unanimous guilty verdicts on all counts. Please see here for more details.

Sarah Morris prosecutes high-profile art burglary

Sarah Morris has opened the case for the Prosecution in a trial at St Albans Crown Court. The defendants are accused of the burglary of valuable works of art from the home of the well-known artist Alan Davie following his death in 2014 and subsequent conversion of criminal property.

The case has been widely reported and further details of it can be found at:
http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-39432517

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.

Elisabeth Bussey-Jones and Barry McElduff present half-day seminar to RASSO; Wessex and Hampshire Constabulary

Two of chambers' Grade 4 RASSO approved prosecutors, Elisabeth Bussey-Jones and Barry McElduff, presented a 3 hour seminar to RASSO lawyers, the Major Crime Investigation Team of Hampshire Constabulary, and members of chambers on Thursday 16 March 2017.

The well-attended seminar covered disclosure (importance to a defendant, the application of the rules, and issues arising at trial); joint enterprise (the current approach, evidential issues); s. 41 applications (responses and steps to take to avoid such applications arising); drafting multiple incident count indictments (post *R. v. A.*).

Editorial

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