the barrister

#103 ESSENTIAL READING FOR BARRISTERS
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The Mystery of the Inquest: Understanding Coroner Inquiries

The inquest process, though often misunderstood, serves as a vital function in our justice system, with roots that extend back to medieval England. Charged with investigating sudden, unexplained, or violent deaths, the role of the coroner has evolved considerably from its inception in 1194, transitioning from a tax-gatherer to an independent judicial officer. Laws LJ said a coroner is a judge, but a judge is not a coroner. This transformation reflects the recognition of a fundamental principle: it is in the general interest of the community to investigate any sudden or unnatural deaths, ensuring transparency and justice for all.

A Brief History of the Coroner's Role
Originally, coroners held significant fiscal responsibility to the Crown. Early duties included investigating anything with the potential for revenue for the monarchy, including deaths by suicide—where property was forfeited to the Crown. Wrecks of the sea, fires, treasure findings, and sudden deaths in the community also came under the coroner's jurisdiction. These cases served multiple purposes, including ensuring public order and financial benefit for the ruling class.

David Pojur, Barrister and Assistant Coroner

The early inquest system held another unique purpose: enforcing Norman control over England. After the Norman Conquest, any village where a dead body was discovered Could face a hefty Fine unless it was proved that the deceased was English, not Norman. This system of "Murdrum" fines introduced the term "murder," with communities needing to rebut the "Presumption of Normanry" by presenting "Englishry." This ancient mechanism reflects the early coroner system's focus on maintaining the social order of the time, often favouring the interests of the elite who

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Resolving disputes about children away from court

Each year, approximately 46,000 private family law applications are issued in respect of children. These disputes usually involve parents, with around 10% involving grandparents or other family members.

It is estimated that 10% of separated families make use of the courts in arriving at child arrangements.

Delays

Proceedings in the family court across the board are lengthy, with the most recent statistics at the time of writing showing that private children cases are taking 44 weeks on average to conclude.

In cases where the court requests the completion of a section 7 (of the Children Act 1989) welfare report, there is a wait of 24-26 weeks in some parts of the country due to an overburdened and under-resourced Cafcass. Because of these wait times, some parents have opted to seek permission from the court to instruct an Independent Social Worker (ISW) to have the report completed, and matters concluded sooner. Multi-day trials often take 6 months or more to be listed, and at the end of all this, there are children awaiting the stability of resolution and fraught relationships between parties being exacerbated by litigation, which also impacts negatively on the children.

Anecdotally, there have been cases where I have been instructed at final hearing and instead of having a trial, my client, the other parent, their barrister and I have spent the day discussing, negotiating and reaching full agreement with little or nothing being referred to the court to decide. The question arises as to

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News

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Meet your personal joint healthcare team

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The Bar Standards Board publishes its 2023/24 Annual Report into Anti-Money Laundering and Counter Terrorist Financing

The Bar Standards Board (BSB) has published its annual report for the 2023/24 fiscal year, setting out the actions that we have taken to counter money laundering, terrorist financing and economic crime in the period. The role of the legal sector regulators in relation to economic crime was clarified in the Economic Crime and Corporate Transparency Act 2023, which introduced a new Regulatory Objective into the Legal Services Act 2007 to promote the prevention and detection of economic crime.

Although very few barristers are directly involved in transactions that engage the Money Laundering Regulations (MLRs), the BSB is determined to ensure that the Bar plays its part in combatting illicit financing. All barristers have to declare at Authorisation to Practise (when they renew their practising certificate annually) whether they engage in work that falls within the scope of the MLRs. BSB entities must do the same on authorisation and annual renewal.

This report sets out how we are meeting our responsibility as a professional body supervisor under the Money Laundering Regulations for barristers and BSB entities in England and Wales. It highlights themes emerging from our supervision work over the fiscal year 2023-24 that will assist barristers when reviewing their own controls.

Commenting on the report, Director General Mark Neale said:

"The BSB oversees the Bar in complying with the relevant rules to prevent money laundering and to combat economic crime in a range of different ways. Our website is regularly updated and contains information to help barristers to comply with the Regulations. In addition, we shall shortly be launching a new page for chambers, bringing together and clarifying our regulatory requirements of barristers' practice management in chambers. I would strongly encourage barristers to monitor our website, our monthly Regulatory Update and our social media platforms for the latest information."

The full report is available on the BSB website.

The CJA responds to Government's Independent Sentencing Review

The CJA welcomes the Government's announcement of an Independent Sentencing Review, to be led by former Conservative Lord Chancellor David Gauke. The review will be guided by the following three principles:

1. Ensure sure prison sentences punish serious offenders and protect the public, and there is always space in prison for the most dangerous offenders.
2. Look at what more can be done to encourage offenders to turn their backs on a life of crime, and keep the public safe by reducing reoffending.
3. Explore tougher punishments outside of prison to make sure these sentences cut crime while making the best use of taxpayers' money.

We hope the review will result in a decisive swing towards greater use of community sentencing, and away from custody and long sentences as a first resort. In our recent report, *Time for change*, CJA members highlighted the harms and destructive impact of detention, as well as the lack of resources for rehabilitation and support for people in prison. They want to see greater investment in community alternatives and the Probation Service.

The role of CJA members in delivering services will be crucial, as will drawing on the expertise and insights of those with lived experience of the system, to inform and enhance best practices. The CJA will continue to work with our members and the Government to foster collaboration on criminal justice reform, striving towards a system that is less punitive, more preventative, and fairer for all.

BSB announces minimum pupillage award from 1 January 2025

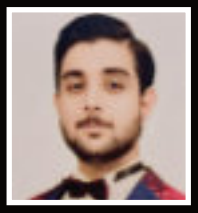
The Bar Standards Board (BSB) has announced that the rate for the minimum pupillage award that will apply from 1 January 2025 will be £24,203 for 12-month pupillages in London and £22,019 per annum for pupillages outside London.

The award is set having regard to the Living Wage Foundation's hourly rate recommendation, which was announced on 23 October.

The annual increase in the pupillage award applies from January each year, regardless of when pupils started pupillage. Monthly payments must be adjusted accordingly. Where possible, we would encourage Authorised Education and Training Organisations to consider increasing the pupillage award early if they can, to assist pupils in the most financial need.

The rates in 2024 have been £23,078 for 12-month pupillages in London and £21,060 for 12-month pupillages outside London.

More information about pupillage funding can be found in Part 4E of the Bar Qualification Manual.



More Than Just a Grade: My Fight for a Future at the Bar

Deciding to become a barrister was not merely a career choice, for me it was an innate decision as if it was woven into the fabric of who I truly am. Being a barrister is not just an ordinary job, it is a way of living that has a positive impact on the society that one resides in. Life at the bar can be closely summarised in the adage 'live by the sword and die by it'. Except, in this case the sword is replaced by morals and staying true to the guidelines issued by the Bar Standards Board (BSB).

By Mohammed Ali Raza Khan, aspiring Family Law Barrister founder, The Family Law Insider

The profession demands an unwavering amount of commitment to upholding the law and justice, even if the odds are not in your favour. But let us be honest, breaking into this career, making a living and thriving as a barrister? That is a tough gig. The statistics alone are enough to put anyone off who is hopeful for a career at the bar. Especially individuals such as I, who have no connections, no guidance, no Oxbridge background and an academically troubling past. What hurts most are the discouraging words of people when they get to know that you are striving for a career at the bar. For example, I was once told by somebody, that I don't look or speak like a barrister and therefore would never become one. To this date, I am not even sure what those remarks meant: Do I need to grow horns? Get a plastic surgery? Fake an accent? But in all honesty, whilst I did not take this heart, I was able to crack the essence of this statement and the underlying undertone which questioned the colour of my skin and the accent I carried, none of which are factors within my control.

Whilst what people say does have a toll on my morale, I brush it off gallantly, because I am a firm believer of the fact that irrespective of how discouraging the statistics may be, if something is meant to happen, it will happen, may be not instantaneously but certainly. My dad always says that 'As long as you work hard, have a good purpose, and an undying faith in God, you will eventually achieve what you set your sights on'. My parents have been my biggest motivators throughout my academic journey and even though I graduated with a lower second-class degree (2:2) which seemed as the death of my dreams to become a barrister, but mum and dad never gave up on me. I was motivated by them to pursue a master's in law and I am glad that I did it because it was one of the best experiences of my life and as a cherry on top, I aced through the post grad degree. I am not giving up and now find myself in Bar School pursuing the Bar Training Course.

While my hopes and dreams are bright, reality must be addressed. According to the Bar Standards Board's 2024 report, out of 197 people with the same classification who applied for pupillage, only one secured it. I won't lie, those odds are grim. But as long as there's even a tiny 1% chance, I'll keep going. Here's the part that really messes with me: the Bar Standards Board says the minimum requirement to become a barrister is a lower second-class degree (2:2). Great, right? But in reality, that's a bit of a myth. Most chambers make it clear on their websites that they won't even consider you unless you've got a 2:1 or higher. Some don't even bother to mention whether they'll consider extenuating circumstances. Even worse, higher qualifications like a master's degree don't seem to count for much. Some chambers boldly state that your Bar Training Course (BTC) grade doesn't matter, as long as it's "Very Competent." If that's the case, why do we shell out thousands for the BTC when chambers barely acknowledge it? This is something the BSB really needs to look into and fix. There's a huge disconnect between what they say and what's actually happening in practice.

The struggle to even get into an AETO-approved Bar school was a nightmare. Despite meeting the BSB's minimum requirements with my 2:2, most AETOs wouldn't accept me. One even told me via email that a 2:2 "does not meet the academic rigour of the course." Really? Because the BSB says otherwise. So, what's going on? Is the BSB just outdated, or is it not enforcing its own rules? I had legitimate extenuating circumstances, and I was more than ready to provide proof. Plus, I was already doing well in my LLM, with predicted grades that should've been taken into account. But nope. Same story as the chambers. It's frustrating, and there's a serious lack of transparency around how postgraduate achievements factor in. This kind of ambiguity needs to be addressed.
The problem isn't just about this mismatch between the BSB, chambers, and AETOs. The bigger issue is how this system unfairly shuts out people who didn't have a smooth academic ride. Not everyone sails through university. Some people have learning disabilities, mental health struggles, or health issues that get in the way. In my case, I had an IGTN infection that lasted eight months and required surgery, seriously affecting my ability to attend classes and study like everyone else. With the current system, someone with a first-class degree in a "Mickey Mouse" subject is more likely to become a barrister than someone like me, who's dedicated their life to law. To add insult to injury, some AETOs say they'll accept a 2:2—if it's in a non-law subject and the candidate has passed the GDL. Where's that same leeway for law graduates? It feels low-key discriminatory, and it's a policy that needs rethinking.

I'm not just saying this because I had extenuating circumstances. I genuinely believe that people can improve over time. If we lock this profession behind rigid academic requirements, we'll miss out on barristers who could bring something really valuable to the table. The BSB even floated the idea of removing the degree requirement entirely, but the Bar Council shot that down. I get why there has to be some standard but maybe we need a bit more flexibility and consideration within this profession. For instance, someone with a third-class degree who's gained years of legal experience should have a way to prove they're worthy of pupillage. They shouldn't have to redo their degree, which isn't feasible for most people. There could be alternative pathways, like a one-year course in a specific area of law that allows them to demonstrate their competence.

At the end of the day, academic performance isn't everything. Barristers are often self-employed and while someone with a first-class degree might tick the boxes of academic standards, they might lack in other areas such as marketing, networking, dealing effectively with clients and just being a nice human in general, while someone with a 2:2 could be a natural advocate, with great people skills and a strong work ethic. Sometimes, it's the people with something to prove who work the hardest and that's something the profession should recognize.

Mohammed Ali Raza Khan, aspiring Family Law Barrister Founder The Family Law Insider

LOTHBURY

EXPERTS IN WEALTH MANAGEMENT

Not all Budgets are the same.

Rachel Reeves' Budget on 30th October 2024 was one of the largest tax raising events the UK has seen since the end of the 2nd World War.

By now you will be aware of the headlines changes, including the increases to Employers National Insurance and Capital Gains Tax rates, and the changes to Business and Agricultural Reliefs.

Across our clients the change that has created the greatest consternation are the proposals changing the treatment on death of so called "unused" pensions. For most these are Money Purchase Pension pots, but also include lump sums that are paid under pension legislation, which will include some workplace death in service arrangements.

The Government has issued a consultation paper to establish how these changes are applied in practice. The consultation runs until January 2025, and the changes are due to take effect from April 2027.

In summary, from April 2027:

- "Unused Pensions" will be included in the estate
- Pensions which provide only a secured dependant's pension income will not be included.
- Current rules regarding the income tax treatment of inherited pensions remain.
- Current rules regarding the income tax treatment of inherited pensions remain, which are broadly free of income tax on death before age 75 and taxed as income after age 75.
- Interspousal exemptions apply to pensions as with other assets.

One impact of adding the pension to the estate could be the Residence Nil Rate Band (RNRB) being tapered or lost completely, which would compound the effect of this change.

What seems certain is that for many, the strategy regarding pensions in later life will need to change dramatically.

Before April 2027 Until April 2027 the opportunity remains to pass the pension outside of the estate. For a married couple with children, a revision of wishes might be sensible. Rather than leaving the pension fund to the surviving spouse and adding to their estate should they die after April 2027, the first to die may want to consider passing their pension straight to their children or into trust.

Annuity For those taking income, they may want to consider annuitising part or all their pension fund. Adding a spouse's income and guarantees can ensure value is preserved, and the fund used to purchase the annuity falls immediately out of the estate. Post April 2027, this could return the RNRB if that were an issue, and if the annuity generates surplus income, gifts could be made, or Life Insurance purchased to enhance death benefits.

Life Insurance A Life Insurance Policy written in trust is an effective way of funding a lump sum for beneficiaries which should fall outside of the estate.

The policy could be written on a first death or single life basis if the pension fund is mostly in one person's name, with the trust providing the option to loan funds to the surviving spouse during their lifetime, and then distributing to discretionary beneficiaries on second death.

Tax Free Lump Sum The Pension Commencement Lump Sum (PCLS) or Tax Free Lump Sum as it is often called survived unchanged. Prior to April 2027, if you are 75 or older whilst the PCLS is lost on death, at least the residual fund was outside the estate. After April 2027, the PCLS is included with the rest of the pension in the estate, and the PCLS would be subject to income tax in the hands of the beneficiaries.

Some may benefit from taking the PCLS during their lifetime, and then gifting to individuals or trusts, or investing these funds in Business Relief assets, to potentially save 40% inheritance tax.

Spousal Bypass & Other Trusts As alluded to earlier, the interspousal exemption will apply to pension funds, which means for married couples, it is the second death that is often the critical event. Some years ago, the only option on death for money purchase pensions were survivor's annuity or a lump sum. Taking a lump sum added to the surviving spouse's estate. To bypass the surviving spouse's estate, a Spousal Bypass Trust was used to receive the benefits from the pension scheme. I would expect we will see a re-emergence of the use of these and other trusts for pensions on death.

Advice You should not take any part of this article as being advice. Everyone's situation is different, and you should seek professional advice before taking any action. If you would like to us talk about how these changes might affect you, please call or email to book a free consultation.

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controlled the overarching system.

The scope and nature of inquests shifted dramatically by the 19th century as public health concerns arose in response to cholera and other epidemics. The Births and Deaths Registration Act of 1836 responded to public anxiety about the lack of reliable data on death causes. In 1887, the Coroners Act further defined the coroner's responsibilities, diminishing financial interests in favour of investigating the causes and circumstances of sudden deaths. These shifts paved the way for the modern coroner service, prioritising public safety and justice over revenue.

The Structure and Legal Framework of Inquests Today
Each jurisdiction, of which there are over 70, operates independently, with Senior Coroners and often Area Coroners and or part time Assistant Coroners overseeing cases within their defined areas. This independence is key to the coroner's duty to conduct investigations without external pressures. Under the CJA 2009, if a death is violent, unnatural, cause of death is unknown or occurs under state custody, the coroner must initiate an inquest to ensure public accountability.

Legal Foundations and Balance of Probabilities
The Supreme Court in the landmark case of *R (Maughan) v. HM Senior Coroner for Oxfordshire* [2020] set a significant precedent, clarifying that inquests employ the "balance of probabilities" standard for all findings. This contrasts with the higher standard required in criminal courts. Lady Arden's ruling emphasised that the balance of probabilities standard is sufficient for determining key conclusions, such as Unlawful Killing or Suicide, in line with the inquisitorial nature of inquests.

This decision reflects a pivotal shift in the inquest's focus, underscoring the importance of fact-finding over punitive judgment. By adopting the balance of probabilities standard, inquests can better serve the public interest by determining the most likely circumstances of death rather than engaging in adversarial legal battles.

The Core Questions in an Inquest
The inquest process seeks to answer four fundamental questions about the deceased:

1. **Who is the deceased?**
2. **Where did the death occur?**
3. **When did the death happen?**
4. **How did the deceased come by their death?**

This fourth question encapsulates "by what means," the deceased died and reflects the inquest's focus on clarifying the circumstances rather than assigning criminal or civil liability, which is prohibited.

A fifth question applies where the coroner will additionally examine *in what circumstances* the deceased came by their death. This arises when there is an arguable breach of Article 2 of the European Convention on Human Rights- the right to life. The test of arguability is low and the court is not permitted to determine whether there is an actual breach.

Interested Persons (IPs) as opposed to parties, such as family members or others closely connected to the death, can participate in the process. However, the inquest remains solely under the coroner's control, focusing on uncovering facts rather than assigning faults. That said, the coroner's court is often seen as a gateway court. The police, Health and Safety Executive, Care Quality Commission, Independent Office of Police Complaints and others with regulatory functions and enforcement powers, are often IP's or attend inquests to observe. Inquests can form the foundation of a civil claim, prosecution or professional disciplinary referral to bodies such as the General Medical Council or Nursing and Midwifery Council. Any of the above would be entitled to request a copy of the recording of the proceedings.

The Duty to Investigate and the Scope of Inquests
Coroners have a duty to investigate deaths that meet specific statutory criteria. When a body is found within their jurisdiction, a coroner must establish if there is reason to suspect that the death was violent, unnatural, of unknown cause or occurred in custody, triggering the need for an inquest. Occasionally, the lack of a body does not prevent an investigation; if enough evidence suggests the likelihood of death, the coroner may proceed based on circumstances alone.

One of the most important aspects of a coroner's investigation is the "scope," or the extent to which the coroner will examine the details surrounding a death. There is often strong legal argument over the parameters of the judicial inquiry. While the Coroners and Justice Act does not provide a legal definition of scope, precedent emphasises that coroners must fully, fairly, and fearlessly investigate cases of public concern, especially when deaths involve custodial or state-related circumstances. There is often seen to be a tension between this and the recent case of *Morahan [2022]* which indicates that inquests should be a "relatively summary process...and not a surrogate public inquiry."

This is resolved by the coroner enjoying what is known as a *wide discretion* to decide which issues to examine and which witnesses to call, with each decision guided by what is "necessary, desirable, and proportionate."

The Process of the Inquest: Stages and Reviews
In complex cases, coroners may hold Pre-Inquest Review (PIR) hearings to discuss sensitive or contentious matters. These preliminary hearings set expectations, determine the scope, and identify potential IPs. PIR hearings ensure transparency and help avoid last-minute surprises, aiming to foster a fair and efficient inquest process.

Some inquests can take a few hours, others weeks or months.

Coroners maintain a high level of discretion throughout the inquest process. They are responsible for managing their witnesses, directing the questioning unless they have Counsel to the Inquest, and limiting the inquiry's bounds, ensuring each inquest stays relevant to its statutory purpose. The coroner's discretion also extends to document disclosure, which questions can be put by counsel for IP's and determining whether evidence will be presented orally or in writing. Coroners can use powers under Schedule 5 of the CJA 2009 to obtain evidence, requiring cooperation from IPs, who must provide disclosure and assist in producing relevant information.

Rules of Evidence in Inquests
Inquests operate differently from other judicial proceedings in terms of evidence and parties. Hearsay evidence and opinion testimony are admissible, and cross-examination is not permitted. The style of advocacy is different. In 2021 the Bar Standards Board and Solicitors Regulatory Authority with assistance from the Deputy Chief Coroner published a set of competencies to raise the standard of advocacy in the coroner's courts. This approach underscores the expertise required in the investigative and fact-finding nature of inquests, in contrast to the adversarial structure of criminal or civil trials.

The rules on self-incrimination also play a unique role in inquests. Witnesses are informed that they may refuse to answer questions that might in the opinion of the coroner, incriminate them, reflecting the inquest's primary aim: establishing the circumstances surrounding a death rather than pursuing prosecutions. Jury involvement, when required, remains supportive rather than adversarial, with jurors encouraged to question witnesses, after the coroner and advocates, to clarify the facts rather than to assess fault.

Prevent of Future Deaths
An ancillary function of the coroner is to consider whether they have concerns that unless action is taken future deaths will occur. Once such a concern is established either on the investigation or the evidence, the coroner is required to issue a prevention of future death report. It sets out the concerns and requires the recipient to state what action they will take. Such reports cannot make recommendations. The report and response are both public documents which are then published on the Chief Coroner's website.

Appeals
Where any person or entity is dissatisfied with a coroner's decision, the process for appeal is limited and indirect. There is no direct route of appeal against the coroner's rulings, findings or conclusion. Instead, anyone aggrieved by a decision must seek permission for judicial review of that decision, which is conducted before the Administrative Court in the High Court

of Justice. The process is strict and governed by the Civil Procedure Rules. The judicial review allows the High Court to assess the rationality of the coroner's decision, examining if it was reasonable, fair, or made within the scope of the coroner's powers.

While the Chief Coroner of England and Wales, often a circuit judge, does not have the authority to hear appeals directly or complaints about a coroner at all, they play a key role in guiding coronial practices across jurisdictions and providing judicial leadership, together with 2 deputy chief coroners often made up of a circuit judge and a senior coroner. On occasion, the Chief Coroner also sits as part of a Divisional Court when judicial reviews related to coronial decisions are heard. In very rare circumstances the Chief Coroner can intervene as an Interested Party before the High Court in a judicial review.

The Community Role and Public Interest in Inquests

The coroner system's evolution from medieval roots reflects its longstanding role in promoting public safety and order. By scrutinising unexpected deaths, inquests serve a broader societal interest, ensuring accountability and providing families and the public with a sense of closure. The community's reliance on inquests underscores their importance; these investigations not only confirm the facts but also help alleviate suspicions, fears, or misunderstandings about mysterious deaths.

Over the centuries, as legal reforms have reshaped the coroner's role, the focus has shifted to medical and factual accuracy. For example, in the 19th century, growing concern over uninvestigated deaths due to poisonings and epidemics led to the establishment of death registration laws.

The Future of Coroner Investigations: New Challenges and Reforms

In the 21st century, notable cases, such as that of Dr. Harold Shipman, have highlighted the limitations of current legislation in ensuring robust death investigations. Shipman, a general practitioner convicted of murdering numerous patients, spurred inquiries into how deaths are reviewed, particularly those occurring in medical settings. These inquiries recommend legislative reforms aimed at improving the rigour of inquests and expanding the scope of coroner investigations to address emerging challenges, such as hospital-related deaths or systemic failures in care facilities. The current framework of the coronership, which investigates only a subset of deaths referred for specific reasons, contrasts with more proactive models that some reform advocates suggest. There can be the transformation of an inquest converting into a public inquiry if the government thinks there is sufficient need such as the Manchester Arena Inquiry under Coroner and later Inquiry Chairman Sir John Saunders.

The Enduring Role of the Coroner

From its origins as a tax-collecting position, the coroner's role has transformed to meet society's need for impartial, thorough investigations of unexplained deaths. Today's coroner inquests are vital instruments of public safety, seeking to determine the facts surrounding deaths that might otherwise leave families and communities in uncertainty. Guided by discretion and grounded in legislation, inquests help uphold justice and transparency.

While future reforms may further redefine the scope of inquests, the coroner's mission remains the same: to explore the truth behind sudden or suspicious deaths and to safeguard public welfare. This enduring commitment to factual inquiry and public service is what keeps the mystery of the inquest relevant in an ever-evolving society, serving as a bridge between the needs of the past and the unknown, and the demands of the future.

David Pojur, Barrister and Assistant Coroner

Author: David Pojur is a barrister specialising in inquests and coronial law. He is recognised by the Legal 500 and Chambers and Partners as a Leading Junior in his field. He sits as an Assistant Coroner, is Counsel to the Inquest and represents Coroner's in judicial reviews in the High Court. David practices nationally from Lincoln House Chambers, Manchester and Lamb Buildings, Temple, London.

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whether this could have been achieved earlier, away from a court building, using mediation, arbitration or early neutral evaluation and the answer to that is: probably, yes.

New applications in the family court in respect of children do require attendance at a Mediation Information and Assessment Meeting (MIAM) unless one of the exceptions such as domestic abuse apply. However, it is widely observed how often this is bypassed by unwilling parties or those who do not fully understand the process for lack of accessible information, and attendance has not usually been subsequently required by the court.

Legal updates

This conceivably was one of the reasons for the Family Procedure Rules being updated at the end of April 2024 to encourage more dispute resolution out of court. One of the key differences is that the definition of 'non-court dispute resolution' under rule 2.3(1)(b) now includes collaborative law, neutral evaluation (by a third party), arbitration and other forms of alternative dispute resolution (ADR).

Amongst other changes, rule 3.3 has an additional subsection (1A) which allows the court to require the parties to provide statements "setting out their views on using non-court dispute resolution as a means of resolving the matters in proceedings" and rule 3.9(2) has also been amended to require MIAM providers to give information about other forms of non-court dispute resolution and their processes.

These updates are positive but it's worth considering whether more could be done to encourage dispute resolution outside of the court arena.

The role of family law practitioners

In paragraph 16 of, Re X (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538 (Fam) Mrs Justice Knowles commented that, *" Litigation is so often corrosive of trust and scars those who may need to collaborate and co-operate in future to parent children… Going forward, parties to financial remedy and private law children proceedings can expect – at each stage of the proceedings - the court to keep under active review whether non-court dispute resolution is suitable in order to resolve the proceedings. Where this can be done safely, the court is very likely to think this process appropriate especially*

where the parties and their legal representatives have not engaged meaningfully in any form of non-court dispute resolution before issuing proceedings."

Collectively, as family law practitioners, we could be more conscious about ensuring that we're proactively signposting to ADR and recommending this to our clients when appropriate- not just prior to the commencement of cases and early into them, but throughout. The success of this is dependent on collaboration with other lawyers involved, rather than taking an unnecessarily adversarial approach. Those of us with the interest and capacity could also take up some of these ADR roles more ourselves in complement to our practices, completing the requisite training/ qualifications where they're required.

It appears that non-court dispute resolution is gaining traction more quickly in family finance cases than in children cases. Browsing barrister's chambers, particularly specialist family law sets, it's becoming more frequent to see offerings of private Financial Dispute Resolutions (FDRs) and family law barristers, solicitors and retired judges marketing themselves as private FDR judges. A google search brings up several pages of results, many of which are explainers on chambers' and law firms' websites alike setting out the advantages: mainly that private FDRs are quicker and less costly than seeking an order through the court.

Dispute Resolution Appointments (DRAs) are the closest equivalent to FDRs in private children cases, but when searching for information on private DRAs online, there are very limited results, and seemingly only one chambers offering this service- which seems to be a missed opportunity.

Conclusion

There are private children cases that have complex legal, welfare or safeguarding issues, including domestic abuse, that are difficult or inappropriate to resolve without court intervention. However, for those that can be settled safely and efficiently using a form of non-court dispute resolution, there needs to be a culture change across the system for the benefit of these families, diverting their disputes away from the court and to a less litigious outcome.

Lola-Rose Avery, Family Law Barrister, Co-founder, Black Women's Law Network

Winter is Coming

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Where planetary boundaries and legal boundaries coincide

I write as the world holds its breath awaiting the results of the election in the USA. Whoever wins, there will be significant consequences for legal regulation of many details of the physical and living world; whatever regulatory policies are pursued will affect greenhouse gas (GHG) levels, environmental pollution, biodiversity, marine ecosystems and all aspects of our planetary home.

By Abigail Holt, Barrister, Garden Court Chambers

Thinking about climate change, biodiversity loss and connected destabilisation is terrifying. Nonetheless, increasing numbers of lawyers and activists are dealing with the existential angst involved and seeing what legal tools can be deployed to address the changes to human behaviour, ultimately, which are needed to reorganise human societies at a local and international level so as to rapidly reverse global warming. This needs to occur whilst protecting what remains of the living world at the same time as lifting millions of people in the developing world out of poverty without a phase of carbon-based industrialisation.

Students are increasingly studying climate justice as part of their law degrees, whilst some Universities and advanced legal institutions are devising post-graduate courses for legal practitioners, encouraging established lawyers to learn the relevant science and legal developments of climate change law so as to develop new skills relevant to their particular area of law. BIICL (British Institute of International and Comparative Law) has been running an eight-session introductory course on Climate Change Law. Hughes Hall at Cambridge University has devised a very sophisticated series of online courses "Democratising Education for Global Sustainability and Justice"[1]. Some of the courses are free. The Cambridge University courses are based around the United Nations' 17 Sustainable Development Goals. These courses include an overview of the network of International Treaties forming the blueprint for global regulation, which, when translated into national law, would be a massive step towards remedying the climate crisis and so-called "wicked" connected problems. Lead by the indefatigable Professor Dr Marie-Claire Cordonier Segger, the courses not only aim to educate anyone based anywhere in the world involved in relevant climate and biodiversity policy areas (not just legal professionals), Hughes Hall is equipping an army of informed course graduates. They will leverage their knowledge to influence change locally in their home countries and also at international meetings in which they are encouraged to actively participate, for example the recent Convention on Biological Diversity held in Cali, Columbia (October 2024) and the 29th United National Climate Change Conference (COP) at Baku, Azerbaijan (November 2024).

Judges are starting to get in on the education action too. I recently participated in a course devised by t The Climate Judiciary Project at the Environmental Law Institute in Washington DC and facilitated by the Bloch Judicial Institute of Duke Law School has designed a course to help judges understand the relevant scientific principles underlying climate change and the wealth of data contained within the reports of the Intergovernmental Panel on Climate Change (IPCC), as well as the science behind possible remedies, such as carbon capture technology and alternative hydrogen-based energy sources.

For many practitioners unfamiliar with these legal education projects, or unaware of the small but increasing numbers of climate justice and environmental cases, the vibe is often professional scepticism. Law forms the scaffolding which supports our carbon-based global wealth and commerce, which relies in turn on planetary-resource-depleting extractive activities, swathes of methane-producing agriculture and the pursuit of economic growth. So how on earth can litigation that costs the earth do anything to help preserve the earth?; this especially in the light of the increasingly harsh sentences that have been handed down to climate protesters by the criminal courts (eg Roger Hallam & others) and which have attracted the attention of Michel Frost UN Special Rapporteur on Environmental Defenders under the Aarhus Convention[2], as well as the draconian civil injunctions against "persons unknown"[3]used to stymie climate activists.

Against this sad background, for those who are determined to use the law to confront arguably the most urgent "triple planetary crisis of climate change, biodiversity loss and pollution" 2024 has actually brought glimmers of hope in the UK and overseas. Here I seek to sketch some of the new jurisprudence that is evolving, and which is particularly exciting as lawyers adopt a collaborative international comparative law approach to address physical world phenomena for which the niceties of national jurisdiction and boundaries are irrelevant.

June 2024 saw the landmark decision of R (Finch on behalf of the Weald Action Group) v Surrey County Council and others[4]. Local resident Sarah Finch applied for judicial review of the Surrey County Council's decision to grant planning permission for oil extraction at Horse Hill without assessing the likely (scope 3) emissions from *burning* the to-be extracted crude oil. Ms Finch argued that the Environmental Impact Assessment (EIA) should cover both direct and indirect environmental effects, including climate impacts from GHG emissions. By a 3-2 majority, the Supreme Court found the Council's decision unlawful and the majority judgment, delivered by Lord Leggatt, emphasised that it is not merely likely but *inevitable* that the crude oil produced from the site would be refined and would eventually undergo combustion producing GHG emissions.

One practical result of the Finch decision was that, on 30 October 2024, the new government announced a consultation on supplementary EIA guidance for assessing the impact on climate of scope 3 emissions from oil and gas projects[5]. Other practical

consequences are that the Secretary of State for Housing, Communities and Local Government has accepted that the decision to approve a controversial coal mine in Whitehaven, Cumbria is legally flawed, and on 29 August 2024 the government also announced that they no longer intend to oppose appeals in relation to the proposed Rosebank and Jackdaw oil fields in the North Sea.

It is thought that the Finch decision could influence the decision in the Greenpeace Nordic case currently before the ECtHR[6] where 6 Norwegian young people are arguing that the Norwegian Government's decisions to issue new licences for oil and gas exploration in the Arctic (Barents Sea) to extract hydrocarbon fuels violates the claimants' article 2 and 8 rights under the ECHR.

The Greenpeace Nordic case also seeks to build on the successful Strasbourg Verein KlimaSeniorinnen Schweiz v Switzerland[7] decision and where a majority of 16 judges to one decided that there had been a violation of the Article 8 and Article 6 rights of a group of older Swiss women who were concerned about the effect of global warming on their living conditions and health. They successfully argued that the Swiss authorities were not taking sufficient action to mitigate the effects of climate change on their demographic, despite the Swiss authorities' obligations to do so for the benefit of their citizens and as a result of their international commitments. The ECtHR found that the Swiss Confederation had failed to comply with its positive obligations under the ECHR by failing to put in place an adequate regulatory framework to limit national GHG emissions and meet reduction targets. Whilst the judges of the ECtHR recognised that national authorities enjoy wide discretion regarding how they go about meeting their obligations, they had not demonstrated that they had acted quickly enough or in an appropriate way to implement a regulatory framework to meet their international obligations, particularly under the UN Framework Convention of Climate Change (UNFCCC) and the Paris Agreement 2015.

On a different issue, in February 2024 the Privy Council applied UK jurisprudence to decide an appeal relating to the Eastern Caribbean Island of Barbuda brought by Barbudan residents Mr John Mussington (Marine Biologist) and Ms Jacklyn Frank (former School Principal). They brought a successful judicial review challenge regarding the decision of the Antigua and Barbuda Development Control Authority to grant a permit for the construction of an airport and associated infrastructure on the Island of Barbuda following catastrophic damage caused by Hurricane Irma in 2017 and at a time when a majority of the islanders had been evacuated from their homes to a neighbouring island and so were unaware of what was unfolding in their absence.

In that appeal a central issue was the issue of "standing" in judicial review claims. What were the features of the special "interest" that a person connected to the case had to demonstrate so as to qualify them to act in the public interest and to be accorded "standing" in an environmental case? In the earlier case of Walton v Scottish Ministers[8] the Supreme Court had held that a person with a genuine interest in the aspect of the environment that they seek to protect, and sufficient knowledge of the subject in question to qualify them to act in the public interest, may be accorded standing in an environmental case, even though the challenged decision does not *directly* affect their own rights or interests. In John Mussington and another v Development Control Authority and others[9] the Privy Council expanded the Walton principle in a way which is poetic and tantalising in its possibilities. At paragraph 57 judges deciding similar cases are given the following guidance:

> *'Where an application for judicial review involves issues of environmental concern it is not necessary that the applicant demonstrates an expertise in the subject matter. All that is required is that they demonstrate some knowledge or concern for the subject. So an amateur ornithologist or bird-watcher might raise a concern about the potential loss of a bird's habitat; or a fisherman about the effect of a hydro-electric scheme on fish; or a local historian about the effect on an archaeological or historical site; or a local resident on the loss of a local beauty spot frequented by the local community. In Walton Lord Hope in effect asked the rhetorical question, "Who speaks for the ospreys?". The answer is whoever can demonstrate a genuine interest in their fate.'*

And so the doors of the courts have been unlocked to allow for those who can demonstrate "a genuine interest" to advocate for birds, fish, sites of historic and cultural interest and valued places of beauty. The irony is, of course, that human beings are part of the living world which they need, along with an understanding of history and exposure to beauty, for their very survival and to thrive. These are very exciting developments in a constant slew of bad news and a call to action for all lawyers to advocate for planetary homeostasis and to weave respect for all forms of life into the DNA of lawfulness, as if our collective lives depend on it. Because they do.

Abigail Holt, Barrister
Garden Court Chambers

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[1] Democratising Education for Global Sustainability and Justice - Hughes Hall
[2] Aarhus_SR_Env_Defenders_statement_following_visit_to_UK_10-12_Jan_2024.pdf dated 23.01.24
*[3] Ineos Upstream v Persons unknown [2019] EWCA Civ 55, UKOG v Persons Unknown [2019] *** and as further defined by Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47*
[4] [2024] UKSC 20
[5] Consultation on draft supplementary EIA guidance - GOV.UK
[6] Greenpeace Nordic and others v Norway – filed 2021 Application no 34068/21
[7] application no 53600/20 – decision announced 9 April 2024
[8] [2012] UKSC 44, [2013] 1 CMLR 28
[9] [2024] UKPC 3

The Greatest Barrister of all time was an American

On the evening of 5 March 1770, shots ring out across King Street in Boston, Massachusetts as eleven redcoat soldiers fire upon an angry crowd leaving five men dying in the street. Arrested shortly thereafter, the redcoats are unable to find counsel, none being willing to act for them because of the strong local antagonism against British troops, that is until a junior counsel aged a tender thirty-four with only ten years' experience enters the fray to begin his meteoric rise that would reshape the world. The name of that intrepid young barrister is Mr John Adams.

By Andrew Brown, Barrister, Radcliffe Chambers

Certainly there are many barristers who have led successful lives at the Bar and in the arena of life so as to contend for the title of greatest: some might argue for Ghandi, whose accomplishment speak for itself, others for John Mortimer, who combined a successful career defending the publishers of Lady Chatterley's Lover while giving the world Rumpole and adapting Brideshead Revisited for the BBC, and certainly none should forget the apocryphal stories that Margaret Thatcher was involved in the creation of soft-serve ice cream before her career at the Bar and subsequent activities (a feat which surely must rank her highly on the list).

However, in this time of American political change it is right to reflect on a barrister who demonstrated skills in our core competencies and rose from a humble English colonial barrister to the second President of the United States. In the years between the start of his practice and his presidency, this slightly rotund man from Boston managed to impliedly outlaw slavery in Massachusetts through cleaver drafting (while legalising same-sex marriage two-hundred years later), convince the Continental Congress through debate to issue the Declaration of Independence, negotiate loan instruments to fund the American Revolution, and settle the American Revolution via the Treaty of Paris.

Education and Advocacy:

Mr Adams was born the son of a farmer in in October 1735, and initially aspired to follow his father's career. At the age of sixteen he entered Harvard, and five-years later signed a contract for pupillage with a local barrister, whereby John would pay $100 and conduct his pupillage in the evenings for two-years while also teaching at a local school during the daytime. In these sun-filled days of youth, John rejoiced in his status as an Englishman and *'glorified in the name of Britain.'* Called to the Bar on 6 November 1759, John lost his first trial two-weeks later on a pleading point arising from his failure to properly draft his client's writ. Undeterred by this mistake, he spent the following years riding the circuit with a broad common law practice ranging from conveyancing disputes, to criminal cases of all manner including murder, admiralty and marine insurance claims, and matters related to trespass and common assault.

By March 1770, and while only having been in practice for ten years, Mr Adams had seen the wide breadth of English common law. He was a seasoned trial advocate who was lauded by the local populace with its simmering rebellious sentiments for his successful defence of four local sailors who had killed a Royal Navy officer to avoid impressment. However, when informed that the British soldiers involved in the Boston Massacre had been turned down by all other counsel, Mr Adams did not hesitate to accept the brief being firm in the belief that all men should be afforded a fair trial. Despite being scorned by his friends and neighbours, Adams successfully defended the redcoat officer at trial in October 1770 – being described by those present as a virtuoso in doing so, and two-months later in December achieved an acquittal of six of the eight soldiers with the remaining two only having their thumbs branded as punishment for manslaughter. In his closing, John urged the jury to avoid the siren song of sentiment and anger, submitting that *'facts are stubborn things, and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.'*

Drafting Skills (and Equality and Diversity):

Oral advocacy is only one of our many competencies as a barrister, and John Adams demonstrated his skill in drafting by being the sole author of the Massachusetts state constitution, which he drafted in 1779 while the American Revolution raged around him.

While John Adams abhorred slavery, he balked at overt attempts for emancipation during the Revolution as it might cause a rift with the Southern Colonies. Instead, his draft of the state constitution included as its first right at Article I that, *"All men are born free and equal and have certain natural, essential, and unalienable rights…"* Adopted in 1780, one-year later the case of *Brom Belt v Ashley* gave a slave her freedom when the jury agreed slavery was inconsistent with Adam's Article I, which the Massachusetts Supreme Court agreed with in the case of *Quock Walker v Jennison*. The impact of this drafting was not limited to the 18th Century, and these very same words formed the basis of the 2003 reasoning in *Goodridge v Department of Public Health* wherein the Massachusetts Supreme Court ordered the state to recognise same-sex marriage.

This constitution contained a bicameral legislature (the first state constitution to do so), an intendent judicial branch with life-long appointments, and an executive that could be overridden by a two-thirds majority veto; all of which feature in the Constitution of the United States drafted ten-years later.

The keenest eyed readers of this article will notice that the wording of Article I bears a strong resemblance to the American Declaration of Independence, which is unsurprising as John Adams was the chair of the committee in charge of drafting the declaration in

1776. However, while Jefferson has received the historical praise for that document, it was John Adam's debating skills which assured its passing by the Continental Congress.

Debating Skills:

Scarcely remembered by most is that the Declaration of Independence was not assured to be accepted once it had been drafted.. The thirteen American colonies were disparate in their views on independence, with some states arguing for a return to the British fold. Into this arena, John Adams had the unenviable role of persuading the representatives of each state to adopt the resolution to declare formal independence – with the effect that all those present would be put to death as traitors if their revolution failed. No transcript of this debate exists, but in the writings of Thomas Jefferson Mr Adams is described as speaking *'with a power of thought and expression that moved us from our seats.'* Following two-hours on his feet arguing for independence he was described as *'the Atlas of the hour' to whom 'the country is most indebted for the great measure of independency… He it was who sustained the debate, and by the force of his reasoning demonstrated not only the justice, but the expediency of the measure.'* On 2 July 1776, twelve of the thirteen colonies were persuaded by Adams to vote for independence (New York abstained). Two-days later the delegates signed the Declaration setting in motion the creation of the United States of America.

Alternative Dispute Resolution and Commercial Negotiation Skills:

Advocacy in its oral and written formats are only one of the competencies we must display as counsel, and Mr Adams further cemented his status through his commercial negotiation skills. The nascent nation was in desperate need of external funding with the dollar being devalued and trade choked by the British. Having been appointed as an ambassador to the Dutch Republic, in 1782 when Adams was able to secure a loan of five million guilders while also agreeing a trade treaty. Of note, on his first voyage across the Atlantic to Europe to serve as an ambassador Adams was forced to take up his musket when his ship was attacked by a Royal Navy vessel, demonstrating the tenacious fighting spirit of proper counsel.

Adams was appointed to negotiate the peace treaty with Britain in 1783, and had a keen sense for how to play the various belligerents against one another. He took the cut-throat approach of excluding the French from his negotiations in favour of dealing directly with the British ministers, and not only managed to secure a peace treaty recognising American independence, but also secured fishing rights for American fishermen off Newfoundland with the right to cure their fish upon the Canadian shoreline. The French were impressed enough with the British concessions that they did not require a renegotiation on their own terms, and their exclusion allowed them plausible deniability in not pressing for transfer of Gibraltar to the Spanish.

Later Successes:

After a stint as ambassador to the Court of St. James, John returned to the United States where he came second in the first presidential election, and was thereby elected Vice-President to George Washington. Adams went on to cast 23 tie-breaking votes in the Senate including

preventing the US capital being located in New York rather than the new city that would become Washington, D.C. He then served as president for four-years from 1797 – 1801, before retiring to work his farm.

Ultimately, the life and career of John Adams reveals a remarkable string of successes reflecting the core competencies of a barrister, and an ability to employ his barrister skills to set the stage for the modern Western world. Surely no other barrister could match such accomplishments, although I suspect that John Adams would relish in any such debate.

Andrew Brown, Barrister, Radcliffe Chambers

Adjudication: A Successful UK Export

Statutory adjudication (under the Housing Grants, Construction and Regeneration Act 1996 (as amended)) [the HGCRA] (which was itself founded upon contractual mechanisms under industry standard forms) is, almost certainly, one of the most significant and successful legislative exports of the United Kingdom.

By Andrew Burr[1] and Narudee Chuekitkumchorn[2]

UK adjudication procedure

Procedure under the UK adjudication régime is reasonably flexible (by contrast with some other jurisdictions), permitting longer timeframes, compared to the more rigid and prescriptive certification process elsewhere. This flexibility aligns with the rôle of adjudication as a speedy dispute resolution mechanism, involving a two-stage process, which commences with the issue of a notice of adjudication, followed by a referral notice.

• Initiation of adjudication
Either party can initiate the adjudication process under the UK scheme, which benefits both parties to construction contracts, including employers, who have the statutory right to refer a dispute arising under their contract to adjudication.

• Selection, or nomination, of the adjudicator
The selection, or nomination, of an adjudicator can be agreed upon by the parties involved, or it can be made by an adjudicator nominating body [**ANB**] agreed upon by the parties. If the parties cannot agree upon an adjudicator, or an ANB, the claimant has the right to choose any ANB to nominate an adjudicator. This approach offers flexibility, allowing the parties to select an adjudicator whom they trust or, if necessary, rely upon an ANB to make an impartial nomination

• Timeframes of adjudication
There is no timeframe for the claimant to prepare their adjudication claim. This is considered a disadvantage, by some, because the claimant may ambush the respondent with volumes of carefully-drafted claim documents, leaving the respondent with limited time in which to respond. Such ambush tactics were reported to be rampant, particularly in the early years of the operation of the UK régime; despite being acknowledged by the court as undesirable, these tactics were given judicial approval in *London & Amsterdam Properties Limited v Waterman Partnership Limited*, as not amounting to procedural unfairness. However, since most modern construction contracts in the UK now require contractors and sub-contractors to notify claims within a set timeframe, the problem with ambushes appears to have been mitigated.

The adjudicator has typically 28 calendar days from the referral notice to render a decision. The definition of "day" as a calendar day (including weekends and public holidays) has been criticised, since it can exacerbate the pressure upon the respondent. Other jurisdictions, like New Zealand and New South Wales, Australia, mitigate this by defining "day" as a working, or business, day and by implementing moratorium periods during industry shutdowns, such as around Christmas, or New Year.

• Enforcement of the adjudication decision
Under the UK régime, an adjudicator's decision needs to be enforced through the courts. A party seeking enforcement must apply for summary judgment, the landmark case of *Macob Civil Engineering v Morrison* clarifying that adjudicators' decisions would be enforced through summary judgment, solidifying this as the proper enforcement avenue. The UK courts have consistently supported such enforcement, adhering to the principle of "pay now, argue later." Provided that the adjudicator has acted within their jurisdiction and complied with natural justice principles, their decision will be enforced, even if there are errors in law, or fact. This robust judicial support aligns with Parliament's intention to make adjudication a swift and effective dispute resolution mechanism.

Worldwide story
The current state-of-play with regard to the global update of adjudication is, as follows:

	REGION	JURISTICTIONS INSTITUTIONAL RULES
A	**United Kingdom and Ireland** England and Wales	*The HGCRA (as amended)*
	Northern Ireland	*Scheme for Construction Contracts in Northern Ireland (Amendment) Regulations (Northern Ireland) 2012*
	Scotland	*The HGCRA, amended by the Local Democracy, Economic, Development and Construction Act 2009*
	Ireland	*Construction Contracts Act 2013*
	Isle of Man	*Construction Contracts Act 2004*
B	**Australasia** Australia: New South Wales	*Building and Construction Industry Security of Payment Act 1999*
	Australia: Victoria	*Building and Construction Industry Security of Payment Act 2002*
	Australia: Queensland	*Building Industry Fairness (Security of Payment) Act 2017*
	Australia: Western Australia	*Construction Contracts Act 2004*
	Australia: Small eastern jurisdictions: Tasmania, the Australian Capital Territory and South Australia	*Building and Construction Industry Security of Payment Act 2009*
	Australia: The Northern Territory	*Construction Contracts (Security of Payments) Act 2004*
	New Zealand	*Construction Contracts Act 2002*
C	**Asia** Hong Kong	*Construction Industry Security of Payment Bill*
	Malaysia	*Construction Industry Payment and Adjudication Act 2012*
	Singapore	*Building and Construction Industry Security of Payment Act 2004*
	Thailand	*Draft Act on Settlement of Disputes Relating to Payment under Construction Contracts*
D	**Africa and Indian Ocean** Mauritius	*Construction Contracts Act 2016*
	South Africa	Prompt Payment Regulations 2015
E	**North America** Canada: Ontario	*Construction Lien Amendment Act 2017*
	United States of America	*Federal Prompt Payment Act (1982)*
F	***Institutional rules*** *Beijing Arbitration Commission Construction Dispute Board Rules 2009*	
	Chartered Institute of Arbitrators' Dispute Board Rules 2014	
	DIS Rules on Adjudication 2010	
	Fédération Internationale des Ingénieurs - Conseils (FIDIC) Dispute Board Rules 1999	
	Chartered Institute of Arbitrators' Dispute Board Rules 2014	

Attempted synthesis

Any effort to synthesise these developments is fraught with difficulty, but the following summary is attempted:

A. Most adjudication schemes worldwide seek to outlaw "pay-when-paid" (or "pay-when-certified") provisions and replace these with a statutory right of the claiming party to appoint an adjudicator to determine payment claims;
B. Some jurisdictions exclude claims under certain types of construction contracts (such as residential, or complex, contracts, or under a certain value);
C. Certain jurisdictions (such as those in Australia, generally) are more restrictive as to appointing bodies and the qualifications of and CPD requirements for adjudicators;
D. Numerous institutional bodies (such as the BAC, CIArb and ICC) and contract drafting entities (such as FIDIC) have climbed abroad the adjudication bandwagon, and
E. Local courts worldwide have generally been fully supportive of the "short, sharp, shock" process of arriving at a speedy adjudication decision and encourage enforcement.

Potential problems under the law

Even though statutory adjudication generally shares the several goals of supporting the "pay now, argue later" principle, in order to ensure swift resolution of construction disputes, differences in specific details may lead to potential enforcement issues.

Thailand's proposed *Bill*, for example, addresses several concerns related to adjudication proceedings in construction contracts. Since adjudication cannot be avoided, efforts to by-pass adjudication are not permissible, since the termination of a construction contract does not exempt any party from pursuing adjudication proceedings. Another aspect is the absence of a time limit for the creditor to initiate adjudication claims. This implies that the creditor can start proceedings, whenever the payer defaults, without facing a specified deadline. Moreover, this *Bill* also prevents debtors from refusing adjudication proceedings. Ignoring the debtor's claims will only hasten the proceedings and displease the adjudicator. However, the *Bill* imposes a strict timeline of seven days for debtors to prepare and submit their defence upon receiving a claim. Extensions are not permitted. This might pose practical challenges, since many payment applications in Thailand often lack sufficient supporting documents, making it challenging for debtors properly to evaluate interim payment applications and prepare a defence within the given timeframe.

Meanwhile, The Singapore adjudication régime has the disadvantages of its predecessor, the New South Wales régime. One notable disadvantage is the inclusion of a final payment claim within its scope. There are strong arguments against the inclusion of final payment claims within the scope of the adjudication régime, which are worth highlighting. Since the intention behind the policy objectives of the Singapore legislation is to minimise disruption to the progress of work as a result of payment problems, the fact that disputes concerning final payments occur at the end of the project may be regarded as insignificant in the context of the contractor's cash flow and thus less likely to affect the completion of projects.

Lessons to be learned

Against the above backdrop, it is, perhaps, possible to derive the following lessons from the global odyssey thus far:

- Ensure clarity in the policy objectives;
- Security of payment legislation is intended to protect cash-flow ("the lifeblood of the construction industry"); but should there be a distinction as between sums claimed, or sums certified as properly due?
- Should consultancy agreements, as well as mainstream construction contracts, be included?
- Should there be any exclusions? See the Irish approach to PFI contracts and residential dwellings;
- To what extent should freedom of contract be removed? See the reforming approach in Mauritius and Thailand;
- Should ANBs be state-, or industry-, based bodies? Should there be monitoring of quality and standards and what mix of professional disciplines is required for adjudicators?
- How important is cross-border harmonisation in the increasingly-global construction industry? What time periods and service requirements are necessary? Would legislation-compliant standard form contracts assist?
- Beware disparate parochial pressures, such as those which have plagued the eight Australian state jurisdictions, pressures which may come to the fore under a federal scheme, such as in the USA;
- Discourage lobbying by diverse interest groups, seeking to turn security of payment regulation into a "political football", and
- The "hasten slowly" approach (in Canada, Hong Kong and Thailand, for example) provides a model to ensure that these policy goals can be fully articulated, examined and interrogated with all stakeholders.

A "work in progress", perhaps, but nonetheless, a job well done, thus far!

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What can Housing expect from the new administration (apart from less Housing Ministers)?

Housing is a very broad term, and this article does not intend or pretend to cover all that is relevant in this field. It does however seek to give a flavour of the position we find ourselves in now and what is being done and likely to be done to improve matters.

By Andrew Lane, Barrister, Cornerstone Barristers

Where are we now?

There can be little doubt that this country is in a housing crisis and has been so for many years. This is clear from even a cursory look at some of the figures released by the Ministry of Housing, Communities & Local Government ("MHCLG") on 3 and 30 October 2024:

- 358, 370 households homeless, an increase of 10.4% on the previous year
- 146,430 households threatened with homelessness and so owed the prevention duty[1], an increase of 3.1%
- 117,450 in temporary accommodation, an increase of 12.3%
- 74,530 households with children in temporary accommodation, up by 14.7%
- 8,309 people sleeping rough in June 2024 for at least one night, up 15% on June 2023
- 2,808 people sleeping rough longer-term in June 2024, up 22%.[2]

In December 2021[3] the National Housing Federation's research estimated that there were around 8.5 million households with some form of unmet housing need and that for 1.6 million households social housing would be the most appropriate tenure to address that need.

That recognises that the private rented sector, whilst a significant player in the debate, is not the answer to such unmet need, not least because of its high rent model and insecurity of tenure. That uncontroversial recognition is further exacerbated by restrictions to housing benefit and the housing costs element of Universal Credit since 2010.

The rising cost of the benefits bill led the Coalition Government,[5] in its June 2010 budget, to announce the bedroom tax and, 4 months later, the household benefit cap amongst other costs-saving measures. In 2011 the level of the local housing allowance ("LHA") was reduced from the 50th to 30th percentile such that LHA would cover the lower 30% of rents in each area. The Conservative Government then, in July 2015, announced the freezing of LHA rates from April 2016 (a measure that continued until April 2024).

This not only effects tenants' ability to fund their rents, but also local housing authorities' ability to provide temporary accommodation pursuant to their homelessness obligations to be found in part 7 of the Housing Act 1996. The total costs of such placements increased in England from £1.14bn in 2018-19 to £1.8bn in 2022-23.[6]

The LHA freeze was especially significant (alongside the reduction of the percentile) as it sets the maximum amount of housing support claimants of Universal Credit and Housing Benefit can usually expect to receive for private rented homes of different sizes.[7]

This all puts greater focus back on the social housing sector which, between April 1980 and March 2023, had seen a loss of 2,020, 779 social housing dwellings through statutory Right to Buy, Voluntary Right to Buy and Preserved Right to Buy. Since its introduction in 1998 there have also been 12,748 sales of social housing through the Right to Acquire recorded by Homes England.[8]

Many Housing Ministers liked to announce their wish for 1:1 replacement but the reality is that right to buy has caused the social housing sector to shrink. The House of Lords Library noted in June 2022 that over 40% of former council homes were now in the private rented sector.[9]

What can we expect to happen?

Timing is important in so many spheres of our lives, but I must confess to having been fortunate in my choice of subject-matter being accepted for this article when we not only have the long-awaited Renters' Rights Bill been introduced into Parliament on 11 September 2024,[10] but the first Budget of the new Labour government on 30 October 2024 highlighting several significant housing reforms and funding commitments.

The Renters' Rights Bill will clearly have a significant impact on the private rented sector and, to a lesser extent, the social housing arena as well. The much-trumpeted removal of "no fault" section 21 notices and process, and the greater focus and powers to be given to ensure better standards in the sector – such as a new decent homes standard, the extension of "Awaab's" law to the sector and the introduction of a Private Rented Sector Ombudsman – are generally seen as positive and constructive moves.

In terms of the costs of the private rented sector then, unlike in Scotland, [11] rent controls seem very much off the table. Matthew Pennycook M.P., the Minister for Housing and Planning, said in a written answer in the House of Commons back in August:

"The Government does not support the introduction of rent controls. We have made clear that we intend to use the Renters' Rights Bill to provide tenants with greater protections against unreasonable within-tenancy rent increases."

Looking towards the social housing sector we saw the Chancellor, Rachel Reeves MP, commit to an extra £500 million in the 2025-26 Affordable Homes Programme as well as more immediate funding for house-building programmes such as in Liverpool Central Docks (2,000 homes) as well as more generally through the Local Nutrient Migration Fund (28,000 homes).[12]

The Chancellor also announced a 5-year social housing rent settlement, £233 million additional 2025-26 spending to tackle homelessness and reduction in right to buy discounts. The latter is especially topical as the Secretary of State for Housing, Communities and Local Government and Deputy Prime Minister, Angela Rayner MP, told the BBC in November 2024 that she also wanted to stop new

council homes in England been sold under the Right to Buy Scheme.

Conclusion

My personal take on all this is that I get a sense of this government taking housing very seriously indeed, wanting to move quickly and, just as important, properly understanding the crisis it finds itself in.

That is not to say that everyone will be resolved overnight or even in the short to medium-term. For example, there are issues still to be talked about – for example, what is going to happen to the voluntary right to buy programme and how will housing associations and other private registered providers operate their starter tenancies with the ending of assured shorthold status and fixed-terms?

There are also the inevitable unknowns. Again, looking at my practice area of social housing will the government invest sufficiently in the courts system to ensure that hearings are held quicker, and warrants enforced in a reasonable fashion?

And finally, there is the real continuing problem of temporary accommodation costs for local housing authorities. On 24 October 2024 London Councils reported that London boroughs were spending £4million every day on such costs, and had a fo recast overspend of £250m this year on their homelessness budgets. They are seeking a removal

of the January 2100 cap on LHA payable for temporary accommodation in Housing Benefit subsidy, a doubling of the Homelessness Prevention grant funding and the LHA rates 2024-25 increase to be made permanent.

So watch this space! The public face of the previous administrations was not impressive in the housing arena and saw 16 Housing Ministers in the 14 years starting in 2010. Of course, it is too early to see whether that pattern will be continued but in Matthew Pennycook MP I believe we have a Minister who knows their brief and is genuinely interested in and committed to the area.

Andrew Lane, Barrister, Cornerstone Barristers

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[1] Section 195, Housing Act 1996
[2] It was announced on 6 November 2024 that an emergency £10 million fund has been launched by the Deputy Prime Minister to protect rough sleepers from cold weather this winter.
[3] I have relied heavily in this article on the wonderful House of Commons Library Service, and in particular here on their 4 March 2024 Research Briefing "Social rented housing in England: Past trends and prospects".
[4] "People in housing need – The scale and shape of housing need in England".
[5] See the House of Commons Library Research Briefing of 17 August 2021 – "The rent safety net: changes since 2010" (Wendy Wilson, Francis Hobson and Roderick McInnes).
[6] Department for Levelling Up, Housing and Communities, Accredited official statistics – "Local authority revenue expenditure and financing England: 2021 to 2022 individual local authority data – outturn" (23 November 2023).
[7] House of Commons Library's Research Briefing – "Local Housing Allowance 9LHA): Help with rent for private tenants" (Wendy Wilson, Francis Hobson & Rachael Harker).
[8] MHCLG accredited official statistics – "Social Housing sales and demolitions 2022-23: Right to Buy sales", updated on 27 June 2024.
[9] "Right to buy: Past, present and future" (Frank Eardley).
[10] The similar Renters (Reform) Bill introduced by the previous Conservative government ran out of Parliamentary time upon the calling of the general election and it not being included in the 'wash-up period' allowing for bills to be passed in quick fashion before the July 4th election.
[11] See the Housing (Scotland) Bill. Conversely the Welsh Government has recently indicated that rent controls do not form part of its plans for the private rented sector.
[12] See 7 November 2024 MHCLG press release.

The Case of AA v ZZ – Shining a light on complicated family law proceedings

By Mani Singh Basi, Barrister at 4PB

The case of AA v ZZ [2024] EWHC 2008 (Fam), conducted by Mrs Justice Arbuthnot DBE attracted a lot of media attention. In the heading of the judgment, it is recorded: **'JUDGMENT – A PERPLEXING CASE – DO ANY CHILDREN EXIST?'.** It was reported in the Case Law National Archives and the case generally raises the awareness of how complex family law proceedings can be and the difficult tasks that judges have to embark upon when making findings and reviewing complex and competing evidence, both in writing and orally. Further, the case demonstrates the evolving landscape of family litigation and how matters can become more and more complex as litigation goes on, with new evidence and new issues materialising for judges to grapple with.

The factual background is quite complex within itself. In short, the applicant applied in relation to what he said are his twins, referred to as 'MAZ1' and 'MAZ2' who it was alleged were born in February 2021. In support of the application, the applicant provided various recordings of conversations, accounts from witnesses, WhatsApp messages and photographs form his telephone of one child, and sometimes two to which the respondent had sent to him. He also produced pregnancy ultrasound scans. In contrast, the respondent's case was that she was never pregnant and no twins were ever born.

The respondent and various witnesses gave evidence, and the respondent said that the photographs of a child or children and the ultrasound scans had been doctored by the applicant and were not authentic. Ultimately, it was the respondent's case that the applicant knew the twins were not born and that *'he has pursued her as a continuing act of controlling and coercive behaviour or as an act of revenge for her reporting his father to the authorities as a possible child molester. As was clear from the recordings and as she accepted, she allowed herself to join in the deception at the beginning although her case was that no one was deceived'.* The applicant was a litigant in person at the outset, but eventually both were. The heading of the judgment outlines how many days the Court was tasked to consider the case, the first hearing date being November 2023 and judgment being handed down on 03rd July 2024.

The judgement was detailed in that it provided a summary of both the written and oral evidence considered by the judge. Ultimately, it was for the applicant to prove the existence of the children. A Lucas direction was particularly relevant in this case.. The guidance stipulated in *R v Lucas* [1982] QB 720 and *R v Middleton [2000] TLR 293 is that a conclusion th*at a person is lying or telling the truth about point (a) does not mean that he is lying about or telling the truth about point (b). in this context, the judge commented: *'this is an unusual case because either the Applicant or the Respondent had lied about the pregnancy and the birth of these children for more than three years'*. The judge further commented in the judgement in respect of lies:

'304. One of these parties had lied to me in these second proceedings for about a year through a dozen hearings (some very short) including the five day final hearing. The lies one of them had told had been complicated, persistent and very well planned and executed. Potentially two of the witnesses have lied, MSS and MTT in particular.
305. There are a number of alternatives open to me on the evidence'

It was the judges task to consider the alternatives that were open to her, with a sight on the evidence she heard and read. The judge summarised the witness evidence at length from [59]-[179]. At [106] she concluded that the accounts given by a number of witnesses about the twins in the recordings were so convincing that they affected her view of their reliability, and she could not give great weight to their denials of the children's existence.

Arbuthnot J described AA as seeming credible and honest and to be a man who believed the children had been born [112]. The respondent produced recordings in which AA was abusive to her. The judge accepted ZZ's evidence that AA had threatened to desecrate her mother's grave and that he had been abusive during the relationship, although the extent of this was hard to determine. The respondent had explained that she had told lies about a pregnancy as a way out of a coercive and controlling relationship and was upset when AA said he wanted her to have a termination, so left him. This explanation according to the judge did not *'make entire sense'*.

From [180] the judge went on to discuss the mass of documentary evidence, which included ultrasound scans as well as material from the Portland Hospital. Some of the documents were said to have been forged. She found that WhatsApp exchanges, purportedly exchanged between the applicant and some of the respondent's witnesses, were probably forged by the applicant. A hospital letter, relied on by the applicant to prove that the respondent had a miscarriage in 2019, was also likely to have been forged.

From [303]-[331] the judge drew the evidence together "in search of a decision." There was evidence that pointed in different directions. The judge observed at [314]that there was no clear key to the case; she was troubled by MTT's (who was a psychotherapist and counsellor: [55]) evidence about seeing the respondent with a toddler who called her "mummy" and the Portland evidence about conversations the respondent ZZ in which she apparently referred to *"an appointment for a termination, which was not attended, to twins, to a child born in the hospital and a private midwife used whose first name was H."* In considering the respondent's credibility she bore in mind that she had for two years participated in conversations which made it clear that the twins existed. She found that respondent had been pregnant and had considered having a termination at the Portland Hospital.

Reviewing the evidence and forming a conclusion led the judge to end the judgment by stating:

'Conclusion

332. Up to the receipt of the evidence from the Portland Hospital and MTT in 2024 there was insufficient evidence to support a conclusion that the children existed, it was for the Applicant to prove that case and he had failed to do so.

333. It is the evidence provided in the early part of this year which has strengthened the Applicant's case. I now find there is strong evidence there was a pregnancy and there is some evidence that at least one child was born. There is insufficient evidence to say there were two.

334. This conclusion does not answer a number of questions raised by the evidence, for example, why a forged letter relating to a miscarriage was produced or why some WhatsApp messages were forged. I cannot say where the birth took place but it is likely to have been in a private hospital. I cannot say where the child is currently.

335. I am struck again by the difficulties that a Family Court has in fully understanding and exploring a set of facts in a case when there are no legal representatives. The Family Court cannot act as an investigator. There was evidence in these proceedings that may well, had it been explored appropriately, have led to a different conclusion. These proceedings had been lengthy enough, each adjournment had led to further contradictory evidence, the fact finding had to come to an end.

336. This matter will be listed for further directions in due course'

Paragraph 335 is key. A family advocate has a very important function in family law proceedings, to consider all the evidence and to advance the case that they have. However, it is well known that since the legal aid cuts in 2013 / 2014 – more and more litigants are acting as litigants in person in family law proceedings. In such circumstances, the litigants in person have the responsibility to conduct the case in accordance with the law and the Family Procedure Rules 2010. The complexity of cases can very on a case by case basis, but the publication of such a judgment provides a useful light on the difficult task judges are often faced with in family law proceedings.

The judgment outlines the difficulties that can arise in such cases, albeit it has to be acknowledged that this case was extremely unusual. Notwithstanding that, the High Court is often tasked to consider the most complex cases concerning child protection and cases can have thousands and thousands of pages of evidence, including hearing from many witnesses over the course of many weeks. The sole individual determining the truth, or what has or has not happened is – the judge.

Mani Singh Basi, Barrister at 4PB

Escape to the Country – the view from the far west

My move to Cornwall in 2011 took place under a significant cloud. My parents had moved to Cornwall the previous year and personal circumstances meant I had no choice but to follow. I left my excellent civil and commercial set in London, barely two years into tenancy. Needless to say, those who did not know the situation I was facing thought me insane. I was resentful, but resigned to the fact that it was for the best.

By Charlotte Davies, Barrister, KBG Chambers

With an eleven-month-old in tow, I moved to Truro and joined KBG Chambers (formed out of the then very recent merger between Kings Bench Chambers in Plymouth, and Godolphin Chambers in Truro), the most far western chambers in England. I was immediately reassured by the warm and friendly welcome I received from everyone. Better than that, my diary was certainly busy enough and somewhat surprisingly, my fees in fact went up – I later put this down to there being less competition at the junior end of the bar. Having been renting on the London commuter-belt, I was now able to rent a four-bedroomed detached house within walking distance of court… for half the cost. A night out (albeit a rare indulgence at that time) no longer broke the bank.

When I became pregnant with my second child, the sick feeling I developed in the pit of my stomach at the thought of telling my then Head of Chambers was entirely misplaced. In fact, I recall him being mildly bemused that I had even felt the need to tell him so formally! The clerks were wonderful: however I wanted to organise my practice over that time and thereafter was down to me.

Now, over thirteen years later, I am not ashamed to say that I go out of my way to sell life on circuit to every big city counsel who crosses my path. Despite the circumstances, my move to Cornwall was without a doubt the best 'decision' I ever made. I have lost count of the number of London counsel I have been against who say that they have often considered a move but fear a lack of work or reduction in earnings. Since Covid-19, and the changes that it forced upon the profession, those whispered conversations have become ever-louder. All of us now seem to want something different from life and in that respect, I feel I was ahead of the curve. My children attended small village primary schools; the type of education which I would no doubt have had to have paid for in London. After school in the warmer months invariably involves a trip to the beach, or fish and chips on the harbour. Frankly, my children have no idea how lucky they are.

On the flip-side, and if it was not already a tourism hotspot, Cornwall seemed to become the go-to destination for summer staycations over Covid times, with numbers remaining high ever since. That can make July and August tricky months for those of us who live and work here. The infrastructure in Devon and Cornwall has improved significantly, with the most noticeably transformative change being the dualling of the A30 around Truro. The wash-out summer this may have contributed, but the roads felt easier to navigate this year as a result.

Hearings that can be done online, have generally stayed online. Alongside that, reasonable requests to have matters heard remotely tend to be accommodated. I know that many barristers prefer the cut and thrust of an in-person court attendance but it does mean a far better work-life balance and, more pertinently, no need to leave the comfort of your seaside home to appear in court in London.

I am keen to reassure anyone considering a move that there is no lack of work. How can there be? People in Cornwall argue with each other just as much as anywhere else; all of life's trials and tribulations apply as much here as they do to the rest of the country. And we are the only Chambers in the entire county. In Devon, you can count the number of chambers on one hand, and KBG is one of those too. I have never spoken to a fellow western circuit barrister who has complained about a lack of work. We continually recruit, and there is a reason for that.

In terms of income levels, whilst I am now well out of the London loop in terms of earnings, and with property prices in the south west post-Covid being rather less affordable than they have historically been, I remain without any complaint. The expansion of fixed costs across the new tracks will likely act as somewhat of a leveller also.

As you will often hear, in Devon and Cornwall, everyone knows everyone, and that is certainly true of the bar and judiciary. That of course can have its positives and negatives. In my view, it is a distinct positive. If there was one thing that I did not like about London practice it was the enormous number of chambers and courts. Every day would be a different opponent, and a different judge. There is also a huge number of courts within a reasonable travel distance of London, amplifying the problem many times over. What I did not appreciate until I moved onto a circuit, was the value in knowing your tribunal. I do not mean knowing judges in the personal or social sense, but knowing how they tend to decide things in certain circumstances - knowing what they want or need from parties; how they are going to approach a particular issue; how strict they are with procedure; how the hearing is likely to be conducted. Having a good idea of how these things are likely to go makes it exponentially easier to advise your clients.

I loved attending events at the Inns of Court when I lived in London, and was worried that I would really miss out on that networking and social side of the bar down here on the edge of the circuit. I need not have feared. The circuit has plenty of networking opportunities and the Western Circuit's 'Grand Nights' are legendary. I have contributed in my own way having joined the steering committee of the Western Circuit Women's Forum, which holds regular local meet-ups across circuit, as well as more career-driven events such as 'Ask A Judge', to which the Lady Chief Justice attended in May 2024. There are Law Society dinners, quiz nights, boat trips, curry nights – plenty to entertain for even the most social of butterflies.

The WCWF also operates a mentoring programme - which I co-lead - aiming to assist women barristers overcome barriers to career progression. In short, there is a huge amount of varied support available to barristers at all levels on the circuit. Interestingly, quite a few of the enquiries we have are from established members of the bar moving onto circuit from London.

Whilst the broadness of my practice has evolved as somewhat of a necessity, it is something I enjoy. I have areas I prefer, of course, but no day is the same and that has to be a good thing, if only for my own mental stimulation. However, if you are - or wish to be - highly specialised within a civil practice, then circuit life, certainly on the far-reaches, may be more challenging. That is not to say it is impossible - there are specialised

practitioners, including civil silks, but it is much harder to develop and maintain a narrow practice.

I have also had to come to terms with the fact that my chances, as a civil practitioner, of ever having a sufficiently and consistently high level of experience to apply for silk are slim to none. We have no civil silks in my chambers and I am unlikely to ever be led. I suspect this goes hand-in-hand with the challenge of maintaining a specialism, and those chambers with civil silks naturally look to their own members for juniors.

Neither of these aspects of circuit-life cause me any sort of angst. They are offset a hundred-fold by the positives of a practice by the sea.

Where there is arguably better opportunity is in the judiciary. Since the establishment of the Judicial Appointments Commission, the playing field has been levelled. Although I do not claim to know all the intricacies of appointing judges, or whether there is any merit in being in a smaller pool of local applicants that improves chances for certain areas (maybe I am doing myself a disservice, having been appointed as both a Deputy District Judge and First Tier (Mental Health) Tribunal Judge in 2020, roles which I thoroughly enjoy), but I do know that appearing before the same judges regularly makes for more persuasive references. If climbing the judicial ladder is your goal, then a move to the provinces certainly won't hold you back. You will also find plenty of support in your ambitions - the smaller size of the bar does not, in my experience, manifest in less willingness to help each other.

So, if you do fancy a change of scenery with a completely different pace of life, and you like pasties, clotted cream, and

friendly judges, then the far reaches of the western circuit may be for you. You would be best to remember however that barristers in Cornwall put their jam on first, the friendliness only goes so far.

Charlotte Davies, Barrister, KBG Chambers

Catfishing: is it time to reel the law in? Lessons from Sweet Bobby

By Vithyah Chelvam, Probationary Tenant, Red Lion Chambers

What happens when you realise that the person you thought you've been sexting for years doesn't exist? The prevalence of online dating and online sex work have contributed to the word 'catfish' becoming a mainstream term. For the few of us who may be unfamiliar with the word, it involves a perpetrator(s) using a fictitious online persona with the motivation of luring an unassuming party into a relationship, either romantic or platonic.

A minor fish tale: The term 'catfish' was derived from a metaphor used in the 2010 documentary 'Catfish' by Vince Pierce, the husband of a catfish:

> *"They used to tank cod from Alaska all the way to China… By the time the codfish reached China, the flesh was mush and tasteless. So this guy came up with the idea that if you put these cods in these big vats, put some catfish in with them and the catfish will keep the cod agile. And there are those people who are catfish in life. And they keep you on your toes. They keep you guessing, they keep you thinking, they keep you fresh. And I thank god for the catfish because we would be droll, boring and dull if we didn't have somebody nipping at our fin."*

Ironically, it has since been found that the above story is a myth – much like a catfish itself. Nonetheless, this is the tale that gave the documentary and the MTV reality show its title: 'Catfish'.

Catfishing typically results in financial and/or emotional harm. Whilst the 2010 reality TV series "Catfish" garnered the word national popularity, this show along with others, also significantly contributed to trivialising the impact and the act of catfishing. Over the last decade, catfishing is increasingly seen as a form of entertainment despite resulting in serious harm, which in some cases is fatal. It is clear that catfishing needs to be give more legal consideration. However, in my view, this does not necessarily mean that wheel needs to be reinvented and new laws need to be created yet. Instead, a change of attitudes, robust prevention measures, and effective charging by the police and CPS are clearly vital. Kirat Assi's story calls us to at least think about it.

Kirat Assi's story

The Tortoise Media podcast and Netflix documentary Sweet Bobby follows the UK's longest-known catfishing scam. Kirat Assi was subjected to a romance scam that lasted nearly a decade. In 2009, she received a friend request on

Facebook from someone she knew from the West London Sikh community: Bobby Jandu. They had friends in common. She even saw him in person in a nightclub one day, but he didn't recognise her. She reasoned that he was likely drunk. Following the encounter, they continued to exchange messages on social media. Over the course of five years, their friendship developed into romance. Eventually, they became engaged. Assi was added to Facebook groups where Bobby would 'introduce' her to his family and friends. This would incorporate approximately 60 different profiles. She would speak to some of these friends and relatives on a regular basis.

The relationship soon took a dark turn. Bobby began to exert more control over

Assi, often accusing her of flirting with other men. He monitored her movements and dictated her choices. He dissuaded her from going to work, and tried to prevent her from seeing her friends and family. After nine years of contact, and many unsuccessful attempts to meet in person, it was revealed that Bobby was not in fact Bobby at all. Though his pictures and identity was based on a real person called Bobby, the Bobby that Assi was speaking to was created, allegedly, by her cousin, Simran Bhogal. Assi was devastated.

When Assi reported this to the police in 2018, she was told that there was nothing they could do because catfishing is not a crime in the UK. Additionally, she was informed that she was not, legally speaking, a victim – the real Bobby Jandu was.

Bhogal has provided a statement through her lawyers to Tortoise Media in 2021 saying:

> *This matter concerns a family dispute over events that began over a decade ago, when I was a schoolgirl. As far as I am concerned, this is a private family matter that has been resolved and I strongly object to the numerous unfounded and seriously defamatory accusations that have been made about me as well as details of private matters that have been shared with the media.*

This was undoubtedly an acutely traumatising experience for Kirat Assi. Is it right that Assi's case goes unaccounted by law simply because catfishing is not a specific offence?

The law

Financial gain is often the driving motivation behind dating scams. The National Fraud Intelligence Bureau ("NFIB") received 8,036 reports during the financial year of 2022-2023 of romance fraud, amounting to over £92m lost. Sweet Bobby, however, is a case where money was not the driving force. It was a relationship that was mainly predicated on power and control.

Providing the evidential threshold was met, Assi's catfishing ordeal could have been addressed under existing law. For example, controlling or coercive behaviour in an intimate family relationship is addressed in s.76 of the Serious Crime Act 2015. It states the following:

(1) A person (A) commits an offence if –

a. A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
b. At the time of the behaviour, A and B are personally connected,
c. The behaviour has a serious effect on B, and
d. A knows or ought to know that the behaviour will have a serious effect on B.

(2) A and B are "personally connected" if –

a. A is in an intimate personal relationship with B, or
b. A and B live together and –
   i. They are members of the same family , or
   ii. They have previously been in an intimate personal relationship with each other.

For a prosecution to progress, it is likely that limb 2(a) needs to be met. Assi has 10 years' worth of messages proving a relationship with fictional Bobby. It was, undeniably, an intense and deeply intimate relationship featuring constant contact. Some have questioned whether Bhogal can be prosecuted for being coercive and controlling towards Assi, even though Bhogal was posing as Bobby. With the provision of evidence confirming Bhogal controlled these false accounts, this can be surmounted. Assi is not the first victim of catfishing in the UK. Recent cases demonstrate that abuse can be properly attributed to the catfish abuser.

Helpful guidance from the CPS demonstrates that this cyber-enabled crime has several existing legislation in place to hold catfishes accountable. This includes:

- S1 – 2 Fraud Act 2006;
- Malicious Communications Act 1988;
- Communication Act 2003
- S.2-5 Protection from Harassment Act 1997;
- S.44-46 Serious Crime Act 2007; and
- S.181 OSA 2023.

There are clearly many avenues of legislation to pursue in Assi's case. Therefore, perhaps the focus should not be on creating more legislation, but rather to effectively enforce the ones that already exist. There are numerous evidential and technological hurdles that exist. However, in Assi's case, she was able to identify a perpetrator as Bhogal allegedly admitted responsibility. This progressed further into a civil claim, in which Bhogal is said to have privately apologised for her actions.

Moving forward

Three issues need to be addressed in order to deal with cases like Assi's more effectively. Firstly, we must tackle the culture that trivialises catfishing and online harm. Catfishing should not be seen as function of embarrassment or 'stupidity'. Since the podcast was released in 2021, Kirat Assi has been subject to intense trolling and online abuse. She has often been asked "how could you have been so stupid?". However, this is an important part of the modus operandi of a catfish: to make a person feel completely embarrassed and stupid. This contributes to severe underreporting.

Additionally, our opinion of how intelligent a complainant is largely irrelevant. The law is not there to only protect those that we assess as 'worthy'.

Secondly, the police and CPS must charge effectively and consistently. It should not have mattered that catfishing was not a specific offence when a lot of legislation already exists. This discussion was, in my opinion, a distraction from the existing law being fit for purpose.

Finally, earlier intervention could have prevented the alleged perpetrator from taking it so far. Often criminalisation is considered the most impactful change, though it is not always the most effective. For too long we been sold the narrative that criminalising people for the harm they cause will automatically solve the problem and make it stop. Those of us who spend every day working within the criminal justice system know that this is not always the case. The criminal justice system is extremely stretched and under-resourced. It should be utilised in the most serious cases, serving as a final resort. Gina Martin has reflected on why she does not want to change any more laws after she campaigned to make upskirting a specific offence in England and Wales in 2019. Her work now asks, "How do we prevent this *before* we need to criminalise it?". The same question should be asked for those who catfish.

CONCLUSION

Catfishing has become increasingly insidious over the years. A conscious effort must be made to ensure that the impact is not trivialised and that victims are not blamed. That starts with us. Are we using the word 'catfish' as a joke, or recognising it for the serious harm it can cause? In the legal sphere, more must be done to understand the legislation available to us to charge offences effectively. Complainants cannot be told that the tools do not exist to protect them, when really the time just has not been taken to consider the wide range of legislation available. Most of all, more consideration should be given to prevention. That may take the form of structured intervention, or general education. Ultimately, criminalisation is not necessarily always the answer.

Please note that this article represents the opinion of the author and does not necessarily reflect the view of any other member of Chambers.

Vithyah Chelvam, Probationary Tenant, Red Lion Chambers

The Provision of Legal Services in the Era of Social Media

Barristers are often typecast as pin-stripe-wearing extroverts who are rather too good at self-promotion. But mention "business development", "marketing" or "social media" in any meeting and you're guaranteed to watch talented, experienced advocates squirm.

By Anna Yarde, Barrister, Harcourt Chambers

Why?

Firstly, there's a huge difference between being confident in the courtroom and being effective on social media. The audiences are different. The language is different. And so are the metrics of success.

Instead of one judge, one trial, and one judgment, you will find an unwieldy worldwide population, posts, photos, videos, likes, shares, engagements, impressions and comments. And everyone has an opinion.

Secondly, it feels risky. That's not surprising, given that the old Code of Conduct contained specific restrictions on advertising and marketing. When I first joined chambers, "marketing" was limited to having a website, carrying simple business cards and having drinks with friendly solicitors. That is no longer the case.

The current Bar Council guidance on "Advertising and website profiles" (last reviewed in July 2024) acknowledges that,

"In a competitive market for legal services, it is only right that barristers are permitted to market themselves through websites (whether run personally or through chambers) and through other methods such as social media or advertisements. In many cases, lay and professional clients are likely to be interested in researching barristers who they are, or who they are considering, instructing – or barristers who are known to be on the other side of the case. Other people connected with litigation, such as judges, lay or expert witnesses or even jurors[1], may choose to find out more about the barristers in a particular case, as may members of the public and the press."

As the guidance points out, that does not mean that advertising and marketing is not within the scope of regulation. It points out that the following core duties are likely to be relevant to marketing:

CD3 – *You must act with honesty, and with integrity*
CD5 – *You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession*
CD6 – *You must keep the affairs of each client confidential*
CD2 – *You must act in the best interests of each client.*

You must also comply with the transparency rules which concern the provision of information to clients.

The Bar Council Guidance gives examples of how each of those core duties may be applied to types of posts, quotes or claims made online. Every barrister should read it in full (and, probably, regularly). And, perhaps just as importantly, having revised the potential pitfalls, every barrister should consider the advantages of creating an online social media presence before deciding whether (and how) to utilise it.

What are those advantages?

1. It's good for equality and diversity.

Social media is a great leveller. It is no secret that "traditional" networking events have not always supported efforts to improve equality and diversity at the Bar, nor that there is an increasing awareness of the importance of holding events which are alcohol-free, timed to suit those with caring responsibilities or with options for remote attendance where manageable.

Social media is inclusive. It requires only a phone/laptop, as much time as can be reclaimed from a busy schedule, and a drive to nurture meaningful connections. Only have 30 minutes whilst the toddler naps or the 6-year-old does ballet class? That's fine. Don't have an existing network? It will come. Worried that no one will read your posts? Nothing lost.

2. It makes it easier to network in person.

Some of the best conversations start with, "I read the post you shared last week. It really resonated. I had a case the other day and…"

There is already a spark of connection.

I've lost count of the number of events that I've attended solo. The varied, fast-paced, unpredictable nature of life at the Bar means that colleagues often get held up at Court or will be travelling from another city. I suspect that I'm not the only one who has stood outside the entrance and taken a deep breath before joining a noisy and unfamiliar room. Having an online presence means not only a wider professional network (increasing the odds of finding friends in the room) but it also means being more likely to be recognised yourself. Recognition makes in-person networking much easier.

3. It helps solicitors to choose the right barristers for each client.

An enduring relationship between solicitor and barrister will often result in an excellent match for lay clients. The solicitor will already know what qualities they want to prioritise for the individual – do they need empathy? Tenacity? The ability to deliver straightforward advice about complicated concepts or technical legal terms? They will also likely be familiar with the leading juniors and silks in their field of expertise.

But what happens when solicitors are looking to book someone new or brief a case at short notice? More and more enquiries come to chambers via email, rather than dynamic telephone calls with the clerks (who can also recommend good matches) and those emails are often sent to multiple chambers at the same time. How do the solicitors choose from several unfamiliar barristers to make the best choice for their client?

Perhaps social media profiles, which showcase individuals' expertise, interests and personality, will have a growing role to play.

4. You can develop a "personal brand".

This doesn't always sit comfortably for barristers, who are used to speaking on behalf of others and unrelatable by tradition and design (wigs and gowns, anyone?).

But it is important not to underestimate the value of connecting with peers, colleagues, clients and students using digital content platforms. It's a lesson that even Kensington Palace has demonstrably accepted. Earlier this year, the Prince and Princess of Wales shared a video on multiple social media platforms. It provided an update on the Princess' health, return to duty, and the impact of her diagnosis and treatment on the family. Despite the high production values and scripted content,

the video still resonated with the audience. Viewers felt an authentic, human connection with the Royal Family, and the Prince and Princess retained control of a deeply personal message. It was a masterclass in controlling the narrative whilst remaining vulnerable, delivering a clear message and demonstrating what Kensington Palace offers modern society.

5. It helps with recruitment.

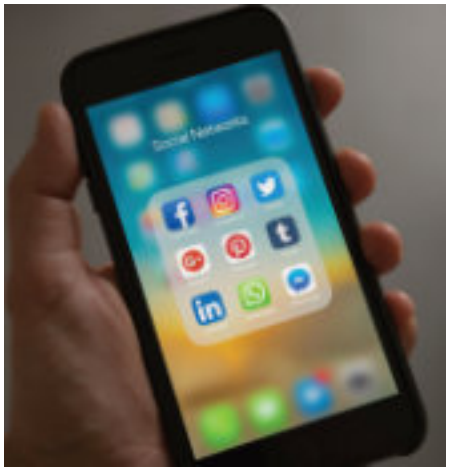
When I was applying for pupillage, I spent hours researching different chambers. Once I'd shortlisted the sets I was interested in, I spent hours more repeatedly reading individual barristers' profiles. I studied where they had gone to university, what scholarships they'd been awarded and, importantly, what their interests and hobbies were. What was I looking for?

Variety.

I have nothing against countryside pursuits, opera and Italian cooking. But those aren't my interests. So, I decided to apply to chambers where members talked openly about raising a family or pursuing different interests outside court.

Now, rather than being confined to two sentences (with a light joke and an exclamation mark!) at the bottom of a profile page or a dynamic conversation during a mini-pupillage, social media profiles offer students the opportunity to learn a huge amount about their prospective colleagues.

Individuals can showcase their achievements, post photos, and share links to blog posts and articles. Not only that, but candidates can see other



barristers and solicitors engaging with those posts. From that, they can ascertain where work likely comes from, who their instructing solicitors are likely to be, and what their own future career might look like. Perhaps even more importantly, candidates can see their achievements being celebrated by the legal community.

Students can also filter their searches by topic (and authors can invite engagement) using hashtags and group membership. Those might be as important as #womeninlaw or #socialmobility, or as simple and effective as #legalbakeoff or #barristercats. I'm not sure if that last one is real, but you get the idea…

6. Reach

The potential reach of each social media post is unfathomable. Picture Wembley Stadium and its 90,000-seat capacity. How much value would you place on being able to speak to an audience of that size about a topic of your choosing at a time of day that suits you? A single social media post can reach an audience that size (or greater) without its author leaving the house or spending a single penny on marketing.

It isn't just the size of the audience that is important, but the individuals within it. Who are your next instructing solicitors and lay clients? Where will Gen Z find their divorce lawyer? Or surrogacy expert? Or personal injury solicitor?

7. Opportunities.

Careers are often built on the connections between humans. Those connections can exist online too. And they can result in speaking opportunities, networking events and briefs.

How did this article come to be? A direct invitation on LinkedIn. And what an honour it is.

Please do feel free to connect. Online, in real life, or both.

Anna Yarde, Barrister, Harcourt Chambers

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[1]It is an offence for a juror to research a case during the trial, which includes seeking information about the judge or any person (including a lawyer) involved in the case: see s.20A Juries Act 1974.

Let's talk about drugs

Thinking upon my reflections of 2024, what a year it was; a former criminal barrister and head of the DPP now running the show in the UK, Donald J Trump back in the Whitehouse, being brought to the brink of WW3 and of course our crumbling criminal justice system.

By Mark Robinson, Barrister, Garden Court Chambers

In May of 2024 Rishi Sunak's Conservative government launched Operation Early Dawn, followed by Labour's early release scheme. Both schemes highlighted just how bad things had gotten within the male prison population in England & Wales, full to the brim and lest we forget as of May 2024 according to the National Audit Office there were 67,573 cases waiting to be tried in the Crown Court and as of December 2023 and according to the Law Society as of November 2023[1] there were 370,090 case waiting to be heard in the Magistrates Courts.[2]

Releasing inmates early may ease up some of the overcrowding issues in prisons but it seems to me at least, the Elephant in the Room is something that Sir Kier and co will need to "grow a pair to do", in addition to stop pandering to the right wing press, the court of public opinion in the Daily Mail and perhaps do something that is glaringly obvious and stop sending so many people to prison in the first place.

It's way past time that we have a grown up conversation about our antiquated drugs policies in the UK, whilst the rest of the Western hemisphere finally "gets it", including many states in the USA, especially NYC that I visited in the summer of 2023, where there are now cannabis outlets on every corner, the same place, where you'd be taken down to Central Booking a few years earlier has now legalised cannabis, into a multi-billion dollar business and generated much needed revenue by way of taxes and dispensary licences, and guess what, the sky hasn't fallen in.

However, my humble article (and humble opinion for that matter) isn't about legalising the Ganja; it's about serious reform to our half a century old drugs laws that maybe, just maybe would go some way into reducing the court backlog and overcrowded prisons, so I am going to say something really controversial now; it's time to remove custody as a punishment for simple possession offences.

Now I've got the controversial bit out of the way, let's take a look at the sentencing guidelines. For possession of Class A (cocaine and heroin) on indictment the starting point is a Band C fine with a maximum penalty of 51 weeks custody, the starting point for Class B (cannabis) is a Band B fine with the maximum penalty 26 weeks custody, and the starting point for Class C (anabolic steroids) is a Band A fine with a maximum penalty of a medium level community order. Possession of a controlled drug is an either way offence with the maximum penalty in the Magistrates 26 weeks custody, although as of 18 November they can now bang you up for 12 months.[3] A discharge is also an available disposal for both Class B and Class C on indictment.

Now, I'm certainly not condoning the use of drugs but the reality is if you're going to do a line of the ol' snortski on a Friday night, pop some pills in your favourite tech-house festival or smoke the reefa in the privacy of your own home, no matter what laws the government impose there will be little to prevent or deter you from consuming your chosen high. If you are arrested and charged for "simple possession" in the eyes of the law, you are a drug user, and it may be that you need some sort of help with addiction.

If doing the same thing over again and again, without anything changing is an act of lunacy, surely, we are at the point where we can all agree that our laws for possession are simply not working. If you are a drug addict you probably need help and if you take recreational drugs and have the money to do so, a hefty fine, for possession of Class A may be more appropriate. I'm not for a second suggesting loosening the laws against those that are dealing drugs, but possession is exactly what it says on the tin, and we are achieving nothing by putting these people through the criminal justice system and potentially prison.

Bringing people before the courts for possession is a complete waste of time, and regardless of quantity that is recovered, if the prosecution accept that the drugs are for personal use or some other valid reason, they have concluded that you are not involved in the supply of drugs so prison should be completely off the table at that point.

My proposal would be Operation New Dawn (pun intended) with the following:

1) Immediate scrapping of all custodial sentences for simple possession offences.
2) Police to have powers to fine and take payment from people in the custody suite for possession.
3) Police to have powers to divert addicts to treatment centres as an alternative to fines.
4) All simple possession offences are summary only.
5) Community penalties only used for repeat offenders.
6) Super fines for Class A 'powder cocaine' users with the rationale being that a certain demographic of society uses powder cocaine and so much in the same way the latest Labour administration added VAT on those attending fee paying schools, a super fine could be slapped on cocaine users and this would be used to fund state of the art treatment/rehabilitation centres for those addicted to non-recreational drugs such as crack cocaine, heroin and other amphetamines.

Home Office Official Statistics in England and Wales 2023 to 2024 reveals that the majority of drug possession offences recorded in the year ending March 2024 related to cannabis with 90,405 compared to around 35,517 offences of all other drug types. Cannabis possession had a much lower charge/summons rate (16%) than for other drug offences (31%). This reflects the fact that possessions of small amounts of cannabis for personal use will often be dealt with through a Cannabis Warning or a Community Resolution, but the suspect must admit guilt for such outcomes to be applied.[4]

Whilst no data is available for those arrested for powder cocaine, if we take a guestimate of 20,000 and apply a £500 super fine that still equates to £10 million that could be used to fund treatment centres. A further proposal could be a modest surcharge of £10/£20 for those who receive a cannabis warning or a community resolution and this could be used for additional funding for treatment and rehabilitation centres.

Whilst nothing I have suggested is rocket science, we simply cannot continue as we are, the backlog in the courts is not reducing and our adult population of those consuming illicit substances is not reducing. According to the Office of National Statistics In the year ending March 2023, an estimated 9.5% of people aged 16 to 59 years (approximately 3.1 million people) reported using a drug in the last 12 months; 7.6% reported using cannabis (around 2.5 million people) and 3.3% reported using a Class A drug (around 1.1 million people)[5].

In a recent possession with intent to supply Class A case that I was involved in, the judge questioned why my client was charged with the offence, having only been found with 6 wraps of cocaine, and no other supporting evidence. My client had wisely chosen to elect a Crown Court trial, and this led to the judge being slightly more persuasive than I could be with prosecution counsel, who after a very quick call to the CPS reviewing lawyer, decided to accept a guilty plea to simple possession and the judge imposing a £100 fine. One detects a sense of apathy coming from the judiciary with these types of cases.

What I have proposed is not radical by any means and for the record I am in favour of the legalisation of cannabis and other recreational substances but what I have set out is perhaps baby steps where it is hoped would incur the least resistance and be viewed as nothing more than common sense. But indulge me for a second if you will, imagine a criminal justice system in England & Wales, where all drugs are controlled by the state, where there are state of the art drug rehabilitation centres in every city in the country, mental health from neurodiverse to severe psychiatric conditions are taken seriously, all treatment centres and SEN in schools are properly funded and then think of how many people would actually be in the prison population. A former practising barrister once said, "tough on crime, tough on the causes of crime", I totally agree with the latter part of his statement…

Mark Robinson, Barrister, Garden Court Chambers

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[1] *https://www.nao.org.uk/wp-content/uploads/2024/05/reducing-the-backlog-in-the-crown-court-summary.pdf*
[2] *https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/scant-progress-in-tackling-huge-court-backlogs*
[3] *https://www.legislation.gov.uk/uksi/2024/1067/regulation/1/made*
[4] *https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2023-to-2024/crime-outcomes-in-england-and-wales-2023-to-2024#section1-3*
[5] *https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/drugmisuseinenglandandwales/yearendingmarch2023*

Art Not Evidence - Too Radical? Limiting The Use of Rap Music as Evidence in Criminal Trials

You are summonsed for jury service and are selected to sit on a trial for murder. In the dock are a group of young men, or more accurately, boys. The prosecution case is that this a shooting with alleged 'gang' connections. You start to hear about the evidence that they are going to present in support of their case; eye witnesses, CCTV, DNA, fingerprints, cell site evidence. Then you hear that part of the evidence will involve art. Music; a rap track and the accompanying video. If the latter seems incongruous it is no longer exceptional in our courts. This is a practice which has been deployed by prosecutors with increasing frequency in serious criminal trials in England and Wales since around 2005.

By Nick Whitehorn, Barrister at 25 Bedford Row

Many think that this is a practice that has gone too far. Art Not Evidence (ANE) is a coalition of lawyers, MPs, journalists, artists, academics, youth workers and music industry professionals who want to combat the overuse and misuse of rap music as evidence, including the author of this article. ANE has created a private members bill which it hopes will one day become legislation: The Criminal Evidence (Creative and Artistic Expression) Bill. Rap music and in particular Drill has it's fair share of critics and there are those who see this as an another strand of vital evidence available to the police. So why is it that ANE feel change is required and what do it's opponents have to fear from the proposed legislation?

Published in April 2024, a review by the University of Manchester, 'Compound Injustice', delivered the following key findings:

- The majority of cases where rap music evidence is used are 'Joint Enterprise' prosecutions
- Children and Young People are very heavily represented
- A large majority of the defendants are Black and 'Black/mixed'
- 'Gang' labels are widely used in these trials
- Cases are London-concentrated but also happen unevenly elsewhere

'Joint enterprise' continues itself to be controversial notwithstanding the restatement and reframing of the applicable principles by the Supreme Court in R v Jogee [2016] UKSC 8. The Manchester University study considered a dataset of 68 cases involving 252 defendants. 80% of those cases involved more than 1 defendant, and 53% of the cases involved 'joint enterprise' prosecutions, lending weight to the concerns that rap is being used to further inflate the numbers of people charged in such cases.

These cases often involve very young defendants. 'Compound Injustice' found that *at the time of trial*, 15% of defendants in the dataset were children (17 or younger) and 67% were aged 18-24. Nor are we talking about any old alleged offences. Of those under-17s charged, 88% of them were charged with murder.

84% of defendants across the dataset were ethnic minority people. Two-thirds (66%) were Black people (compared to 4% of the overall English and Welsh population), with a further 12% Black/mixed. 63% of the dataset cases involved prosecution cases with a 'gang' narrative.

Emerging from the report is a pattern, familiar to many defence practitioners, where the use of rap music evidence in trials predominantly affects or targets young people, particularly black or black/mixed boys. You have music used as evidence against children, charged with the most serious offence known to law, in cases where some of the defendants are not alleged to have struck the fatal blow or may not have even been present at the immediate scene of the crime. The music lyrics themselves frequently do not even reference the specific crime alleged, but are deployed to supplement a 'gang' narrative.

The music currently in the sights of prosecutors is Drill. Typically containing violent lyrics and imagery but also immensely popular with young people.
Drill is music made by young people for young people and can alienate and offend older people. From Jazz ('the Devil's music') in the 1920s, Rock and Roll and Teddy boys in the 1950s, Mods and Rockers in the 60s, Reggae and Punk in the late 70s, Acid House at the end of the 80s, through to grunge, EMO and so on thereafter, emerging musical genres can seem like a threat to the fabric of society or the establishment. Obviously the meaning to be derived from the lyrics often becomes a crucial issue at trial.
If a question came up about the meaning of Drill lyrics in a quiz it would be fans of the music, probably the youngsters in your team, you'd be asking for the answers. But when this music is presented in serious criminal trials it is explained in the overwhelming majority of cases not by music industry professionals, academics or youth culture experts but by police officers considered to have sufficient expertise by the courts. This professed expertise (widely accepted by the courts) often emanates from officers trawling the internet for tracks and videos. But it also is often based upon training created by the police themselves. See for instance the Met programme, 'Project Insight', launched in 2021 "*to identify and train MPS personnel who have expertise in urban street gangs and slang*"[1].

Expert witnesses; frequently perceived by the defence to be less than balanced in their conclusions, who are police officers (or former police officers), trained by the police, and instructed by the police to give evidence in cases where the police have a clearly vested interest.

Of course, should this evidence go before a jury, the defence are entitled to call their own expert evidence, and counsel have the opportunity to test the evidence through cross examination. But often the damage is done by that stage, and the unfair prejudice difficult to erase. Defence practitioners can and should do more to get it right first time, and challenge the admissibility of evidence where appropriate. In practical terms however defence counsel have to weigh up difficult tactical decisions. The perennial questions arise; is it preferable to attack weaknesses in the prosecution evidence through cross examination or call your own expert for their conclusions to be attacked? Do we want to give this evidence further undue prominence in the trial as a whole?

The Private Members Bill

The ANE cause itself is potentially seen as radical in some quarters and no doubt unpopular amongst police officers responsible for bringing such cases to the CPS. The MPs who have thus far signed up to support it are from the left, academia attracts those assumptions and music industry figures or defence lawyers could be suspected of bias. I am often asked 'but surely if a person is confessing to a crime in a song it should be used as evidence?'.

However the legislation proposed by ANE does not suggest that lyrics could never be used in evidence against a defendant. In that sense the proposed bill, in my opinion at least, is not particularly radical and should not be feared by skilled prosecutors. Below is a short explainer as to the changes advanced by the proposed bill.

Section 1
That a person's creative or artistic expression, their own or borrowed/copied, cannot be used in evidence against them or another unless a court is SURE that the following conditions are met:

Section 2

a) The expression has a literal, rather than figurative or fictional, meaning;
b) If the expression comes from another person or is copied, the person who copied it intended to adopt the literal meaning of it;
c) The expression refers to the specific facts of the crime alleged;
d) The evidence is relevant to a disputed issue of fact; and
e) That it is necessary to admit the evidence as the issue cannot be proven by other evidence.

Section 3 seeks an obligation upon Judges to have regard to the linguistic and artistic conventions of the expression and the social and cultural context in which it was created.

Section 4 would impose a requirement that the court only determines the required conditions assisted by the evidence of an independent expert who "…is suitably qualified to give evidence about the linguistic and artistic conventions and the social and cultural context of the creative or artistic expression".

Sections 5 and 6
Where evidence is admitted, there should be redactions where prejudicial effect outweighs probative value, and judicial directions for the jury to guard against stereotypes.

Much of this amounts to little more than a restatement of already established law or practice. A true and careful reading of the proposals may actually surprise some whose initial inclinations would be unsympathetic to change.

The use of a person's art as evidence against them in criminal proceedings is not entirely without precedent. Oscar Wilde was tried for gross indecency in 1895, cross examined extensively about writings that both he and acquaintances had authored and ultimately convicted. It is not generally an episode favourably remembered given modern sensibilities. This is an extract from his Preface to 'the Picture of Dorian Gray':

Thought and language are to the artist instruments of an art. Vice and virtue are to the artist materials for an art.

From the point of view of form, the type of all the arts is the art of the musician. ..

All art is at once surface and symbol. Those who go beneath the surface do so at their peril.

Those who read the symbol do so at their peril. It is the spectator, and not life, that art really mirrors.

Is it truly radical to suggest that there may be something wrong with a non-specific artistic expression being used against a child from an underprivileged group in a murder trial where his presence was not even alleged to have directly contributed to the murder? Or is it the status quo that in years to come will be considered radical?

Nick Whitehorn

The author is a barrister at 25 Bedford Row: https://www.25bedfordrow.com/site/people/profile/nwhitehorn
all opinions stated above are his own.

The Art Not Evidence website can be found at: https://artnotevidence.org/

See also University of Manchester website for further information and materials: https://sites.manchester.ac.uk/prosecuting-rap/home/about/

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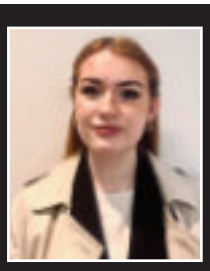
https://www.college.police.uk/article/analysing-gang-related-music-linked-serious-violence



Crisis at the Criminal Bar – a Law Student's Perspective.

As a law student, witnessing the continuing deterioration of the Criminal Bar is deeply concerning. While there are several issues, what stands out prominently to me is the shortage of criminal barristers. The Crown Court's outstanding caseload is the largest it has ever been at over 67,000 at the start of 2024. Last year, one in twenty Crown Court trials were abandoned due to Counsel being unavailable to represent either/or both the prosecution and defence[1]. The Criminal Bar is witnessing some of the lowest retention rates of all time.

By Hannah Jackson, Second Year LLB Law Student, University of Nottingham

Has criminal law lost its lustre?

Despite criminal law being a mandatory module on an LLB Law degree, engagement with the module is – in my personal opinion – declining significantly. Through my own experience, I see that much of my cohort is choosing to pass over a career at the Criminal Bar from the outset, enticed instead by the promise of a six-figure newly qualified salary at a top commercial law firm. Some of my peers were considering the Bar, but were discouraged within the first term once they realised how difficult it is to obtain pupillage, with odds of success at around 1 in 6, alongside the often-perceived poor financial prospects in criminal law, it no longer seems viable/attractive. Additionally, poor working conditions, a lack of education and early exposure to the profession were other reasons cited.

Legal Aid – a panacea?

Legal aid cuts have been catastrophic for barristers working on publicly-funded criminal cases. Many criminal case fees now fall below the minimum hourly wage, considering the expected preparation time and amount of cases to handle. Cases now require working more front-end hours as barristers are completing tasks such as collecting witness statements, traditionally done by solicitors and clerks. This additional workload means less time for preparing courtroom advocacy. "Half (51%) of pupils who work in crime say they do more than 50 hours per week, compared to 36% of those working in other areas of practice."[2] Many young criminal barristers highlight the fear that their careers may not be sustainable due to the substantial hours and the lack of adequate remuneration. The significant front-end work comes with no up-front payment. A big issue raised by pupils and junior barristers is that legal aid is paid at the end of a case. Linking this back to the Bar's future pupils, the levels of student debt and the cost-of-living crisis have left university students more focused

than ever on the financial rewards of career choice, turning them away from the Criminal Bar. Ultimately, it is the Government that must increase legal aid funding to compensate the Criminal Bar, but more can, and should, be done.

Exposure deficit

Education and exposure stand out as another issue. Students are often actively discouraged from pursuing the Criminal Bar. Academics, family, friends, and some legal professionals advise me to stay away from the Criminal Bar. The resounding opinion is that there is little money in it and the working conditions are poor. Many universities no longer promote the Criminal Bar to their students as they feel it is no longer 'viable'. Max Hill KC said: "When I ask university lecturers about what they say to students expressing interest in going to the publicly funded Criminal Bar, they say they advise them not to do so."[3]There are external schemes and events aimed at fostering an interest in criminal law, but given the finite number, they are oversubscribed and some have strict diversity criteria, meaning there are simply not enough places.

There also isn't enough emphasis placed on skills training through practical and experiential modules at some universities, these opportunities at undergraduate level often come from Mooting or Bar Societies which are extra-curricular options. Education should be transformed to encourage those students interested in criminal work, rather than put them off.

Civic Duty – a moral ideal?

On a philosophical level, there's been a decline in the sense of social justice and civic duty in younger people. Alison Park, Research Director at the National Centre for Social Research states, "If you divide the population into age groups, sense of civic duty is much stronger in older generations."[4] This is perhaps one of the reasons for the increased interest in lucrative commercial law careers. In 22/23 the mean salary for crime pupillages was £30,000 and £74,000 for commercial pupillages.[5] Fewer students wish to fulfil this sense of justice, the core message behind the Criminal Bar. There is a distinct need for universities and the Criminal Bar to highlight, to a greater extent, the benefits of upholding justice, contributing to a social and democratic society, while fostering and

nurturing those with an initial interest in justice.

Arguably, the Government can make the largest impact at the Criminal Bar by investing in legal aid and the Criminal Justice System. Systemic change is needed to save our foundation. However, the Bar and its members can implement some smaller, key changes to make a difference.

Educating generations

One change which will have a generational impact is educating students at a younger age about the legal system while instilling the core values of social justice and civic duty. Early intervention enables foundations to be built. There are charities such as Young Citizens and Leducate, who work with high schools to educate students on the legal system and justice, reinforcing why it is a cornerstone of our society. These schemes require funding and support to further their work, something which chambers, firms, and legal organisations should invest in. Supporting such schemes is essential to inspire the next generation of criminal lawyers.

Within higher education, the adoption and promotion of criminal law schemes should be increased. Harvesting an initial interest could ensure fewer students are discouraged from the Criminal Bar.

University of Kent Law lecturer, Darren Weir and colleague Trevor Linn, set up the 'Student Outdoor Clerking Scheme' (SOCS) to inspire law students to get involved in criminal law. Both experienced working at the Criminal Bar first-hand and see the growing disparity between those students interested in criminal law and the available practical experience opportunities in court. SOCS addresses this disparity by providing students with hands-on exposure to advocacy and the court process. The scheme has been a success and Weir is hoping for a national roll-out by recruiting other universities. Without schemes like this, many students will not get to experience the art of criminal law advocacy first-hand, and students will instead get swept up in the wave of six-figure salaries at commercial law firms and chambers.

Most universities with law courses have a Bar Society or a Law Society. As a Bar Society committee member for two years, I have experienced first-hand the difficulty of ensuring their viability due to lack of funds and low levels of general support in organising events. Bar societies are an influential stimulus to a student aspiring to a career at the Bar. Some local sets of chambers are very supportive, but more could be done to help with sponsorship and hands-on advocacy development events such as mock trial competitions. I am keen to ensure our members hear about the Criminal Bar, but we've found it difficult to obtain valuable opportunities. Promoting criminal practice could mean the difference between inspiring a student to choose the Criminal Bar or pursuing another practice area at the Bar. If you are a criminal barrister, please do contact your local Bar Society to ask if they would be interested in your help, they should be receptive to your offer!

Funding more criminal pupillages

More criminal pupillages create more criminal barristers. However, pupils cost sets of chambers money and many criminal sets may already be struggling. More external support is required to contribute financially towards pupillages. The Inns offer the COIC Pupillage Matched Funding scheme, where chambers can apply for funds to cover the first six months of a 'matched' pupillage place each year. For example, in 2022, COIC supported over 30 pupillages. With further aid, the scheme could fund more. The government, large solicitor firms and Bar Course providers are examples of organisations that are affected by the Criminal Justice System, so their financial contribution to this scheme could help.

Service obligations and remittance terms

Some barristers chose not to stay in criminal law post-pupillage. The Bar could consider copying the minimum service requirements that law firms make on trainees, to ensure those who have received funded places are retained in crime for at least 3-5 years. This could help increase retention at the Criminal Bar.

It is unlikely that the Government will further increase legal aid right now. However, fee remittance could be reviewed. Fees are paid after completing the case, meaning if a barrister cannot make court, they lose fees spent on preparation. Half of the payment could be received in the middle of the case, the second half paid post-case completion. This would help support criminal barristers who are struggling financially, particularly pupils and barristers of new call.

To conclude, the Criminal Bar needs significant reform to reverse its decline. The Government can make the largest impact by further investing in legal aid and the justice system. However, one cannot solely rely on increases from the public purse given the current climate. The Bar must tackle the areas they can address themselves now. They must also engage with other professionals and stakeholders such as universities and law firms, for financial, educational and political support to reverse the decline and ensure a healthy and prosperous future for the next generation of criminal barristers.

Hannah Jackson
Second Year LLB Law Student,
University of Nottingham

Common issues facing the Criminal Bar:

- Shortage of criminal barristers and other professional staff
- Perceived poor working conditions and remuneration via legal aid
- Students being discouraged and not actively engaging with criminal law
- Lack of sufficient criminal law opportunities or exposure to educate and inspire

Some short-term solutions:

- Inspire and nurture an interest in criminal law at university and in justice in late primary and secondary education
- Instil social justice and civic duty in students
- Support university Bar Societies, particularly those with an emphasis on career stimulus and skill development
- Fund more criminal pupillages
- Implement Criminal Bar service obligations and amend legal aid remittance

[1] *Sam Townend KC (2024). How to fix the criminal justice system. [online] Thetimes.com. Available at: https://www.thetimes.com/uk/law/article/law-comment-how-to-fix-the-criminal-justice-system-sam-townend-kc-8sndfzdcb [Accessed 26 Sep. 2024].*
[2] *The Bar Council Pupil Survey 2024*
[3] *Ames, J. (2014). The Criminal Bar: will cuts spell the end for young Rumpoles? [online] Thetimes.com. Available at: https://www.thetimes.com/article/the-criminal-bar-will-cuts-spell-the-end-for-young-rumpoles-d2xnlcz5d36 [Accessed 13 Sep. 2024].*
[4] King, V 'Is there such a thing as civic duty? And do we feel it?' (2011). BBC News. [online] 24 Nov. Available at: https://www.bbc.co.uk/news/uk-politics-15763388.
[5] The Bar Council Pupil Survey 2024

Cohabitation and Relationship Breakdown - what is going on?

Did you know that the United Kingdom was the 27th country in the world to allow same sex couples to marry nationwide? And the sixteenth in Europe. Can it, will it, be up there as one of the first for cohabitation rights?

By Sapna Shah, Barrister, 33 Bedford Row

Fact: *In 2021, for the first time, the number of children born to unmarried mothers (51.3%) outweighed those born to mothers in a marriage or civil partnership*

Fact: *a 'cohabiting family' is the fastest growing family type in the UK*

Fact: *In 2022 the number of married couples in the UK accounted for 49.4% of the population, the first time this rate has fallen below 50%*

In the same year, the proportion of people cohabiting came to 22.7% [6.8 million]. This was a 3% increase since 2012.

[https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2022]

Consider this scenario: Ms A is in her mid-40s and she has lived with Mr D for 6 years. They have a property together, as well as a 6 year old daughter. Mr D's parents purchased the property in their names and the parties have been paying into a joint account on a monthly basis, by way of a form of repayment. The couple have separated. Here are potential difficulties for Ms A:

- her 'repayments' to Mr D's parents are not equal and she cannot show that she made substantial contributions;
- Mr D has offered to pay her a lump sum of £20,0000.00;
- Mr D's parents have asked Ms A to vacate the property, else they will commence legal proceedings;
- There is no offer of child maintenance;
- She is not a named beneficiary on Mr D's pension, which is, it is understood, substantial

I suspect those of you practising in family law would have much to say about the split of assets, were this couple married. They would have the Matrimonial Causes Act 1973 or Schedule 5 of the Civil Partnership Act 2005 working with them/for them.

But this couple did not attend the registry office and, perhaps assumed that a number of years of cohabitation would give them 'married' rights. Or at least Ms A did, and she assumed wrongly, of course.

In order to get anywhere, each of Ms A and Mr D must rely on the general law of contract, property and trusts to resolve disputes. They do not have automatic rights of ownership to each other's property. They do not have automatic inheritance rights on death.

And what of the young child?

All parties, married or not, have recourse to the Children Act 1989 for orders relating to living arrangements, prohibited steps orders. There is also recourse to Schedule 1 of the same statute.

But, it is the financial support/framework or rather, lack of it, that brings children of a cohabiting couple into a space that simply seems to be ignored: Divorcing parents tend to make claims for child related provision, using the available matrimonial jurisdiction (MCA 1973), as they also have the ability to make maintenance and capital claims in their own right and don't have to wait for a CMS maximum assessment before seeking child maintenance through the court.

Cohabiting parents turn to Schedule 1 of the Children Act 1973 for financial provision but, this provision is described as unpredictable and unfair, given the tendency that it is more able to be used by wealthier families. The reality, it seems, is that Schedule 1 applications apply to those who are ex-partners of the wealthy and also former cohabitees who need a home whilst the child is a minor. But this does not provide any relief for the cohabitee him/herself. And, it all requires a lot of form filling.

Google cohabitation reform and much helpful information comes up. But what it all has in common is there is none. *(I should add here that given the word reform refers to some sort of change, I shouldn't really be using it as there is not anything in existence at all).* Indeed, the position for those who live together is still the same as it was over 40 years ago when Mrs Burns who had lived with Mr Burns for 18 years and who had given up her profession as a tailor to raise their children, was told by the court that she had no legal interest in the property that she had lived in with the family, as it was not in her name and also, because she had not made any direct contribution to the purchase price [1983] EWCA Civ4. Valerie Burns had changed her surname to that of her partner's but they had not married.

Lord Justice May said this, in Burns:

"When one compares this ultimate result with what it would have been had she been married to the respondent, and taken appropriate steps under the Matrimonial Causes Act, 1973, I think that she can justifiably say that fate has not been kind to her. In my opinion, however, the remedy for any inequity she may have sustained is a matter for Parliament and not for this Court."

In 2023 the Labour Party took a positive and hopeful stance in relation to taking action regarding the rights of cohabitees and many family practitioners welcomed this. Unfortunately the stance has not manifested into anything concrete and as at the time of writing all plans to do anything to protect the rights of cohabitees has been put on hold pending the completion of other work in relation to financial remedies on divorce.

The Law Commission's review on financial remedies on divorce is no doubt welcomed: given our most recent statute in this area is now over 50 years old [MCA 1973], this in itself merits a separate discussion. However – and it's a BIG however in my view – divorcing couples and their lawyers have recourse to something at least. Cohabitees don't. The Law Commission's financial remedies actually states clearly that its review *will not consider the law relating to the rights of cohabitants on relationship breakdown.* [scoping paper para 1.13 (3)].

If there was to be anything done, what might it be?

Resolution in its Vision for Family Justice calls for a legal framework of rights and responsibilities when unmarried couples who live together

split up, to provide some legal protection at the time of separation. What could this look like?

Australia and New Zealand have 'qualifying' criteria that is primarily based on length of relationship and/or children and once this is met, the couples have the same rights as married couples. In New Zealand it's known as being a 'de facto' couple.

Scotland and Ireland have specific laws for cohabiting couples.

Whatever happens, my humble views:

- There needs to be more than there is right now
- Cohabitees should, like married couples, have rights arising directly as a result of the relationship and not solely because there are children and/or because they own a property
- Cohabitees should surely have one avenue, as opposed to the current complexities they have to go through in order to establish rights: for financial relief they need to seek advice about rights to do with property, for child maintenance there is the CMS and/or a Schedule 1 application but, as said above, there is nothing which provides, for example, 'partner' maintenance
- Cohabitees should have rights on death (surely?) and whether that is by way of certain qualifying criteria, needs to be considered carefully
- Cohabitees should have rights on pensions
- The 'qualifying' criteria that comes to mind: a reasonable length of marriage, children, contributions

It would be an understatement to say there is a need for change in this area of the law. Without change the Ms As and Mr Ds in this country would be well advised to enter into properly thought out agreements which will inevitably assist in the event of breakdown. But hindsight is a wonderful thing. Without such agreements it is the clients and, more importantly the children of those cohabitees who have no definitive protection to hand. So, I still don't know what is going on…..

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Practical Law – Schedule 1 to the Children Act 1989, who can apply for financial provision for children

Case Attrition in Domestic Violence: A Ripple Effect and Its Impact on Family Courts

Domestic violence remains a serious challenge for the criminal justice system in the UK. Despite growing public awareness and legal reforms, one critical issue that is often overlooked is case attrition; the phenomenon where domestic abuse cases drop out of the system before reaching trial or conviction. While the number of domestic abuse incidents reported to the police continues to rise, the number of cases that actually result in prosecution remains alarmingly low. Attrition is largely driven by victims withdrawing from the process. Beyond the immediate consequences in Criminal Courts, case attrition has significant repercussions in the Family Courts, where survivors seek protection orders and decisions about child custody.

By Sartaj Haque, Barrister (Unregistered)

Understanding Case Attrition in Domestic Violence

Case attrition refers to the failure of a domestic violence case to progress to prosecution or conviction. Attrition can occur at any stage in the criminal justice process, but it most frequently happens when victims withdraw from the process, often due to fear, coercion, or a lack of support. According to the Domestic Abuse Commissioner, over 50% of domestic abuse cases in England and Wales are dropped before they reach court.

The Domestic Abuse Act 2021 was introduced to address some of these concerns. The Act includes measures like Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs), which could provide immediate protection for victims. However, the system still faces significant challenges, including insufficient victim support, lengthy court delays, and inadequate risk assessments. These barriers continue to perpetuate high attrition rates, which then directly undermine the ability of family courts to protect survivors and their children.

Many survivors fear that pursuing legal action will provoke further violence or manipulation from their abuser. Abusers frequently use threats related to child custody or finances to coerce victims into withdrawing from legal proceedings. According to Women's Aid, fear of retaliation remains a major reason for victims disengaging from the criminal justice system. Additionally, the lack of enough support services, such as Independent Domestic Violence Advisors (IDVAs), also leaves many survivors feeling vulnerable and unsupported. According to the Domestic Abuse Commissioner, this overwhelming strain often results in victims withdrawing from the process.

The Impact of Case Attrition on Family Courts

When domestic violence cases collapse in criminal courts, the consequences ripple into family law proceedings. Family courts often rely on the outcomes of criminal cases to assess allegations of abuse and the risks posed to children and families. The collapse of these cases leaves a void in evidence, undermining the credibility of survivors and making it more difficult for them to secure protective orders or safe custody arrangements.

Undermining Survivors' Credibility in Family Courts

The Harm Panel Report (2020), commissioned by the Ministry of Justice, highlighted that family courts frequently prioritise contact between children and both parents, even in cases involving allegations of domestic abuse. The Children Act 1989 includes a presumption of parental

involvement, which creates a bias in favour of contact. This can be particularly problematic in cases involving coercive control, a form of abuse that is often minimised or misunderstood by family court professionals.

It is unsurprising that between 49% and 62% of private children law cases in family courts involve allegations of domestic abuse. Without a criminal conviction or clear findings from the criminal courts, family courts frequently dismiss these allegations, leaving children and survivors at risk. This systemic failure also allows abusers to manipulate the legal process, extending control over survivors through lengthy and complex legal proceedings.

Coercive Control and Manipulation in Family Court Proceedings

Abusers often exploit family court proceedings to maintain control over their victims post-separation. One increasingly concerning tactic is the use of parental alienation claims, where abusers accuse survivors of sabotaging the child's relationship with them. This shifts the focus away from the abuse and undermines the survivor's position. The Right to Equality's Presumption of Contact Report 2024 highlights how this strategy, combined with the pro-contact culture in family courts, increases survivors' vulnerability.

Re-traumatisation of Survivors in Family Court

According to the Domestic Abuse Commissioner, over 80% of legal practitioners believe family courts are likely to re-traumatise survivors due to the adversarial nature of proceedings. Survivors are forced to relive their trauma while courts fail to adequately assess the risks posed by abusive parents. Despite the Domestic Abuse Act 2021 recognising children as victims in their own right, there is criticism that the family courts often fail to prioritise child welfare. The presumption of contact continues to dominate decision-making, even in cases involving serious abuse which often falls out of the criminal justice system due to case attrition.

The Path Forward: Addressing Case Attrition and Family Court Failures

Many survivors of domestic violence feel betrayed by the justice system, which often fails to provide adequate protection or hold abusers accountable. To reduce case attrition and improve outcomes in family courts, several key reforms are needed:

a) Improving Coordination Between Criminal and Family Courts:
One major issue in both systems is the lack of coordination between criminal and family courts. When criminal cases collapse, family courts are often left without crucial evidence. The Pathfinder Courts Pilot, initiated in family courts across North Wales and Dorset, seeks to enhance communication between key agencies like the police, local authorities, and the courts. A key aim of this pilot is to allow domestic abuse professionals to share risk assessments directly with the court, reducing the need for victims and other parties to repeatedly recount traumatic experiences during the legal process. By streamlining information sharing, the pilot hopes to make the process less distressing for survivors while improving the court's ability to make informed decisions. Recently, this pilot scheme was extended to Birmingham Family Court and South Wales. National expansion of such pilot schemes could be a key step in addressing case attrition and its far-reaching effects.

b) Ending the Presumption of Contact:
Often the survivors see themselves in the middle of prolonged family court proceedings because of the fear that the abusers would use their children to cause them harm. Especially, in private children proceedings, the courts face challenges in balancing the presumption of contact with the risk of parental alienation. The presumption of contact in family courts has been widely criticised for prioritising parental involvement over the safety of children and survivors. The Right to Equality's Presumption of Contact Report 2024 calls for an end to this presumption in cases involving domestic abuse. It suggests reforms must prioritise risk assessments and ensure the safety of both children and the survivors.

c) Implementing Trauma-Informed Practices:
Both criminal and family courts must adopt trauma-informed practices to ensure survivors are treated with care and respect. The current adversarial system often re-traumatises survivors, discouraging their participation in legal proceedings. These practices are essential to making sure survivors are supported throughout the process and are able to engage with the system safely.

Conclusion

The high rate of case attrition in domestic violence cases continues to weaken the criminal justice system and has significant repercussions for family law. As cases drop out of the system before reaching trial or conviction, family courts are often left to make decisions without sufficient evidence, creating additional pressures. Family courts are then placed in a position where they must choose between prioritising child-

centred or survivor-centred approaches, particularly in private children proceedings, where the court's paramount objective is to safeguard the child's best interest. In response to these challenges, the Ministry of Justice is launching a Domestic Abuse Protection Order (DAPO) pilot scheme in November 2024, covering Greater Manchester, Gwent, Croydon, Bromley, Sutton, and the British Transport Police. These DAPOs, introduced under the Domestic Abuse Act 2021, aim to provide enhanced legal protection for domestic abuse victims. By making breaches of these civil orders a criminal offence, DAPOs create stricter enforcement and more immediate consequences for abusers, while also offering survivors greater legal recourse.

Although the DAPO pilot has the potential to provide survivors with stronger protections, its effectiveness will largely depend on how well it coordinates with the family courts and addresses the complex interplay between criminal and family legal proceedings. The Pathfinder Courts Pilot will be critical to ensuring that these protections are enforced consistently and efficiently.

Additionally, to tackle the broader systemic issues, reforms like ending the presumption of contact in family courts and implementing trauma-informed practices must become central to the justice system. Survivors often disengage from legal proceedings (both criminal and family) due to fear of retaliation or the emotional strain of facing their abuser in court, and a more supportive, trauma-informed approach is essential for encouraging survivors to stay engaged.

The DAPO and Pathfinder Court pilot might provide a significant solution to 'significant' failings, or it might simply treat the symptoms without resolving the core problems. It is clear, however, that continued evaluation, legislative support, and long-term funding for survivor services will be necessary to ensure the lasting success of such reforms. Whether these new tools will successfully address the deeper issues of case attrition and the challenges within family courts remains to be seen.

Sartaj Haque, Barrister (Unregistered

Persuasion in the Courtroom: Philosophical and Research Insights- The Role of Persuasion in Advocacy

Persuasion is the cornerstone of effective courtroom advocacy. An advocate must not only present evidence but also influence how that evidence is perceived. This task requires an ability to resonate with an audience on multiple levels.

By Sonia Simms, Barrister, Lecturer, Door Tenant Farringdon Chambers

This article explores the concept of persuasion through a twofold approach. First, it examines philosophical perspectives on persuasion, focusing on insights from Aristotle and Cicero. Second, it reviews contemporary research findings on persuasion from fields such as behavioural and social psychology, sociology, and behavioural economics.

Philosophical Perspectives on Persuasion

Aristotle – Ethos, Pathos, and Logos

Aristotle, in his work Rhetoric,[1] written around 335 BCE, identified three essential components to effective persuasion: ethos, pathos, and logos. Each component represents a different appeal that contributes to the persuasive power of an argument.

Ethos (Credibility): Aristotle argued that the credibility of the speaker is crucial to persuasion. Ethos is established through the speaker's character, integrity, and authority on the subject. A persuasive speaker is one whom the audience believes to be trustworthy and knowledgeable.

Pathos (Emotional Appeal): Pathos refers to the speaker's ability to appeal to the emotions of the audience. Aristotle recognised that human emotions are powerful motivators, and by evoking specific emotions, a speaker can influence the audience's receptiveness to the argument.

Logos (Logical Argument): Logos is the logical aspect of persuasion, involving reasoning and evidence. Aristotle believed that a well-structured argument, supported by facts and logical connections, is essential for convincing the audience intellectually. For Aristotle, these three elements are interdependent and must be employed together to create a persuasive, well-rounded argument.

Cicero – The Ideal Orator

Cicero, a Roman statesman and orator, expanded upon Aristotle's concepts in his treatise De Oratore,[2] written in 55 BCE. Cicero's insights into rhetoric highlight the importance of adaptability and the orator's ability to engage the audience on multiple levels. He described the ideal orator as someone who combines wisdom with eloquence, capable of understanding and responding to the emotional and intellectual needs of the audience.

Cicero argued that effective orators must be able to shift seamlessly between logical reasoning and emotional appeals depending on the situation. He emphasised that it's not just the content of the argument that matters, but also the delivery. According to Cicero, tone, style, and body language all contribute

significantly to the persuasiveness of a message. For instance, a measured, composed tone can convey authority, while animated gestures can highlight key points, adding emphasis and dynamism to the argument. This makes the advocate's presentation a compelling performance, one that not only communicates information but also engages and captivates the audience.

Cicero also believed that understanding the audience's desires, fears, and motivations is essential for an orator.

Modern Research on Persuasion in the Courtroom

In addition to these philosophical insights, contemporary research provides empirical evidence on effective persuasion techniques.

Narrative Persuasion and Storytelling

Green and Brock (2000)[3] developed the concept of "narrative transportation," it posits that people who become absorbed in a story are more likely to accept its implicit messages.

'Transportation' involves three main components: attention, emotional involvement, and cognitive engagement. Individuals who are highly attentive and emotionally connected to a narrative are more likely to experience transportation. This process has several consequences, including a temporary disconnection from reality, strong emotional responses, and cognitive changes that alter beliefs. Those who are transported may suspend disbelief, reduce counter-arguments, and sometimes adopt the protagonist's perspective, leading to behavioural modelling.

Key Applications in the Courtroom

In opening and closing speeches, advocates often present a cohesive narrative to guide jurors' perspectives. By embedding facts into a story, they aim to transport jurors into a specific view of the case. This immersion can reduce jurors' critical scrutiny, thereby enhancing the advocate's persuasive impact.

Transportation theory highlights that transported individuals are more likely to empathise with story characters. Advocates can make use of this by emphasising emotional elements, such as a complainant's suffering, making decision makers more sympathetic and open to arguments that align with the story teller's perspective. This emotional engagement can influence moral judgments, affecting verdicts and sentencing decisions.

Trials often involve complex evidence that may overwhelm jurors. Advocates can use a narrative framework to present evidence in a way that feels intuitive and memorable. For example, forensic evidence can be woven into a storyline, helping jurors follow and retain the information.

The Story Model, proposed by Pennington and Hastie (1992)[4], provides further insight into how jurors make decisions from stories. The model suggests that jurors don't simply add up evidence in a logical manner but construct a narrative to explain what happened. Pennington and Hastie conducted experiments to show that jurors are more likely to reach confident verdicts when the evidence supports a coherent story. When evidence is organised to facilitate story construction, jurors are more persuaded because it helps them understand and remember key points. This research suggests that advocates should not merely present isolated facts but weave them into a compelling narrative that guides jurors through the evidence in a logical, emotionally engaging sequence.

Anchoring and Adjustment Heuristic

A theory relating to decision making comes from Amos Tversky and Daniel Kahneman, two of the most influential figures in behavioural economics. In a 1974 paper[5] Tversky and Kahneman theorised that when people try to make estimates or predictions, they begin with some initial value, or starting point, and then adjust from there. This has become known as the anchor-and-adjust hypothesis. In essence, anchoring is a cognitive bias where initial information (the anchor) strongly influences subsequent decisions. When individuals encounter an anchor, related information becomes more accessible in their minds, making it easier to rely on anchor-consistent data and harder to consider alternatives.

In a study[6] involving mock jurors, researchers aimed to demonstrate how anchoring biases can influence juror decisions in civil cases, especially when it comes to assessing damages and attributing fault. In this study, jurors were asked to evaluate a case in which a plaintiff claimed that a health-related product, specifically a birth control pill, caused her ovarian cancer. The plaintiff demanded damages of either $5 million (high anchor) or $20,000 (low anchor), depending on the group. The jurors exposed to the high anchor of $5 million reported significantly higher confidence that the product caused the plaintiff's condition, indicating a stronger attribution of fault. This suggests that jurors, when presented with a larger monetary figure, may subconsciously interpret the situation as more severe or more clearly attributable to the defendant's actions. This study highlights how initial numerical information can alter perceptions of responsibility and causation, a finding with implications for jury decision-making in both civil and criminal cases .

Judges, despite their training and expertise, are not immune to anchoring effects either. In one study[7], judges were given a hypothetical criminal case, including what the prosecutor in the case demanded as a prison sentence. For some of the judges, the recommended sentence was 2 months; for others, it was 34 months. First, the judges rated whether they thought the demand was too low, too high, or adequate. After that, they indicated what they would assign as a sentence if they were presiding over the case.

As the researchers expected, the anchor had a significant effect on the length of the sentence prescribed. On average, the judges who had been given the higher anchor gave a sentence of 28.7 months, while the group given the lower anchor had an average sentence of 18.78 months.

Key Applications in the Courtroom

In advocacy, anchoring can be a strategic tool. For example, in opening speeches, a prosecution advocate might frame the defendant's actions as premeditated and intentional, setting an anchor that guides jurors to view subsequent evidence through this lens. Defence advocates can use anchoring by highlighting the defendant's positive qualities, such as good character, or circumstances early on, establishing a favourable reference point for the jury.

The Persuasive Impact of Simplicity

Reber, Schwarz, and Winkielman's (2004)8 research on processing fluency suggests that the simplicity of a message can significantly enhance its persuasiveness. Processing fluency refers to the ease with which information is processed. Their study found that when information is presented in a clear, straightforward, and fluent manner, individuals find it more enjoyable and are more likely to accept it. In contrast, complex information requires more cognitive effort, which can lead to discomfort, scepticism, and resistance.

Key Applications in the Courtroom

Advocates can increase processing fluency by avoiding jargon, breaking down complex information into digestible parts, and using visual aids such as charts and diagrams. Simplifying arguments not only enhances comprehension but also makes the information appear more credible and trustworthy, which can significantly affect jurors' decisions.

Conclusion

It is clear that persuasive courtroom advocacy extends beyond presenting facts and logical arguments; it requires a holistic approach that encompasses storytelling, emotional resonance, simplicity, and strategic framing. This multi-dimensional approach ensures that arguments are not only understood but also felt and remembered, thereby enhancing their persuasive power in the courtroom.

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