Guildhall CHAMBERS

Newsletter

CRIME NEWS WINTER 2012

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If laws are like sausages, and how much we know of them affects how toothsome we find them, it may be that the articles in this edition of our newsletter make recent legislation distinctly unpalatable. The gristly Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) has an ambitious remit and individual provisions seem bound to generate much debate among practitioners and academics – there must be a doctoral thesis in analysing the title alone. Tara Wolfe in our lead article evaluates s144 of the Act which has retrospective effect and will criminalise squatting; including squatting in properties in respect of which a legal owner cannot be identified and properties which are not intended for occupation. Tara discusses some of the possible defences which may be advanced on behalf of those prosecuted under this Act, and looks too at the broader issue of the 'rebalancing' of rights and societal expectations which seems to be its hallmark. Homelessness has risen by over a quarter in the last two years, and it may be thought that s144 will do little to further the Prime Minister's mission to 'spread privilege'.

Similarly, Mark Worsley, in his article on LAPSO as a legislative miscellany, highlights the fact that a defendant who has paid his own legal bill and been acquitted of an offence will no longer be able to have an order from central funds to recoup the cost of his defence, other than in a very few unusual circumstances. Some might think this amounted to some significant red pen being applied by the Government to the contract between state and citizens: it might raise some important questions as to the on-going legitimacy of a system in which the state imposes on defendants a pressing financial incentive not to have a trial. In a similar vein, James Haskell examines how the statutory imposition of a Victim Surcharge as a result of secondary legislation is likely to result in seemingly inequitable situations arising, with the poorest defendants likely to be hardest hit. However LAPSO itself contains some surely welcome provisions which will variously abolish indeterminate sentences, tidy up the statute books, and extend the power to order suspended sentences. Panacea, omnishambles, or simply a predictably uneven addition to the mingled yarn of the criminal law, LAPSO is bound to be the subject of scrutiny by the higher courts before long.

Andrew Langdon QC in his article about the 'unruly horse' that is hearsay examines the disconnect between the caution those higher courts often generally urge and their reluctance to overturn individual convictions when courts at first instance have adopted a more cavalier approach to determining the interests of justice. Andrew discusses the shift in emphasis between the hearsay provisions mooted by the Law Commission, which seemed to envisage a preliminary assessment being made of the reliability of the out-of-court statement, and the provisions as enacted, in which reliability is one factor of many to be considered by the trial judge. This perhaps demonstrates that even if an understanding of the law's manufacture might occasionally be unappetising, it can frequently be salient to considering its correct application.

Finally, thank you very much to all who responded to our survey inviting feedback about these newsletters. We are encouraged by the number and tenor of the responses: we will continue to reflect on your comments, and hope to address some of the particular topics suggested in the next few editions. We aim to produce material that is both thoughtful and useful, and comments on how we are doing are always welcomed by the editor.

Please email me with any comments and suggestions about current and future articles, as we aim to make these newsletters as topical and relevant as we can

Mary Cowe, Editor

Legal Week British Legal Awards Chambers of the Year Winner 2011

CHAMBERS BAR AWARDS 2011 WINNER REGIONAL SET OF THE YEAR

The LEGAL 500 UNITED KINGDOM TOP TIER 2012

TOP RANKED CHAMBERS UK 2013 LEADING SET

Team News

Many congratulations to Caighli Taylor on becoming a full tenant of these Chambers following the successful completion of her pupillage with Brendon Moorhouse. We have been fortunate to have a number of reasons to punctuate the last few months with celebration. Susan and Simon Darwall-Smith, former tenants of these Chambers, who have together enjoyed a professional life-time of crime have recently retired from the circuit bench. Whilst we are delighted that Chambers continues to be a source of highly experienced criminal practitioners for Her Majesty's judiciary, Ian Pringle QC, who was very recently appointed to the circuit bench in Oxford, will also be tremendously missed after his 32 years with Guildhall. On the judicial theme, we congratulate Anna Vigars and Rupert Lowe on their appointment as Recorders; both will naturally be sitting in crime, Anna on the Northern Circuit and Rupert on the South-Eastern. Rupert will also be supervising the pupillage of Greg Gordon, who officially started in Chambers on the 24th of September and will be able to receive instructions next Spring. Greg starts his exclusively criminal pupillage with a rare combination of international and domestic insights, having studied law with American law at the Universities of Nottingham and Texas, and having worked as a police station representative in this country before commencing his career at the Bar. We wish all our movers, shakers and appointees every success in their new endeavours.

DAVID SCUTT – NEW CRIME TEAM MEMBER

We are thrilled to announce that David has joined us from 9-12 Bell Yard, London. Called in 1989, David has extensive experience both defending and prosecuting in all aspects of serious crime including murder and manslaughter, sexual offences, human trafficking, drug trafficking, organised crime, fraud and landmark trading standards cases.

In 2011, David defended a senior police officer accused with others of conspiracy to pervert the course of justice in the largest case of its kind ever prosecuted. Recently, David has defended and prosecuted several large drugs conspiracies, rapes, a substantial mortgage fraud and a conspiracy to supply firearms to serving prisoners. David also undertakes regular pro-bono work in Jamaican and Bahaman cases.

If you would like to discuss instructing David or any other members of the Guildhall Crime Team, please don't hesitate to contact Lucy on 0117 930 9000 or lucy@guildhallchambers.co.uk. David's CV can be accessed via our website.

Judicial Review comes to Bristol

On 6th November 2012 the Divisional Court (Thomas LJ, President of the Queen's Bench Division, Beatson J and Burnett J) sat in Bristol for the first time. Brendon Moorhouse was involved in the first case heard by the court dealing with the prosecution powers of a regulatory authority.

This followed the opening of the Administrative Court in Bristol. The new court is administered from the Cardiff Office and will allow Judicial Review cases and statutory appeals, such as appeals by way of case stated or planning appeals.

To mark this major legal advance for Bristol and the West Country, Guildhall Chambers held a conference on 30th October 2012 which, chaired by Peter Blair QC, was addressed by Mr Justice Beatson (the Administrative Court liaison judge), David Gardner, the Administrative Court Office lawyer based in Cardiff, and Kerry Barker (fresh from having prosecuted the Winterbourne View case).

There were well over 200 subscribers, too many to all be accommodated at The M-Shed, and the conference was deemed a great success. Judicial Review and statutory appeals form a significant but often ignored aspect of criminal cases. Such was the success of the conference that Guildhall Chambers is considering putting on another conference exclusively for criminal practitioners. The editor will pass on any expressions of interest about such an event.

Notes from the conference are available to download from our website at www.guildhallchambers.co.uk/seminars.

Kerry Barker


Bristol Civil Justice Centre

Criminalisation of squatting

Despite widespread and misleading reporting in the press to the contrary, criminal liability has attached to squatting since the coming into force of the Criminal Law Act 1977. Under section 7 it is an offence to "fail to leave" premises that one has entered as a trespasser when asked to do so by a displaced residential occupier, or by a protected intending occupier. The police have corresponding powers to arrest any trespasser who refuses to leave. Further, under rule 55 of the Civil Procedure Rules a person with a right to the property can apply for an Interim Possession Order which, once served, requires the trespasser to leave within 24 hours, or commit a criminal offence.

The new legislation will leave the provisions under the Criminal Law Act, with its range of both criminal and civil remedies available, largely redundant. Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not criminalise conduct previously within the exclusive remit of the civil courts; it has radically extended the ambit of criminal liability. It provides:

"A person commits an offence if:

(a) The person is in a residential building as a trespasser having entered it as a trespasser,

(b) The person knows or ought to know that he or she is a trespasser, and

(c) The person is living in the building or intends to live there for any period"

A person convicted under this section is liable on summary conviction to a maximum penalty of six months imprisonment or a fine, or both (s144(5) and (6)). As a preliminary issue, it is clear that the legislation applies only to residential properties. The old regime will still apply to those who squat in commercial properties.

The legislation is problematic for a number of reasons. First, whereas previously a squatter was only liable to prosecution at the point at which s/he failed to leave a home when required to do so, under the new provisions criminal liability attaches upon entry and occupation even if there is no displaced or protected intending occupier: i.e. even when no legal owner can be identified and the property is not intended for occupation. Thus, criminal sanction will attach to those who squat in premises that are vacant and abandoned. This upsets the delicate balance that was maintained under previous legislation between the right of the legal owner to recover possession of the property and the need for squatters to use that property as a home, even if only for a very short period.

Second, squatting is often brought about by necessity not choice. Crisis has estimated that the number of homeless people in England has reached 50,000[1]: a 14% increase since 2010-2011 and a 26% increase since 2009 – 2010. Homelessness is on the rise at a time when an estimated 720,000 properties are empty, of which 279,000 have been empty for over six months[2]. A survey conducted by the charity found that 40% of single homeless people admitted to squatting at least once in the last year. Further, their research shows that homeless squatters are more vulnerable than the single homeless population. The coalition's claim that "there are avenues open to those who are genuinely destitute and who need shelter" is misleading. Local authorities have a legal duty to provide advice and assistance to people who are homeless but only those considered to have priority need are eligible for emergency housing. Single men will rarely qualify unless they also suffer from mental or physical disability or have recently been released from prison. So, those who are prosecuted under the new legislation and sentenced to a term of imprisonment may then be considered "priority need" and entitled to housing.

Third, the provision and the corresponding police powers of summary removal[3] presumes that it will always be clear whether an occupier is a trespasser or in possession of some legal right to occupy the property, but often this will not be the case. It is not unusual for alleged squatters to have an oral agreement with the legal owner to occupy. Although the person may escape conviction if it cannot be proved to the required standard that they "knew or ought to know" that they were a trespasser, it does not safeguard them from being summarily removed from their home and arrested. Further, the offence is not committed by a person holding over after the end of a lease or licence even in the event that that person leaves and re-enters the building (s144(2)). The original entry and occupation must be unauthorised. The police have an unenviable task in enforcing this legislation. The criminal justice system, often a blunt tool, may not be the appropriate forum for resolving such property disputes.

Finally, section 144 operates retrospectively (s144(7)). Thus squatters who have lived in vacant buildings years prior to the section coming into force will be liable to prosecution. No consideration appears to have been given to the fact that squatters who have lived in a property for 10 years have a right to make a claim for adverse possession under the Land Registry Act 2002. It is difficult to see how these two legal regimes will operate together. Also, in cases where the property has been occupied as a home, particularly if for a

[1] Crisis believes that the figures are in fact much higher but due to the nature of homelessness it is impossible to gather accurate data.

[2] Empty Homes November 2011 national survey conducted from data provided to local councils.

[3] s17 PACE has been amended to give police constables the power to enter and search any premises for the purpose of arresting a person for an offence under section 144.

"The Police have an unenviable task in enforcing this legislation."

considerable period, Article 8 of the European Convention on Human Rights and Fundamental Freedoms will be engaged[4].

Possible challenges

Where there is unlikely to be a dispute that the person is occupying the property as their home, the operation of s144 may be subject to legal challenge on the basis that summary removal, arrest and prosecution are a disproportionate interference with the person's right to a family and private life guaranteed under Article 8. Legal challenge has already been commenced in the High Court on this basis. Irene Gardiner has instituted a human rights test case against the police and the CPS asking for assurance that she would not be prosecuted or removed from the home that she has squatted with her children for 11 years[5].

Article 8 guarantees both substantive and procedural rights. The European Court has held that the loss of one's home is the most extreme form of interference with the right to respect for the home and that any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal[6]. To be Article 8 compliant, certain procedural safeguards must be in place for the assessment of the proportionality of the interference. Therefore, where the operation of s144 engages Article 8, there must be at the very least the opportunity of challenging the decision to summarily remove, arrest and prosecute. Arguably, in any case where family life is raised, s144 should not apply.

Where Article 8 does not apply, there is little room for challenge, save those instances of trespass not covered by the s144 as set out above. Save those exclusions, the issue is likely to be whether the prosecution can prove that the person "knew" or "ought to know" that they were trespassing.

Conclusion

It is important that effective and adequate remedies are available to those whose properties are squatted. But, the new legislation is not an appropriate or proportionate response to the problem. Procedural safeguards that existed under the previous legal regime have been removed and the new legislation will serve to criminalise some of the most vulnerable members of society at huge public cost.

Tara Wolfe

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[4] *Qazi v Harrow LBC [2003] UKHL 43; McCann v UK (2008) 47 EHRR 40*

[5] A home that has been vacant for 30 years. She pays council tax. The property has no running water or electricity.

[6] *Kay v UK (2012) 54 EHRR 30*

A Miscellany of Legislation in a Single Act

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act") received the Royal Assent on May 1st of this year.

According to its long title the Act makes provision inter alia about Legal Aid and the funding of legal services, about costs and other amounts awarded in civil and criminal proceedings, about sentencing, about penalty notices for disorderly behaviour; it creates offences in relation to threatening with weapons in school premises, causing serious injury by dangerous driving, squatting, and buying scrap metal for cash.

This piece does not aim to digest the Act but to visit a few of its provisions only.

Costs

Section 62, "Costs in Criminal Cases" gives effect to schedule 7 of the Act. It was brought into effect on 1st October 2012[1] but does not have retrospective effect, only applying to criminal proceedings arising on or after that date.

The lack of retrospectivity should not be regarded as a softening of attitude by the legislature, the effect of schedule 7 being to remove from the ambit of defendant's costs orders under s.16 Prosecution of Offences Act 1985 ("POA 1985") such sums as represent the payment of legal costs. A new s.16A is inserted which reads:

16A Legal Costs

(1) A defendant's costs order may not require the payment out of central funds of an amount that includes an amount in respect of the accused's legal costs, subject to… [very limited exceptions].

The exceptions are where the accused is an individual and the order is made:

(a) under s.16 (1) POA 1985 (Magistrates Court orders),

(b) upon a successful appeal against sentence or conviction from the Magistrates Court to the Crown Court, or

(c) where the Court of Appeal allows an appeal against a verdict of not guilty by reason of insanity or a finding or order under the Criminal Procedure (Insanity) Act 1964. Legal costs incurred in proceedings in the Supreme Court are also excepted.

Where a defendant's costs order is made (other than in relation to proceedings in the Supreme Court) that does include an amount in respect of legal costs, that element of the order must not exceed an amount specified by regulations made by the Lord Chancellor (it is believed that this will be equivalent to Legal Aid rates).

Legal Costs are defined as being fees, charges, disbursements and other amounts payable in respect of advocacy services or litigation services including, in particular, expert witness costs.[2]

Just in case anyone thought that it cannot surely be meant for the new provisions to be quite so proscriptive, schedule 7 paragraph 6(3) adds that the Lord Chancellor may by regulations set scales and rates for payment of costs orders out of central funds, and

(d) make provision requiring amounts required to be paid to a person out of central funds by a relevant costs order to be calculated in accordance with such regulations (whether or not that results in the fixing of an amount that the court considers reasonably sufficient or necessary to compensate the person).

The effect of s.62 and schedule 7, then, is to impose very tight constraints on the circumstances where a defendant's costs order may be made to include payment of legal costs incurred; the reference to the accused being "an individual" where such costs are still available seems to exclude the recovery of costs paid by companies appearing

"The sinister nature of this legislation warrants spelling out. In virtually all Crown Court proceedings, a defendant who is privately represented, who is acquitted and who is the recipient of a defendant's costs order will receive nothing under that order in respect of his legal costs."

[1] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.2 and Specification of Commencement Date) Order 2012 (S.I. 2012 No. 2412) and The Costs in Criminal Cases (General)(Amendment) Regulations 2012 (S.I. 2012 No. 1804).

[2] Schedule 7 paragraph 3(10)

in the Magistrates' Courts, and a defendant who has funded his or her own legal costs in the Crown Court can receive nothing at all by way of reimbursement of those costs if successful.

Richardson (in Criminal Law Week) does not see any grounds for optimism in these provisions:

"The sinister nature of this legislation warrants spelling out. In virtually all Crown Court proceedings, a defendant who is privately represented, who is acquitted and who is the recipient of a defendant's costs order will receive nothing under that order in respect of his legal costs; and in those criminal cases where an amount is payable in respect of legal costs the amount will be limited to the rates specified by the Lord Chancellor (anticipated to be limited to what would payable under legal aid). Very few defendants in the Crown Court will be willing to pay privately for their representation when they know that, in the event of acquittal, they will receive nothing towards their costs. Criminal practice will become yet more unattractive, with the most able young lawyers coming into either profession being ever less likely to choose to pursue a career in criminal law. The downward spiral will continue, with the quality of justice suffering, with those whose abilities are not such as to allow them to compete in more lucrative areas of practice being left to perform the publicly-funded work, which, in turn, will be relied on by government to keep fees low or even to reduce them yet further."

Sentences of Imprisonment for Public Protection

By s.123 of the Act sentences of imprisonment for public protection under the Criminal Justice Act 2003 ("CJA 2003") are abolished (as are sentences of detention for public protection and extended sentences)[3].

They are replaced, however, by a new s.224A to the CJA 2003 which provides for a mandatory life sentence (subject to the court being of the opinion that there are particular circumstances relating to the offence, the offender's previous relevant offence, or to the offender which would make such a sentence unjust).

The mandatory life sentence attaches:

(a) for a person aged 18 or over who is convicted of one of a number of qualifying offences which was committed after the section comes into force; and

(b) where the "sentence condition" and the "previous offence condition" are met.

The "sentence condition" is that the offender would have received for the offence a sentence of 10 years or more in any event (disregarding any extension periods under the new s. 226A).

The "previous offence condition" is that at the time the new offence was committed the offender had already been convicted of one of the qualifying offences for which the offender had received either a life sentence with a minimum term of 5 years (subject to reduction for any time spent in custody or on bail before sentence) or a determinate sentence (imprisonment or detention) of at least 10 years (again, subject to reduction for any time spent in custody or on bail before sentence).

The qualifying offences are to be found in schedule 18 to the Act (and constitute a new two part schedule 15B to the CJA 2003). They include for the purposes of the new offence to be sentenced:

- manslaughter,
- s.18 OAPA,
- ss.16 - 18 Firearms Act 1968,
- s.1 Protection of Children Act 1978,
- Robbery with a firearm or imitation firearm,
- various terrorism offences; and
- ss. 1, 2, 4-12, 14,15, 25, 26, 30, 31, 34, 35, 47-50 and 62 of the Sexual offences Act 2003 (ss.4, 30, 33 and 38 only where the offender is liable on conviction on indictment to imprisonment for life).

Murder is the additional qualifying offence for the purposes of the previous offence condition.

Extended Sentences

A new s.226A to the CJA 2003 and its equivalent for under 18's, s.226B, provides new extended sentence legislation. Their terms are extremely similar to the repealed sections of the CJA 2003. They apply, however, whether the offence to be sentenced was committed before or after the new sections came into force. The qualifying offences of one of which the offender has to have been convicted at the time the new offence was committed are in (new) schedule 15B. The alternative to previous conviction remains that the court would specify for the purposes of an extended sentence a custodial period of at least 4 years Limits on extension periods remain the same as before (5 years for specified violent offences, 8 years for specified sexual offences).

Suspended Sentences

Section 68 of the Act amends s.189 of the CJA 2003 to provide that custodial sentences from 14 days to 2 years may now be suspended. The condition that a requirement be attached to the suspended sentence becomes discretionary[4]. Sanctions for breach of a suspended sentence order are extended to include the imposition of a fine of up to £2500.

Custody Plus and Intermittent Custody Orders

These disposals, the enactment of which we all enthusiastically looked forward to, are by s.89 of the Act removed from the CJA 2003. We will miss them.

Mark Worsley

[3] Section 224 CJA 2003 (meaning of specified and serious offences) and the requirement for a court to consider imprisonment and detention for life in ss. 225 and 226 the CJA 2003 remain in force.

[4] So no more requirements excluding defendants from going to places where they never wanted to go in the first place.

The Victim Surcharge

The Victim Surcharge was first introduced in April 2007. The surcharge was payable at a flat rate of £15 by any offender ordered to pay a fine (the 2007 Order). It did not apply to any other type of sentence. On 2nd July 2012 the Government published its response to the consultation 'Getting it right for victims and witnesses': the product is The Criminal Justice Act 2003 (Surcharge Order) 2012 (SI 2012/1696).

Judges have no discretion: the new regime will see the surcharge levied on all of those convicted of an offence committed on or after 1st October 2012 and the value of the surcharge will depend upon the Court's method of disposal.

Is this a genuine attempt to put victims at the centre of the criminal justice system? A cynic may say that this is no more than a crude attempt to raise extra revenue whilst pretending to be tough on criminals.

Interestingly, the surcharge is not directly related to the type of offence committed, nor is it directly related to the harm caused or loss suffered by the victim. The surcharge is wholly unrelated to a defendant's means or ability to pay.

Is it fair that wealthy criminals pay the same as those receiving benefits? The legislation as enacted will result in other potentially unjust and absurd situations: a 16 year old who receives a fine for possessing a small amount of cannabis will pay the same surcharge as a 16 year old who receives a non-custodial sentence for an offence of dwelling house burglary; and a 16 year old caught with cannabis in his or her possession would pay no surcharge if a police officer decided to deal with the offence by way of a fixed penalty notice.

At the other end of the spectrum, how will a victim's family feel when a Judge imposing a sentence of life imprisonment on a defendant convicted of murder concludes his sentencing remarks by imposing a £120 surcharge?

Importantly, it is difficult to see how the scheme is going to be effectively enforced. The Government is already wholly incompetent when it comes to enforcing the payment of fines. The National Audit Office exposed last year (August 2011) that the MoJ had accumulated over £600 million in unpaid fines. What possible incentive could there be for anyone convicted and sentenced to a lengthy custodial sentence to pay the surcharge?

Practical Guidance

- Where an offender is sentenced for a single offence committed before 1st October 2012, the 2007 Order continues to apply.
- Where an offender is sentenced for more than one offence, at least one of which was committed before 1st October 2012, the 2007 Order continues to apply.

- Where a Court deals with an offender for more than one offence, all of which were committed after 1st October 2012, but where at least one offence was committed when the offender was under 18, the surcharge should be ordered at the under 18 rate.
- Where a Court imposes more than one disposal for multiple offences all committed after 1st October 2012 the surcharge should be ordered against the disposal attracting the highest surcharge amount.
- The surcharge will initially only be payable by an offender subject to an immediate custodial sentence when imposed by the Crown Court. The surcharge will not be payable on immediate custodial sentences imposed by the Magistrates' Court until Primary Legislation is passed to prevent the surcharge from being discharged as additional days in custody (currently the Magistrates' Court but not the Crown Court has this power).
- For full details visit: http://www.legislation.gov.uk/uksi/2012/1696/pdfs/uksi_20121696_en.pdf

Offenders under 18 at time of offence:

Disposal	Victim surcharge
Conditional Discharge	£10
Fine	£15
Youth Rehabilitation Order	£15
Referral Order	£15
Adult Community Order	£15
Suspended Sentence	£20
Custody (all lengths)	£20

Offenders 18 and over at time of offence:

Disposal	Victim surcharge
Conditional Discharge	£15
Fine	10% of the fine (minimum £20 and maximum £120 rounded up or down to the nearest pound)
A Community Order	£60
Suspended Sentence	6 months and less - £80 Over 6 months - £100
Immediate Custody	6 months and less - £80 Over 6 months and up to and including 24 months - £100 Over 2 years - £120

Person who is not an individual:

Disposal	Victim surcharge
Conditional Discharge	£15
Fine	10% of the fine (minimum £20 and maximum £120 rounded up or down to the nearest pound)

James Haskell

"Is it fair that wealthy criminals pay the same as those receiving benefits? The legislation as enacted will result in other potentially unjust and absurd situations..."

An 'Unruly Horse'

The Court of Appeal has in the past 2 years dealt with a flurry of cases relating to the use of section 114(1)(d) of the CJA 2003 - admission of hearsay *'in the interests of justice'*. In particular the Court has repeatedly emphasized that the section should not be used to admit hearsay from witnesses who are physically available to be called, thereby circumventing section 116. See e.g. *Ibrahim* [2010 EWCA Crim 1176, *Z* [2009] EWCA Crim 20, and *CT* [2011] EWCA Crim 2341. But a number of recent cases demonstrate that the courts do not follow the sentiment expressed in these cases – that 114(1)(d) should be sparingly used. For example an exception was made in *Burton* [2011] EWCA where the witness in question was a 14 year old child who '*needed protection from her own feelings towards older people'*. It is difficult to see how that consideration provided any relevant comfort as to the reliability of the hearsay adduced, or the ability of the defence to challenge the hearsay once admitted.

Do the courts pay mere lip-service to the caution advocated as to the overuse of s 114? Or are judges reluctant, in a serious case, absent some other route to admissibility, to refuse to admit apparently compelling hearsay, especially where the prosecution case seems otherwise weak? The courts are treading a tightrope given the Strasbourg jurisdiction – and the risk of incompatibility with Article 6(3)(d) where the evidence of the absent witness is *'sole or decisive'* per the position articulated in *Horncastle* [2009] UKSC 14.

The caution expressed by the Court of Appeal cannot avoid the fact that s114(1)(d) is of enormous breadth. It is instructive to note that what is now s 114(1)(d) appeared in the Commission's draft bill in a slightly different form:

> *'9. In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if the court is satisfied that, despite the difficulties there may be in challenging the statement, its probative value is such that the interests of justice require it to be admissible.'*

"Time will tell whether this method of adducing powerful incriminating evidence will become frequent."

Did that envisage a higher threshold, whereby the court formed a view of the reliability of the evidence, such that they were satisfied of a high degree of reliability before allowing its admission? The enacted section 114(2) 'checklist' does not steer the Judge to that test – the considerations being so wide as in the end to provide little ultimate guidance as to the degree of reliability that the hearsay ought to demonstrate before it can be deployed.

A further and dramatic example of the potency of the effect of the subsection is the recent case of *Saunders* [2012] EWCA Crim 1185, where the evidence identifying Saunders as the murderer of one 'Moses', was formed from two strands of hearsay – one a dying declaration and the other, a hearsay account from one Jane Buckley to her Aunt Betsy as follows:

> *'"Aunty Betsy, I saw all what happened. Jimmy Saunders did it. He came from the side of the wall to the front gate and did it like that." She demonstrated a stabbing action, but said she thought at first it was only a punch. Jane said that the appellant had said "That's for kicking my brother up and down." [...] Betsy spoke later to Jane Buckley about why she wouldn't tell the police what she had seen. Miss Buckley's response was that she would love to do right by Moses but she had two little boys and she was on her own with no husband, making it clear that she would not speak to the police because she was in fear.'*[1]

Section 116 could not be employed because the witness had indicated that she was willing to testify but would not give the incriminating evidence. In the end she was called by the judge and cross examined by both parties. The judge then allowed Aunt Betsy to give her hearsay account of what Jane had said to her, pursuant to his discretion per s114 (1) (d).

In upholding the conviction the Court of Appeal acknowledged that s114 (1) (d) *'is drafted in vague terms and is an unruly horse' and that there was 'considerable authority to the effect that this paragraph must be cautiously and narrowly construed and applied.'* But, it was said, *'the difference between a case in which it is alleged that a witness is unwilling to give evidence at all (section 116(2)(e)) and that in which it is alleged that a witness is willing to give evidence, but through fear is unwilling to give truthful evidence or a complete account of what he or she saw or heard, may not be substantial, and it would be curious if in such a case the witness's previous statements could not, in an appropriate case, be adduced in evidence.'*[2]

[1] Paragraph 11

"Evidence identifying Saunders as the murderer of one 'Moses', was formed from two strands of hearsay – one a dying declaration and the other, a hearsay account from one Jane Buckley to her Aunt Betsy."

Of course if the witness is called, concerns as to *Horncastle* and Article 6 compatibility might be thought to fall away. By this mechanism s114(1)(d) can apparently be employed to adduce a hearsay account given by a witness to a friend or relative, where the witness declines to make a formal statement or give evidence repeating the account, if the witness is called so that they can be cross examined by the defence – and then the recipient of the out-of-court assertion called to relay that assertion to the court.

This is not, on any view, a narrowing of the use of section 114(1)(d) in practice. It may be something which becomes more common given that the defence have the 'protection' of being able to examine the witness. The problem is that the witness will not have give evidence *in court* 'against' the defendant, and would have to be cross – examined (if at all) on the basis of what it was alleged had been said out of court. How much protection that really affords a defendant is a matter of debate. He will not in those circumstances be able to confront his accuser. The accusing witness (Jane) declines to make the accusation on oath in court and in front of the defendant, and the relaying witness (Aunty Betsy) cannot be tested on the veracity or accuracy of the relayed assertions made out of court. That surely is a long way from what the legislature intended should be the effect of the section. Time will tell whether this method of adducing powerful incriminating evidence will become frequent. If so it will demonstrate that the unruly horse that is section 114 (1)(d) can, for all those Court of Appeal words of caution, still deliver a powerful kick.

Andrew Langdon QC

[2] Stanley Burton LJ paragraph 34

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