Guildhall CHAMBERS

Newsletter

CRIME NEWS SUMMER 2013

The Crime Team at Guildhall Chambers believes that the changes the Government proposes to make to criminal legal aid will be catastrophic for the public, as well as for the professions of both solicitor and barrister.

We anticipate that a combination of Price Competitive Tendering (PCT) and the removal of the right of clients to choose their own representatives will create a 'market' in which only monolithic companies (Tesco, G4S, Eddie Stobarts) who can bulk contract for work can thrive. These businesses will operate safe in the knowledge that however well or badly they represent their clients, their accredited employees cannot be sacked and their firm has a guaranteed share of the market. We are deeply concerned that traditional, independent firms of solicitors who have served communities for decades will be unable to tender successfully; we fear that those firms who fulfil the needs of minority groups within the community may be the first to go to the wall.

The deeply flawed 'Quality Assurance Scheme for Advocates' (QASA), which will apply to all criminal work, has been described as lending a fig-leaf of legitimacy to these proposals. We believe that the naked truth is that a combination of 'plea-only advocates' and stark financial incentives built into the fee scheme will result in defendants being wrongly advised to plead guilty. We fear that when faced with the prospect of working within a fundamentally unjust system, there will be an inevitable exit of talent from our professions which will affect both defendants and victims of crime. Such a legal aid exodus will mean that in the future, there will be no independent bar to prosecute serious crime, or to try it. As has been observed, from Tesco lawyers will come Tesco judges.

We will stand with our professional colleagues in a bid to stop these proposals becoming law.

We, as a team, refuse to endorse either scheme because of the injustices they will inevitably import.

Guildhall Crime Team says No to QASA and No to PCT.

Editorial

Welcome to the Crime Team Newsletter's 'Spring into Summer' edition: the issues that dominate our front page seem to cast a pall over the weather. The central changes foreshadowed in the Consultation document "Transforming Legal Aid" are a reduction of almost two-thirds in the number of legal aid providers, the introduction of bulk tendering for a fixed share of the market on the part of remaining or new firms, and the removal of client choice in terms of representation. These changes will create an anti-competitive environment in which there will be no incentive for firms to provide proper client care, as however inadequate a service is provided to clients, those clients will be unable to change their allotted legal aid provider, and that provider will have a guaranteed share of the market. In order to reassure the public that their state-foisted representative will do a good job, a 'quality assurance scheme for advocates' has been created that manages in its design to compound the likely iniquities. QASA will ensure minimum standards only, and allow for some advocates to have their competence assessed on a 'plea-only' basis. Given the sharp decrease forecast for trial fees and a corresponding increase in the guilty plea fee – 'fewer hours spent = more money earned' – doubtless many new providers will be keen to hire plea only advocates who will turn around a high volume of guilty pleas.

This means that when arrested, you may receive advice from a firm which is unable to represent you if you say you didn't do it, and which will receive a considerable amount of money if they can quickly persuade you that is really better for everyone if you get on and say that you *did* do it. It takes very little imagination to construct nightmare situations, particularly when one considers the over-representation of people with mental disorders among defendants: will a moderate learning disability which makes one suggestible be picked up at the police station by a practitioner working in this new system? Will the ramifications in terms of law or evidence, possible defences or PACE points, be of interest to that practitioner when they really need to get ten pleas that day and every 'contest' means writing off a case? Our crime team pupil, Gregory Gordon, explores the complex issues surrounding fitness to plead in a timely examination of this subject within this edition. Greg, who is now 'on his feet' defending and prosecuting in Magistrates' and Crown Courts, takes the reader through the implications of mental illness on trial procedure in an article which considers the topic from its Victorian beginnings right up to changes currently proposed by the Law Commission.

It is worth remembering that if introduced QASA will apply to *all* criminal advocacy – might 'plea-only advocates' attempt to enter the regulatory sphere? Our head of Chambers, Peter Blair QC, and regulatory crime specialist Anna Vigars write in this edition about challenging unlawful seizures of material by the police or regulatory agencies. They point out the implications that such seizures may have in terms of informing a prosecution even after 'ill-gotten material' has been returned. Tactical issues such as these bring into focus the difficulty in a client being well served by someone without hands-on knowledge of preparing for trial or a breadth of experience. Susan Cavender, who in addition to her mainstream criminal practice also conducts regulatory work and inquests, gives some practical pointers for those engaged in dangerous dogs litigation in her article in this edition.

We believe that all criminal work, however it is funded, is important; and important enough that it should be conducted by specialist solicitors and counsel, not as a side-line for a supermarket. Our newsletters are one small way in which we can consolidate and share specialist knowledge.

As ever, our readers are encouraged to send any comments on either the content of this newsletter or material they would like to see covered in future editions to the editor mary.cowe@guildhallchambers.co.uk.

With warm wishes for a hot summer.

Mary Cowe
Editor

Fit for Trial?

Parliament and the courts have developed a process of identifying when defendants are unfit to stand trial in the Crown Court to allow accommodations to be made to the court process[1]. It is an area rife with potential pitfalls and requires careful case management and close attention from the advocates involved. As soon as the issue arises, all parties should be aware of the procedure, so as to avoid the many continuing difficulties which are still not widely understood.

Fitness Hearing

The question of a defendant's fitness is a different one from the question of insanity; fitness relates to mental capacity at the time of the trial, not at the time of the alleged offence. The law governing fitness is set out in sections 4 – 5A of the Criminal Procedure (Insanity) Act 1964, (as amended):

s4: (1) This section applies where on the trial of a person the question arises (at the instance of the defence or otherwise) whether the accused is under a disability, that is to say, under any disability such that apart from this Act it would constitute a bar to his being tried.

....

(5) The question of fitness to be tried shall be determined by the court without a jury.

(6) The court shall not make a determination under subsection (5) above except on the written or oral evidence of two or more registered practitioners at least one of whom is duly approved.

It is no longer for a jury to decide whether the defendant is fit to enter a plea; that determination is solely for the judge (subsection 5), who can base the decision either on the written reports of the relevant medical experts, or by listening to their live evidence (subsection 6). There is no requirement in law that the two registered practitioners must agree whether the defendant is fit. Although in practice two concurring reports are usually obtained before a defendant is declared unfit, if there is a legitimate basis for that conclusion then the judge is entitled rely on one report which pronounces the defendant unfit, even if the author of the other report disagrees.

If the judge finds that the defendant is fit, there is no requirement to receive the evidence of two medical practitioners; the section 4 procedure relates only to unfitness: *R v Ghulam* [2010] 1 Cr.App.R. 12.

A fitness hearing can take place at any time before a verdict in a trial is returned, but it should be determined as soon as the question arises. If the defendant is found unfit, the trial must be abandoned, whatever stage it may have reached.

If, after a defendant is declared unfit, the issue of fitness arises again at any point before 'sentence' is passed, the court must hold another section 4 hearing. If subsequently found fit, the defendant should be arraigned and a full trial held: *R (Hasani) v Crown Court at Blackfriars* [2006] 1 Cr.App.R 27 DC.

Similarly, a judge who finds that the defendant is fit is under an obligation to keep that ruling under review for the course of the trial, and to hold a subsequent section 4 hearing if necessary: *R v M* [2006] EWCA Crim 2391.

Disability

To be declared unfit, the defendant must be "under a disability". It is not enough that a defendant appears to be incapable of acting in his best interests: *R v Moyle* [2009] Crim.L.R. 586 CA. Many otherwise able defendants routinely fail to act in their best interests; not pleading guilty when without a defence, or running a defence which is plainly incompatible with the evidence, for example. If the advocate were to take control every time a defendant made the wrong decision, it may be thought that there would be few remaining defendants capable of entering a plea at all. Equally, "it may be that a defendant is highly abnormal" but this alone is not sufficient to be declare the defendant unfit: per Lane LJ, *R v Berry* (1977) 66 Cr.App.R. 156 CA.

A relevant medical diagnosis is not always sufficient. Amnesia, causing a loss of all relevant memories, does not render a defendant unfit as per the judgment in *R v Podola* 43 Cr.App.R 220 CCA; nor did the defendant's delusional beliefs about the evil influences taking hold of the court proceedings; *R v Moyle* (above).

The test of disability as laid down in *R v Pritchard* (1836) 7 C&P 303, still holds good today.

A defendant is under a disability if he is unable to:

- Instruct his solicitor and counsel;
- Plead to the indictment;
- Challenge jurors;
- Understand the evidence; or
- Give evidence himself.

The inability to complete any one of these tasks is sufficient for finding that the defendant is unfit.

The Law Commission (Consultation Paper 197) has recommended changing this test. Rather than focusing on discrete aspects of a

[1] The extent to which unfitness can be addressed in courts of summary jurisdiction is heavily circumscribed.

"It is no longer for a jury to decide whether the defendant is fit to enter a plea; that determination is solely for the judge, who can base the decision either on the written reports of the relevant medical experts, or by listening to their live evidence."

criminal trial, the Law Commission argues that the test should apply a general focus on the "decision making capacity" of the defendant.

A defendant would be under a disability if he is unable to:

- Understand the information relevant to the decisions that he or she will have to make in the course of his or her trial;
- Retain that information;
- Use or weigh that information as part of a decision making process; or
- Communicate his or her decisions.

If a formulation of this test is adopted, for the reasons outlined above it is important that it is not interpreted to incorporate unwise, irrational or tactically-poor decision making.

Funding

From the point at which a defendant is declared unfit, legal aid funding is withdrawn. This is important to know, and is sometimes overlooked by the parties and indeed the court, with the result that a defence team may continue to work without the prospect of being paid.

In place of a legal aid funded defence, an advocate is appointed by the court and paid out of central funds. The court must consider who is the best person to put the case for the defence. This person might be the person who had up until the fitness hearing been representing the defendant; but it is not necessarily so, and the court must make this consideration afresh. The situation may call for a person with specific experience of dealing with the relevant issues: *R v Norman* [2009] 1 Cr.App.R 13.

If at a subsequent section 4 hearing the court finds that the defendant is then fit, the role of the court appointed advocate ceases and legal aid can be reinstated.

Awaiting Trial – Remand to Hospital

The Mental Health Act 1983 allows for a person who would otherwise be remanded in custody awaiting trial, to be remanded to a hospital for the purpose of medical treatment:

s36: (1) Subject to the provisions of this section, the Crown Court may, instead of remanding an accused person in custody, remand him to a hospital specified by the court if satisfied, on the written or oral evidence of two registered practitioners, that:

(a) he is suffering from a mental disorder of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and

(b) appropriate medical treatment is available for him.

(2) For the purposes of this section any person who is in custody awaiting trial before the Crown Court for an offence punishable with imprisonment (other than an offence the sentence for which is fixed by law) or who at any time before sentence is in custody in the course of a trial before that court for such an offence.

…

(5) The power of further remanding an accused person under this section may be exercised by the court without his being brought before the court if he is represented by an authorised person who is given an opportunity of being heard.

(6) An accused person shall not be remanded or further remanded under this section for more than 28 days at a time or for more than 12 weeks in all; and the court may at any time terminate the remand if it appears to the court that it is appropriate to do so.

Before the expiration of 12 weeks detention under section 36(6) above, the Secretary of State may, on the evidence of two relevant medical experts, order the removal of the defendant to hospital on a permanent basis:

s48: (1) If in the case of a person to whom this section applies the Secretary of State is satisfied:

(a) that person is suffering from a mental disorder of a nature and degree which makes it appropriate for him to be detained in a hospital for medical treatment; and

(b) he is in urgent need of such treatment; and

(c) appropriate medical treatment is available for him;

the Secretary of State shall have the same power of giving a transfer direction in respect of him under that section as if he were service a sentence of imprisonment.

(2) This section applies to the following persons, that is to say:

(a) persons detained in a prisoner remand centre,

(b) of course it may well be that time spent on remand in hospital, receiving medical treatment, will increase the likelihood that the defendant becomes fit and a subsequent section 4 hearing is required.

Trial of Fact

There could be no fair trial of a defendant who is unfit to defend himself[2]. The 1964 Act (as amended) allows for a trial of the facts:

s4A: (2) … it shall be determined by a jury:

(a) on the evidence (if any) already given in the trial; and

(b) on such evidence as may be adduced or further adduced by the prosecution or adduced by a person appointed by the court under this section to put the case for the defence,

Whether they are satisfied … that he did the act or made the omission charged against him as the offence.

(3) If as respects that count or any or any of those counts the jury are satisfied as mentioned in subsection (2) above, they shall make a finding that the accused did the act or made the omission charged against him.

(4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict or acquittal as is on the count in question the trial had proceeded to a conclusion.

An unfit defendant may be fully acquitted of a crime, but he may not be found guilty[3]. The jury determine only whether the defendant did the act; his mens rea is irrelevant. After all, the only person who can accurately speak to what the Defendant was thinking is the defendant.

Take for example the offence of rape. There are three aspects of rape: 1. penetration, 2. complainant's lack of consent, and 3. defendant's lack of reasonable belief in consent. Penetration (1) is obviously relevant to a trial of fact. A lack of reasonable belief in consent (3), as the mens rea of the defendant, is clearly not in issue in a trial of fact. The complainant's lack of consent (2), although to do with what she is thinking, is not the mens rea of the defendant and therefore falls within the actus reus of the offence; it was this point upon which the recent case of *R v Ebdon* 2012 (unreported) turned (Ramin Pakrooh acting as the appointed advocate).

The segregation of the mens rea from the act can be problematic where, in the absence of a culpable mindset, the act itself is otherwise lawful. For example, with the offence of voyeurism, the defendant's purpose of observing another engaging in private act, namely for his obtaining sexual gratification, was held to form part of the act: *R v Burke* [2012] EWCA Crim 770.

Where a defendant was charged under the Financial Services Act 1986 with dishonestly concealing a material fact for the purpose of inducing others to enter an agreement, where that material fact was the defendant's present intention, the defendant's present intention was held to be part of the act and not his mens rea; the defendant's dishonesty and his purpose were part of his mens rea: *R (Young) v Central Criminal Court* [2002] 2 Cr.App.R 12 DC.

It is a fine distinction. A defendant charged with murder is unable to put forward a defence of diminished responsibility, as that would necessarily require an examination into his state of mind: *R v Grant* [2002] 1 Cr.App.R. 38 CA. In that case, the CPS had properly charged the defendant with murder according to their own criteria; the fact that a defence which would reduce the charge to manslaughter was unavailable to the defendant was immaterial to that decision.

As it currently stands, the ordinary principles of joinder are not altered where a fit defendant is tried alongside an unfit co-defendant by the same jury: *B and others* [2008] EWCA Crim 1997.

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[2] It may be questioned if this procedure which *effectively* involves trying the defendant whilst, in practice, removing his or her right to give evidence, is an appropriate method of determining the culpability of someone no longer able to communicate effectively with legal representatives.

[3] This being said, a finding that a defendant did the act alleged will often result in his being made the subject of a Hospital Order. The imposition of such an Order is no bar to a later trial and a sentence of imprisonment being imposed should the defendant get better in hospital.

Role of the Court Appointed Advocate

In a trial of fact, the role of a court appointed advocate is different from that of defence counsel. The advocate does not act on behalf of the defendant and may not put forward a positive defence. The extent of the brief is to test the evidence only in such a way as appears available on the papers: *R v Antoine* [2001] 1 AC 340 HL. If there is no evidence to support a specific defence, this may mean that the advocate is required to professionally forget any instructions as to that defence which were given by the defendant in his previous role as defence counsel.

The unfit defendant may still be called to give evidence, but at the trial of fact he is merely a witness; it is no longer his case to run and he cannot insist on being called. Considering the court's findings of the defendant's mental state, great care should be taken before any decision to call the defendant is made.

Appealing the Fitness Decision

There is no right of appeal against the determination of fitness or unfitness. A defendant who is found unfit may appeal that decision only if he is then found to have committed the act: s15 Criminal Appeal Act 1968. A defendant who is found to be fit and is subsequently convicted may appeal against his conviction on the basis that the judge at the section 4 hearing erred in law, so that there should not have been a substantive trial: *R v Podola* [1960] 43 Cr.App.R 220 CCA.

Appealing the Trial of Fact

Where an appeal is successful (on the ordinary principles) against a finding that the defendant did the act, in addition to quashing the verdict the Court of Appeal must direct a verdict of acquittal: *R v Norman* [2008] EWCA Crim 1810. The Law Commission has recommended legislation to rectify this, and grant the Court the power to remit a case for a re-hearing under s4A.

Hospital Orders

If the defendant is found by a jury to have committed the act, three disposal orders under the 1964 Act are available to the court.

s5: (1) This section applies where:

....

(b) findings are recorded that the accused is under a disability and that he did the act or made the omission charged against him.

(2) The court shall make in respect of the accused:

(a) a hospital order (with or without a restriction order);

(b) a supervision order; or

(c) an order for his absolute discharge.

(3) Where:

(a) the offence to which … the findings relate is an offence the sentence for which is fixed by law, and

(b) the court have power to make a hospital order,

(c) the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).

A court has the power to impose a hospital order under the MHA 1983, if:

S37: (2)

(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from a mental disorder and that either:

(i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him; or

(ii) in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and

(b) findings are recorded that the accused is under a disability and that he did the act or made the omission charged against him.

(2) the court is of the opinion … that the most suitable method of disposing of the case is by means of an order under this section.

In *R v Grant* (above), the defence of diminished responsibility (reducing murder to manslaughter) was particularly relevant in relation to s5(3) of the 1964 Act, above. Had the defendant been found to have committed the act of killing, and had the charge been manslaughter, all three disposal orders would have been available – though realistically for an act resulting in the death of another, it would be highly unusual for a hospital order not to be made. But as the defendant was found to have committed the act of killing, and the charge was murder (an offence carrying a sentence fixed by law), a court is required not only to impose a hospital order (so long as it has the power to do so), but one accompanied by a restriction order.

Release From Care

If the defendant did not do the act, a formal not guilty verdict is entered. If the defendant had been remanded to hospital under sections 36 or 48 of the Mental Health Act for the duration of the trial, he should be released from the hospital's care immediately. However in practice, although the criminal process has concluded, it is common for the medical practitioners who will have accompanied the defendant to court to seek to further detain the defendant under sections 2 or 3 of the Act.

The law governing fitness to stand trial is unsettled and there is often scope to argue that a different element of a given offence should or should not comprise part of the act; to a degree, it may be dependent on the facts of a given case. Defences of mistake, or self-defence, which necessarily require some investigation of the defendant's mens rea, may nevertheless be brought to the surface through skilful testing of the evidence, but only where there is objective evidence to raise the issue; the burden is then placed on the prosecution to disprove these defences: *R v Antoine* (above).

This is where an advocate who is familiar with the deceptively complex issues surrounding fitness, and experienced with the subject matter, can make a difference. Selecting counsel carefully at the outset makes it likely that, if the defendant is found unfit, the best advocate will already be in place for the trial of fact.

Greg Gordon

Illegal Seizure

What is the situation when you're acting for a client whose premises are entered by the police, the Environment Agency, SOCA or the like and that agency seizes documents in excess of their powers or outside the terms of the warrant? One solution is to raise the issue within the ambit of the criminal trial; the difficulty with that is that by that stage the prosecution case will often have been shaped, in part at least, by the ill-gotten material and that, of course, makes much more difficult the task of having the material excluded. The other solution is to apply for an injunction to secure the return of the material wrongly seized together with an application for damages. Peter Blair QC is currently leading Anna Vigars in just such a case acting for a significant South West employer against the Environment Agency. Questions which have arisen concern arguments over legally professionally privileged material, copies of documents wrongly seized, and damages.

Authorities re improper execution of warrants (copies)

R (on the application of Cook and another) v Serious and Organised Crime Agency) [2010] EWHC 2119 (Admin) is a case in which Leveson LJ and Ouseley J dealt with a warrant improperly executed and gave an order for delivery up of all documents seized under that warrant. They did not grant the return of copies, indicating that they might have dealt with that question differently had LPP been asserted;

"Although we have not seen the documents, as I have said, it has not been suggested that they fall outside the scope of s 19(2). It is not suggested that they were legally professionally privileged, which might override any disclosure provisions. It is not suggested that they contain purely private information or have a confidential quality that might override what would otherwise be the plain inference that they are relevant to a criminal investigation falling within s 19(2)." (Per Ouseley J at paragraph 27)).

Similarly, *R v Chief Constable of Lancashire Constabulary, ex parte Parker* [1993] QB 577 addresses the ability of the police to retain documents taken pursuant to what was found to be the unlawful execution of a warrant;

"Neither Reg v Sang nor section 78 provides any support for the proposition that the police have a general right to retain unlawfully seized material as against its owner for use as evidence. Such a right could only be conferred by express statutory language." (per Nolan LJ).

Again, this case is not wholly clear as to the retention of copies; on the basis that the finding is that originals must be returned and that the argument appeared to have been that copies would be inadequate, it is not expressly ruled upon.

Most recently, there is *Cummins (R, on the application of) v Manchester Crown Court* [2010] EWHC 2111. Again, this is a case of the unlawful obtaining of material by SOCA. On this occasion, SOCA conceded that their warrant had been unlawfully executed and that they were not properly in possession of the material. However, they sought to attach conditions to the return of the material so that it was still identifiable to them and available when they had got the required documentation to seize it lawfully. In response the claimants required that their solicitors should witness the destruction of all copies and, effectively, that no use should be made of any information gathered from the material. The same Court, of Nolan LJ and Ouseley J, dealt with the application and granted it so far as return of originals was concerned, observing that anyone receiving the material back should understand the view that might be taken, in subsequent criminal proceedings, of any attempt to dispose of that material to thwart an attempt to seize it lawfully. In relation to copies, however, this was said;

"... it is clear from these authorities that securing copy documents will be far from straight-forward. On this basis, one possible way for any agency to deal with this aspect would be to quarantine all the LPP material."

"The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the claimant's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done."

"In addition to the return of the documents the claimant seeks destruction of all the copies and an order that no derivative use be made of any knowledge gained as a result of the unlawful search and seizure, together with the details of those who have seen them. As I explained in Cook v SOCA, in relation to copies of the documents no authority has been cited for the proposition sought. I have no doubt that section 78 of PACE amply controls the use to which any copies of documents could be put, bearing in mind that the deployment of unlawfully obtained evidence is not necessarily and inevitably prohibited irrespective of the circumstances (see Sang [1980] AC 402) and the many cases that developed the exclusionary principles which follow both from that decision and section 78."

Again the question of LPP did not arise. But, it is clear from these authorities that securing copy documents will be far from straight-forward. On this basis, one possible way for any agency to deal with this aspect would be to quarantine all the LPP material. In that way, they could perhaps seek to satisfy a Court that they had

i Returned originals,

ii Removed LPP material from the investigation, and

iii Dealt appropriately with LPP material.

Damages – aggravated or exemplary

Aggravated damages are not generally to be pleaded where the defendant to the proposed criminal proceedings is a company because the principle governing those is that they can only be awarded where there has been an element of mental suffering or distress caused by the conduct of the agency. Where the defendant is a company, it doesn't have a mind, in that sense, to suffer distress. There is one case (*Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397) in which Caulfield J, at first instance, made an award of aggravated damages to a limited company but his rationale was based on the outrageousness of the defendant trade union's behaviour (in picketing and advising advertisers not to place adverts with the newspaper company if they "knew what was good for them" and in acting in contempt of a court order) rather than considering closely the mental element of the award as considered in other cases on this topic. This is not a case upon which, in my judgement, it would be sensible to rely, particularly in the face of long-established authority on this point.

Exemplary damages are deprecated in most of the reading on the subject, in particular the 1997 Law Commission report (Aggravated, Exemplary and Restitutionary Damages) and also many of the cases. However, in *Rookes v Barnard* [1964] AC 1129 Lord Devlin made clear that exemplary damages were available in any one of three categories, including, significantly on these facts, where there had been "oppressive, arbitrary or unconstitutional acts by government servants".

"As a result of the decision in the House of Lords in Kuddus v Chief Constable of Leicestershire [2002] 2 AC 122 it can confidently be said that today exemplary awards are possible across the whole range of tort. Provided always that there is unacceptable behaviour on the part of the defendant, behaviour that displays features which merit punishment by way of malice, fraud, cruelty, insolence and the like, there is no tort where the writ of exemplary damages will not run" (per McGregor on Damages 11-011).

Lord Nicholls, in *Kuddus* said this;

"The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the claimant's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna." (paragraph 63, emphasis supplied)

The authorities on this point deal in the main with occasions on which the police have wrongfully arrested or imprisoned someone. Cases directly on the point with which we are dealing are vanishingly rare (although there is a significant number of authorities relating to warrants in which exemplary damages has been claimed but not ruled upon for procedural reasons), but, as a matter of first principles, exemplary damages are available in this situation. That said, the award of damages in this category is described, consistently, as being "exceptional".

Peter Blair QC
Anna Vigars

Dangerous Dogs Legislation

There are two different, and distinct, ways that prosecutions can be brought against the owners of dogs. This may seem a bit academic, but the legalities are worth chewing over, because if the Crown gets it wrong then an owner can find some wriggle room in unexpected places.

Most often these days a prosecution is brought under the **Dangerous Dogs Act 1991**. This (obviously, you may say) means criminal proceedings which are started by summons in the usual way. **Section 3** states that the owner or keeper of the dog can be prosecuted if it is *'dangerously out of control in a public place'* and *'injures a person'*. **Section 10(3)** gives a useful definition – a dog is regarded as dangerously out of control if there are grounds for reasonable apprehension that it will injure a person, whether or not it actually does so.

Defra has produced a publication named 'Dangerous Dogs Law – Guidance for Enforcers' which explains that '*it is vital to understand that the intention of Parliament was the protection of people* (not other animals).

The same Guidance emphasises the point by saying that "This section should only be used in the most serious incidents investigated by 'enforcers'".

This does not, therefore, include the – fairly frequent – cases of a dog attacking and injuring another dog. There are lots of dogs who don't mind people- or at least respect them enough to leave them alone - but who really dislike other (usually smaller and therefore annoying) dogs.

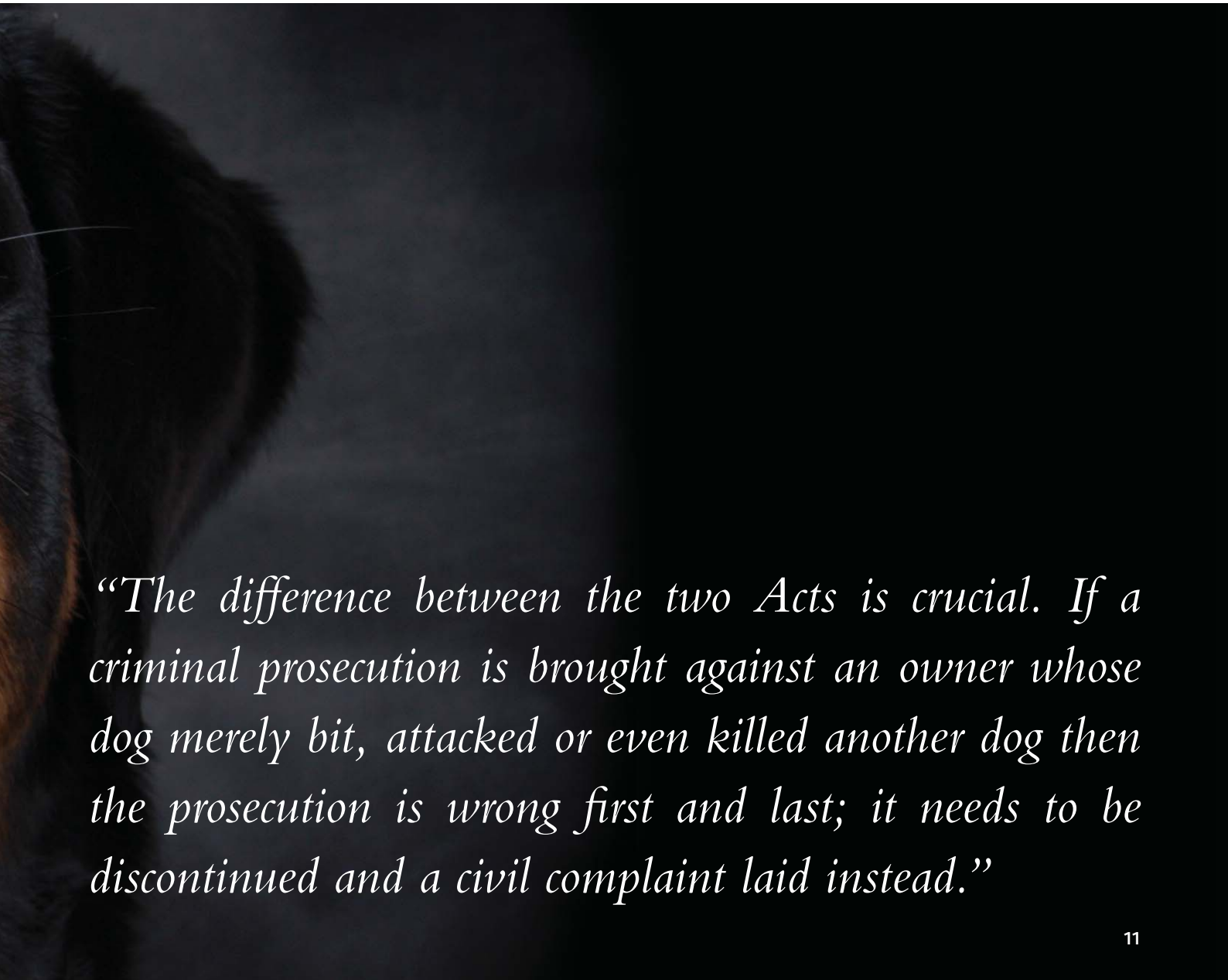
For this anti – social type the Dangerous Dogs Act 1991 is no use because without a reasonable apprehension that the dog is going to bite a person it cannot apply. It follows that in dog-on-dog attacks the Crown ought to turn to the much older and consequently better drafted and shorter **Dogs Act of 1871**.

Section 2 of that Act says that a court can take action against a dog that is *'dangerous and not kept under proper control'*. Importantly this is regardless of whether it was in a private or public place. Those of you who are still reading will realise that there is no difference here as to whether the dog bites man or beast. This Act is a different breed altogether. It is described by the Defra booklet referred to above as *'possibly the most effective piece of dog control legislation available to enforcers'*. Any proceedings are started by complaint – it is a merely civil matter, though the outcome is very similar. Sentence can be a control order or destruction – it is not mandatory as it is with the 1991 Act.

The difference between the two Acts is crucial. If a criminal prosecution is brought against an owner whose dog merely bit, attacked or even killed another dog then the prosecution is wrong first and last; it needs to be discontinued and a civil complaint laid instead. However, it may not always be an easy task to persuade the Crown to this view, especially when the proceedings have been rumbling on and they find themselves out of time to lay a complaint (six months). It is worth a look though, because if the prosecution has been wrongly brought you should be able to persuade the Bench to throw the case out.

If that fails then you will need to have to hand the new set of **sentencing guidelines**, issued in August 2012. These apply to the 1991 Act only, and they are not, perhaps, as stiff as the person on the Clifton Omnibus would have liked. The owner of a dog who bites someone will usually be sentenced only to a fine or medium-level community order, unless it's a particularly vicious attack or the victim is a child. The real sentencing danger is, of course, for the dog. A Destruction Order MUST be imposed unless the court find that the dog does not constitute a danger to public safety, in which case they can (and often do) impose a contingent destruction order with measures specified for control of the dog. If you find yourself in the uncomfortable position of appealing a Destruction Order up to the Crown Court then it is worth the expense of getting a really good behavioural expert for the dog; they are far more impressive than any number of cute photos of Fido being cuddled by the neighbours' kids! So, check what the dog did (OK, was alleged to have done) against the Act.... it can make all the difference.

Sue Cavender



"The difference between the two Acts is crucial. If a criminal prosecution is brought against an owner whose dog merely bit, attacked or even killed another dog then the prosecution is wrong first and last; it needs to be discontinued and a civil complaint laid instead."

Crime Team

Peter Blair QC
peter.blair@guildhallchambers.co.uk

Richard Smith QC
richard.smith@guildhallchambers.co.uk

Andrew Langdon QC
andrew.langdon@guildhallchambers.co.uk

Christopher Quinlan QC
christopher.quinlan@guildhallchambers.co.uk

Ian Dixey
ian.dixey@guildhallchambers.co.uk

Kerry Barker
kerry.barker@guildhallchambers.co.uk

Rosaleen Collins
rosaleen.collins@guildhallchambers.co.uk

Ian Fenny
ian.fenny@guildhallchambers.co.uk

Ray Tully
ray.tully@guildhallchambers.co.uk

Nicolas Gerasimidis
nicolas.gerasimidis@guildhallchambers.co.uk

David Scutt
david.scutt@guildhallchambers.co.uk

Charles Thomas
charles.thomas@guildhallchambers.co.uk

Stephen Dent
stephen.dent@guildhallchambers.co.uk

Brendon Moorhouse
brendon.moorhouse@guildhallchambers.co.uk

Mark Worsley
mark.worsley@guildhallchambers.co.uk

Ramin Pakrooh
ramin.pakrooh@guildhallchambers.co.uk

Anna Vigars
anna.vigars@guildhallchambers.co.uk

Rupert Lowe
rupert.lowe@guildhallchambers.co.uk

Tara Wolfe
tara.wolfe@guildhallchambers.co.uk

Martin Lanchester
martin.lanchester@guildhallchambers.co.uk

James Bennett
james.bennett@guildhallchambers.co.uk

Susan Cavender
susan.cavender@guildhallchambers.co.uk

James Haskell
james.haskell@guildhallchambers.co.uk

Mary Cowe
mary.cowe@guildhallchambers.co.uk

Sam Jones
sam.jones@guildhallchambers.co.uk

Caighli Taylor
caighli.taylor@guildhallchambers.co.uk

Lucy Northeast
Principal Crime Clerk
lucy@guildhallchambers.co.uk

Grant Bidwell
Crime Clerk
grant@guildhallchambers.co.uk

Elena Cherry
Crime Clerk
elena@guildhallchambers.co.uk

Jeremy Sweetland
Chief Executive
jeremy.sweetland@guildhallchambers.co.uk

Guildhall CHAMBERS

23 Broad Street, Bristol BS1 2HG **Tel:** 0117 930 9000 **Fax Crime:** 0117 930 3800
DX: 7823 Bristol **www.guildhallchambers.co.uk**