Issue 23

The Circuiteer

News from the South Eastern Circuit

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Barristers Abroad

A Note from the Editor

Noel Coward's remedy for troubles was to 'sail away'. This is hardly practical advice for barristers, who find dealing with other people's troubles to be a full time job. 'Sailing away' is reserved for gap years and mid-life crises. This issue therefore celebrates Circuiteers who were clever enough to combine work with the opportunity to see something of the world.

Top right on the cover is Geoffrey Nice, Q.C. in his role as chief prosecutor of former President Milosevic in The Hague, a monumental task lasting four years and ending, short of a verdict, with the death of the defendant. Bottom right is Iain Morley, who went from the Milosevic defence team to prosecuting those accused of committing genocide in Rwanda—both experiences of which he has written about for this magazine. The cover shows him in a different role, rafting in Uganda and (I know, since he sent me the picture) managing to survive to tell the tale. Sappho Dias, who ironically (as she describes) flies the English flag of advocacy teaching abroad, is shown relaxing in Johannesburg with two good South African friends, both of whom are judges. Justice Cameron can also be seen with her in the picture on page 9, in Vienna where the first lesbian and gay conference in a parliament was taking place. Top left is Josepha Jacobson, whose internship in The Hague began as Geoffrey Nice's tenure was coming to its unexpected end. She stands between Judge Liu Daqun and Lindy Muzila, Assistant Legal Officer to Judge Liu Daqun, It reminds us of how truly international the tribunal is.

Geoffrey, Josepha and Sappho deal with world politics, great trials—and how to remedy them--and with the struggle to get a legal education. Sarah Clark who spent several months in Malawi doing legal aid work, looks back on that experience with a much needed sense of humour tinged with the sadness of losing one of her most committed co-workers. All of them would have returned with a sense of the English Bar in context—that although it has a great deal of good in it, it is not the only system in the world and many of its problems are relative. In a less dramatic way, that was also the lesson which Shabnam Walji would have learned by doing the Florida advocacy course as the Circuit's delegate. It is also what both English and foreign participants learned at this year's Advanced Advocacy Course at Keble College, Oxford. The views of three sets of participants are on pages 24-25. The only thing they do not do is to calculate the amount of professional fees willingly foregone by those who taught and learned during that week.

This issue also addresses matters back at home. John Riley introduces readers to Intermediaries, created by section 29 of the Youth Justice and Criminal Evidence Act 1999. Seven years later, we are still waiting for the scheme to go nationwide, even though, in the government's words, it has been readjusting the criminal justice system in favour of victims and witnesses, by allowing vulnerable adults and children (whom courts usually and mistakenly believe understand more than they do) to 'tell their story' both in interview and in evidence. Circuiteers and not just those in the pathfinder area of the Thames Valley need to be aware of it. Even as I write, news comes in of a judge in Reading who was content to allow a 10-year old girl with a vocabulary of a six year old to be cross examined, unaided, by counsel who had no guidance on what questions were appropriate. There are many lessons to be learned by everyone, and John and Intermediary Amanda McLellan begin the job.

The outgoing Chairman of the Bar, Stephen Hockman, Q. C., and our former Leader, sets out the challenges facing the Bar. We should be pleased with some of the changes, as the Judicial Appointments Commission settles into its job. Sonia Proudman, Q. C., one of the two Silks on the panel to select Q. C.'s has kindly explained how they went about their work and, like Judge David Pearl and Baroness Prashar of the JAC, reassures barristers that things are being done fairly.

We are grateful to Professor David Ormerod who again shares his unique expertise on the criminal law, this time introducing the Fraud Act 2006. With the headlines about big money divorces coming back for the McCartney case, Grant Armstrong tell us how the McFarlane and Miller decision will affect even 'humbler' litigants in the family courts. And BVC student David Orman illumines a hitherto unexplored area of trade mark law.

As always there is something to celebrate. The Circuit dinner was another huge success, as Tanya Robinson once more reports. The Circuit trip, despite a bumpy start, again proved to be vaut le voyage. The Circuit town series goes south to Brighton, where Tim Bergin explains how one can enjoy working in the country's premier holiday city. The Association of Women Barristers annual dinner attracted some stars and did even more for charity.

The new Minister at the DCA, Vera Baird, Q. C., M.P. is profiled. Whatever fees counsel are paid, there remains an important role for those who advise the least fortunate. The Zacchaeus 2000 trust trains McKenzie friends and we urge everyone to support their good work.

This is the last issue during Tim Dutton's Leadership of the Circuit – 'leadership' being the operative word. The spring 2007 issue will pay tribute to his term in office and will welcome his successor.

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Leader's Column

In his swan song column as Leader of the Circuit, Tim Dutton, Q. C. looks back on his three fascinating years

Sadly, this is my last Leader's Column. So, a few reflections on the Circuit.

I firmly believe that the bonds which tie the Bar together are the relationships which we form as we work, often against each other, in courts and tribunals around the country. It is the Circuits which bind practitioners and judiciary together in a common endeavour. The Circuits create bonds beyond individual practice discipline. With regional strength, and clear central direction, the Bar will remain cohesive and strong.

Added value, added judges

In order to build on our strengths we have, at the Circuit's October AGM, voted to make some changes to the Constitution. We will admit judicial members. Judges could not, constitutionally, vote in the affairs of the Bar (so no votes for the judicial members): but the judiciary and the Bar have to work together in a common endeavour. I hope we will find that we have a large judicial membership. It seems odd to me that a judge should be cut off from professional collegiate life simply because he/she has been appointed to the Bench. Odder still when one considers that judges and advocates work with one another day in and day out.

The Circuit has also voted to reduce the term of office for the Leader and for the Recorder from three to two years. By this means I believe the Circuit will attract people who want to assume the challenges of those roles but also continue to develop their practices. The strongest professions are those which are led by their strongest practising members. The elections for the Committee produced a record number of candidates. In addition, the election for the new Leader is also attracting strong interest. All these are healthy signs for the Circuit's future.

Replying to Carter

Payment for publicly funded work will remain at the forefront of the profession's concerns for the future. Lord Carter's July Report has triggered over 3,000 responses to the DCA Consultation, the results of which are expected shortly. The Bar's response which is on the Bar Council's web site, was thorough and firm. We must see the "Revised Advocacy Graduated Fee Scheme" for criminal work implemented as quickly as possible. We are arguing for better management of long cases, and better payment arrangements. We support the Law Society in the concerns being expressed about the LSC's desire to change the payment system for family work – in particular the unworkable flat payment scheme for interim hearings in family cases.

CPS Grading

We have been in a long consultation with the CPS. The Preferred Set System is to be abolished. By 30th April 2007 the South East will have a grading system similar to that which operates fairly in the rest of the country and by which it should be possible for the CPS to have barristers of appropriate skill and seniority matched to the brief. The Bar working with Heads of Chambers and clerks will need to complete a simple grading form by the end of January 2007. The setting up of the new system will be monitored by the Joint Advocacy Selection Committee, with representatives from both the CPS and the Bar. I believe this reform is long overdue. When the system is up and running barristers who want to prosecute for the CPS should find that work is distributed more fairly.

I have been chairing the Advocacy Liaison Group which the Chairman of the Bar and the DPP set up to ensure that we address the difficulties created by the CPS' use of in house advocates (HCAs). We have agreed a working set of principles which, when applied, should help to eradicate the difficulties which I know are occurring in work distribution. The next stage of our work will be to ensure that these principles are applied by the CPS and the Bar.

Regulation, regulation, regulation

The Legal Services Bill is now making its way through Parliament. The Circuit strongly supports the Bar's aims: to have a power of delegation from the Office of Legal Complaints to the Bar Standards Board for all complaints – whether disciplinary or service, and to keep the costs of the ever increasing burden of regulation down. A profession works best when it applies its regulatory processes firmly, fairly and speedily to those complained against. The Bar has been successful in this regard, and we do not need to become embroiled by the Government in another regulatory monolith.

Good news

There is much which happens in the South East which is encouraging for the Bar. Our readiness to push our advocacy standards higher is reflected in the increased turnout at our summer courses at Keble and at Jesus College. Both were successful. There is a judicial competition going on in the South East for circuit judges with a strong list of candidates. Although the Silk system is not perfect we have had a good crop of Silks appointed on this Circuit, and I believe the new Silk system will become a lasting feature.

At the recent Bar Conference the Circuit ran two workshops, both packed out. The first was on "Who decides what is in the public interest" and we were given a barn stormer by Lord Justice Moses. The second had seven senior members of the Circuit working together in an advocacy workshop with medical experts. At this year's Circuit dinner we had the privilege to listen to a speech, modestly delivered, but reflecting his courage, of the former Chief Justice of Zimbabwe Anthony Gubbay. At last year's dinner words of wisdom uttered by Sir Sydney Kentridge, Q.C. to the Lord Chancellor captured the profession's concerns about some of the Government's ideas about legal services reform – "You can't buy loyalty at Tesco, Charlie". On 24th January 2007 the second Ebsworth Memorial lecture will be given by Justice Louis Harms of the Supreme Court of Appeal of South Africa. And there has been time for some stimulating visits to our colleagues abroad in Warsaw, Berlin and Barcelona.

A privilege

It has been a privilege to be Leader of the Circuit. I am grateful to all of those, too numerous to name, who have helped in the Circuit's work over the past three years, and I will remain a vigorous supporter of regional representation and strength for the Bar.

Prosecuting Abroad

It is a long way from prosecuting fraud to prosecuting presidents for genocide. Geoffrey Nice, Q.C., made the leap from Maidstone to Milosevic. En route he learned a lot about history, the nature of evil, and the need for an independent Bar, as he discusses in interview with the Editor.

By the 1990s, Geoffrey Nice, Q.C. was a successful Silk with a common law practice. He admits, though, that he was 'quite bored'. He recalls doing a Customs prosecution which had to be tried three times: one juror had an affair with an accused; another had to be sacked for being drunk in the morning; during one retirement there were fights in the jury room.

At the other end of Europe

Meanwhile, at the other end of Europe, Yugoslavia was breaking apart amidst a succession of wars.

A Tribunal judge listens

First, Slovenia seceded, more or less peacefully. Then Croatia declared its independence, sparking off a bloody war. Finally Bosnia-Herzegovina decided to go its own way. The war there, between Catholic Croats, Muslim Bosnians and Orthodox Serbs, turned into a bloodbath. In response the United Nations established an International War Crimes Tribunal (ICTY) in The Hague to try the perpetrators. The then chief prosecutor, Louise Arbour, felt that her team needed strengthening by the qualities of the English Bar. Geoffrey got the job. He was not a stranger to Yugoslavia: as it happens he had gone there on an exchange as a schoolboy, and he returned later as a tourist. Now, from 1998-2001 he was there to prosecute two trials, including the first case charging genocide which had some conclusion. The defendant, Jelisic, had boasted about being the 'Serbian Adolf'.

When it was over, he went back to the Bar and became head of chambers at 1 Temple Gardens.

A war crime too far

Something else had happened though during those years. The Balkan conflict re-ignited within Serbia itself. The complainants were ethnic Albanians in Kosovo. In 1999, for the first time since World War II, the mainland of Europe was put under aerial bombardment, by NATO planes trying to force the Serbs to abandon ethnic cleansing. Now the tribunal prosecutors set their aim at a new defendant: the Serbian President, Slobodan Milosevic. In 2001 the then Serbian government handed him over to the tribunal in The Hague. Geoffrey Nice was asked back to prosecute the first head of state to go into the dock for war crimes and genocide. It was an epic four year effort which only ended, earlier in 2006, when Milosevic suddenly died, shortly before the conclusion of the defence case.

Back in London and once more back at the Bar, he spoke to me about the task of being the most high profile English prosecutor abroad, and what it taught him about the adversarial system in which he had been bred.

Where should the case begin?

In the Spring 2005 Circuiteer, Iain Morley, who assisted in the Milosevic defence team, wrote about the three indictments, relating to the Croatian, Bosnian and Kosovan conflicts. The court obliged the prosecution to begin with the latter, which was the last in chronology. It felt that this was simpler because by 1998, Milosevic was commander in chief. Geoffrey disagreed. He would have preferred working in chronological order, to show how the wars developed. 'I think Bosnia was the heart of the case against the

The defendant uncharacteristically smiles

accused for this man' and the massacre there at Sbrenica, when Serbs butchered men and boys, was the worst crime.

The order of trial was only one of several concerns. One could not ignore the fact that amongst the other atrocities of our time the international community had only found the will to prosecute in Yugoslavia (and later in Rwanda and Sierra Leone). There was the fact that Milosevic stood trial but not others who might seem equally guilty. 'In those three and a half years,' Geoffrey said, 'there was no good guy—no examples of people walking away from meetings saying, "this is criminal, I am walking away from this"'. Wars are not in themselves illegal. But once there is a war you have to ask, in any individual case, whether 'they are all criminal or was it a combination of frailties within their vanities, power seeking or whatever you like plus circumstances which led them to their doing things which allowed others to commit crimes?'

A work in progress

First though there was the fundamental problem of conducting such a case and in particular putting it together. It was throughout a 'work in progress', in which he was running an investigation as the trial was going on. Evidence either turned up at the last minute or took years to extract. In one of the earlier trials, his first insider witness came out of the blue after two years. In the Milosevic case witnesses were not willing to give evidence at first; 'it was only in the slow process of seeing people give evidence that others became willing'. And the very best documents only became available after years, e.g., the stenographically recorded verbatim records of the military cabinet which was obtained at the end of the prosecution case.

Part of the problem was operating a judicial system out of the territory—in England a judge can make a without notice order and the police will turn up on a doorstep an hour later. At The Hague the judges were dealing with a foreign sovereign power, and they felt that they had to treat the former Yugoslavia as they would any other state. Geoffrey considered this to be 'nonsense'. They also proved to be very sympathetic to the Yugoslav objections: prosecution requests for documents were held to be 'burdensome' 'far too broad' or 'a fishing expedition'. The Yugoslav trials (in contrast to Rwanda and Sierra Leone) were substantially based on documents: millions of pages, in one format or another were eventually forthcoming; prosecution team meetings sometimes numbered 50 people (though later it went down to half a dozen or a dozen); in a conventional case the exculpatory exercise would have required 30 people working for a year. The essential flaw in all this was that the court was operating an adversarial system. Rather than ask itself what evidence it needed, it waited for the prosecution to request it. When it did, the court was rather feeble in its orders.

The problem of disclosure

The classic example came in terms of the war diaries which the Serb military units kept and which recalled day to day what happened in the field. The judges initially refused the prosecution request for

them, even though it simply meant handing over 20 volumes sitting on a shelf. They became available after four years and only after one of the generals called by Milosevic referred to them. They proved to be evidential dynamite, including passages such as 'cleanse this village'.

The irony was that the defendants wholly failed to see how this played into their own hands. Milosevic, and before that Croat defendants 'represented by expensive Americans' thought that 'it was in their interest to take every point in the book'. Had they instead said to the prosecution, 'just read everything into evidence and we'll have a two month trial on the evidence which shows that my chap is guilty', the prosecution would have been 'in absolutely dead straits'. They didn't have the evidence at the start; 'the best evidence often came right at the end of the timetable established by the accused or his lawyers'. Had anyone thought of 'playing it short', it would have been a 'dream case to defend', tailor made for a lawyer who knew how to 'invest the accused with the charm of the advocate'.

Geoffrey ponders a point

History enters the arena

Instead the Milosevic case got bigger and lasted longer. Crucially, history entered into the arena. The judges had wanted it to be a simple case in which they did not go into the events before 1989, when the country began to break up. Later they asked the prosecution to call an historian. Milosevic then felt that a lot of Serb history should be dealt with. Geoffrey himself was won over to the idea that an understanding of history was 'invaluable' and had 'a very significant part to play,' in understanding the processes whereby political ideas and leadership allowed for the commission of crimes in the name of the leadership. Had the case carried on to the point of Geoffrey's closing speech he would have deployed the argument that this was not a case of 'intrinsically bad people doing wicked things' but a case of 'typically indifferent or poor politicians being led by a combination of their own personality traits, circumstances beyond their control, history and culture' to do certain things at the top in politics which 'have the effect of allowing people further down the management chain – policemen, soldiers, individuals and paramilitaries – to commit the most terrible crimes in apparent pursuit of or loyalty to the agenda of the politicians at the top'.

In due course he came to understand the way history is used or misused. 'When you go back to 1389 which is what everybody does and the Field of Blackbirds [when the Ottomans defeated the Serbs and occupied the country for the following

Schoolboy Geoffrey and the Serb family

500 years] – I have only learned the full explanation as to why the Serbs think it is justified to celebrate a defeat; it is to do with the Serbs as a religious race. Lazar elected defeat and heavenly reward and the Serb nation became forever blessed'.

We are all capable of genocide

All this led to his insight on how genocide happens. 'All you need for genocide' is an insider and an outsider culture, propaganda, some disturbance of the monopoly of violence which any State has, and on which we are 'absolutely dependent. Withdraw the police tomorrow and looting will start within hours and killing thereafter. If you as a State interfere with that, say by bringing in paramilitaries.. . then the person at the bottom of the heap, who fancies his neighbour's car, cattle, property and who sees himself as supported by the State interest, goes and commits crime because he is invested with a sense of impunity'. 'Human beings are clearly disposed to kill. It is only a question of the circumstances being right.' Only a few people 'are able to turn away from the forces of wickedness' once they become bystanders or compelled to become active. So we must find ways 'in which man can be constrained in what in our sober moments we recognise as being for our own good'.

Law can change minds

Not simply because he is a lawyer, he believes in the power of laws to change behaviour 'and by changing behaviour changing minds'. He cited the example of the American civil rights movement, and the simpler example of how the breathalyser laws have made it unacceptable to drink and drive. The week before we met he spoke at a conference on product liability. He recognises that nowadays international companies have the power that 'controls the way society is run'. One can see some companies which become complicit in committing crimes because they are too intimate with criminal regimes. They want to make profits and so they turn a blind eye though 'it is unlikely to be as simple as that; people are neither all good nor all bad though people in groups tend to behave badly'. 'My clear inclination is that you can only begin to change the way people behave and think by the blunt use of the law'.

Was it worth it?

It is not surprising that having to deal with momentous issues he found everything to do with the case more interesting than a barrister's work. Words like justice, deterrence and retribution were bandied about. Was it worth a billion dollars 'to bang up 100 men in their 50s for an average of 10 years each?' The answer is 'Probably yes'. The trials laid down an 'undeniable record that cannot be denied of the events'.

On a personal level it required a seven day working week from him. There was 'always material you hadn't read, busy investigating, catching up with the other two wars; you were missing points all the time'. Although he had to abandon lessons in Serbo-Croat, he (unlike the judges) was able to go to Belgrade and to speak to people on a relaxed basis—intellectuals and NGO's would in effect give him tutorials so that he had more of an understanding of what was going on. Someone kindly organised a reunion with his school exchange friend.

An independent Bar

Having taken leave of the Bar at a time when he was dissatisfied with it, and having seen the adversarial system work the wrong way with the ICTY, he has now become 'increasingly aware of the real value of the independence of the Bar. The Bar works not because barristers are better than others' but because 'it is a hugely gossipy profession'. A barrister knows that if he or she is caught out, they may never survive. Such transparency does not work in institutions, where you can shovel off responsibility as soon as the pressure comes to you to do something which is wrong and where you can bury your errors when you decide to follow the office line. Barristers face ethical decisions all the time, and are forced to tell the judge if they have failed to disclose something. They do it because it is in their long term interest. 'You may lose the case but you will be a person of integrity, able to take another case'. What astonishes him now is how little the English establishment values that independence. That is all the worse because 'it is the structures in which people operate which determines the degree to which they will or will not succumb to their baser instincts'.

Hope

When the Milosevic trial began he was quoted on a radio interview as saying, 'if you don't have hope and if you are not positive nobody will ever do anything'. He has not resiled from that. He has not managed to put off his two daughters from the law – one is a solicitor and the other has just qualified for the Bar. The family lives in Kent where he twice stood as the SDP candidate in Dover – and came third, both times. Still, the University of Kent has given him an honorary degree.

From defeat to a blessed state indeed.

Learning at The Hague

As Geoffrey Nice's service at The Hague was coming to an end, 18 Red Lion Court pupil Josepha Jacobson's was about to begin.

The beginning of my legal internship at the ICTY was not exactly auspicious. Within weeks of my arrival Milan Babiç committed suicide in the Detention Unit just days into his cross-examination in the Martiç trial. Less than a week later, Slobodan Miloseviç was found dead in his cell. Politicians, press and Pinter adherents (those who believed that Miloseviç should never have been tried in the first place) busily criticised the Tribunal for the protracted trial which would never culminate in justice.

Judge Liu Daqan and Josepha

Over the weeks that followed, the Tribunal's capacity for delivering justice came under heavy scrutiny. The court had failed to adjudicate the guilt or innocence of Miloseviç, who had effectively died in the dock. After four years of trial, over 50,000 pages of transcript detailing the testimony of approximately 350 witnesses there could be no verdict, only mounds of shredding.

Addressing the issues

I never worked on the *Miloseviç* case but I felt its posthumous impact on my work for Judge Liu Daqun in the ICTY Appeals Chamber. Criticism of the *Miloseviç* trial, coupled with the pressure to conclude a number of pending 'mega-trials' such as *Milutinoviç* and *Popoviç* (which each involve a number of high-profile defendants) by 2008, in line with the completion strategy, was intense and it was decided that the judicial approach to international criminal indictments was in urgent need of revision.

The Iraqi Special Tribunal suggested an alternative approach to the problematic issue of indicting notorious and prolific war criminals. It required the Prosecutor to select a set of specific charges against Saddam. This practice was adopted in an attempt to guarantee an expeditious and manageable if historically incomplete trial.

On 30th May 2006, the ICTY judiciary endeavoured to address the issue of bloated indictments by introducing amendments to Rule 73 *bis* (D) in the Rules of Procedure. This revised directive allows the Trial Chamber to invite the Prosecutor to reduce the number of counts in the indictment. To expedite proceedings further, this new rule also enables the bench to fix the number of crime sites and incidents at trial and to limit the evidence that may be tendered in court. The rule remains deeply divisive and extremely controversial. Addressing the Security Council on this measure in June, the Chief Prosecutor, Carla Del Ponte, effectively denounced the amendment as an infringement of the independence of the Prosecutor and intimated that it amounted to a violation of Article 16 of ICTY Statute.

Pragmatism v Justice

In many of the cases that come before the Appeals Chamber, which acts concomitantly as the court of appeal for both the ICTY (dealing with the former Yugoslavia) and ICTR (dealing with the Rwandan genocide), the tension between pragmatism and justice is pronounced. In the ICTR case *Bagaragaza,* the accused, the former Managing Director of the Rwandan tea industry, struck a favourable deal with the Office of Prosecutor. It was agreed to relocate his case to Norway where he would be tried not for genocide as indicted, but for murder, the gravest homicidal offence listed under Norwegian statute. The maximum penalty, if found guilty, would be a 21 year sentence. In accordance with Norwegian prison practice, only two-thirds of the term would be served. By contrast, the standard sentence for a genocide conviction at the ICTR is life imprisonment. The case was referred to the ICTR Appeals Chamber for adjudication as to the suitability of the Norwegian courts as venues for such charges.

While the judges were acutely aware of the imperative to expedite pending cases in the interests of justice, the Court was not prepared to undermine the principles of international criminal law for the sake of efficiency. Transferring a number of cases from Arusha to Scandinavia would have certainly eased the burden on the Rwandan Tribunal but it would have come at the expense of diminishing genocide as an atrocity and equating it with an ordinary crime. Although the Appeals Chamber recognised that dismissing the *Bagaragaza* application "may limit future referrals to similar jurisdictions which could assist the Tribunal in the completion of its mandate" the Court remained unequivocal in its conclusion: "the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law. This is particularly so when the accused has been charged with genocide, an offence that – unlike murder – is designed to protect a 'national, ethnical, racial or religious group, as such'."

The effect of the ruling

The ruling in *Bagaragaza* has had an immediate impact on Rule 11*bis* applications which allow ICTY and ICTR cases to be transferred from their respective international tribunals to national courts for trial. Domestic tribunals which for legislative reasons cannot try genocide and crimes against humanity are not apt or able fora to address such serious charges.

Whether the ICC will follow this approach is less certain and indeed unlikely. Article 20 of the Rome Statute states that the ICC will not try those already convicted of "ordinary crimes" under domestic law because of the principle of 'complementarity'. This essentially anticipates that the ICC will be satisfied with lesser convictions for gross violations of international criminal law. While Article 20 does include safeguards against abuse of this principle the question remains as to where the ICC will choose to draw the line.

60 Years On

Sixty years on from the Nuremberg and Tokyo trials, international criminal jurisprudence is fast developing. During my six months at The Hague I saw the definition of rape as an international crime confirmed in *Gacumbitsi,* the right of appeal limited to review in *Zigiç,* the definition of new fact evidence reconsidered in *Radiç* and much more besides. I was privileged to work for the Judge Liu Daqun from China, who was extremely mindful of the dangers of rendering substantive justice at the expense of procedural fairness. His joint dissent with Judge Theodor Meron in *Gacumbitsi* underlined this issue and emphasised the vital importance of fair notice for a defendant.

I completed my legal internship at the ICTY in September. The Trial Chambers at the ICTY and ICTR are mandated to continue until 2008 and the Appeals Chamber is scheduled to complete its work by 2010. With the International Court of Justice just around the corner and the International Criminal Court a matter of tram stops away, a legal internship at the ICTY is highly recommended for those with an abiding interest in international criminal law.

The views expressed in this article are the author's own and in no way represent those of the International Tribunal or the United Nations.

The author owes a huge debt of gratitude to Trevor Pears and The Pears Foundation for their extremely generous sponsorship which made this internship possible. She also wishes to thank Middle Temple and Paul Phillips for their generosity and unstinting support.

Those interested in applying for an ICTY internship should download the forms from www.ICTY.org

Legal Aid: The Malawi Experience

As she embarks on her career at the English criminal Bar as the new junior tenant of 18 Red Lion Court , Sarah Clark looks back on her experiences in Malawi. Circuiteers concerned about remand time, prison overcrowding and an under-funded Legal Aid system in this country would do well to put things in context

In 2004 I was privileged enough to spend several months as an intern with the Legal Aid Department (LAD) of Malawi. Malawi is a small, landlocked country – 900km long and 10km long – and wedged between it's East African neighbours – Mozambique which curls around from the east, south and south-west; Zambia to the west and Tanzania to the north. It is famous for it's incredibly beautiful 'calendar lake', so-called because it is 365 miles long and 56 miles wide, taking up about one fifth of the land mass.

The internship was organised by the University of Westminster's Centre for Capital Punishment Studies and was partially funded by the Criminal Bar Association. My remit was to conduct research in order to provide a basic insight into the legal system in Malawi and the current social and political climate in the country in relation to the death penalty.

Moratorium but not abolition

Malawi achieved independence in 1965, and adopted a legal system based on the English model. The death penalty (subsequently abolished in England) has remained in place. It is mandatory for murder and treason and available for certain forms of aggravated rape and armed robbery.

For three decades Malawi's governance was in the hands of President-for-life, Hastings Kamuzu Banda, who encouraged people to betray relatives who criticised his rule. In May 1994 the first free, multi-party elections since independence finally took place. He lost.

The new President, Bakili Muluzi resolved not to sign any execution warrants, saying: *"I will never sign the Death Sentence for a fellow human being. I would like to reaffirm this commitment. Life is sacred, I believe a person can [re]form, I believe that forgiveness makes all of us better persons."* He duly commuted 79 death sentences on Good Friday in the Christian calendar. There have been no executions in Malawi since then. Currently those convicted of capital crimes are sentenced to death and then after a month those sentences are commuted to life imprisonment without parole.

The situation in Malawi has commonly been termed a 'moratorium' on the death penalty, but cannot be said to be a moratorium in the true sense of the word since there has not been any meaningful consultation within government about the death penalty and no sensible alternatives have been mooted. Those sentenced simply serve a life sentence without parole instead.

While I was in the country, it was reported in the press that the current President (since May 2004), Bingu Wa Mutharika, had thought better of his predecessor's commitment and said that he would be prepared to sign execution warrants in certain circumstances. There have however been no reported executions.

An under-funded system

Statistics vary according to which development figures you look at, but it is commonly said that Malawi is around third in the list of the world's poorest countries. The criminal justice system is funded by a number of sources including from DFID. The problems which often arise relate to the way in which this money is spent. It appears that in a number of cases it has been handed out in tranches to various branches of the criminal justice system. When I was there, although the Legal Aid Department (consisting of four full-time Malawian lawyers and a number of non-legally qualified paralegals) worked tirelessly in the preparation of homicide trials, none of the trials were in fact taking place. The reason was because the judiciary had exhausted their share of the funding. It was rumoured that they had spent their allocated funds on a conference in South Africa for the Malawian judiciary to discuss the problem of under-funding for homicide trials.

Incredible commitment

I was extremely impressed with the people involved in the Malawian system. Struggling against the burden of under-funding and chronic governmental corruption, those involved in the system on a day-to-day basis are extraordinarily committed to improving it and their dedication and hard work are examples to us all.

The Legal Aid Department is a small office in the old town of Lilongwe and is headed up by 'The Chief' Mr Wezi Kayira who, with the help of his second-in-command, Bruno Karemba faces the unenviable task of clearing the backlog of homicide cases (whilst simultaneously dealing with clients on a legal aid basis in just about every other area of law).

Since funding had run out for homicide trials during my stay, I spent a good deal of my time preparing bail applications and visiting remandees in prison to take instructions (using a Legal Aid paralegal as a translator) as there was little trial observation to be done.

Prisons

The situation in the prisons is dire. Prisoners spend up to seven years remanded in custody in what can only be described as atrocious conditions. Many of the men from whom I took instructions were suffering from easily treatable medical conditions which, due to lack of treatment, had become serious, and even life-threatening. In some cases it became apparent that the file had been lost, and nobody in the prison was able even to tell me what charge had led to the person being incarcerated.

Convicted prisoners at Dedze

The life of a remand prisoner differs dramatically from that of a convicted prisoner. Those convicted wear a uniform of white and are allowed a number of privileges. The remandees are not allowed to do any form of work in prison. They therefore spend the entire day doing nothing. They survive on one daily meal of nsima (mealy meal) cooked by the convicted prisoners outside the inner-gates of the prison in a huge vat over a bonfire. The cooks and other working prisoners are watched by armed prison officers, but do not seem in the least inclined to escape. Disease, sickness and HIV are rife, but the authorities refuse to distribute condoms within the prison. To do so would be to acknowledge the existence of homosexuality.

It would be unfair to make these assertions without mentioning the excellent work being done

out there by Penal Reform International whose team of dedicated paralegals advise the prisoners of their rights and report back to the authorities on the conditions within the prisons to try to bring about change.

Most of the prisoners I interviewed were remanded on charges of homicide. However, it became abundantly apparent that very few killings in Malawi are pre-meditated and the causes can normally be traced back to the socio-political problems within the country. Almost every file I read whilst preparing homicide cases mentioned the words 'panga knife' (crop cutting knife carried by most Malawian villagers) or 'Kachasu' (local 'beer' which is in fact a home-brewed spirit from the villages often containing easily-obtainable chemicals such as fertiliser; known to cause hallucinations and even death). Malawi suffered a serious famine in 2001 and 2002, when the government allegedly sold much of the maize crop upon which Malawi's people rely, to neighbouring Zambia for profit. As such many of the murder cases I read involved conflicts between neighbours in the villages defending their land, or fighting over crops. The remainder follow fights between men who had been drinking Kachasu. It is not always clear whether the cause of death was the fight or the Kachasu.

No smoke without fire

The majority of the population live in villages, where the way of life has changed very little in decades. Concepts such as murder and manslaughter and the notion of a 'trial' in the sense in which we think of it are alien concepts. Many of the Village Head Men have their own 'tribal' notions of justice which are very much at odds with the notion of justice as espoused by many of the development agencies. The two do not always sit comfortably together. Malawian people have a very strong notion of 'no smoke without fire' or more specifically, in Chichewa *'pari bi pari minga'* (where there is a dark spot on a person's skin, there must be a thorn beneath).

Remandees at Maula

There also remains a strong belief in witchcraft, which is a recurring theme when reading through homicide files. My predecessor at the LAD Elliot Schatzberger took me on my first day to Maula Prison in Lilongwe and introduced me to a client in the women's section, assisted by one of the LAD paralegals acting as translator. She was 21 years old and had been 19 when first remanded at Maula. When we interviewed her, her two year-old baby (rather ironically named 'Lucky') was asleep on her back tied in chitenje cloth. The client faced a charge of murder. The prosecution alleged that she and another woman (a witch doctor) poisoned the girl's grandmother.

Apparently she had been given 'medicine' by the 'doctor' for her grandmother who had died shortly after taking it. The 'doctor' was released without charge. The young woman would have been as well if she had she done as the officers had told her and allowed them to 'have fun with her'. The alternative was to 'rot in Maula'. She had chosen the latter and was still there. Two years later, with her child growing up within the gates of the dusty prison, she was no closer to having her trial.

Access to resources

All of the files I read whilst at the LAD were in paper form and were not electronically stored anywhere. Most statements were handwritten. Many were illegible while others had significant pieces of evidence missing or lost. Given more time and manpower the gaps in the evidence could lead to successful dismissal or abuse of process arguments, but often, by the time someone comes close to reviewing a file, the defendant has already served a number of years in custody.

Lilongwe Magistrates' Court

One of the useful tasks the interns at the LAD were able to do was to train the paralegals and LAD employees in a system designed to store the files electronically. In fact this has the potential to save days at a time, since it can take that long simply to locate the papers. I understand that the system put in place by the interns is now routinely in use by the LAD.

So far as legal resources are concerned, no one I came across at court had access to an up-to-date Archbold. There is a trend now for interns to take their old copies and leave them out there. This helps, but the need for legal texts remains urgent.

The Nick Webber Trust

While I was at the LAD I was joined by a young City solicitor named Nick Webber. He walked into my room one day and joined in the work – no one seemed to know he was coming, but his assistance was greatly appreciated. It turned out that the email announcing Nick's arrival hadn't reached the Chief. It took 40 minutes on the only internet-connected computer in the office to load an email page, so no one ever bothered.

Nick and I spent many hours interviewing prisoners at Maula and Kasungu and it was great to have someone to have a beer with when the sheer frustration of the system got too much. We shared an office and sometimes the paralegals would poke their heads in the door to see where the laughter was coming from as we reviewed files and managed to find humour in even the darkest of them.

Tragically Nick was killed in a car accident while we were in Malawi. We were travelling back from a long weekend at the lake when the car Nick was travelling in struck a bridge. Two other interns from the LAD and another passenger were injured badly, but survived. All too ironically, Malawi was also Nick's birthplace, since his mother had worked as a volunteer teacher there in the 1970's. Nick had come back to Malawi to use his legal skills to assist a country he loved.

His mother Pauline has now set up a charity in his memory, which seeks to support all of the causes which were close to Nick's heart. The Nick Webber Trust is working towards providing a well-stocked law library in the Legal Aid offices. The library will be a huge asset to the department, enabling their lawyers and paralegal advisors to work more efficiently, and improving recruitment and retention of quality staff. The Trust has commissioned a local craftsman to build and install the required furniture, and has bought a computer for the library's use. They are currently in the process of sourcing and delivering books, CD-ROMs, and instructional DVDs for the lawyers.
They are also providing bursaries for law students who otherwise could not afford to qualify, on condition that they work for the Legal Aid Department as interns in the vacations and for three years full-time after graduation. The first recipient starts a law degree at the University of Malawi in spring 2006.

Anyone who is interested should see; **www.nickwebbertrust.org.uk .**

Unforgettable

My memories of Malawi, though tainted terribly by Nick's tragic death, are ones which I will never forget. It is a beautiful country and the people are more wonderful than anywhere I have visited before or since. Their determination in the face of adversity to pull the legal system up by its bootlaces and ensure justice for everyone is staggering and their relentless efforts admirable.

Editor's Note: In July 2006, former President Muluzi was arrested on fraud and corruption charges. His successor, President wa Mutharika then suspended the chief investigator. The Director of Public Prosecutions took the view that he had to drop the charges.

Misadventure and Memory: Teaching Advocacy Abroad

The English Bar's finest 'export' is its teaching of advocacy to our colleagues both in and out of the 'common law world'. Sappho Dias, who has taken the lessons of good advocacy around the globe, remembers some of her experiences without forgetting her own long journey to the law

The strangest thing about being asked abroad to teach as an "English" advocate is that it causes identity crisis mayhem in me for a time. This was resolved on the first occasion of such an invitation (in September 2000) by me writing and generally hinting about Not Being Quite English. Despite the hint, the invitation from the Black Lawyers Association in South Africa was not withdrawn.

Crossing borders

There came the day when I flew into Johannesburg. I had booked into a hotel there for one night on the understanding that the next morning I would be flown to Gabarone, Botswana where the actual teaching would take place. On arrival however, I was informed that I would not be permitted to stay the one night in Johannesburg. Instead, I would be expected to undertake a bus journey that very day. I had arranged to meet Edwin Cameron (then a High Court judge) in town so I was not amused to have my plans arbitrarily altered. However, not having much choice, I took off in a taxi briefly to visit Edwin.

The year before, whilst being interviewed for a position at the Constitutional Court, Edwin had announced that he was suffering from AIDS. When I arrived at his home, it was to find him suffering from flu. The meeting was therefore fraught and distressing to both of us. (In fact he made a rapid recovery and was soon afterwards appointed a judge in the Supreme Court of Appeal).

I arrived back at the headquarters of the BLA in Johannesburg and at about midday, a group of us set off in a bus for the journey to Botswana. I had been told that the journey would take 3 to 4 hours and expected to arrive in the early evening. We got to the border between the two countries after midnight. The border gates had closed; there was not the remotest prospect of getting to Botswana that night and the search for a hotel proved fruitless. I was inchoate with rage by the time we found a friendly face in Mafeking who put us all up for the night. The next morning the border was crossed in awful silence.

Things improve

However, the programme itself proved infinitely interesting. Seven neighbouring countries were involved and the advocacy training was not confined to lawyers but also involved some police chiefs. I met practitioners from Lesotho, Zimbabwe, South Africa, Namibia and Angola. All the participants who attended were dedicated and anxious to make as much of the programme as possible. They were also friendly, kind, respectful of each other, and hardworking. I left Botswana having made some good friends.

My next two stints were in the philosophically divided worlds of Florida and California. Whilst the Floridians were serious and laboured long hours, the Californians enjoyed themselves and the teaching days were not as long as in other places. It was also easy to understand why feminist literature first came out in cart loads from the United States. There was much Macho Bravado. One day, in Florida, I was invited out to dinner by a fellow trainer. I turned up wearing evening dress and my grandmother's diamonds. My "date" was acutely embarrassed as he was dressed in shorts and a Hawaiian shirt. Aaaagh, dinner was Not A Success. But once again, the participants saved the day and each programme provided an interesting contrast in approach to the other.

Sappho at a Viennese conference

Going 'home'

In 2003, there came a riveting invitation to teach in Pakistan. I accepted immediately. A mixture of longing and dread informed that acceptance. Long years ago, following the coup d'etat in Burma, I, together with my two brothers and our parents had fled to what was then East Pakistan. Soon after our arrival there, civil war broke out and we ended up in West Pakistan which subsequently became Pakistan. All my critical adolescent years had been spent in Pakistan. English was a language I had learnt at the Karachi Grammar School. To return to the scene of this disrupted adolescence evoked peculiarly contradictory emotions in me. Was it apparent to all the people whom I taught on that programme? I do not know but there was this blinding sense of relief in having had an education, having a career, having independence.

Getting to university

And though this is meant to be an article about Barristers Abroad, there is an important Sisterhood story to be told, so I narrate it here. I watched the dopata covered heads of the lady barristers and I remembered my seventeen year old self. I remembered pleading for an audience with my father so I could persuade him that it was an education I wanted, not marriage. The first reaction was a Big No. But the future lawyer in me found a route to the Court of Appeal (which took the shape of my grandfather). I begged and pleaded to be allowed to go to University and eventually my grandfather relented. But there was a condition: I would be allowed to go to England but only if it was Oxbridge. My first port of call was Oxford but they required Latin "O" levels as well as the other entrance exams. Latin teachers did not then exist in Karachi. That left Cambridge (who were prepared to accept an Urdu "O" level in lieu of Latin).

I began happily to prepare for my "A" levels as well as the Cambridge Entrance Exams when my grandfather added a gloss to his pre-conditions for my freedom. I would have to go to an all women's college in Cambridge. Girton had just become coeducational that year and it was rumoured that Newnham were going that way. That left New Hall as the only option. However, when I wrote to New Hall, a Horrible Obstacle loomed. The entrance exams were not enough; New Hall required all candidates to sit their own Special Entrance. The headmaster of my school in Karachi was fed up to his back teeth with arranging invigilation for my many exams; he downright refused to co-operate with the Special Entrance.

In desperation, I wrote to the British High Commissioner: "Your excellency" said I "unless I am allowed to sit the Special Entrance in the British Embassy, I shall be doomed to a loveless marriage…." The High Commissioner was moved by this piece of advocacy and he permitted me to sit that exam under his umbrella. Well, as they say, the rest is history.

Just like England

On my last day of teaching in Islamabad, I asked one of my lady pupils what it was like to practice law as a woman in Pakistan. She tilted her head and looked quizzically back at me. I left Pakistan with her words ringing in my ears. "I don't suppose it is very different from what you experience in England".

Intermediaries – A Practitioner's Tale

The Intermediary scheme, the most innovative of the 'special measures', has been running successfully in six pathfinder areas (including Thames Valley) since 2004 and should go nationwide next year. John Riley of 4 King's Bench Walk, who has been involved from the start, explains what it is and how we have been waiting for it to come into use

Introduction

On a cold Wednesday morning in York in April 1997 a very large number of people from the Home Office, other government departments, management consultants, the voluntary sector, interested groups, the police, one Queen's Counsel (Peter Rook, Q. C. as he then was) and one junior barrister (myself) were gathered together for a conference about a new entity in the criminal justice system. We were introduced then to the concept of the *vulnerable witness,* and to the yet to be published report by that interdepartmental Group; "Speaking Up For Justice". From that time onward I have been involved in various ways, mostly representing the Criminal Bar Association. In particular I have been involved in the creation and development of the role and practice of the Intermediary.

Intermediaries under section 29 of the Youth Justice and Criminal Evidence Act 1999 are persons who communicate to the witness questions put to the witness and to any person asking such questions the answers given by the witness in reply to them, and explain such questions and answers so far as necessary to enable them to be understood by the witness or person in question. As part of the special measures scheme, court approval is required. It seeks to reverse the traditional denial of access to the criminal process for those who were perceived to be disabled by communication difficulties or by age (at either end of the scale).

The use of Intermediaries

It was decided that the best way forward was to develop pathfinder areas and see how referrals for Intermediaries worked out.

On the prosecution side the police would be the obvious first point of contact--they would see the witness or victim / complainant and make an assessment of that witness's communication needs. Some training, but hardly enough, has been undertaken and even in the pathfinder areas there is still much unintended ignorance on the part of the police of whom it may be said too much is expected as they are not fully trained to spot communication problems.

The six pathfinder areas have been working for nearly two years. The highly experienced consultancy firm, Lexicon Limited, closely monitored the entire scheme including every trial in which an Intermediary has been involved. They have produced a number of interim reports to the Office for Criminal Justice Reform and have just completed their final assessment. It is hoped that a national roll-out will follow. Even now if in a non pilot area it is determined that an intermediary should be used then this can be arranged. Some 75 Intermediaries are 'on the books' and another 60 are qualifying between July and November 2006. Intermediaries are fully qualified and experienced speech and language specialists or professionals in specialist fields who deal with specific areas of communication difficulty. They are all trained in court room skills and procedure as far as their role is affected. This was provided by the Inns of Court School of Law.

In a nutshell it works like this: Early in the investigation the police identify the witness as having a communication difficulty; they contact the Home Office secretariat to identify an Intermediary best suited for the witness's needs; and after the Intermediary assesses the witness's needs and disabilities, (s)he assists in communication in the video recorded interview. All this is sanctioned retrospectively by the application for Special Measures at the PCMH, when the judge is also asked to make a prospective order allowing the Intermediary to assist the witness at the trial.

Intermediaries, like all special measures, are available to defence witnesses although not, under the statute, to defendants. However, the court retains its inherent jurisdiction to make sure that the defendant is able meaningfully to take part in his own trial, and the Office for Criminal Justice Reform (helpline: 020 7035 8461) will provide an Intermediary for a defendant if a judge deems it necessary though outside the provisions of the 1999 Act.

Preparation

By the time briefs have been delivered prosecution counsel at least should be aware that an Intermediary is being used. It may be that the CPS will already have involved counsel from an early stage. On the other hand, identification of a witness's communication difficulty may take place late in the time frame of the case. The late recognition of a communication difficulty may be more frequent when dealing with child witnesses.

Best practice suggests that it is essential to conduct a preliminary conference with the Intermediary, Officer in the Case and the CPS. At this meeting the issues surrounding the communication difficulty can be explored and matters as to how the application for the use of this special measure will be made can be dealt with. Counsel should ask the Intermediary to assist about the issues of communication, e. g., how the Intermediary is going to intervene when the questions seem to be too complex or that the witness has not understood them. Questions about "time and space" for the young and disturbed child with learning difficulties are often very difficult to process. The Intermediary will be able to suggest alternative ways of expressing a question that would otherwise cause the witness a problem.

Everyone will be assisted by the fact that part of the Intermediary's job is to prepare a report for the court based on their assessment of the witness and their understanding of his or her needs. This is a crucial document, which all parties and the court must use as the basis for developing the 'ground rules' of how a witness is to be questioned. It is counsel's job to take the Intermediary's guidance on board and it is the judge's job to make sure that counsel has done so. The assessment report covers a wide range of issues from relevant personal details of the witness to the length of time that any breaks in evidence should last. It helps both sides in how to question the witness, hopefully without the Intermediary needing to intervene. The pilot cases have shown that the best use made of the report and any other guidance that the Intermediary can give counsel results in cases running smoothly and the issues for both sides being properly explored in court.

The pre-trial meeting

After the PCMH and before trial there must be a pre trial meeting between the Intermediary, the trial judge and trial counsel to discuss all aspects of the conduct of the case as it relates to the Intermediary and the examination of the witness. It is here that the fine detail needs to be discussed. Someone should take the lead in arranging and promoting this meeting and usually it should be the party using the Intermediary. The witness's evidence must not begin until this has taken place, even if it only happens at the trial itself.

The use of intermediaries is still a very new idea. Counsel and the judges need to have the most open of minds in setting the way in which the court room experience will work. The defence and the Intermediary need to discuss how the questions relevant to the defence case are to be asked and anticipate any issues that may arise. Preparation of cross examination in advance of the trial is made easier by the fact that the Intermediary has been used on the video which stands as the witness's evidence in chief. The more help counsel obtains from the Intermediary as to questioning technique the better. Such preparation is far better than being interrupted when conducting the cross examination. The tone and delivery of the question can cause as much of a problem as the content.

A convert

I confess that although I have been involved in this project from the start I was highly sceptical of its advantages. However over the years of planning, building in safeguards, seeing the individuals who are accredited Intermediaries in action and seeing the dedication of those involved in delivering this project I have become a "convert" to the use of Intermediaries in appropriate circumstances.

One of the most compelling reasons is that counsel is gaining the assistance of a language / behavioural / communication expert who is independent, owes her primary duty to the court, and has the witness's communication abilities at the heart of her work. Being able to hone in on the witness's special needs in advance is a great advantage to both sides in case preparation.

National roll-out of the scheme is envisaged in the next 6 – 8 months. In the first instance seek the assistance of the Intermediary section at the Office for Criminal Justice Reform (Home Office). The literature that they have developed is first rate and an essential aid to dealing with this special measure. In particular they have produced check lists which have proved essential. This scheme allows those who hitherto would not have been able to contribute to a criminal case to be included as complainant, defence or prosecution witness. With the correct balance practitioners can make this work.

From the Other Perspective

What does it take to make sure a vulnerable witness can be heard in court? Intermediary Amanda McLellan explains what it was like to try to help the witness, and how the 'system' assisted or hindered her efforts.

As the Intermediary project is in its infancy, there is so much to be learnt from each case.

Background

I trained originally as a Speech and Language Therapist and then qualified as a Play Therapist, and now provide assessment, therapy and consultation for children who have experienced significant trauma and those in foster care. As such I am mindful of the impact of trauma upon a witness, especially with recent research recognizing neurobiological changes brought about by a traumatic incident, and therefore the effect this may have upon a witness's ability to give best evidence.

Our role is to facilitate communication, and therefore improve access to justice for a vulnerable witness at each stage of the criminal justice process.

The case

The Officer in charge first contacted me in March 2005, requesting an Intermediary for the purpose of trial. I would normally be involved at the assessment stage and before a video interview was conducted, but the witness had already been interviewed before the Intermediary project was known about. She was 11 years old and reported to have learning difficulties, resulting in her abilities being similar to those of a 7-year old. She and her three step-siblings had made a disclosure of sexual abuse by her father.

The disabilities

Following initial discussion with the police, I met with the witness in order to assess her communication skills and level of learning. Many difficulties emerged. Firstly, she had a short span of attention and was easily distracted, meaning she would need regular breaks during the trial. Secondly, she experienced difficulty with short-term auditory memory so could only be asked short, simple questions. In terms of her understanding of language, the witness was at a 7 – 8 year level, able to comprehend simple question forms, but not 'why?' questions. She had particular difficulty with sequencing and the concepts of time and before/after. This meant that all questions put to her needed to follow a chronology, be simplified and be framed so she understood the context. She did not understand negatives, such as "You said that didn't you?" or ambiguous sentences. The witness's expressive language was also at a 7 – 8 year level and she was unable to answer open questions such as "Tell me what happened". She suffered from a word finding difficulty, for example, saying she was trying to "memorise" when meaning 'remember' and this had implications in the case where it was suggested she had been told what to say. Most striking was the witness's deterioration in language when she became anxious or when questions with an emotional component were touched upon. Finally, the witness was showing considerable emotional and behavioural difficulties with destructive anxiety; low self-esteem with a tendency to opt out and simply reply "don't know" if she felt something was too hard for her; considerable fidgeting; unexpected soiling; and angry outbursts accompanied by swearing.

From this assessment, I wrote a report, detailing what I felt she would need in order for her to attend court and be cross-examined. This was used by the CPS in their application for a Special Measures direction.

Nothing according to plan

The trial was eventually set for May 2006. The witness was now 13 years of age. Having liaised with the Witness Service, I accompanied her to the pre-trial visit. Watching her video evidence to refresh her memory, led to considerable distress, but gave us the opportunity to discuss possible strategies if she were to become angry, suddenly need the toilet, etc, and this is felt to have reduced her overall level of anxiety.

On the day of the trial, nothing went to plan. Due to the witness's deterioration in behaviour and ability to process language, it was crucial for her to be cross-examined as early as possible in the morning, and, having regard to her concentration, for no longer than two hours. However, the judge had scheduled in sentencing at the start of the day, the witness's two hour video recorded evidence-in-chief had not been watched by the court the previous night as requested, and I needed to attend a hearing with the judge to discuss my involvement as this had been cancelled three times previously. Despite my asking for the live link equipment to be checked that morning, it had developed a fault by the afternoon and so the witness did not begin until 3.15.

However, I had been able to keep her calm, informed and had planned for her to bring things to do to keep her occupied. She proved to be a credit to herself. She did need me to intervene for questions to be simplified or broken down, and I requested a short break on noticing subtle signs of an imminent angry outburst. Otherwise she stayed focussed and replied as best she could.

The defendant was charged with 25 offences and found guilty of 15, including the attempted rape of the witness.

Difficulties

The delays in the case did not help, and the witness's behaviour had deteriorated in the 14 months since I first met her. Delays on the day meant she was potentially at a considerable disadvantage. I have also wondered if Intermediaries need to be more assertive with those concerned as to the importance of our core recommendations, e. g., the need to be cross-examined first thing in the morning. The technology should be checked, to make sure it works, before the trial starts.

Successes

I received excellent support from the police, Witness Service and Social Services in developing a plan to meet the witness's needs so that she could communicate to the best of her ability.

Both barristers took time to introduce themselves to the witness, explaining and simplifying the process. This helped to reduce her anxieties. I had met previously with defence counsel, as he was keen to know exactly what type of questions she would and would not be able to comprehend. As a result, she understood most of the questions and therefore attempted an answer rather than defeatedly responding that she did not know.

Whilst my role is to facilitate communication between the witness and the court, I feel that one of the most useful things I did was to ensure that her emotional needs were met in order for her to feel safe and secure enough to give best evidence. This included: planning for her to be accompanied by appropriate supporters; things she could bring to court to comfort and distract her; bringing foods that would not lead to hyperactivity; and organising, via her Social Worker, a reduced timetable of attendance at school in order for her to gain their consistency and support without being excluded as her behaviour deteriorated further in the run up to the trial.

The Intermediary project is a creative and empowering service that can enable our most vulnerable witnesses to have a voice. The witness I worked with was clear that she wanted the defendant to be imprisoned in order for her to start to move on with her life. It now looks as though this will certainly happen.

Challenges Facing the Bar

At the Bar Council meeting on 30 September, the Chairman, Stephen Hockman, Q. C., told members that 'the profession is not seen as being in line with the community'. Here he tells Circuiteers how we can remedy that.

One of the Bar's greatest strengths is that its traditions are rooted in history. Professor Sir John Baker Q.C. in his volume in the Oxford History of the Laws of England describes a speech made by a Chief Justice in the reign of Henry VIII who addressed the Serjeants at Law in the following terms: that they were expected

> "… to observe high standards of conduct: to assist the poor and oppressed without reward; to give counsel to anyone who should seek it; to dissuade clients from pursuing unjust causes, and to advise them to abandon causes if it appeared they were in the wrong; to deal with business expeditiously and not prolong it for gain; to keep their clients' business secret; to avoid corruption by money or favour; 'to stick with hand, foot, and nail to the truth, never pretending that a wrong is right'; and to do nothing contrary to good conscience."

These principles are exactly those which underlie the modern profession of advocacy.

The key to the future

The key to the Bar's future success is to hold fast to these enduring principles whilst being ready to adapt constructively to changing social conditions. Society today no longer respects tradition for its own sake. Any profession must continually demonstrate its value in the public interest, and must be prepared to undergo monitoring and review on a hitherto and unprecedented scale. I have seen it as my responsibility as the Leader of the profession, albeit for only a relatively short period, to give the Bar the self-confidence to face these changes positively and with optimism, in other words to avoid being dragged kicking and screaming into the 21st century.

Where to adapt

Let me list briefly some of the areas in which it is proving necessary to adapt to change.

The first and most significant is in the area of legal services reform. Under the Legal Services Bill, which is likely to feature prominently in The Queen's Speech in November, a new Legal Services Board will be created, which will be independent of Government and will supervise the regulation of the legal profession as whole. Nonetheless, if, as we shall insist, Government fulfils its commitment to the continuing independence of the profession, the Bar Council's future as an approved regulator of barristers (through the Bar Standards Board) will be secure. We will then have to revisit once again the nature and scope of our regulatory regime. It will be essential to avoid preconceptions. The criterion in such a review should be whether a proposed approach is consistent with the preservation of a corps of specialist advocates and advisers, guided by the ancient traditions which I have set out above.

Our own profession in this country is comparatively unusual in the degree of support which it receives from public funds. This fact imposes on professional leaders a peculiarly difficult balancing act in their relationship with Government. The Carter Review, despite the many difficulties it faced, and despite the apparent complexity of its outcome, has enabled a comprehensive and rigorous view to be taken of the system of public procurement going forward. Lord Carter's strong support for elements of the system such as the advocates' Crown Court graduated fee scheme augurs well for the future. Such schemes have been shown to deliver effective control of costs, and have an enduring part to play in the system provided that they can be regularly updated and reviewed. The challenge for the profession here is on the one hand to make such schemes work effectively in the public interest, and in the interests especially of younger practitioners, and of BME practitioners, at the same time as insisting upon periodic review to prevent the development of anomalies which prejudiced the system of public procurement in the past.

The most important challenge

Perhaps the most important challenge for the profession in the years to come will be, not merely to adapt to these important changes, but to show publicly that it has done so. So far as the Bar is concerned, my impression is that all sections of the profession now recognise the need for modernisation. The Inns of Court, the Specialist Bar Associations, the Circuits and individual sets of chambers and practitioners are steadily acclimatising themselves to the new world of legal practice, and are continuing to maintain standards of dedication and effectiveness of which any client could be proud. But does the public at large, especially as represented by the politicians and the media, recognise these developments? To adopt a slightly over-used expression, on this issue, it is truly a case of attempting to "turn around a tanker", and that will be a slow process. The Public Affairs Committee of the Bar Council, with the strong support of the Specialist Bar Associations and others, is making strenuous efforts. We shall need your help and your ideas to make this campaign successful.

A New World for Judicial Appointments

Judge David Pearl

Baroness Prashar, CBE

From 'secret soundings' to the transparent world of the Judicial Appointments Commission (JAC)—the Chairman of the JAC, Baroness Prashar, and JAC Commissioner Judge David Pearl speak to the Circuiteer about how the system will work.

Of the great constitutional changes announced in June 2003, the most welcome innovation was the Judicial Appointments Commission, which removes from the Lord Chancellor his historic role in choosing candidates for judicial office. After six months spent in laying the groundwork for their future work, it will truly come into its own in November with its first competition for a High Court judgeship.

For those who might feel any nostalgia for the old days, it is worth recalling the Lord Chancellor's track record in even the recent past. What sticks in the mind was the appointment of a Chancery judge in Wales. Lord Falconer ignored the recommendation of the selection panel and chose instead someone whom the panel did not prefer and on the basis of criteria to which not all the applicants had been asked to address themselves. Neither the Commission for Judicial Appointments who assessed the process nor the Constitutional Affairs Committee of the House of Commons could see the advantage in what he did. All that however is now in the past.

Some familiar faces

In July I met with one of the JAC's 15 Commissioners, Judge David Pearl. I first met him exactly 35 years earlier, when I was not quite an undergraduate in law and he was about to be my director of studies. Quite a lot has happened to him since then: Professor of Law and Dean of the Law School at the University of East Anglia, President of the Immigration Appeals Tribunal, Director of Studies for the Judicial Studies Board, judge, and now President of the Care Standards Tribunal. The latter is located a stone's throw from Blackfriars' Crown Court, where he was about to sit. He also spends eight weeks in the Family Division. It was as a Tribunal President that he was appointed as a JAC Commissioner, along with – amongst others – two members of the Court of Appeal (Auld and Hallett, LJJ) and Jonathan Sumption, Q. C. Lay member Sara Nathan is familiar to the Bar from having been on the Professional Conduct Committee.

The Chairman, Baroness Prashar, to whom I spoke in October, was First Civil Commissioner for five years, executive chairman of the Parole Board for England and Wales and a member of the 1993 Royal Commission on Criminal Justice.

Three stages in selection

Baroness Prashar describes the Commission's role as being in the middle of the process. It is the Lord Chancellor who has to issue a notice that there is a judicial vacancy and it is still the Lord Chancellor who does the actual appointing. However he will now only have before him the single candidate put forward by the Commission and his options are limited. In stage 1 he can accept the selection, reject it, or require the panel to reconsider. If he chooses either rejection or reconsideration, in stage two he can accept the selection, reject the selection (but only if it was made following a reconsideration) or require the panel to reconsider (but only if he rejected the selection in stage 1). If matters reach stage 3, he has to accept the selection unless he chooses instead the person he had earlier required to be reconsidered. He also has to give reasons.

Being proportionate

The Commission may be in the middle of the process but it is the crucial position. Baroness Prashar sums up the method of choice as being 'proportionate to the level of appointment, while rigorous enough to give us the right result'. The aim is to make 'objective assessments' based on a very clear process; in addition, the panel which recommends a name to the whole Commission (who must endorse it before it goes to the Lord Chancellor) must do so with 'clear reasons'.

Applicants for the High Court appointment will be asked to submit an application or CV. The candidate will nominate referees as will the Commission, who will tell the candidate who these are. Those short-listed will be invited to attend a 'structured discussion' ('basically a dialogue') with a panel consisting of the Chairman, the Vice Chairman, Lord Justice Auld, and Sara Nathan. This will last for about 45 or 50 minutes, and will explore the candidate's track record and qualifications.

The Commission was well aware of and concerned by the 'very complex' form which had been used by the DCA. When I met Judge Pearl the JAC was in the midst of the process of devising something which enabled the Commission to find out what information it needed and which also allowed the candidates to state clearly why they thought they met the criteria. The old 29-page DCA form, which had nine competencies and 47 behaviours has given way to a 9-page form asking for five qualities and 17 abilities. Overall, it is hoped that the written and the oral information will give the whole picture.

It is the intention to maintain a reserve list for the High Court in the event that another vacancy comes up within a year.

In competitions for other positions, e. g., district judges, there will be interviews, conducted by panels who will be appointed to carry them out. They will receive training, the important thing being the quality of the discussion.

The aim is that the JAC's part of the process will take about three months for a small competition and five months for a big one.

Merit and diversity

Almost the first thing which both the Chairman and Judge Pearl mentioned were the Commission's twin statutory duties: to select a candidate solely on merit but to have regard to the need to encourage diversity in the range of persons available for selection. A quick glance at the DCA statistics justify this (as if justification were needed). Persons of ethnic minority origin make up 1.6% of circuit judges, 4.8% of recorders and 3.1% of district judges; there is only one person of ethnic minority origin amongst the 160 members of the higher judiciary. Women still only make up roughly 10% of High Court and circuit judges. A survey carried out for the Bar Council early in 2006 demonstrates that there is a problem of expectations from the very beginning: 38.6% of white BVC students interviewed hoped one day to obtain a judicial appointment; 28.3% of all women students did but only 19.8% of ethnic minority students entertained such hopes.

The first task, Judge Pearl told me, is 'to try to encourage people who have traditionally never thought of a judicial position'. He mentioned the problem with solicitors. 'We all know that if you are a City solicitor and you tell your colleagues you're interested in a judicial position, you're a dead man or dead woman walking'. To a large firm, it is considered anti-career; sole practitioners feel they cannot find the time. Baroness Prashar spoke about reaching out 'to as wide a range as we can': if they find there are barriers that they cannot do anything about then they will draw them to the attention of the Lord Chancellor and the Lord Chief Justice. Suggestions such as part-time and job-share schemes, career breaks and sabbaticals are a matter for the DCA, but there is a great deal of outreach work that can be done. Baroness Prashar herself has spoken to women barristers, black solicitors and Asian lawyers and she plans on having specific events to encourage people before every competition.

The Commission is adamant that this is a new regime and that all applicants will be dealt with fairly and without bias. If the Bar has anything constructive to say in how the process can be improved, then Lady Prashar wants to hear it ('talk to us rather than accept whispers'). She also wants to hear from the judiciary and from tribunals about the qualities they are looking for in new appointments. 'I am a great believer in clarity of communication', knowing that mythology can inhibit people from applying, she told me. The Commission wants to gain the confidence of the legal profession and Judge Pearl says, 'I think it has': an independent body but with lawyers and judges on it, but with lay representatives as well, appointing on merit in a fully transparent way 'is a much more attractive way'.

The legal system has waited a long time for this. It has been well worth the wait.

D.W.

New System New Q.C.'s

On 16 October the first Q. C.'s under the new system of selection were sworn in. Sonia Proudman, Q. C., of Radcliffe Chambers, and one of the two barristers on the selection committee, explains to the Circuiteer how they went about it.

The first Queen's Counsel was appointed in 1597. He was Francis Bacon: lawyer, philosopher, politician, courtier, essayist, poet and scientist. He took bribes as a judge, and if it helped his career he stabbed his patrons in the back, but by any standards he was a great man. He died of pneumonia as a result of stuffing a dead chicken with snow, an experiment into whether refrigeration delays putrefaction. One assumes the experiment was successful. Excellence has always been the hallmark of a Silk.

A new process

The 2006 new Silks, the list of which was published on 20th July, were the first to have been appointed since 2003. While there is no doubt that those chosen in the past were outstanding advocates, the process was felt by many to be insufficiently transparent and weighted against solicitors and minority applicants generally. For a while it looked as though Silks, like Serjeants-at-law, would die out. However, most people wanted to keep the rank of Q.C., and a protocol for a new selection process was agreed between the Bar Council and the Law Society, and welcomed by the Lord Chancellor. Constitutionally Silks continue to be appointed by the Queen on the recommendation of the Lord Chancellor, but this time he was advised by a Panel independent of the executive, the judiciary and professional bodies. His remit was to oversee the process, not to comment on individual candidates. The Panel comprised four distinguished lay members (including a lay Chairman), one retired senior judge, two barristers (of whom I was one) and two solicitors. The process was designed to be self-financing.

A break with the past

In the past, the Lord Chancellor made his recommendations with the aid of comments from a range of automatic consultees (principally senior judiciary) and some referees nominated by the candidates themselves. Under the new system, the only persons consulted were the judges, practitioners and professional clients (over a much wider range than in the past) named by the candidates themselves. The process envisaged a total of 11 references per applicant, taken either in writing or by means of a structured interview with a Human Resources consultant. A candidate completed a detailed self-assessment and was also interviewed for the purpose of gathering further evidence to be considered alongside what was contained in references and self-assessment. Another change was that candidates did not declare their income in their applications.

For the first time, there was a competency based selection. The Panel's task was to determine whether, after consideration of all the evidence, relevant competencies were demonstrated to a standard of excellence. Conclusions were not arrived at arithmetically on the basis of ratings, nor was there any quota, either overall or in relation to specific fields of practice, areas of the country or any other matter. Each applicant was taken individually on his or her own merits. The Panel took the view that for the standard to be met, there had to be relevant evidence from judicial, practitioner and client consultees across all the competencies. The assessment was evidence-based rather than opinion-based; in other words the evidence had to comprise examples of relevant behaviour in particular cases.

Being objective

Many of the candidates were personally known to one or more members of the Panel, especially the legally qualified members. Because this was a competency-based exercise, Panel Members' subjective views had to be discounted. All members recused themselves from the assessment of candidates with whom they had any close personal connection, or of whose work they had sufficient personal experience to form a subjective judgment. This rule was probably a nightmare for the secretariat administering the paperwork, but it was strictly observed. In addition, members of the Panel decided not to act as consultees or referees for any candidate. The possible disadvantage this may have caused to a few candidates was outweighed by the necessity of avoiding any bias, actual or perceived, for or against any applicant.

A pinch of salt

All unsuccessful candidates automatically received feedback indicating the areas in which he or she was deemed to have fallen short of the standard of excellence required for appointment. I have heard about claims made by some candidates as to the reasons why they were unsuccessful, claims which I know to be untrue. If a disappointed candidate makes a surprising comment it should be regarded as the face-saving exercise that it probably is, rather than as cast iron truth reflecting badly on the process.

The statistics

443 applications were received, of which 175 (39.5%) were successful. In all there were 68 female applicants, of whom 33 (48.5%) were appointed, as compared with the previous high of 27.2% in 2002. There were only 12 applications from solicitor-advocates, but four of those were appointed. Twenty-four applicants declared an ethnic origin other than white, of whom 10 were appointed, again a greater number than in previous years. Five applicants declared that they had a disability, of whom one was appointed. There is no disability data from previous years. It is worth pointing out that no statistics were compiled until after the assessments had been made. The Panel was unaware of the balance of the list while conducting the assessment process. Each candidate was considered on his or her merits without any regard to gender, ethnic origin, age, area of practice, geographical location, status as barrister or solicitor or anything other than the competencies.

A real change

This list reflects real changes in the selection process. A striking change in my personal view is that more than a quarter of all applicants were aged over 50, of whom 28 (nine over the age of 55) were appointed. The oldest new Silk was aged 67. Although there are no age figures from previous rounds, it is safe to say that appointments over the age of 50 were rare. I see this change as evidence of the fairness and openness of the new process which is designed to exclude factors extraneous to the assessment of excellence.

In all, nearly 4,500 references were gathered, from some 3,000 people. There was a very heavy burden on referees and it is important to alleviate that burden and address the referees' concerns in future competitions. Indeed the Panel recognises that the new arrangements can be improved in a number of ways and is urgently giving thought to the nature of such improvements. Feedback is welcome.

Detailed information and statistics about the process, competency framework and the ultimate appointments is available online at **www.qcapplications.org.uk.** But here are answers to some of the more informal questions I have been asked.

- Yes, huge amounts of work were involved for the Panel, far more than we contemplated at the outset.
- Yes, there were mountains of paperwork.
- Yes, we had many preliminary training and discussion sessions.
- Yes, a vast amount of coffee was drunk.
- Yes, the Panel had an excellent working relationship; this was thanks to the dedication of the members, the diplomacy of the chairman and the efficiency of the secretariat.

And for the avoidance of doubt, the relevant competencies did not include stuffing a chicken with snow.

Unravelling the Fraud Act 2006

Professor David Omerod of Leeds Univeristy, editor of The Criminal Law Review and hailed as 'the quintessential practitioners' academic', takes time from completing the new edition of Smith on Theft to give Circuiteers a preview of the new Fraud Act 2006

History

Royal Assent for the Fraud Bill should be forthcoming in the new Parliamentary session. The Bill is based on Law Commission recommendations,[1] and a Home Office Consultation in 2004,[2] but reform has been under consideration for much longer. The deception offences in the Theft Acts 1968 and 1978 presented problems in practice on such crucial matters as whether there was an operative deception where V was indifferent about the truth of D's representation[3] or whether a 'deception' could be practised on a machine.[4] The Law Commission and Home Office catalogued further problems: too many offences, with too much overlap, and too much technicality which rendered charge-selection unnecessarily difficult with different offences applying where D was paid by cheque, cash or money transfer. Recognition of these defects, coupled with reports suggesting that the cost of fraud in the UK is around £16bn p.a. made necessary a more structured and coherent package of offences to keep pace with technology, modern methods of property transfer and commercial transactions.

Headlines

The Act will:

- Abolish the deception offences in the 1968 and 1978 Theft Acts (including that inserted after *Preddy* by the Theft (Amendment) Act 1996).
- Introduce **three basic fraud offences** where liability turns on D's representations rather than the actions or beliefs of V. Each carries a maximum 10 year sentence on indictment.
- Replace the offence of obtaining services by deception with **obtaining services dishonestly.**
- Introduce far-reaching preliminary offences of possessing/making equipment to commit frauds.
- Introduce an **offence of fraudulent trading** for sole traders/partnerships.
- Increase to 10 years the maximum sentence for fraudulent trading.
- Retain **conspiracy to defraud,** but new Attorney-General's guidance on its use will be published.

Section 2 - Fraud by False Representation

Under s.2, D commits an offence by dishonestly making a false representation, intending thereby either (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss. The offence is wide-reaching with (arguably too) much turning on the question of dishonesty.

The elements of *actus reus* are that:

- D made an express or implied representation by whatever means. The representation may be as to fact or law, including a representation as to the state of mind of D or another. Representations made to machines (e.g., Chip and Pin) are specifically caught by the extended definition of representation in *subs.* (5).
- The representation is false. By *subs.* (2) a statement is false if it is untrue or misleading, *and* D knows that it is, or might be, untrue or misleading. It is enough that D's statement is in fact misleading (which the Home Office suggests is something "less than wholly true and capable of an interpretation to the detriment of the victim"[5]) and D knows that it *might* be misleading. Problem cases debated in Parliament include D selling a painting which he attributes to Renoir knowing that given the incidence of forgery it might not be by that artist. His liability would turn on the concept of dishonesty. There is no explicit defence that the false representation was made with lawful excuse; that must be subsumed within the dishonesty question. Whether a representation is false usually depends on the meaning understood by the parties and will be a jury question except e.g., where it is a pure question of law such as the legal effect of a document.

The *mens rea* requires proof that:

- D knew the representation was or knew that it might be false. Knowledge is presumably to be narrowly construed. The section requires only that D knew the representation might be false; this is not recklessness which requires awareness of a risk of falsity and an unreasonable taking of that risk. Proving knowledge of falsity in representations about others' states of mind may be difficult.
- D was dishonest within the Ghosh[6] test. Although heavily reliant on this concept the offence does not turn solely on dishonesty and does not infringe Article 7 of the ECHR.
- D acted with intent to gain or cause loss, but there is no need to prove that D succeeded in doing either. In most cases "an intention to gain" and an "intention to cause loss" will go hand in hand; V's loss will be D's gain, but not always: D might intend to cause a loss to V without any intent to gain. Section 5 defines "gain" and "loss" as in s.34(2)(a) of the 1968 Act, being limited to gain and loss in money or other property. As under s.4(1) of the 1968 Act, property covers all forms of property, including intellectual property. On close examination, the requirement that D acts with intent to gain or cause loss extends criminal liability under s.2 to include making a false statement with intent to cause someone to be exposed to the risk of temporarily not being able to get that which he might otherwise have got.

Section 2 will be the most commonly used of the new offences covering commonplace wrongdoing such as making false mortgage applications or insurance claims as well as cases of 'advance fee fraud'. It is also designed to criminalise phishing on the internet. Its breadth is obvious, as is the effect of the change from the old law where it had to be proved that D's conduct deceived V. Now there is no need to prove a result of any kind or that any person believed or acted on any representation. Indeed, there need not be any identifiable victim. This shift from a result to a conduct-based offence means that the crime is complete much earlier in time – as soon as the representation is made - and there will be less need to rely on attempts.

Section 3 - Fraud by Failing to Disclose Information

This offence is committed where D dishonestly fails to disclose information to another which D is under a legal duty to disclose, and he intends, thereby to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. The offence is narrower than s.2, but there is considerable overlap, indeed arguably all cases of legal duty might fall within s.2[7] Nevertheless, where the allegation centres on a failure to fulfil a legal duty, charges under s.3 will more accurately describe the wrong done.

The central element of this offence is the concept of a legal duty, which was explained by the Law Commission[8] as extending to duties arising: under statute (e.g., obligations of accuracy in company prospectuses); in transactions of the utmost good faith (e.g., insurance); from general contractual terms or from the custom of a particular trade or market; and from the existence of a fiduciary relationship between the parties. The legal duty extends beyond situations in which D's failure to disclose gives V a cause of action for damages, and includes those where V has a right to set aside any change in his legal position (e.g., by rescinding a contract and reclaiming property).[9] The jury will need to be directed that if they find certain facts as identified by the judge they can conclude that there is a duty in law. As a matter of principle, it is submitted that it should not be criminal to withhold information which one is entitled to withhold under civil law. It is no defence for D to claim a lack of knowledge as to the duty to disclose; that must be packaged as a denial of dishonesty.

Unravelling the Fraud Act 2006 (continued)

Section 4 – Fraud by Abuse of Position

This is the most controversial of the three fraud offences, criticised in Parliament as a "catch all provision that will be a nightmare of judicial interpretation".[10] It is committed where D "occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person" and he dishonestly abuses that position, intending thereby to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss. D might be in a relevant financial position towards A as his employer, and abuse that position to cause loss to B. The section clearly catches the secret profiteer such as the wine waiter selling his own bottles and passing them off as belonging to the restaurant.[11] There is, however, no need for the conduct to be "secret".[12] The government also emphasised the potential for s.4 to combat legacy fraud with an expectation that charities will benefit by £2-3m pa.

Although the element of "abuse" remains undefined, the greater difficulty with this offence lies in identifying whether D occupies a relevant financial position. The government refused to restrict the provision to circumstances where D owes a fiduciary duty. How much further does s.4 extend? The Law Commission treated as sufficient relationships of trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners, and, more worryingly, suggested that the relationship could arise e.g., "within a family, or in the context of voluntary work, or in any context where the parties are not at arm's length."[13] The Home Office also suggested that s.4 applies where D is given access to V's premises, equipment, records or customers.[14] The breadth and ambiguity of the offence give rise to the potential for all sorts of trivial civil law disputes to become issues of criminal law, and as elsewhere under the Act, the element of dishonesty will prove crucial.

Section 6 - Possession of articles for fraud

Section 6 creates a wide offence, carrying a maximum five year sentence on indictment, of possessing or controlling any article for use in the course of, or in connection with, any fraud. By s. 8, "article" includes "any program or data held in electronic form."

The offence combats the growing menace of computer programs used to generate credit card numbers and blank utility bills. Although based loosely on going equipped,[15] s.6 is much broader, applying to possession at home or in the workplace, and with no requirement that D has embarked on committing the relevant fraud offence. Since practically any article might be used in a fraud – pen and paper, laptop and printer, pack of cards etc- much will turn on *mens rea,* and on its face the section contains none. However, after persistent lobbying, the government accepted that the Crown must prove D had *a general intention* that the article be used by someone for a fraudulent purpose, though it is not necessary to prove intended use in a particular fraud.[16] Problems of application can be anticipated – is the offence limited to "frauds" under this Act? Is it restricted to the commission of the offence as principal or as an accessory or conspirator? Can possession be defined and easily in this context?

Section 7 - Making/adapting articles for fraud

The section creates an offence of making, adapting, supplying or offering to supply any article (i) knowing that it is designed or adapted for use in the course of or in connection with fraud, or (ii) intending it to be used to commit, or assist in the commission of fraud. It carries a maximum 10 years' imprisonment on indictment. The section has obvious application in criminalising those who make/supply devices which cause electricity meters to under-record consumption.[17] Parliament has created numerous specific offences to tackle similar behaviour,[18] but this is a welcome general offence. It has potential to apply more widely, catching e.g., software manufactures producing programmes designed for criminal purposes.

Fraudulent Trading

Section 9 criminalises knowingly being a party to the carrying on of fraudulent business where the business is not carried on by a company. Those caught include sole traders, partnerships, trusts, companies registered overseas, etc. This complements s.458 of the Companies Act 1985, and will carry a maximum 10 year sentence as will s.458 (by s.10).

Section 11 - Obtaining Services Dishonestly

The offence of obtaining services by deception under s.1 of the 1978 Act was of no use where, as is increasingly common, D obtained services through an automated process. That offence is replaced with one of obtaining services by a dishonest act, (i) knowing that the services are to be paid for or knowing that they might have to be paid for and (ii) with intent to avoid payment in whole or in part. As with the 1978 Act offence it applies only to services for which payment is required. It is not inchoate; there must be an act and an obtaining of the service, and it is narrower than the old offence because D must intend to avoid payment.

This important offence carries a maximum five year sentence on indictment. It extends well beyond the machine "deception" type cases, to encompass eg cases where D climbs a wall to watch a football match without paying the entrance fee – although not deceiving the provider of the service directly, D is obtaining a service which is provided on the basis that people will pay for it. As under the old law, an application for a bank account or credit card will only be caught if the service is to be paid for: *Sofroniou.*[19]

Other provisions

The remaining provisions in this unusually short Act deal with miscellaneous matters. Section 12, echoes s.18 of the 1968 Act, rendering personally liable company officers who are party to the commission of 2006 Act offences by their body corporate. Section 13 introduces a provision akin to s.31 of the 1968 Act whereby D is protected from incriminating himself or his spouse or civil partner for the purposes of offences under the Act and related offences in co-operating with civil proceedings relating to property. Schedule 1 to the Act makes consequential amendments to the Criminal Justice Act 1993 to provide jurisdiction over all the offences in the 2006 Act when property is fraudulently gained in England or Wales, even though the representation has taken place in another country.

Conspiracy to defraud

The Law Commission followed many practitioners, judges and academics in calling for abolition of conspiracy to defraud, describing its retention as "indefensible".[20] With the 2006 Act's broad new offences and their inchoate counterparts, its days certainly looked numbered. However, despite severe criticism from Law Lords during the Parliamentary debates, the government resisted abolition, pointing to the risk that course entailed and the likelihood that there would remain circumstances in which conspiracy to defraud was the only available charge or at least the most appropriate. Although reprieved, the offence is to be kept under review to assess its continued value. The Attorney General will (at the time of the Act) release guidance on when prosecutors ought to charge conspiracy to defraud.

Conclusion

The Bill met with widespread support, being described as a "model of law reform", and the Act should succeed in simplifying the law, making issues more comprehensible to juries, and providing offences flexible enough to combat fraud in all its diversity. What is more doubtful is whether it will advance the government's broader fraud reform agenda: will the Fraud Act really help in the general problem of how to prosecute large scale and complex frauds efficiently?

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1 Report No 276, *Fraud* (2002). http://www.lawcom.gov.uk/docs/lc276.pdf
2 http://www.homeoffice.gov.uk/documents/cons-fraud-law-reform/
3 *Charles* [1977] AC 177; *Lambie* [1982] AC 449.
4 *Re Holmes* [2004] EWCA Crim 2020.
5 Explanatory Notes, para 19.
6 [1982] QB 1053.
7 If omission to disclose could be seen as a representation.
8 Fraud (2002).
9 Fraud, (2002) para 7.27.
10 Standing Committee B, 20th June 2006, col 25.
11 *Doukas* [1978] 1 All ER 1071.
12 cf the original proposal in the Law Comm Report, *Fraud.*
13 *Fraud,* 7.38.
14 Para 23.
15 Theft Act 1968, s.25
16 The judicial interpretation of *mens rea* in going equipped (Ellames [1974] 3 All ER 130) is to apply.
17 *Hollinshead* [1985] 1 All ER 850.
18 See e.g. Communications Act 2003, s.126; Mobile Telephones (Re-programming) Act 2002, s.2.
19 [2003] EWCA Crim 3681.
20 *Fraud* Law Com No. 276 (2002) paragraph 1.4. See also Law Commission Report No 228 *Conspiracy to Defraud* (1994).

Big Money in a Post Miller and McFarlane World

The media may love a 'big money' divorce case but family practitioners have to read the fine print of judgments to discover where they go from here. Grant Armstrong of 6 Pump Court makes this task easier for all barristers

The recent history of matrimonial finance litigation is littered with the wrecks of marriages of the extremely wealthy - the Big Money Cases where a husband typically seeks to defend his fortune against the predations of his wife's legal team.

The House of Lords Judgment in the conjoined appeals of **Miller v Miller and McFarlane v McFarlane [2006] UKHL 24** is the latest step in the Big Money cases but the judgment is of general application and not limited just to those who are inordinately wealthy.

Like all good judgments the glitterati of the Family Bar have been dining out on it on the lecture circuit ever since, debating the meaning of life in a post modern Miller & McFarlane world.

The result as Anthony Kirk, Q.C. Chairman of the FLBA wrote in his summer newsletter:
Although no longer a finance practitioner, I am aware that many take the view that the speeches in the Miller/McFarlane litigation have, if anything muddied the waters further. Having attended several seminars on the subject, I am inclined to agree.

Some background

On a divorce the Court redistributes wealth in accordance with the section 25 Matrimonial Causes Act 1973 criteria which prioritises the needs of the children and requires the court to have regard to the

- income, earning capacity, property and other financial resources of the parties both now and in the foreseeable future including any earning capacity a party could reasonably acquire
- The financial needs and obligations and responsibilities which the parties are likely to have
- The standard of living enjoyed by the parties
- Their age, the duration of the marriage and any physical or mental disability
- The conduct of each of the parties if that conduct is such that it would be inequitable in the opinion of the court to disregard it
- Any benefit lost by reason of the divorce

Current Trend

Prior to **White v White [2001] 1 AC 596,** cases were determined on the basis of the wife's reasonable needs.

In White v White the parties to a 30 year marriage were equal partners in a farming partnership each having contributed their own respective farms.

Unsurprisingly the House of Lords determined that there should be an equal division.

In addition the House of Lords laid down principles that

- all cases should be judged by "*the yardstick of equality*" and
- should achieve "*a fair result*" and
- there should be no discrimination between the contribution made by a home maker and a breadwinner.

Fairness

The word "Fairness" does not appear in section 25 and (as Lord Nicholls accepted in Miller) the word defies any logical analysis and its meaning will vary from generation to generation.

4. Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.

Since White there have been a number of cases where wealthy husbands have sought to retain assets by a departure from fairness and equality on the grounds special contribution i.e. the business acumen that generated significant wealth. However this special contribution has to be "*stellar*" to qualify. Aside from Sorrell (the WPP global advertising fortune) and Charman (the Dragon insurance company) these attempts have all been rejected.

Miller and McFarlane

In deciding these cases the House of Lords unfortunately did not give one single judgment. Two different leading speeches were given by Lord Nicholls and Lady Hale. Lord Hoffman agreed with Lady Hale. Lord Hope agreed with both Lord Nicholls and Lady Hale and then proceeded to give a judgment lamenting the shortcomings of the Scottish system and calling for reform. Lord Mance's speech identified the differences between Lord Nicholls and Lady Hale.

Miller

This was a classic short marriage case. Prior to marriage Mrs Miller was a public relations consultant earning £85,000 gross and living in rented accommodation. Mr Miller had acquired assets of £17m from financial services prior to marriage. During the marriage he acquired shares in New Star asset management company which came to have a value of £15m.

After a childless marriage (2 years 9 months) Singer J (having reserved judgment for 6 months) awarded the wife £5m.

Conduct

To the consternation of the profession Singer J had ruled that, while conduct was not alleged by either side, it would be unfair to disregard the fact that the wife did not seek to end the marriage or give the husband any remotely sufficient reason for doing so.

The House of Lords

- rejected conduct as an issue in most cases unless it was "*inequitable to disregard it*" i.e. gross and obvious,
- Accepted that the husband's premarital wealth should be looked at as being of a different character than the marital acquest-property acquired during the marriage
- Upheld the award on the basis that the husband's wealth had in fact increased during the marriage by approximately £15m
- Determined that the right to share is applicable to short as well as long marriages
- Rejected the durational approach whereby an entitlement to sharing was built up over the length of the marriage

Lord Mance doubted whether he would have awarded as much as £5m but declined to dissent.

The conduct ruling produced a huge sigh of relief from family practitioners who did not relish the prospect of conducting post marital autopsies.

Overall it is notable that notwithstanding the yardstick she was awarded significantly less than half of the marital acquest.

McFarlane

This was a 16 year marriage with three children. Significantly the wife was a City solicitor who had returned to work after the birth of their first child, earning as much as the husband and at times more. The husband throughout had been a City

Big Money in a Post Miller and McFarlane World (continued)

accountant. On the birth of their second child she gave up work to concentrate on the husband's career.

They had agreed an equal division of capital.

The issue was maintenance. She was awarded £250,000 on a joint lives basis i.e. until her husband died or she remarried (£275k claimed/£100K offered) for herself and £60,000 per annum for the children out of the husband's net income of £750,000 p.a. The husband appealed. The Court of Appeal limited the duration of the maintenance to an extendable five year term because it was uneasy that such a large order should last indefinitely and an indefinite term conflicted with the statutory objective of clean break.

The House of Lords reinstated the original order. It held that she was entitled to generous income provision for herself and the children. The Court of Appeal was wrong to set a time limit. While she would eventually return to work, she would still be entitled to continuing compensation given the time she has been out of the labour market and the difficulties of repairing her pension provision.

The award was approximately one third of his net income. However there is no suggestion that this should be a periodical payments yardstick. There is currently a vacuum for practitioners trying to calculate "fair" periodical payments. The Lords enunciated some principles but gave absolutely no guidance as to the "numbers".

Lord Nicholls considered there were three strands

- Fulfilling the "relationship generated" needs of the parties. In most cases the available assets are insufficient to provide adequately for two homes
- To compensate any significant prospective economic disparity arising from the way in which the parties conducted their marriage. The double loss sustained by a wife from a diminution of her own earning capacity and the loss of a share in the husband's enhanced future income
- Equal sharing of the fruits of the marital partnership unless there are good reasons to the contrary

He suggested that it was permissible to treat the marital acquest (property acquired during the marriage otherwise than by inheritance or gift) differently from other property.

Lady Hale stated

"The ultimate objective is to give each party an equal start on the road to independent living."

She identified three rationales for redistribution on divorce as being:-

- *Relationship generated needs* - to ensure each party has enough to satisfy their needs at a level close to the standard of living enjoyed in the marriage. Needs are to be generously interpreted
- *Compensation for relationship generated disadvantage,* i.e. giving up a lucrative and successful career for the family
- *Sharing the fruits of the matrimonial partnership*

Lord Nicholls considered that the yardstick of equality should apply to all assets acquired during the marriage irrespective of its length. There was no distinction between family assets and business and investments assets.

Lady Hale stated that in a very small minority of cases, where there is big money and a short marriage a departure from equality may be justified in respect of assets which are not family assets (i.e. homes, caravans, furniture, insurance policies and family savings) or business assets generated by the joint efforts of the parties.

In addition she identified a second category where departure from equality might be justified in the genuine dual career family where both have worked and some assets have been pooled and others not.

Conclusion

- In the ordinary case the parties needs (e.g. for rehousing, capital and pension) and the need for compensation will prevail. There is an entitlement to share even in short marriages
- In big money cases, even short marriages will lead to large awards
- The wife who remains at home to look after children will have a lifelong entitlement to maintenance

As to the differences between the Law Lords on other points there is fertile scope for further argument.

The next instalment?

Charman is the first major case decided after Miller & McFarlane by Coleridge J on 27 July 2006. There the wife accepted a departure from equality on the grounds of special contribution of 55/45 in his favour and the court resisted any greater departure urged by the husband. She was awarded a lump sum of £40m (bringing her assets to £48m) i.e. 37% of all assets. Significantly Coleridge J rejected the husband's claims under Article 1 that his rights to peaceful enjoyment of his possessions as being absurd. He further accepted that the field of ancillary relief was discretionary and that it was hard to obtain guidance which limited rather than promoted debate. He noted

> *Pandora is constantly vigilant for opportunities to unlock the box. With the arrival of Miller/McFarlane I hear the rattling of keys.*

By analogy with crime (the published sentencing guidelines) and personal injury (JSB Guidelines) he called for consideration of a tariff system. He recognised

> *In both those areas the courts have been driven to resort to tariffs recognising that there is, in truth, no right or wrong answer and the compromise of unrestrained judicial discretion is justified in the public interest…and to aid compromise. [133]*
>
> *But a tariff of percentage bands which decreased as the size of these extraordinary fortunes increased might prove to be helpful guidance and, ultimately no less fair than the current expensive uncertainty [136].*

Appeals are threatened.

Forbidden Smells

Much of the visual 'look' of modern consumer society is the result of companies wanting to develop their own trade mark. All this is subject to UK and EU rules. But can 'smell marks' also be protected by the law? BVC student David Orman takes us through this interesting part of the law.

We are used to identifying a manufacturer through signs like words and images, for example we can identify a pair of Nike trainers through Nike's tick symbol. The concept that a symbol or trade mark identifies a particular manufacturer seems relatively straightforward, but what would happen if that symbol was a smell? A 'smell mark' would enable consumers to identify a manufacturer through smelling a specific scent. Thus a smell could be attached to packaging in place of conventional words or images. However, innovative 'smell marks' do not seem to interact with the requirements for trade mark protection. In 1999 'the smell of fresh cut grass' for tennis balls was allowed to be registered,[1] nevertheless in recent years the law's approach has become stricter. Why are they considered too problematic to receive protection and what are some solutions for the problems?

What Brussels has to say

The Trade Mark Directive[2] made "…the conditions for obtaining and continuing to hold a registered trade mark… in general, identical in all Member States…" Under Art.2 "A trade mark may consist of any sign capable of being represented graphically… provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings." Signs which do not comply with the requirements in Art.2 are denied registration under Art.3(a).

The Community Trade Mark Regulation[3] facilitates pan-European trade marks and Art.4 which is given force by Art.7(a) lays down identical requirements for trade marks as Art.2 of the TMD. In the context of smell the requirements pose two significant questions; can smell enable us to identify a manufacturer's products? and can smells be represented graphically?

The problem of identification

The concept of using smell to identify a manufacturer's products may seem strange when one thinks of the way we use conventional trade marks. People may go into shops and select products based on the name of the manufacturer or a particular symbol. Thus we are not really in the habit of using smell to distinguish between the products of different manufacturers. However, smell appears to have been successfully deployed in the marketplace as an effective means of indicating origin. In the American case of In Re Celia Clarke, DAB Clarke's Osewez[4] Celia Clark was "…the only person who has marketed yarns and threads with a fragrance." It was accepted that "…the scented fragrance does function as a trademark for her thread and embroidery yarn." In Ralf Sieckmann v Deutsches Patent- und Markenamt[5] the Advocate General believed "…that the abstract ability of a sign, capable of perception by the sense of smell, to fulfill an identification function is completely beyond question." Additionally, the court reached the conclusion that Art.2 of the TMD does not preclude signs like smells which cannot be seen by the eye, so long as they are capable of graphic representation.

Graphic representation

Sieckmann stated that a graphic representation must be "...
clear, precise, self-contained, easily accessible, intelligible, durable and objective…" A description of a smell in words and a chemical formula were rejected because they did not comply with the requirements for a graphic representation. It was pointed out that "…a chemical formula does not represent the odour of a substance, but the substance as such". A deposit of an odour sample was rejected on the grounds that it did not "…constitute a graphic representation…" Additionally, odour samples are not "…sufficiently stable or durable." A combination of the proposed methods was also rejected due to their individual unacceptability. The result of Sieckmann is that there appears to be no acceptable method of representing smells.

What about a written description?

The written description before the court in Sieckmann was 'a balsamically fruity scent with a slight hint of cinnamon.' The Advocate General may appear well justified in criticising the accuracy of such a convoluted description and pointing out that descriptions of smells are undermined by subjectivity. He illustrated this by asking "What does 'balsamically' mean? What should be understood by 'fruity'?" Nevertheless, it may not seem fair to tar more simple descriptions with the same brush, for example 'the smell of fresh cut grass' and 'the smell of ripe strawberries' seem quite clear.

The description 'the smell of ripe strawberries' was considered in the post Sieckmann case of Eden SARL v OHIM.[6] The court stated: "…although as follows from Sieckmann, a description cannot represent graphically olfactory signs which are capable of being described in many different ways, it cannot however be ruled out that an olfactory sign might possibly be the subject of a description which satisfies all the requirements laid down by Art.4 of Regulation 40/94,[7] as interpreted by the case law." In Eden the court considered the submission that "…the description 'the smell of ripe strawberries' is unequivocal, precise and objective." A study demonstrated "…that strawberries do not have just one smell." Consequently the description 'the smell of ripe strawberries' is too subjective to sufficiently represent a smell. The Advocate General in Sieckmann referred to a difference in 'the smell of fresh cut grass' in Alicante. Thus even simple descriptions may not be as precise as they appear to be.

Science to the rescue

In 2004 Axel and Buck won the Nobel Prize for physiology or medicine. Their research has enabled us to understand the "…basic principles for recognizing about 10,000 different odours…" and "…clarified how our olfactory system works."[8] Rob Heverly of the University of East Anglia, Norwich Law School believes "…It is possible to imagine… that the new discovery would lead to a way of uniquely identifying smells through something like a color chart…"[9] The court in Eden referred to the lack of a "…generally accepted international classification of smells which would make it possible,… to identify an olfactory sign objectively and precisely…" Classification systems like musical notes set out on a stave and international colour codes have enabled registered 'sound' and 'colour marks'. Thus Axel and Buck's research could appear to lay the foundations for registered 'smell marks'.

However, Heverly has identified "…some additional graphical representation problems." He explains "…we need to represent what we're protecting. That means we would need to indicate, it seems, not only the definition of the smell, but also the concentration…" He is additionally concerned about smell's lack of durability and asserts: "…To the extent that the smell does not last, it cannot stand as a mark…"

In spite of the fact that smells seems to have the potential to function as trade marks they cannot receive the protection of registration. This situation is unlikely to be remedied by simple written descriptions. Axel and Buck's research could create a classification system which is not undermined by the apparent presence of subjectivity which seems to rule out written descriptions. Nevertheless, Heverly appears to have raised significant concerns about whether a suitable classification system could lead to registered 'smell marks'. Perhaps one day a solution will be discovered but for the time being it appears that the possibility of imaginative 'smell marks' lies purely in our imagination.

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1 Vennootschap Onder Firma Senta Aromatic Marketing's Application [1999] E.T.M.R 429.
2 First Council Directive 89/104/EEC.
3 Council Regulation (EC) No.40/94.
4 17 U.S.P.Q.2d 1238.
5 [2002] ECR I-11737.
6 [2006] E.T.M.R 14.
7 Or Art.2 of the TMD.
8 http://nobelprize.org/medicine/laureates/2004/press.html.
9 http://lawblog.uea.ac.uk/archives/protecting_smells.html

Annual Dinner

Only someone who has gone through the nerve-wracking experience of being junior at such a dinner can truly understand the pleasure with which all subsequent dinners are enjoyed, Tanya Robinson reports.

This year, my cunning plan was to have pre-pre-dinner champagne at the Savoy with a certain lady circuit judge (my pupil mistress) and a few other likely drinking partners. How were we to know that the "Reclaim the Street" protesters on bicycles in enormous numbers would choose the precise moment that we stepped out of the Savoy and into a black taxi, to close off the Strand, Aldwych and Fleet Street for about 15 minutes? We (not very) patiently waited for the protesters to "move along", and arrived just in time to be told to "make our way inside the hall please".

The feast

Dinner was preceded, as is now our tradition, by a beautifully sung Judge's Grace, sung by Rupert Pardoe, Michelle Daly, Barbara Zavros and Alistair Merry.

The menu consisted of chilled gazpacho (something I have always been rather unconvinced of in the past but on this occasion I thought was rather good, with 'La Guita' Manzanilla), roast rack of new season lamb with an orange and rosemary crust (with 1995 Château Charlemagne), Scottish raspberries (with a 1989 Aigle Blanc), and cheese (with a 1985 Royal Oporto). As ever, Stephen Solley Q.C. delighted us with his choices of wine.

Speeches

Before long, it was that time again. Stuffed to the brim with fine food and wine and having admired all the gorgeous ladies' dresses in the (always too long) ladies toilet queue, we settled back for the speeches. Tim Dutton, Q.C., Leader of the Circuit, proposed the health of the guests. Singled out were Simon Barker, retiring as Treasurer this year, who was thanked for his sterling work on the Circuit's finances for so long, Phillip Bartle Q.C. who had "manfully run education and training on the Circuit" whose stint on the Committee was due to end, and Mr. Justice Bell, His Honour Roger Sanders, His Honour Judge Michael Lawson Q.C., Mr. Justice Underhill and His Honour Judge Price Q.C..

Tim Dutton, Q.C. and his mother

The Leader then turned briefly to the Carter Review suggesting "grounds for cautious optimism" before turning his attention to our esteemed Guest of Honour.

Our guest

It was, the Leader said "a distressing feature of modern political life" that "political leaders in some parts of the world eschew the rule of law". The balance can become "so extreme that the very lives and liberty of the judiciary become threatened". Zimbabwe, under its current president, Robert Mugabe, was one such country. The Guest of Honour, appointed Chief Justice by "the person who turned tormentor - Robert Mugabe" was "one such rare person" who had shown "great personal courage to stand up for basic constitutional and legal principle" in the face of personal threats day in and day out of court. "The threats were orchestrated by the Government with crowds in their hundreds". Justice Gubbay's "weapon against such lawlessness was reason, fairness and personal dignity" as he "tried to maintain the rule of law in extremely hostile conditions". He had, the Leader said, "for 11 years held justice up as hope for all of Zimbabwe. A hope dashed by his removal after a courageous struggle in 2001". His legacy, however, was "a hope for the restoration of justice and the rule of law in Zimbabwe which burns brighter than the torches of oppression which have now overcome the country."

Chief Justice and Mrs Gubbay, Baroness Prashar and Lord Justice Moses

Justice Gubbay replies

Justice Gubbay rose to a warm welcome from Circuiteers and guests alike. The Guest of Honour spoke at length about his country, about the developments to the judicial system and his experiences first at the Bar and later as a judge. He described the "draconian criminal legislation" that prior to the advent of Independence (on 18 April 1980) "pushed one's ingenuity to the limit" to "avoid the harsh and unjust penalties that were prescribed upon conviction for what were essentially politically motivated offences". But it was when he spoke of the "direct and blatant harassment of judges" that began in February 2000 after "the unlawful countrywide occupation of white owned agricultural land by war veterans and land hungry followers, acting with the incitement and assistance of Government" that the hall seemed particularly expectant and hushed. How could any of us truly imagine what it would be like to live one's daily life in constant fear of personal harm in this way?

In a reaction to the Supreme Court's order "declaring that the land be vacated with immediate effect and directing the Commissioner of Police to instruct his officers to enforce it", war veterans "called upon the judges to resign or face removal by force". The Minister of Information accused Justice Gubbay of being "biased in favour of white landowners at the expense of the landless majority" and called for his resignation. Members of Parliament brought a motion for his impeachment although the House lacked the power to do so. In November 2000, "200 veterans and followers invaded the Supreme Court" rushing into a Court room where a constitutional application was due to be heard, the mob standing "on chairs, benches and tables, in a show of absolute contempt for the institution of the courts as the third essential organ of a democratic government. They called for the judges to be killed". The invasion "which had been organised

Laura McQuitty and Tom Little

by the Government lasted for an hour. Thereafter, on 14 December 2000, President Mugabe "disowned the courts". "Land distribution" Mugabe said, was a "political and not a legal matter, that cannot be resolved by the little law of trespass". The President stressed that the courts should keep out of the arena, stating that "he would not allow the police to move against farm invaders who were merely taking over land that had been stolen by whites from blacks".

Two days after the invasion of the Supreme Court, the Chairman of the War Veterans Association, who went under the name "Hitler" gave all judges "14 days to resign, or else". Justice Gubbay held on until the end of June 2001, when he "left the bench with a heavy heart". It was clear to him that "the Judiciary was up against an Executive whose express object was to staff it only with those black lawyers sympathetic to its political designs". In this, sadly, they had been successful. The more recent appointments to the High Court bench, he told us, differed from their predecessors. They "accept the unending and often violent land invasions of the comparatively few remaining white farmers as a political not a legal issue. They are reluctant to hold against the Government in most constitutional matters." Opposition parties, human rights organisations and aggrieved individuals, however, "continue to strive to enforce their rights" he told us. Justice Gubbay believed that "the day would come when these specious judgments would be seen for what they are".

Before proposing the health of the Circuit, Justice Gubbay said "To thank you for your hospitality would be hard enough by itself, but you have made the task even harder. You have actually thanked your distinguished guests for coming this evening and enjoying that hospitality. You have even gone so far as to drink to our health, after you have done everything you could to undermine it!" He then thanked the Circuit for a "most memorable evening".

Return of "the Princess"

And so we turned to the final speech of the evening, that of the "better-late-than-never" but warmly welcomed Madam Junior, Laura McQuitty. Determined to "quell those unsubstantiated rumours, viciously and unnecessarily spread" that she had "gone to significant lengths in the heady days of summer 2005 to avoid making this particular speech", Madam Junior was eager to point out that those who knew her well were "only too aware of how I have been counting down the days to this particular evening". Fortunately, she had thwarted "a concerted effort by the Security Forces to clamp down on the movement of accented insurgents around the principal legal sites of inner London" to be with us that evening. In her absence she noted that the judiciary had taken up a new residency on the front page of the Sun newspaper alongside "misleading reports of sentences". Having outlined the judicial resistance that it seemed had formed, Madam Junior turned finally to the topic of Superman (aka Timothy Dutton Q.C.) and his impending retirement as Leader of the Circuit.

The Leader had faced a "greater nemesis than even Lex Luther" in the form of "Lord Falconer and the mass legion of the Damned". His "battle with his nemesis" had "continued unfalteringly for 3 years". With the "kind of super power rarely seen…these days", our "intrepid superhero" had "teased a fiver out of the wallet of Lord Falconer which has now been evenly distributed to the Junior Bar".

Credit where credit's due, Madam Junior observed that "behind every super man, there is a super woman" – Sappho Dias in this case. "Please accept this token on behalf of the Circuit, and take your husband back!" said Madam Junior as a beautiful bouquet of flowers was handed to Sappho. All those in the hall then stood to toast the Leader of the Circuit.

Another thoroughly enjoyable evening. Well done all.

Nicola Shannon and Dru Sharpling

Photographs by Andrew Ayres

HHJ Pawlak, Mr Justice Munby and Geoffrey Vos, Q.C.

The Circuit Trip

Not even a lightning strike at Barcelona airport could dampen the spirits (or capacity for shopping) of Circuiteers who travelled south for this year's visit to colleagues abroad. Kim Hollis Q.C. again records the pleasures and serious side of the trip

This year's programme promised a fun filled and cultural weekend at the start of the summer break in trendy Barcelona. The list of participants included the usual suspects together with many new enthusiastic hopefuls who had taken to heart my article last year about Berlin. It was in this optimistic mood that we gathered at Gatwick on Friday 28th July to check in at 17.00 for an anticipated 18.25 departure direct to Barcelona. The champagne corks started to pop when we heard that the flight may be *slightly delayed* due to

a lightning strike at Barcelona airport. They popped… and popped…and popped. Short breaks were taken by the ladies to duty free, with worried partners looking on. Usefully, the designer sunglasses hut was directly in front of the bar. We arrived at the Hotel Jazz at 3.30 a.m., via Perpignan and a cross-border bus journey.

Nevertheless, we all were on parade as required at 09.30, ready to attend the Collegi d'Advocats de Barcelona for the morning, proving as always that the English Bar has the energy and hence ability to burn both ends of the candle and still appear both bright-eyed and lucid.

A fascinating morning

A fascinating morning's programme then followed in which the question of ethics took centre stage. Ramon Mullerat, former president of the CCBE, started off by explaining the Spanish legal system and ethical rules for lawyers.

Tim Dutton, Q. C., presented a superbly argued paper on conflicts of interest between the barrister, the lay client, and the professional client. Philip Bartle, Q.C., who doubles as Chairman of the Bar Monitoring Board, dealt with the question of professional ethics. He informed our hosts and reminded us all of what is oft forgotten in present times, namely, our primary duty as counsel, as summarised by Lord Denning in **Rondel v Worsley:** " Counsel must accept the brief and do all he honourably can on behalf of his client. I say all he 'honourably can' because his duty is not only to his client. He has a duty to the court, which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice……"

Particularly informative was Maria del Mar Espar's talk on the Spanish Judicial System and Procedure, and how it contrasts with our own system. They have developed provincial courts, in each city, which take the name of the capital of the respective province, and with jurisdiction

extending throughout the province. In Barcelona itself as an example, they are made up of various sections which include: six civil, eight criminal, two family and one newly established court for "Violence against women." This court is a new experimental concept and is specific in its design and procedure to deal with criminal/ domestic matters committed against women and children, which includes both rape and domestic violence.

They are apparently staffed by a single judge (no jury), proceedings are dealt with extremely expeditiously, within weeks / days it seems of allegations being made, resulting in defendants being held in custody awaiting trial for the minimum amount of time and memories being fresher as to facts. As the courts and their concept are so new , as yet there is no data available as to their success, but I venture to suggest that it is not beyond the realms of possibility that the concept may surface here …. So watch this space.

Finally, Judge Geoffrey Breen spoke of his experiences in hearing Spanish extradition requests from the point of view of having been the Stipendiary Magistrate who dealt with them at Bow Street. He also, confounding any local notions of English insularity, delivered his speech in Spanish.

Organiser Giles Colin

Some enjoyment

The hard work of the trip over by 1pm , it was a free afternoon, loosely translating into designer shopping for girls, snoozing after lunch for men and sightseeing for serious diehards.

The evening found us all al fresco dining at the Restaurant Barceloneta overlooking Port Vell. A wonderful venue overlooking the port, an entire floor of the restaurant to ourselves sampling a menu of anchovies, shellfish, lamb, or veal with olive oil grilled vegetables, followed by desserts of tiramisu, chocolate mousse and Moet sorbet. As always a wonderful selection of Spanish wine accompanied the meal, which resulted in fun and laughter all around, regardless of everyone's undoubted fatigue from the previous night's journey.

The evening would of course have been totally incomplete without the now established tradition of HH Roger Sanders, this time alternating with HHJ Geoffrey Breen, giving a wonderful rendition of Cockney music hall songs.

Sunday, was again a free day, before boarding at 1800—on time. Small groups went in different directions on various sightseeing—and managing to beat the crowds at the Picasso museum--followed by lunch excursions, by the port.

Despite its inauspicious beginning we all warmly agreed on the coach to the airport, whilst viewing and swapping photos of each other on mobiles and digital cameras, that the trip as always had been informative , inspiring and best of all had continued the tradition of fun and both making and renewing friendships. This was to a great extent due to the energy, generosity of spirit and kindness of our present leader, whose last trip as leader this was. We made a small presentation to him at dinner on Saturday to mark the occasion. We are sure that he and Sappho will still be with us on next year's trip, but I warn everyone he really will be a hard act to follow, especially on the circuit trip.

Photographs by Philip Bartle

Brighton – The Hub of the South

Generally known as a place to play rather than to work, Brighton is nevertheless home to a cluster of courts. In our latest profile of a circuit town, Tim Bergin of Crown Office Row Chambers takes us around 'barristers' Brighton' and beyond.

Brighton is a delightful seaside city with much to offer—and it is less than one hour from London by train, or 90 minutes by car. Most famously there is the Royal Pavilion—'onion-domed' outside and 'Chinese' inside and the most extraordinary former palace in Britain—but there is also a marina, a racecourse, a greyhound stadium, plenty of beautiful parks and an ailing football team.

Getting there

The best option is to travel by train. A day return is £19.70, leaving before 9 a.m. If you do drive, be prepared for delays, and parking is difficult, expensive (£15 per day), and scarce during the summer months. Kingswood Street and the NCP in Church Road are closest to the courts. There is however a 'park and ride' facility on the outskirts on the London Road. It takes 20 minutes from there to get to the centre and costs £2.80.

Once you've arrived

There are cabs in the taxi-only forecourt of the station which cost about £4.50. Available by the bus stops are the country's first 'motorised tuc-tuc's' which cost £2.50 to get to the Marina. However, I have yet to see anyone pulling up outside the county court in one.

All the courts are a good 20 minutes' walk from the station, so a taxi is recommended if you are carrying heavy bags. All the courts, with the exception of the crown court in Hove, are close to one another, in and around Edward Street. The magistrates' court is close to the police station and on your left as you travel up Edward Street. It is not a very attractive 1960s building with little to endear it to the user. To get to the advocates' room, go to the first floor and turn left. It is secured, so ask at the desk for the number. Since April 2006, the building also houses two satellite crown courts as an over-spill from Lewes. These are on the second floor. There is a small cafeteria serving tea and coffee on the ground floor, but otherwise facilities are somewhat limited.

Nearby is the Family County Court. Here the advocates' room is on the fourth floor and again you will need to get a security number to gain entry. It is however generally safe to leave bags and coats here. Because the courts are spread over four floors, you may spend much of your time trekking up and down stairs, trying to locate lay clients, opponents and instructing solicitors. Refreshments are limited to drinks and snacks from a vending machine. However, there are two good sandwich bars close by. Interview rooms are in short supply so try to get there early to get one. The court staff is always friendly and helpful. The county court is adjacent, in William Street. The advocates' room is on the first floor.

The nearest crown court is in Hove. There is limited free parking though you should try to arrive early to take advantage of it. The court is spacious and airy and there is a small coffee bar with a good selection of sandwiches. Here as well I have found the staff to be pleasant, helpful and friendly.

Where to stay

Accommodation ranges from the luxurious downwards. A helpful website is www.hotels-brighton.com. My recommendation, if you wish to pamper yourself, is the Hotel du Vin, in Ship Street (www.hotelduvin.com). It has rooms on the seafront and is in the heart of the city, near the Lanes. A standard double room is £150 plus breakfast but it is only a short walk to the courts and it has a wonderfully relaxed ambience. If your budget does not stretch to this, there are good quality B&B's for about £50 per night.

Barristers who lunch

There is a wealth of opportunities to indulge yourself during the 'short adjournment'. If time is not on your side, you should consider visiting Biederhof's for a freshly made sandwich. Prêt a Manger recently opened in the Lanes. Bill's in North Street is a gourmet café set amongst a grocery store to the foodies. It is well worth a visit but try to get there early in order to get a table. If you want something more 'international', Carluccio's has opened a branch near the new library, in Church Street, and there is Drake's on the seafront. The Hotel du Vin also has a restaurant with a menu rapid for £14.50 which includes two courses and a glass of wine.

Evening out

There is comedy at the Komedia; music, opera and ballet at the Dome; jazz at the Joogleberry; top stars at the Brighton Centre and pre-west end shows at the Theatre Royal. Alternatively, you might wish to pick up one of the tuc-tucs and head off for a pleasant evening at the Brighton Marina, where you can while away the evening in the Karma Bar or the Rehab Bar. For a special treat I would recommend 'One Paston Place' which is one of the city's finest restaurants.

Shopping

Everyone has heard of the 'Lanes' and many still imagine that they contain antique shops. However

they do retain their atmosphere in the narrow old streets, crowded with jewellers and other little shops. More interesting is the North Laines area, with its bohemian charm and over 300 unique, individual and quirky shops. High Street outlets are found in the huge Churchill Square indoor mall. The area around Carluccio's has recently been developed.

Something more to do

Brighton seafront is a playground of swimming, surfing, sailing, basket ball, skateboarding and lots more. Further afield, the South Downs are great for walking and cycling. There are the yearly events of the RAC Veteran Car Race and the National Speed Trial. This all leaves unmentioned the museums and art galleries, the churches, the cafes and pubs, and the Festival every May.

It is a special place.

The 2006 Keble Course

The South Eastern Circuit Advanced Advocacy Course held at Keble College, Oxford, from 29 August to 2 September, could once again lay claim to being the best advocacy training course in the common law world. The Circuiteer asked three sets of participants for their views on what it was like

Adaku Oragwu and Giles Atkinson, both from 6 Pump Court, from the 'criminal stream':

Giles Atkinson

Having been asked in advance to write an article based on our experiences at Keble, we realised that we would actually have to pay attention and—dare I say it—do all of the preparatory work. Admittedly, this year all participants were obliged to prepare properly by being required to submit their closing submissions electronically before the course began. At the time, this seemed like a great imposition on our busy lives, but the benefits are enormous. The moment we stepped into the college, advocacy was in the air, morning, noon and night. No time was wasted in Oxford familiarising ourselves with the facts of the cases.

Is there a lawyer in the house?

The opening session began on the Tuesday after the August Bank Holiday. There was a somewhat shaky start when, at the welcome lecture, the crew filming the course for a possible TV programme, managed to drop a camera lens from a height, nearly missing someone in a seat below. Tim Dutton, Q. C. retorted, 'are there any personal injury lawyers in this room?' The cracking pace of the teaching was set there and then and was maintained throughout.

Worth it

It was a gruelling week, complete with long days and late nights, but all incredibly worth it. The main teaching method is that of exercise, video review and replay. First, we were given an exercise—say, cross examination—which we undertook in front of our classmates and the teaching panel. Feedback is given immediately with a 'headline' point that can be remembered in a single phrase ('slow down', 'engage with the tribunal' or 'once more with feeling') All feedback is positive and well judged. The second stage is to scuttle off to a distant room clutching the video of the exercise where we were assessed one to one—again in a constructive and perceptive way. The power of seeing oneself without sound on a tape played fast forward should not be underestimated. The final stage is to repeat the same exercise, later that day or the next morning, incorporating the points made by the initial critique and the video view.

Adaku Oragwu, centre, prepping

Sarah Montgomery (Circuit Administrator) and Bernard Tetlow

It is a demanding way of being taught. We were thoroughly dismantled before being reassembled as—I am sure—better advocates. There is no hiding place but it really does work. It is supplemented with demonstrations and lectures, and it all ends with a full mock trial with 'real' Oxford people (mostly students, by the look of them) as the jury. Each juror is given the opportunity to assess each advocate, in confidence. It is a priceless insight into perhaps the most important test of advocacy which is how one appears to the people who produce the verdict.

Dealing with experts

A particular highlight of the week was the day given over to working with experts on the basis of a separate case study. We first met our expert at an evening meeting which itself took place at the end of a day of advocacy exercises. Preparation time for conferences the following morning was significantly and (we suspect deliberately) curtailed as we made our way to our choice refreshment venue and sampled the delights late into the night. Happily, the witnesses did the same. The next day we examined in chief and cross examined a 'real' doctor or accountant.

A funny beast

Advocacy is a funny beast, so particular and so personal in its style. We spent the weeks prior to our arrival wondering how on earth it can be taught. When we got underway we realised that it can be done in the way we have described. This provides, quite simply, some of the best advocacy training available. We had the chance to learn from and to practice in front of some of the best judges, Silks and practitioners at the Bar.

Lucy Moorman and Edwin Glasgow, Q.C.

There is also an undoubted benefit from the collegiality of the week. We were literally in a college, isolated from the outside world and immersed in advocacy. But by sharing the whole experience, over meals and over the occasional half of shandy with our esteemed faculty, we saw them as ordinary people subject to the same pressures and frustrations as us.

No more excuses

Walking away from that beautiful Victorian college, there was a sense of relief and also of panic, and both because we had been there (and bought the T-shirt). Before we undertook the course, we would always subconsciously forgive our own bad advocacy with 'I have not done Keble yet; once I have done Keble, I'll be fine'. The problem now is that we have done Keble and we have run out of excuses.

On the 'civil side' David Southern, of 3 Temple Gardens Tax chambers and Treasurer of the Bar, discovered that it is never too late to learn.

David Southern

A long time ago--before the world began--there was no such thing as advocacy training. Prior to the Keble course the only – extremely valuable – advocacy training which I had received consisted of a series of messages passed to me in the Court of Appeal by a distinguished practitioner, the first of which read: 'Shut up and sit down.' After that, the messages became more direct.

It was not before time to acquire some more structured guidance, lest I should continue to learn by experience what others might learn by example.

Starring role

A striking part of the Keble course is the use of video review. The only time when I had previously seen myself on video was when I starred in a commercial video on the taxation of foreign exchange gains and losses. This is a topic which perhaps does not ideally lend itself to visual presentation, whatever the merits or demerits of the presenter. Copies are, I understand, still available.

The Keble videos were much more testing. I was stooping to the point of being bent double. I looked down. Above all I did not know what to do with my hands. All this was so obvious that my kindly mentors hardly needed to point it out.

The next point was content. Get the court's attention, was the message. You have to start by saying what the case is about in not more than two sentences. Start with some Sun-reader type headlines (or perhaps, given the transformation of the Times into something indistinguishable from Daily Sport, 'Times-reader type headlines'). This is sound advice, though I have sometimes

Anesta Weekes, Q.C. and Philip Bartle, Q.C.

found it advisable to approach a topic with some diffidence, not nailing one's colours to the mast until one has some idea which way the wind is blowing (there seems to be a mixed metaphor here).

Finally, there was handling witnesses. I immediately scored nul point. I have been used to saying, 'Good morning, Mr Smith. Thank you for coming along this morning to help the Tribunal ..'. This produced instant excruciation. 'Disingenuous' was the kindest word applied. It is not a practice which I intend to continue.

The Circuit's Advanced Advocacy Course is hugely valuable and enjoyable, whatever one's stage of experience or inexperience. The patience and helpfulness of the faculty members is beyond praise. It would be rank ingratitude if, in my case, their efforts were not already showing positive results.

But the course is not just for young English advocates. A cohort of keen foreign lawyers also took part and entered into the spirit of how we do things. Amanda Tonkin from Blackburn Chambers in Canberra saw Keble from the Commonwealth point of view.

Amanda Tonkin

I had the privilege of participating in the course at Keble College, Oxford, courtesy of the Australian Bar Association. Notwithstanding 12 years' experience at the independent Bar in Australia (primarily practising in the Australian Capital Territory though holding a New South Wales practising certificate) I anticipated the course with fear and trepidation. I remain inspired by a most remarkable experience.

The course was run by a formidable team with Tim Dutton, Q.C. and Toby Hooper, Q.C. at the helm. All faculty members, though daunting in reputation and experience, shared their knowledge freely and willingly. A most exceptional collegiate atmosphere prevailed notwithstanding that participation was on an international level with individuals from Scotland, England, India, Pakistan, Namibia, The Hague, South Africa, Australia and Florida.

Toby Hooper, Q.C.

Intensive but worthwhile

The five day intensive course was difficult, rigorous and demanding. It was based on the expectation that we had fully prepared the "brief" prior to the commencement of the course. Each participant was required to perform various skills culminating in a mock trial. Feedback came from a panel of three eminent lawyers ranging from High Court judges to senior juniors. Nothing less than a standard of excellence was required.

Stephanie Farrimond shows how it should be done

For the duration of the course faculty members and participants shared meals and socialised together. A banquet was held on the evening before the trial. Several live outstanding performances were given including a moving violin recital performed by Geraldine Andrews, Q.C. an inspiration for women at the Bar.

"Privilege" is defined in the Concise Oxford Dictionary as "special advantage or benefit." Throughout my remaining practice at the Bar I will remain indebted to Tim Dutton Q.C. and Toby Hooper Q.C. for the privilege of participating in the course and inspired by the greatness of faculty members who gave their time, knowledge and experience to promote a standard of excellence comparable to no other.

Photographs by Stephanie Farrimond

New Minister at the DCA

Poacher or gamekeeper? Q.C. Vera Baird takes on the Legal Aid brief for the DCA

The Ministerial re-shuffle last spring saw the departure of the Home Secretary, Charles Clarke, from the Cabinet, and the promotion of his PPS, Vera Baird, Q. C., M. P., to be a Minister at the Department for Constitutional Affairs. She had served loyally at the Home Office, campaigning to allow the police the right to hold terrorist suspects without charge for up to 90 days. Her particular responsibilities now include publicly funded work—she has been described as the Minister for Legal Aid—and is thus the Department's spokesman for the Carter reforms.

Career achievement

Mrs. Baird describes herself as 'an unskilled working class girl from Oldham' who after getting 'a good law degree' at Northumbria University was Called by Gray's Inn in 1975. After initially practising in Newcastle, she joined Lord Gifford's chambers in London but after a year moved to Took's Court. There she represented a number of defendants who had been arrested while taking part in political protest, such as Greenham Common women and Stop the City, as well as battered women who killed their violent partner. She became a Q.C. in 2000 and a Bencher of Gray's Inn. In 2001 she was elected M. P. for Redcar, the seat previously held by Mo Mowlam.

Speaking out

She was not long in her new job before trouble arose. The cause was the much-publicised sentencing of a paedophile. The sentence of life imprisonment—which the Attorney General decided was not 'unduly lenient'—followed Government legislation. The minimum sentence and the minimum time before he could be considered for parole followed the recommendation of the Sentencing Guidelines Council. All this follows the structure put in place by the Criminal Justice Act 2003 which was drafted by the Home Office when Lord Falconer was a Minister there.

When the furore arose over the minimum period before parole could be considered Lord Falconer stated 'I am absolutely sure that the problem is not with the judges, it is with the system overall' although he had in fact put that system in place. Mrs. Baird was already well known for her views on sexual crimes (set out by Joshua Rozenberg in the last Circuiteer) and on judges (she has stated on television that the Judicial Appointments Commission should be given the power to sack judges who are appealed successfully too often on sentencing). In May 2005 she asked her now-colleague, Harriet Harman, Q. C. in a written Parliamentary question to list all the judges on the South Eastern and North Eastern Circuits who are ticketed to try rape and to state the criteria by which judges in the Court of Appeal are chosen to hear rape appeals.

A retraction

Within days of Lord Falconer's ban on criticising individual judges, Mrs. Baird appeared on Any Questions. The matter of the paedophile case arose. Rather than explain the (faulty) system to the listeners she declared that the judge had got it wrong. We do not know what Lord Falconer said to her but we do know what she replied: 'I should not have made those comments on the case following your statement outlining the clear position of the government. Accordingly I withdraw them and fully support the government's position'.

Taxation problems

She is experienced from her own practice in the problem of taxation of counsel's costs. In 1997, she was a junior in the House of Lords appeal in **R v Mills, R v Poole** which decided that where the Crown has reasonably decided that a witness from whom a statement has been taken is not a witness of truth the Crown is under a duty not merely to furnish the name and address of the witness to the defence but to provide the defence with copies of the statements made.

Mrs. Baird put in a claim for a brief fee of £30,000 in the Court of Appeal for 300 hours' work, which was taxed at £22,500; for the House of Lords her proposed fees of £22,537 (for 90 hours' work) were allowed at £7850. The disparity between fees claimed and fees taxed for all defence counsel in this and in other appeals caused the Clerk of the Parliaments to ask the Appeal Committee to consider the question of taxation of costs in legally aided criminal matters. He asked, 'what is the measure by reference to which counsel's fees payable out of public funds in criminal matters should be assessed?' The Bar Council instructed Sydney Kentridge, Q. C., to argue that the Taxing Officer should be given no guidance but should simply use his own knowledge and experience of the 'going rate'. Mrs. Baird's clerk had defended her bill on the basis that there was no going rate for criminal appeals. The Bar Council's submission was rejected along with other alternatives, leaving the Committee to opt for 'a fee which is reasonable in relation to fees which are generally allowed to barristers for comparable work'. At the same time it stated that the mere fact that one was appearing in the House of Lords did not justify a higher fee than for arguing the same case in the Court of Appeal.

Changing views

Mrs. Baird's own views on counsel's just remuneration for criminal legal aid were aired in the House of Commons on 26 October 2005, and can be contrasted with what she wrote in THE TIMES in July as a junior minister when she mourned 'I shall not see much sunshine this August' as she would be visiting 'as many regions towns and cities as I can to discuss' Lord Carter's proposals.

In October 2005: 'a fairly obvious point is that it is hard to cap the legal aid budget for crime. The budget cannot be capped'

July 2006: The legal aid budget has 'been galloping upwards' to £2.1 billion last year. 'We cannot allow this to continue. With no new money to hand, we need to distribute the budget we have to the best effect'.

In October 2005: 'It is said that because the criminal legal aid fund becomes larger, civil legal aid suffers. That should not be the way in which things work. There are many ways of setting aside civil cases without having to go to court . . Crime by its very nature must go to court. . There is not a great deal that can be done to rebalance the criminal legal aid budget with the civil legal aid budget from that point of view'

July 2006: 'Although crime overall is falling, criminal legal aid has been the driver for the increase in spending. This rise is at the expense of civil legal aid—and this disproportionately affects the disadvantaged and socially excluded'

One best remembers though what she said a year ago: 'One third of the increase in legal aid is caused by volume of cases and one would guess that one third is caused by increasing complexity and the addition of a range of new offences . . . First, an enormous number of increases were not costed, and those increases have run away with the DCA's budget. Do not blame defence lawyers for that—it is not their responsibility. Secondly, the leaders of the Bar with whom the Government negotiate are at the overpaid, posher end'. 'To have excellent changes brought in with a fanfare but then to say, "Goodness me, there is a £130 million overspend on the budget" is no way to control a budget'.

Indeed. D.W.

Being a Friend of McKenzie Friends

Barristers are all too aware that those who most need legal advice and assistance can 'fall through the net' of publicly funded help. Ten years ago, The Rev Paul Nicolson founded the Zaccchaeus 2000 Trust to support vulnerable people facing debt proceedings and also to train volunteers to be McKenzie Friends. Sir John Mortimer, CBE, Q.C., former parishioner of The Rev Paul Nicolson, Chairman of the Trust, asks Circuiteers to contribute to the charity. First, though, the Chairman reminds us of some of the cases of need.

An independent survey from the University of Bristol cites over 12 million people suffering from financial insecurity – 10.5 million adults unable to afford one or more essential household items such as carpets or a landline telephone. The government reports that 3.4 million children live in poverty in the UK. But National Statistics hide the deeper pain of poverty in the UK resulting from inadequate statutory minimum incomes in a very expensive economy.

The legal team

The threat of debt

The vulnerable are reduced by debt repayment, bureaucratic error leading to overpayments of benefits, disproportionate fines, threats of eviction for rent and prison for council tax arrears, which are carried out too often. The criteria for imposing repayment for overpayments is not to cause undue hardship, but there is no guidance from Government about the level of income at which hardship begins and no agreed concept of vulnerability. There are thousands of officers in Job Centres, local authorities and HMRC who make harsh decisions affecting people who lack the knowledge to appeal.

For example a mentally disabled single woman receiving incapacity benefit was within a week of eviction for rent arrears. The bailiffs were about to change the locks when we intervened and explained the position to the council. She is now left with £57.50 a week after deduction of overpayments and arrears. We have taken this up with the DWP and the local authority. It is impossible to live a healthy life on an income which is at half the government's poverty threshold.

A pregnant single mother on benefit with five children lived in a damp and over-crowded two bedroomed flat. Wycombe District Council would not move her to larger accommodation until she paid off rent arrears of £2000 at £5 a week. The council and social services each said that it was the problem of the other. There are no solicitors with a housing contract with the Legal Services Commission in High Wycombe. We threatened them all with judicial review and wrote to the Chairs of both authorities. Social Services paid off the rent arrears and she was moved.

Enforcing fines

The enforcement of fines has changed dramatically since the Courts Act 2003 finally came into effect. The Domestic Violence, Crime and Victims Act 2004 removed your right to refuse entry to bailiffs and gave them the power to force entry. For ten years I have dealt with vulnerable people who have come for a means enquiry in the Magistrates' Court. The magistrates were able to remit all or part of the fines if the circumstances had changed for the worse and the fine was no longer proportional to means; or if people had been fined in their absence.

Now the magistrates impose a fine which is handed over with a collection order to the fines' officers who are not required to consider vulnerability or a change of circumstances. Page 9 of the National Standards for Enforcement Agents (NSEA) states that, "*Enforcement agents/agencies and creditors must recognise that they each have a role in ensuring that the vulnerable and socially excluded are protected and that the recovery process includes procedures agreed between the agent/agency and creditor about how such situations should be dealt with*". Had they done so, the following case would not have happened:

McKenzie friend participants

A single mother on benefit with one child and a pregnant 18 year old daughter owed £1072 fines for motoring offences. On the first visit the bailiff forced entry breaking the catch on a slightly open window. On the second visit to seize the goods the he arrived with an armed response unit. The police had advised the fines officer that there was a samurai sword on the premises. It did not exist. She locked herself and her children in the house. The police said they would force entry if the fines' officer was not allowed in. He was let in. He took her TV set and some personal ornaments that had been her mother's but also a DVD player and 60 CD's which belonged to someone else. It was all sold for £72 with £30 being paid to the auctioneer. Her pregnant daughter objected when the fines' officer began seizing her goods, because it was not her fine. She was arrested and taken to the police station; and then put before the magistrates, who sent her back to the police for a caution.

The District Judge has dismissed our case that NSEA should have applied. If it had the case would have been referred back to the magistrates as soon as the bailiff became aware of the vulnerable situation of the debtor. The District Judge also dismissed the submission that the recovery process should include procedures agreed between the agent/agency (fines' officers) and the creditor (Magistrates' Court as the agent of the State) about how such vulnerable situations should be dealt with. He has been asked by Zacchaeus 2000 to state his case for the High Court to consider.

A friend at hand

Without a McKenzie Friend these cases have no defence or emotional support in traumatic circumstances. We aim to train people to listen to the stories of vulnerable debtors and to help them prepare a statement of means, facts, circumstances and chronology for the courts, the local authorities and housing associations. When relevant the statement is passed on to legal aid solicitors. Our friends will provide personal support to the vulnerable debtor through the trauma of litigation, speak for them when asked and remain available for further support thereafter.

Sir John Mortimer, CBE, Q. C. adds:

I am writing to you with the permission of Timothy Dutton, Q.C., leader of the South Eastern Circuit, to ask for your help. I am a Patron of Z2K.

I am deeply supportive of this work

Vulnerable people face totally disproportionate court proceedings due to an increasingly complex and punitive benefit system. I am sure you will be aware of the difficulties facing them when legal aid is either not available or the system of contracts and poor remuneration to lawyers provided by the Legal Services Commission has led to a very substantial reduction in the number of solicitors able or willing to take on civil cases.

Z2K has developed over the past ten years. Courses have been run for McKenzie Friends around the UK. They are currently planning the 2007 programme. It is now time to extend the training and provide professional backup. They need to employ a full-time lawyer, an administrator and set up an office, costing around £150,000 a year. The John Ellerman Foundation has generously donated £75,000 over three years for an administrator.

I am asking you to consider support either with a one off donation or a standing order. Both can be done by logging on to z2k.org and clicking 'donate' which enables the completion of a tax efficient gift aid or by post to 93 Campbell Road, London N17 0AX. I hope I can count on your help.

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The AWB Annual Dinner

Every barrister wants to be an actor and now one of them will be thanks to the AWB annual dinner

Tim Dutton, Q.C. and Baroness Prashar

There is much to be said for a Bar event which takes place outside the Inns. The annual charity dinner of the Association of Women Barristers, held on 18 October at the Renaissance Chancery Court Hotel emphasised the 'broad church' of the organisation: judges, practitioners, pupils, academics and the employed Bar. I for one sat between a promising pupil and a member of the CPS at the Old Bailey.

And that was just the food

The inclusiveness even extended to the menu. For once, both vegetarians and carnivores together tucked into the same things: vine leaves filled with spiced potato and lentils followed by wild mushroom risotto and cappacio [sic] of pineapple, and ending with generous platters of gourmandises.

Chairwoman Kaly Kaul

The occasion was a sell-out with 165 guests including a good cross-section of the male Bar. Most memorable, though, was the appearance of three members of the *Judge John Deed* cast: Sir Donald Sinden, who at 83 continues to play a member of the Court of Appeal at an age only exceeded by the late Lord Denning; Caroline Langrishe who as Georgina Channing, Q.C. can turn

Looking after the Judge/'Coop' (Barbara Thorn) and HHJ King

her hand to any branch of the law and is a role model for those who are never intimidated by the judge; and Barbara Thorn who as 'Coop' is the ever loyal clerk who runs the show while letting the bombastic male imagine that he does.

Star turns

The new chairwoman, Kaly Kaul, began the speeches by reminding everyone of what the AWB achieves, in advising, hand-holding and telling it like it is. She then handed over to her former leader, Anthony Arlidge, Q.C., as master of ceremonies. He introduced Baroness Prashar, chairman of the Judicial Appointments Commission and, in her spare time, godmother to Kaly's daughter.

Lady Prashar took the opportunity to explain the work and the aims of the JAC. Her message was optimistic and she was keen to spread it. The aim is to define what makes good judges and then devise the fairest and most effective method of choosing them, proportionate to the level of appointment. But in addition the make-up of the judiciary needs to change. The Commission 'must do everything to find excellence', 'merit and diversity across the board'. She assured everyone there, 'you'll be treated fairly on merit'.

Constance Briscoe, an old friend of Kaly's, declared 'I don't do after dinner speeches' but she had been persuaded to talk about her

Silks comparing notes – Georgina Channing, Q.C. (Caroline Langrishe) and Sally O'Neill, Q.C.

autobiography, **Ugly,** which spent a long time on the best seller list and is now spawning a sequel. 'I don't regret writing it', she said. Her message was that being a barrister offers freedom. 'We have a great privilege'—independence—while other women are not so privileged. The Bar was 'the best place to be'.

There was no such expression of reluctance by Sir Donald, who seized his moment in the limelight and to everyone's delight made the most of it.

Winding up was the Society's President, Dame Laura Cox, who more than compensated for her absence-through-illness from the AGM. Bringing the issue of representation of women in the law full circle, she recalled that when she came to the Bar, women made up about 10 percent of the profession. Now that she is on the High Court bench, she is

New best friends – Pam Oon and Sir Donald Sinden

again in a minority of 10 percent among her colleagues. There is much still be done.

The auction in aid of The Stroke Association was a huge success. Stephen Hockman, Q. C., Chairman of the Bar, bid to have a gourmet vegan chef cook a vegan meal for him at home. Simon Carr paid a magnificent £2000 for a walk on part in *Judge John Deed.* Has a star been born?

Learning Advocacy in America

Last summer, Shabnam Walji of Regency Chambers became the latest Circuiteer to taste the challenges and delights of learning advocacy the Florida way

This summer I had the pleasure of taking part in the Gerald T. Bennett Prosecutor/Public Defender Trial Training Program, at the Fredric G. Levin College of Law in the University of Florida, in Gainesville. My spirits were only temporarily dampened at learning that alligators had attacked two people in Florida.

There were approximately 80 participants from around the state; the faculty consisted of the best prosecutors and defenders in Florida. I was the only representative from England.

The Potato, Gainesville's ugliest sculpture

The course began on Friday night with a case analysis session. A week previously I had been sent the course materials. The two cases that we would eventually know back to front and inside out were, *State .v. Randall* (a drugs case) and *State .v. Johnson* (an attempted murder).

Choosing jurors

On Saturday morning some of the faculty members took part in a demonstration of a Jury Selection. I saw many advantages to this and it certainly looked enjoyable. However it definitely is an art form, as I found when I tried it out. There

Shabnam and colleagues

simply isn't a correct formula to select the right juror. Nevertheless, having the opportunity to select your jury enables you to form a type of relationship with them. You are actually able to engage them in conversation, and that can be something that may eventually sway them in your favour. In very big cases, they hire expensive jury specialists. On Saturday afternoon we moved on to Opening Statements.

On to the evidence

Bright and early we began direct (examination-in-chief), and cross-examination. Trained actors played the various characters, which made the exercises much more realistic. On Monday we only had a morning session, spent on introducing evidence. Their method is far more complex than ours.

Tuesday was spent concentrating on the main witnesses in each of the cases. We had a very useful demonstration on a direct and cross-examination of an expert witness. On Wednesday we had the opportunity to try the direct and cross on real experts.

On Thursday was an Ethics session. One of the most interesting ethical problems was: if you defended a man who was convicted and sentenced to 'death row' and someone came to see you, and admitted your client had been wrongly convicted, since it was he who committed the offence, and he also gives you the murder weapon - can you go to the police... No. Why? As a client-lawyer relationship has formed between you and this man, there is a duty of confidentiality. You cannot even take the weapon to the police. There were lots of scenarios that would certainly be classed as unethical here. However in the United States, the lawyer owes his first duty to his client and not to the court.

Friday was closing speeches, and this was one of my favourite advocacy sessions. I thought; '*When in America, do as the Americans*'. I therefore conducted my closing while walking around the courtroom. It was very liberating. The most entertaining closing speech was the lawyer from the Florida Keys, who decided towards the end to run out of the room at top speed... with the drugs.

The course was very intensive. Each day began at 8:30am, and ended at 5pm. Regardless, it was very interesting to see the similarities and differences in advocacy styles of the Americans. The fellow students and faculty members were very friendly and welcoming. There was not even an alligator in sight. I just hope I can resist any temptation, back in England, to walk around the court room during my submissions.

Relaxing after a hard day's advocacy

From Around the Circuit

Cambridge and Peterborough Bar Mess

Is this report fit for purpose? Since the last report very little "after dinner gossip" has been brought to my attention. It is perhaps a reflection on the serious nature of the issues that face the Bar that this position has arisen.

Mess business. Tim Dutton, Q.C. and Nick Wood were entertained by the Mess in July. Their exertions in dealing with Carter were relieved with good food and wine. Special thanks go to Paul Hollow, for allowing the Mess to use Fenners Chambers as the venue, and Sally Hobson for "table service".

The Mess are very grateful to Tim and Nick for the time they spent in Cambridge.

Bit of a star is Sally. After a recent spate of dog attacks on children in the area, up pops Sally on TV highlighting the inadequacies of the Dangerous Dogs Act. A cultured and soft delivery of the issues. Should have asked John Farmer. Bulldog on Bulldog. Far more entertaining if you know what I mean!

No dinners since February. Mess Junior is receiving a thrashing from Chairman as I speak. Greg Perrins shall remain nameless!

I think it was sometime this year that HHJ Moss QC left the Bailey for a short while to try a Cambridgeshire murder. It is understood that another Bailey judge is to visit us soon. A report on his behaviour will feature in the next report.

Who can forget Peterborough, especially if you are sent there on a Wednesday. My suggestion is to take a sleeping bag and Thursday's work. The "Final trial readiness" hearings are a good idea but the Peterborough model requires some radical alterations. Anyone else with similar problems?

A final comment on fit for purpose. Dr Reid is touted as a potential leader of the Labour Party and therefore a future Prime Minister. Did he think that he would make friends at the HO by that comment? If he did then it shows a significant lack of judgement. A friend may have told him of the continuing problem with "prison space". Fit for purpose, Dr Reid? You can't blame this crisis on Charles Clarke. Simple solution to the problem. Various newspapers have championed the need to send more and more people into prison. Get them to pay for additional capacity!

Cromwell

Members of the **Surrey and South London Bar Mess and Circuiteers** send their sympathies to Sheilagh Davies on the death of her husband, Michael Beresford-West, Q.C., in September. Michael was 78.

From Around the Circuit (continued)

Central Criminal Court Bar Mess

Since the last report of the CCC Bar Mess, there have been a number of changes to the membership of the committee. Our Chairman, Richard Horwell, has taken Silk and has bid farewell both to the Treasury Counsel Room and to the CCC Committee. His contribution to the Mess, not least setting exacting standards of sartorial elegance and making witty speeches on behalf of the Bar when the Lord Mayor came to visit, will be much missed. He led by example recently in the Mess' fund raising event for Cynthia, the much admired Bailey shorthand writer who has been unable to work due to ill health, with a memorable karaoke performance.

In an equally seismic shift, Emma Broadbent has exchanged her role as Treasurer of the Mess for her alternative persona as Mrs District Judge Arbuthnot. Press reports already show that she is as adept at extracting fines from the rich and famous as she was wringing membership fees from recalcitrant members. In her absence, any freeloading court users with an attack of conscience can, as ever, obtain a membership application form from Duncan Atkinson at 6, King's Bench Walk.

The Mess is also looking for a new librarian. In fact, the last full time librarian was Christopher Mitchell, before he escaped the dusty tomes to sit at Basildon as a judge. The library is not just the only place in the mess where peace and quiet can be found (and silence is being policed more rigorously since some noisy library users reached a deafening murmur) it also is, or should be, somewhere that last minute legal research is possible. An ISDN line has been installed to allow for remote internet access and it is hoped that the new librarian can steer the mess through substantial improvements to these facilities. Anyone interested in taking on the challenge should contact the Junior of the Mess, Jason Dunn-Shaw at 6, King's Bench Walk.

Duncan Atkinson

Herts and Beds Bar Mess

The Mess's written submissions on Lord Carter's recommendations, incorporating the views of those members who responded in writing or at the meeting held to discuss them, were described by our Circuit leader as 'well thought through and persuasive'. They were forwarded to the Bar's Carter team as they finalised the response to Carter. A copy of the submissions is available from the Chairman at a.j.bright@talk21.com .

The Herts. & Beds. Bar Mess Annual Dinner will be held on Thursday 30th November 2006, 7.30pm for 8pm, at St. Michael's Manor, St. Albans. John Coffey QC will be our guest speaker as we say farewell to His Honour Judge Gosschalk who retires the following day. Tickets (£60 for those under 7 years' call and £75 for all others) are available from Andrew Bright QC, 9 Bedford Row, London, WC1E 4AZ. DX 453. Email a.j.bright@talk21.com .

We are pleased to welcome as co-opted members of the Mess Committee one of our new silks, Stuart Trimmer QC, and Will Noble to whom we are grateful for collating members' responses to the Carter proposals.

Andrew Bright, Q.C.

Sussex Bar Mess

The news from the South coast is as follows:

The sad news for all those who regularly attend at the Brighton County Court is that the Designated Family Judge His Honour Judge Lloyd has announced his retirement in March 2007. Judge Lloyd began sitting at the Brighton County Court in October 1995 and was appointed the Designated Family Judge in November 2001. He will be greatly missed by all those who regularly appear at the Brighton Family Court and we all wish him a long and happy retirement.

His Honour Judge Joseph has opted to become a permanent feature in Sussex having previously been the Resident Judge at the Croydon Crown Court. He has chosen the more convivial and relaxing atmosphere of Brighton and will now be sitting at the newly opened Brighton Crown Court.

Tim Dutton, Q.C. has kindly agreed to return to Lewes Crown Court on the 30th November 2006 to update us all as to the progress of the Carter Report. It is essential that as many as possible attend this meeting because being 'forewarned is to be forearmed.'

Finally, can I express the Mess's gratitude to Her Honour Judge Coates and His Honour Judge Tanzer for hosting the extremely enjoyable garden party in July. Although the weather was mixed the event was well attended and there were plenty who plucked up the courage to take a dip in the pool. The event was a great success as usual.

Finally, elections for the various posts including the Junior of the Mess will take place in March/April 2007. Candidates should make sure their applications are received in good time and hopefully there will be an excellent turnout at the AGM. Please look out for the date of this meeting.

Tim Bergin

Essex Bar Mess

A time of mixed emotions in Essex. But to begin with the unbounded joy upon hearing of the award of Silk to the Essex regulars Richard Christie, John Dodd, Stephen Harvey and Mark Milliken-Smith, along with two honorary Essex figures, Tracy Ayling and Mark Lucraft. It is plainly a good thing for the profession to have the award reinstated and a real pleasure on a more personal level to see such talented and hard working individuals rewarded. Thanks to all who took part and in particular the referees.

And the celebrations continued at the news of those appointed Recorder – David ('Evening all') Holborn, Alex Milne, John Anderson, Simon Spence, and Gerard Pounder amongst others. Well done – the competition this year was particularly fierce and their achievement all the more significant as a result.

The resident judges at Chelmsford and Basildon had the melancholy task recently of informing us all that Ben Pearson, Senior Judge at Chelmsford until his retirement in 2002 had died suddenly at his home in France. His was the challenging brief, to move Chelmsford on from the Greenwood/Watling era and he did so with great charm, good nature and much success. It is particularly sad that he and his wife were not able to enjoy his retirement for any great length of time. May he rest in peace.

We all continue to hope and pray that HHJ Adrian Cooper will make a good recovery from illness.

But amidst the rustling of autumn leaves was heard the sound of distress in several robing rooms; the result of the competition for the A-G's List was announced to widespread disbelief and incredulity – not at the names of those who were successful, it should be stressed, and to whom congratulations are due, but at the fact that many individuals of real and proven ability had either been dropped altogether, demoted, or denied overdue promotion between the three categories. There is a view abroad that this exercise has been handled in a very curious way – and that as a result certain members of the Bar who have made a huge commitment to the Crown, in some cases over a period of several years, have been treated unfairly. In addition of course the Crown is now deprived of the services of these men and women who have between them amassed enormous experience in the conduct of complex and demanding work involving some of the most serious criminality to come before the courts. It seems that there is an appeal process and for the sake of both the authorities who rely upon nominated counsel and the individuals themselves, it is to be hoped that these injustices will be cured.

And on a happier note we welcome Frank Lockhart back after his recent health scare. The speed of his return after his heart by-pass surgery--a tribute, not just to advances in medical science, but also to the restorative powers of a round of golf or two.

And we also congratulate Tim Dutton who is coming to the end of his three year term as Leader of the Circuit. He has worked tirelessly on our behalf, and has led us with distinction. Having been elected nem-con to serve as Vice-Chairman of the Bar, he will follow in the exalted footsteps of those other Leaders of recent times, Stephen Hockman, Heather Hallett, David Penry-Davey and Robert Seabrook on to the national stage.

A date for your diaries – the annual Essex Bar Mess dinner will be held at the Great Eastern Hotel in Liverpool Street on Friday 24th November, tickets from our hard working Treasurer, Jacqueline Carey at 2 Bedford Row.

Billericay Dickie

Circuit Squirrel

The Bar can be a very strange place, and especially post-Carter; it appears a level of madness has taken us over. For example, Henry Blaxland Q.C., very down to earth normally? but henceforth to be known as Lord Blaxland of Cockburn Penn (pronounced the posh way- as Coburn, much to the astonishment of Shotgun Steve the alleged Yardie he was cross examining who comes from Cockburn Penn in Jamaica, and had no idea where Coburn Penn was!) Henry blames his pronounciation on the fact that his father was a director of Cockburn Port, others blame Jennings, who was co defending and driving all to distraction, especially poor Dexter Dias who is a world authority on maxims from Latin and Ancient Greek, much to the annoyance of the telephone expert who tried showing off and was found out and destroyed. Then there is Stephen Leslie Q.C., who, whilst dining in Hampstead, almost caused a riot involving Shirley Anne Field who happened to be at the next table when a very large policeman was noticed on the other side of the road. The various diners did not believe that he could be a genuine policeman so Leslie despatched himself to find out if the gentleman could possibly be so large and a real policeman. (WHY?) His dining companions and the famous actress were all mortified as the policeman, escorted by Leslie, arrived at their tables – yes he was real! How embarrassing. We could then turn to 187 Fleet Street where everyone is getting married, Borrelli, Aleeson, Sharma, McCarthy, Rutherford, Thomas, Graffius, who is next? – it's a worrying trend- could it be a reaction to Carter? The AWB dinner was a scream, Kim and Liz donated an evening with them for the auction, and they were won by HHJ Faber, and Bozzie Sheffi successfully bid for Stephen Hockman himself (just wine, don't worry). Sir Donald Sinden did a fabulous double act with Arlidge, pure comedy, especially as both told Nutting stories. Poor Johnny who had been invited, but had another engagement, is very cross but is planning a revenge attack for next year.

I would really like to do a column on school nicknames of members of the Circuit for the next edition so please send any you know of to Wurtzel and your anonymity will be guaranteed by him, (not by me – I don't do secrets, unless they are about Liz Marsh or Constance Briscoe, and then only because I am scared of both of them).

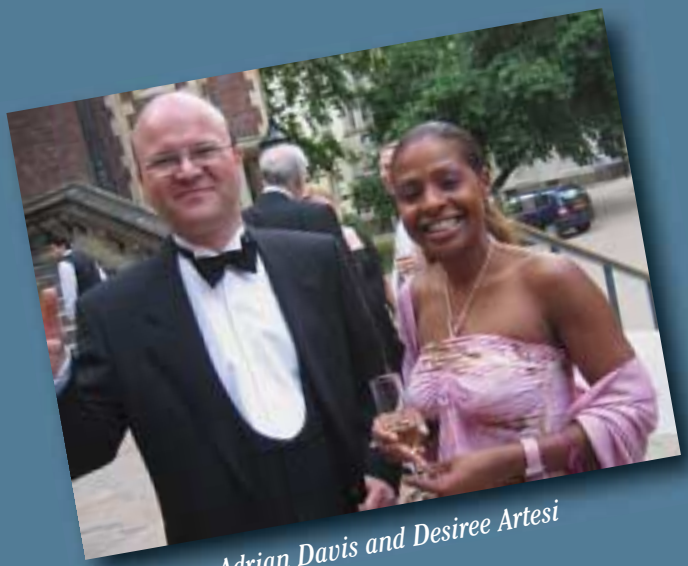
Circuit Squirrel

The Annual Dinner

HHJ John Bevan, Q.C., Fred Ferguson, HHJ Mensah, Gopal Hooper

Stephen Solley, Q.C. and Mr. Justice Burnton

Perican Tahir, Adaku Oragwu, Deborah Charles, Adrian Chaplin, Tanya Robinson, Alexandra Felix, Jocelyn Ledward



Adrian Davis and Desiree Artesi

HHJ Plumstead, Charles Digby, Nicola Devas, Nick Hoffman, Azza Brown

Going to dinner