

***Darbyshire on the ELS* update 12 March 2009**

New Books in ELS and useful background books

P. Darbyshire, *Darbyshire on the English Legal System*, Sweet & Maxwell, September 2008. The headings in this update co-ordinate with headings in the book.

G. Slapper & D. Kelly, *The English Legal System*, Routledge-Cavendish, April 2009.

W. Morrison, A. Geary & R. Jago, *The Politics of the Common Law*, Routledge-Cavendish, August 2008.

R. Haigh, *Legal English*, Routledge-Cavendish, April 2009.

L. Webley, *Legal Writing*, Routledge-Cavendish, May 2009.

Introduction to International Legal English, Cambridge, July 2009 (Student book with two CDs).

Bibliography Used for This Update

Criminal Law Review (hard copy)

Legal Action

New Law Journal (hard copy)

Publishers' Catalogues

Radio 4 *Today* programme

Timesonline <http://business.timesonline.co.uk/tol/business/law/>

Westlaw current awareness/ full text journals/ Legal Journals Index

Many websites, as listed in *Darbyshire on the ELS*, such as the Ministry of Justice, CPS, LAG Legal Services Commission, judiciary, Parliament etc.

Chapter 1

1-003 What is law? Pubs, public/private law and issues that are non-justiciable

A public house is a private place so, under the Licensing Act 2003, licensees were entitled to make decisions as to whom to admit. The applicant had been banned by pubs in the Buckingham Pubwatch area. He was refused judicial review on the ground that, if the matter could not be dealt with by a private law action, which it could not, it did not mean that the matter was justiciable under traditional judicial review principles or the Human Rights Act.

The ban unarguably fell into an area of life with which the courts do not interfere: *R. (on the application of Proud) v Buckingham Pubwatch Scheme* [2008] EWHC 2224, discussed by N. Parpworth at (2008) 158 N.L.J. 1518.

4. *The Mother of All Common Law Systems*

The Importance of the ELS, in worldwide terms

English common law is the most widespread legal system in the world, governing 30 per cent of the world's population. 27 per cent of the world's 320 legal jurisdictions use common law: research by Prof Philip Wood, Allen and Overy, reported at (2009) 159 N.L.J. 245.

According to International Financial Services London, in a report entitled *Legal Services 2009*, the three largest (on fee income) global law firms are from the UK. The fee income of the top 100 UK law firms increased to a record £14 billion in 2007/8: reported at (2009) 159 N.L.J. 244.

1-021 and Chapter 9

“French president Nicholas Sarkozy has announced plans to end the dual role of the investigating magistrate who is intended to both lead an investigation into a suspected crime and protect the rights of the suspect. Under the planned reform, police and the public prosecutor will lead investigations subject to judicial oversight, **marking an historic shift in the French criminal justice system towards an Anglo-Saxon adversarial system**”:

B. Hall, *Financial Times*, 8 January 2009, as abstracted on *Westlaw*.

Further Reading

B.H. McPherson, *The Reception of English Law Abroad*, 2007, reviewed by J.D. Heydon, L.Q.R. 2009, 125(Apr), 349-352.

Chapter 2 Sources

2-017 The importance of statutory interpretation

M&S won a 13 year argument over the tax status of teacakes in *M and S v HM Commissioners of Customs and Excise* [2009] UKHL 8. The law lords reaffirmed a ruling by the ECJ that the Revenue should repay full VAT. M&S argued that its **chocolate-covered teacakes** were incorrectly treated by commissioners as subject to VAT since 1973, instead of being **zero-rated as chocolate-covered biscuits**. The commissioners conceded their mistake in 1994 but offered just a 10 per cent refund: reported at (2009) 159 N.L.J. 209.

Cranston J. ruled that a sapling could be protected by a tree preservation order, since there was **no statutory definition of a tree** under the TCP Act, s. 198. This conflicts with a Denning ruling that a trunk diameter of 7” was required: S. Adams, “Judge's forest of words to legally define a tree”, *Daily Telegraph*, 14 February 2009.

Relying on Statutory Interpretation

Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach: *Isle of Anglesey County Council v The Welsh Ministries* [2009] EWCA Civ 94.

2-018 Literal interpretation and purposive construction

In *Laroche v Spirit of Adventure* [2009] EWCA Civ 12, the CA held that a **hot air balloon** was an **“aircraft”** according to the Pocket Oxford Dictionary but the plain, ordinary meaning was not necessarily determinative. On a purposive construction of the Carriage by Air Acts

(Application of Provisions) Order 1967, it was reasonable to suppose that Parliament intended such balloons to be included, as they were capable of being used for international transport.

2-021 Common law and human rights developing the law in tandem

Watch the story of the currently developing law of privacy in the courts now: T. Allen, “No more sniggering, sleazy tales about the sex lives of celebrities”, *Times*, 20 November 2008 and see the series of cases decided by Eady J. that are provoking aggressive attacks from some hacks.

2-021 strict interpretation of criminal law

There was no canon of statutory construction which empowered any court to write into a statute words which were not there, on the grounds that Parliament ought to have enacted a provision which it had not: *R. v Morgan R. v Bygrave* [2008] EWCA Crim 1323.

2-041 Should judges make law?

See J. Cooper, ‘Judicial activism’ (2008) 158 N.L.J. 1617. He cited Lord Bingham,

the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself [it is] wrong to stigmatise judicial decision making as in some way undemocratic.

2-041 The organic growth of the common law

In the same way that judges have to interpret statutes and determine whether the facts of a case are covered by its words, so they have to consider whether common law concepts fit new circumstances. The CA decided that **frozen sperm samples did constitute “property”** so men whose sperm perished when a freezer broke had a right to compensation. There was “a bailment of the sperm by the men to the unit” so they could claim compensation for distress or psychiatric injury suffered as a result of the loss. The sperm had been frozen and stored before they underwent chemotherapy. Lord Chief Justice Judge observed that the case raised “interesting questions about the application of common law principles to the ever-expanding frontiers of medical science, in particular...about the ability to sue in tort and/or in bailment in respect of damage to bodily substances, namely semen...” *Yearworth and Ors v N Bristol NHS Trust* [2009] EWCA Civ 37. The CA distinguished seventeenth century laws that human bodies could not be owned.

2-044 Orders in Council - Chagos islanders again

Orders in Council preventing the Chagos Islanders returning to their homeland *were* lawful, according to a 3:2 majority of the law lords: *R (Bancoult) v SS for Foreign and Commonwealth Affairs (No 2)*, 23 October 2008, reversing the CA and a two-judge divisional court. Lord Hoffmann held that **an Order in Council was primary legislation but did not share the characteristics of an Act of Parliament. Sovereignty of Parliament was founded on the unique authority of Parliament which derived from its representative character. An OC was an act of the executive.** It was impossible to say that the decision to re-impose immigration control on the islands was unreasonable or an abuse of power. The courts did not inquire whether legislation within the scope of territorial power was in fact for the peace, order and good government or other benefit of the inhabitants of the territory.

Roger Smith points out that OCs by-pass Parliamentary debate and the certification of compliance with the HRA: “Beyond satirical debate?” (2009) 159 N.L.J. 212 and see a new JUSTICE pamphlet on *The Constitutional Role of the Privy Council and the Prerogative*.

Further Reading

R. Buxton, “How the common law gets made: Hedley Byrne and other cautionary tales” L.Q.R. 2009, 125 (Jan), 60-78, *Westlaw*.

K. Qureshi Q.C., “International Rescue” (2009) 159 N.L.J. 223 and 255, on the increased use of public international law in the ELS.

Chapter 3 Community Law

3-018 County court reference to the ECJ

In *McCall v Poulton and MIB* [2008] All ER (D) 212, the CA upheld a county court decision to refer to the ECJ on the obligations of the JMIB to compensate victims of uninsured drivers.

3-018 Referral from HL

Note that the *West Tankers* decision, below, was a reference from the law lords under Art. 234.

Further Reading

C. Barnard & O. Odudu (eds.), *The Outer Limits of European Union Law*, Hart, Feb 2009.

A. O’Neill and J. Coppel, *EU Law for UK Lawyers*, 2nd ed., Hart, July 2009.

V. Mitsilegas, *EU Criminal Law*, Hart, Feb 2009.

Chapter 4 Human Rights

4-001 Daft Brit attitudes to the HRA 1998

For further reading on the reception of the HRA by the British newspapers and thoughts on how we can expand on the Act, see S. Sedley (Lord Justice Sedley), “Bringing Rights home: time to start a family?” (2008) 28 *Legal Studies* 327-336. He cites a typical *Sun* proclamation from 2006:

“Tony Blair was attacked last night for refusing to scrap hated human rights laws. The PM’s buddy Lord Falconer yesterday ruled out any change to the act that frees murderers to kill again”, 26 July.

4-009 Art 2 right to life

Imposed a duty on medical authorities to stop a suicidal mental patient committing suicide: *Savage and South Essex Partnership Foundation Trust* [2008] UKHL 74.

Art 3 and Art 6 Deportation to countries who had given human rights assurances

In *RB (Algeria) v SS for the Home Dept* [2009] UKHL, the law lords concluded that appeals from Special Immigration Appeals Commission (SIAC) were limited to questions of law or irrationality. SIAC had been entitled to rely on “**closed material**” and the **assurances** given

by Algeria and Jordan, that terrorist suspects deported to Algeria would not be subjected to inhuman treatment or tortured and a suspect, radical cleric Abu Qatada, deported to Jordan would not be subjected to an unfair trial. Parliament, in the SIAC Act 1997, had deliberately circumscribed the Court of Appeal's powers so that they "fell well short of the review that would be carried out if a case reached the European Court of Human Rights", per Lord Phillips, as reported in *The Times* law report.

BUT...!!

4-016 Art 5 liberty

The very next day, in *A and ors v UK*, the ECtHR ruled that the UK had breached Art 5 by using secret evidence in SIAC in the Belmarsh case.

Confining people in a police cordon for several hours, for crowd control, did not breach Art. 5 if it was in good faith, proportionate and enforced for no longer than reasonably necessary: *Austin v Commissioner of Police for the Metropolis* [2009] UKHL 5.

4-021 Art 6 fair trial

Banning care workers from working with vulnerable people without giving them an opportunity to challenge the ban was a breach: *R (Wright and others) v SS for Health and another* [2009] UKHL 3.

Art 8 Private and family life

Placing someone on the sex offenders' register indefinitely, without a mechanism for review was a disproportionate interference with Art 8 rights: *R (F) v SS for Justice, The Times*, 23 Jan 2009. The QBD made a declaration of incompatibility.

Storing innocents' DNA samples and fingerprints is disproportionate interference with Art. 8 rights: *S and Marper v UK*, ECtHR, applications 30562/04 and 30566/04, 4 Dec 2008, reversing the law lords at [2004] UKHL 39.

In late 2008, Paul Dacre, editor of the *Daily Mail* made an outspoken attack on Eady J. for imposing a new privacy law on the British press (in relation to salacious articles that have no obvious public interest). He said Eady J. was "amoral" and the law in Britain was now effectively neutral. It is interesting that he considers this a condemnation, given that the judge's job is to *balance* Art 8 Rights to private life against Art 10 freedom of expression.

4-063 The Admin Court applying precedents from the ECtHR and the law lords

Purdy, R (on the application of) v DPP [2008] EWHC2565 (Admin): Debbie Purdy sought judicial review of the DPP's failure to publish guidance and promulgate a specific policy as to when individuals would be prosecuted for assisting suicide. She had a degenerating disease and wanted reassurance that her husband would not be prosecuted for assisting her. The CA found that the ECtHR's judgment in *Pretty* (4-010) was "elliptical" on Art. 8 so they felt themselves bound by the HL, who said Art 8 rights were not engaged at all. The ECtHR said the blanket ban on assisting suicide pursued the legitimate aim of safeguarding life, so was compatible with Art 8.

Further Reading

A.L. Young, *Parliamentary Sovereignty and the Human Rights Act*, Hart, Dec 2008.

H. Fenwick & G. Phillipson & R. Masterman (eds.), *Judicial Reasoning under the UK Human Rights Act*, 2007 Reviewed by JoAnne Sweeney P.L. 2008, Sum, 406-407.

Chapter 5 Law Reform

5-019 Really depressing – Law Commission completely abandoned criminal code

In his editorial at [2009] Crim. L.R. 1, Ian Dennis comments and recites the Law Commission's reasons: "complexity of the common law, the increasing pace of legislation, layers of legislation on a topic being placed on another with bewildering speed and influence of European legislation".

Piecemeal codification of the criminal law, such as the common law on self-defence was "a **pointless** exercise", according to the editorial comment at [2008] Crim. L.R. 507. Lawyers already know the law and it will not help non-lawyers to work out what they can reasonably do to fend off a burglar or assailant.

Chapter 6 Civil Courts and Chapter 10 Civil Procedure

Access to Justice

Following the government's policy that civil courts should be self-funding, there is now a £90 million shortfall in collection of fees. The maintenance backlog in courts now amounts to £200 million.

Very controversially, civil court fees were (1 May 2008) ramped up very dramatically, following government policy that the civil courts should pay for themselves. The cost of taking child care proceedings has risen from £150 to £5,225 so local authority applications have reduced by 25%. **Judges are very hostile** to this and complain that **we are the only modern legal system which does not treat the courts as a social service**. See judicial speeches on the Judiciary website. In judicial review proceedings, the Admin Court decided that the increase in public law child care proceedings fees is not unlawful: *R (on the application of Hillingdon LBC and others) v the Lord Chancellor* [2008] EWHC 2683 (Admin).

Chapter 6 Civil Courts

5. House of Lords/Supreme Court

Brice Dickson often writes interesting statistical analyses of the work of the law lords – the only such reports we have, in the absence of an annual report. There were four references to the ECJ and in these cases, the court issued a single "considered opinion of the committee". **2008 saw the first case since 2000 (when the Human Rights Act 1998 came into force) in which the law lords were overturned by the ECtHR on an interpretation of the Convention**: in *S and Marper v UK*, on the blanket retention of fingerprints and DNA samples.

Remember that **academics** can be Justices of the SC and this was made clear in recent job adverts.

The law lords and others held a series of closed seminars in 2008, at which I was lucky to attend. They are unlikely to change their practices from those as law lords. Remember this a SC only in name. The 2005 Act permits broadcasting.

Richard Buxton J. examines issues on the **composition of the panels** of the UKSC, observing that they cannot sit en banc. He comments on selection and appointment: "Sitting en banc in the new Supreme Court" L.Q.R. 2009, 125(Apr), 288-293.

6-028 Rolls Building

This is being built in Fetter Lane and claims to be the **world's biggest business court**: HM Courts Service website says:

This scheme is to provide a new court building that will deal with work from the Commercial Court, Chancery Division, Technical and Construction Court and other related jurisdictions, currently dealt with in the main Royal Courts of Justice complex. The project is being delivered as a private developer scheme, with the building being located in Fetter Lane.

Its opening has been delayed until 2011.

6-029 Unified Civil Court?

Sir Henry Brooke was commissioned by Judicial Executive Board to consider whether the civil courts should be unified and concluded they should not: *Should the Civil Courts Be Unified?* January 2009, http://www.judiciary.gov.uk/docs/pub_media/brooke_report_ucc.pdf

12. Open Justice

In December 2008, Jack Straw, Justice Secretary published the response to the consultation on opening up family proceedings. He announced that accredited media would be able to visit all family courts, removing inconsistencies. The court will be able to restrict access, for the welfare of children or safety of parties. A pilot project will start now to

"place anonymised judgments online, give parties involved a copy of the judgment and look at the practicalities of retaining judgments so that children involved in proceedings can access them when they are older".

A new consultation was launched, called *Family Justice In View*. It is proposed to allow parties to disclose information about their case to advisors (including MPs) while a case is still in progress and to allow "more information to be made accessible to the public about the way the family courts work and how decisions are made". (MOJ website, 16 December 2008).

Jack Straw is opposed to televising the courts but the new chair of the CCRC is in favour, as he said in the Radio 4 interview cited below. The new DPP, Keir Starmer Q.C., is in favour, for the sake of transparency.

Chapter 7 Criminal Courts

9. Drugs Courts

Four new ones are being launched since January 2009.

Youth Court

It is 100 years since the juvenile court was created. Look out for articles in *The Magistrate* and *The JP* (on Westlaw).

Chapter 10 Civil Procedure

10-005 Pre-action protocols

Practice Direction: Pre-action behaviour, in force April 2009. Useful explanation at (2009) 159 N.L.J. 151 by A. Wadey:

The PD tries to help parties to settle so that proceedings do not have to be issued. It encourages early exchange of info and ADR. Parties **MUST**, for example

- exchange info in reasonable time
- disclose relevant docs
- Consider minimising cost of experts,
- ATTEMPT ADR (though cannot be forced to do so).

Court MUST take account of compliance with this PD and pre-action protocols when making directions.

Thankfully, a timely pre-action protocol on mortgage possession proceedings was launched in November.

10-010 Fast track

The limit goes up to **£25,000** from 6 April 2009. The fast track trial costs recoverable by counsel are £1650 (CPR 26.6).

Costs capping

The court has been granting costs capping orders for years, limiting the amount of costs a party can recover. There is now clarification in CPR 44.18 on when these should be issued.

10-071 Barmy Costs

Another example of **ludicrously disproportionate costs** occurred in *Peakman v Linbrooke Services Ltd* [2008] EWCA 1239. Three CA judges criticised the case. **The dispute was about £2,232 small claim but the lawyers' fees were over £100,000.** The DJ had allocated it to the multi-track because of a spurious counterclaim. The judge should have taken control and struck out the counterclaim much earlier so the claim could have reverted to the small claims track.

And another occurred in *Multiplex Constructions UK Ltd. v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC), in a dispute about the construction of Wembley Stadium. The four year dispute absorbed **£22 MILLION in legal costs, including £1 million on photocopying.** Multiplex claimed £25 million in damages but Jackson J. ordered only £6.1 million, observing that each party had thrown away golden opportunities to settle. He is now Jackson LJ and is conducting a fundamental review of costs in civil litigation and will spend most of 2009 on it.

10-038 McKenzie Friend

See *President's Guidance: McKenzie Friends* [2008] F.L.R. 110 summarising what they can and cannot do.

10-038 Vexatious litigants

See fascinating article by B. Mahendra, 'A law unto themselves' (2008) 158 N.L.J. 1278. Among other examples he mentions *AG v Benton* [2004] EWHC 1952 (Admin). He had issued 32 separate proceedings in 25 months. He was suffering from a fixed delusional syndrome.

10-045 Admitting Fresh Evidence on Appeal

Ladd v Marshall is still the leading case, laying down these conditions:

1. the evidence could not have been obtained with reasonable diligence at the trial;
2. the new evidence would probably have an important influence on the result and
3. the evidence must be apparently credible.

10-058 Evaluating Woolf Reforms

The *New Law Journal* is publishing a series of articles evaluating 10 years of the CPR (in force April 1999). P. Thompson QC, general editor of *The Civil Court Practice* made the following comments in "Woolf's litigants" (2009) 159 N.L.J. 293:

- Over 2 million county court claims were issued in 2007. 177,000 got to the allocation stage. Just under half made it to a final hearing, with 18,400 in the fast track and the remainder in the small claims track, where costs of legal representation are not recoverable and public funding is not available.
- Money claims online in 2002 was a **real breakthrough for litigants in person** and has "done wonders for access to justice" BUT...
- **"The other tracks are full of snags and pitfalls** for which the litigant in person cannot prepare". The 391 pages of *The County Court Practice* are replaced with 2,301 pages of *The Civil Court Practice*, "a 550% increase!" While there is a QBD guide and a chancery guide there is no *County Courts Guide*. "The aims of simplification and unification of procedures were admirable but they have not been achieved". He suggests making the small claims track the normal track where both sides are LIPs, regardless of the claim and amount. He also suggests that lay representation is the norm in employment tribunals and should be permitted in the courtroom.

10-076 Compensation culture

On 24 Feb 2009, the MoJ launched a consultation on "Controlling costs in defamation proceedings", proposing to cap costs, limit hourly rates and emphasise proportionality. Thanks to conditional fee agreements, defamation proceedings have become much easier to bring, remembering that they have never been amenable to legal aid.

10-075 Critique “The decline of civil justice”

Hazel Genn’s Hamlyn lectures, *Judging Civil Justice*, Dec 2008, forthcoming, Cambridge Univ Press are summarised by M. Zander “Judging Civil Justice” (2009) 159 N.L.J. p. 91 (hard copy only – not on *Lexis*). She savages what she considers to be a serious shortfall in access to civil justice because of poor court facilities and cuts in legal aid.

We are witnessing the decline of civil justice – the downgrading of the importance of civil justice, the degradation of court facilities, and the diversion of civil cases to private dispute resolution, accompanied by the anti-litigation/anti-adjudication rhetoric that interprets these developments as socially positive...The anti-law story suggests that society is in the grip of a litigation explosion or compensation culture...the civil justice system has few friends in government, since it is through civil cases that the government is directly challenged.

She has witnessed “terrible IT, stressed admin staff, too few books for judges; judges having to wander down to waiting rooms to get their next case” and for Lord Irvine “Legal aid was no longer to be presented as a welfare benefit for the poor. Instead it was presented as a gravy train for ‘fat cat lawyers’”.

Class Action Proposal

The Civil Justice Council reported to the Lord Chancellor on what Americans call “class actions”. It recommends increasing the types of body that can bring collective claims, making judges the gatekeepers of the procedure, **permitting claims to be brought on an opt-out basis where it is in the interests of justice** and permitting aggregate damages awards: “Improving Access to Justice through Collective Actions”, 12 December 2008.

See discussion by S.M.C. Gibbons, “Group litigation, class actions and Lord Woolf’s three objectives - a critical analysis” C.J.Q. 2008, 27(2), 208-243.

Further Reading

S. Vogenauer & C. Hodges, *Civil Justice Systems in Europe*, Hart, Oct 2009, on EU systems and the prospects for harmonisation.

Chapter 11 Alternatives to the Courts

11-028 Tribunal Reform Continues

First Tier Tribunal and Upper Tribunal came into being in November 2008. Work of tribunals will be progressively transferred to the FTT, in chambers. There are three chambers and one upper chamber now. The UT will deal with appeals on any point of law (by right) and some judicial review transferred from the Administrative Court. Losers may seek permission to appeal from the UT or CA where either considers it would raise some important point of principle or practice. For a very useful explanation, see T. Buck, ‘Transforming tribunals’ (2008) 158 N.L.J. 1599. He refers to the two Implementation Reviews, June & October 2008, in which the Senior President (Carnwath LJ) explains what has been done and will be done. There will be six chambers in the FTT and three in the UT. The employment and asylum immigration structure are outside of this new setup. The tribunal rules copy the civil procedure rules. The Senior President is under a statutory duty to consider methods to support the development of proportionate dispute resolution. Tribunal chairs become judges: 430 fulltime and 2,300 part-time.

11-030 arbitration clause

Where a business contracts with a consumer, they must fully explain any arbitration clause and arbitration clause will automatically be deemed unfair where disputes are for less than £5,000, under the Unfair Arbitration Agreements (Specified Amounts) Order 1999 and the Unfair Terms in Consumer Contracts Regulations 1999: *Mylcrist Builders v Buck* [2008] EWHC 2172 (TCC), applying the HL decision in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, which provides guidance on the fairness of dispute resolution clauses in consumer contracts. For example, it is unfair if it creates a significant imbalance in parties' rights and obligations, detrimental to the consumer and there is a requirement for good faith and fair and open dealing: see J. Purdie (2008) 158 N.L.J. 1368.

11-030 Anti-suit injunction

In *Allianz SpA and Another v West Tankers Inc* Case C-185/07, 10 Feb 2009, *Times* 13 Feb 2009, **the ECJ ruled that a court in one EU Member State had no power to rule that a party should drop a case in another EU state on the ground that the parties had agreed to refer any dispute to arbitration.** Under Regulation 44/2001, the Member State's court had the exclusive power to rule on its own jurisdiction. While some lawyers **fear** this will allow people to avoid arbitrating in London and persuade others to arbitrate in countries where there is power to award anti-suit injunctions, such as New York or Singapore, thus robbing the ELS of work, others disagree. Peter Clough, head of disputes at Osborne Clarke London still has its appeal "founded on its respected framework for arbitration, legal expertise and English law being the law of choice in many commercial sectors": quoted in a news item at (2009) 159 N.L.J. 208. See longer comment by S. Friel and C. Jones, "London Waiting" (2009) N.L.J. 247.

11-030 Finality of Arbitration

Arbitration awards are final and binding. They can be challenged under s. 68 of the Arbitration Act 1996 for a serious irregularity, if the party can demonstrate that they suffered substantial injustice.

11-031 Advantages and Disadvantages of Arbitration

Friel and Castillo claim that one of the advantages of international arbitration over court litigation is that the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards obliges contracting states to recognise foreign arbitral awards: S. Friel & M. Castillo (2008) 158 N.L.J. 1716.

11-034 Types of ADR

Mediation will only be successful if parties are willing to compromise. It is not appropriate for disputes where there is little room for compromise such as possession proceedings.

Expert determination is low cost and appropriate for technical disputes, such as rent reviews, construction and accountancy disputes. Unless the parties agree otherwise, the expert's decision can only be challenged for fraud, bias, unfairness or acting outside his jurisdiction.

11-035 Family mediation

The LSC is to spend £100,000 in supporting trainee mediators: 20 Feb 2009.

11-041 Adjudicator's decision held to be enforceable

In *Westwood Structural Services Ltd v Blythwood Park Management Co Ltd* [2008] EWHC 3138 (TCC): adjudicator's decision enforced in summary judgment.

Baroness Butler-Sloss, former Family Division President, said ministers should recognise Sharia divorces, in a debate in December 2008.

11-041 where ADR is unsuitable

If a case turns on a point of law and both parties want the law clarified or one wants to change the law, then ADR will be unsuitable. Similarly, where only a court order will do, such as a court-sanctioned settlement in family law or an injunction to stop an illegal act, then only a court order will do.

ADR is not suitable for matters that can only be settled by a court, such as eviction of squatters and applications for injunctions: E. Sadler, "A quick fix or a long battle?" (2009) 159 N.L.J. 154.

Opposition to the pressure to use ADR

See Dame Hazel Genn's Hamlyn lectures in December 2008, above, and M. Brunsdon-Tully, "There is an A in ADR but does anyone know what it means any more?" C.J.Q. 2009, 28(2), 218-237. He argues that the advantages of ADR – consensuality, informality, cost and speed are lost when ADR is coerced.

Further Reading

Tribunals journal, on *Westlaw*

P. Cane, *Administrative Adjudication and Administrative Tribunals*, Hart, August 2009.

Chapter 12 Criminal Procedure

Downgrading of offences

Magistrates are concerned about the **sudden massive use of fixed penalties** for minor offences and have persuaded Jack Straw, the Justice Minister to postpone plans to add 21 more offences to the list. A London district judge (magistrates' courts) told me that she has defendants in the youth court who have accrued hundreds of pounds of fines for public order offences, which they will never be able to pay and see F. Gibb, "JPs win battle over fines: more than half of all offences brought to justice never come to court. Are on-the-spot penalties taking over the justice system?" *Times*, 5 February, 2009.

12-006 Reverse burdens of proof

In *Grayson and Barnham v UK* (ECtHR 23 Sept 2008) the Court decided the reverse burden in the Drug Trafficking Act 1994 did not breach Art. 6. Drug traffickers were imprisoned and the judge imposed a £1.2 million confiscation order. They objected to the burden of proof upon them to show, on the balance of probabilities, that their realisable assets were less than the benefit. The Court applied *Phillips v UK* [2001] Crim. L.R. 817: the presumption of innocence is part of the right to a fair trial that applies throughout criminal proceedings but it is not absolute and presumptions of fact or law are not prohibited so long as they remain within limits. Here, such matters were in the applicants' particular knowledge and not difficult to prove. **Andrew Ashworth comments that it is high time the Court spelled out**

exactly what content it is intended to give to the presumption of innocence: [2009] Crim. L.R. 200 at 202.

12-009 The double jeopardy rule

See a really interesting defence of the modern exceptions to the rule in English and Australian law by D. Hamer, “The Expectation of Innocent Acquittals and the “New and Compelling Evidence” Exception to Double Jeopardy” [2009] Crim. L.R. 63.

12-026 Case management

R. L. Denyer Q.C. says “The search for sanctions remains elusive. The situation will only improve as the culture changes and all lawyer participants regard it as their professional duty to comply, so far possible, with time limits set out in Rules and with pre-trial orders. Stringent costs regimes will almost certainly not do”: “Non-Compliance with Case Management Orders and Directions” [2008] Crim. L. R. 784. **He says that, in reality, prosecution failures rarely lead to sanction because the state has an interest in ensuring that those charged with serious crime are tried and convicted and do not escape because of prosecutors’ mistakes. On the other hand, non-compliance by the defence cannot be allowed to jeopardise the defendant’s fair trial.**

Judges who try serious fraud say management techniques have worked: R.F. Julian, “Judicial Perspectives in Serious Fraud Cases...” [2008] Crim. L.R. 764.

12-030 Reforming the Attorney General – seems to have stalled...

My 2008 book explains why the A.G.’s over-powerful office breaches the separation of powers and is in dire need of reform. It tells the story of the debate on this up to spring 2008. Since then, two further commentaries were published, a report of the Justice parliamentary select committee, in June 2008 and a joint parliamentary committee report on the draft Constitutional Renewal Bill, in July 2008 **BUT** the process now seems to have stalled. A **Constitutional Renewal Bill was notably absent from the Queen’s Speech**, opening the present parliamentary session, and the draft bill is no longer a live draft before Parliament. There is no news on the AG’s website but from the home page you can access really useful explanation of her multifarious jobs. **The Attorney herself is much more pre-occupied with attempting to bulldoze-in a fully fledged American style plea bargaining system in fraud cases.** See the fraud review and consultation on her website. See press releases, especially 3 April 2008, as referred to at **12-050** of my 2008 book.

12-030 The DPP - Human rights hero appointed

January saw the appointment of a new DPP, Keir Starmer Q.C., replacing Ken Macdonald Q.C. **The appointment of Keir, the most eminent UK human rights lawyer, is very heartening, as was the appointment of his predecessor, a defence lawyer.** There is no danger of a lawyer with such a background becoming “prosecution-minded”. For instance, Sir Ken opposed the government’s plans for 42-day detention for terrorist suspects, loudly protesting that it was unnecessary. In his first press conference, Keir said he said he wanted a transparent prosecution service, firm and fair, renowned for high quality casework and high ethical standards. **He’s got his work cut out, then!** (F. Gibb, “Why the courts should be open and transparent”, *Times*, 15 January 2009). See full speech on the CPS website. Remember the CPS has a highly-informative, user-friendly website which explains everything about prosecution decisions in the news and prosecution in general. You can download the plain-

English Code for Crown Prosecutors in nine languages and comment on the draft of the new one, now open to public consultation.

12-031 CPS

Outgoing DPP, Ken Macdonald, had a policy of expanding in-house prosecutions by barristers employed by the CPS and by para-legals in the magistrates' courts. See F. Gibb, "We are determined to do more ourselves", *The Times*, 8 April 2008. There are two concerns raised by this:

1. The quality of prosecutions in magistrates' courts by these Designated Case Workers leaves a lot to be desired, in my opinion. Having observed cases in magistrates' courts recently, many of them are very poor advocates. Also, the expansion of non-lawyers appearing before lay justices is alarming, it seems to me.
2. Some lawyers and judges are alarmed at the diminution in independent barristers available to prosecute. Incidentally there is still a gross imbalance in remuneration between prosecutors and legally-aided defence lawyers so that it is not uncommon to see a junior prosecutor against a silk and a junior defending.

12-033 Witnesses

See comment on *Davis* in the House of Lords by Andrew Ashworth at [2008] Crim. L.R. 915 and see editorial comment on the consequent Criminal Evidence (Witness Anonymity) Act 2008 at [2008] Crim. L.R. 749.

See article, P. Roberts and C. Saunders, "Introducing Pre-Trial Witness Interviews – A Flexible Tool in the Crown Prosecutor's Toolkit" [2009] Crim.L.R. 831. **I have no idea why they did not invent this procedure a few centuries ago.** Possible benefits include:

- Sifting out weak cases,
- Improved witness care, keeping them better informed and making their experience less traumatic/alienating,
- More effective witness liaison, encouraging court attendance and making better-informed decisions on special measures,
- Saving resources where the interview led to no charge, or discontinuance,
- Generating additional information to inform trial strategy, reviewing the prosecutor's arguments, examination and presentation of other evidence,
- The possibility of inducing a guilty plea,
- Educating the police on CPS work and interviewing,
- Generally raising the public profile of the CPS.

12-040 Judicially reviewing prosecution policy

In the *Purdy* case, mentioned above, the Admin Court applied *Pretty* (2001), that whether or not the DPP had the *power* to make such statements (on circumstances in which the CPS would prosecute), he had no *duty* to do so.

12-047 plea bargaining

Judges who specialise in trying serious fraud were agreed that there was a place for plea bargaining in England and Wales. They were reluctant to develop a fully fledged American system but R.F. Julian comments that our pre-trial management system would accommodate it. See Julian, cited above.

12-052 Speeding cases through the magistrates' court and virtual courts

In October 2008, the Government claimed its scheme of "simple, speedy, summary justice" was working. They claimed that the time from charge to conclusion of a case in the MC was 45 days, down from 62 days in March 2007.

An experiment with **virtual courts** is now commencing. Once a person is charged with an offence at a police station, they appear on a video-link to a magistrates' court within two hours. The legal framework for this is the Police and Justice Act 2006. The government says that defendants will be able to opt for real court hearings but **Andrew Keogh objects that research shows that they often do not know their rights**. He cites research on the same scheme in immigration and asylum cases, by the British Refugee Council, which found that over 87 per cent of detainees did not know that they could request to appear in person. Keogh says 50 per cent of police station detainees are not represented and, in the immigration cases, while 37 per cent of the overall sample were granted bail, 75 per cent of the represented sample were bailed, demonstrating the importance of representation to outcome: "Lights, camera, action!" (2009) 159 N.L.J. 9. The Law Society wants Parliament to review plans in the Coroners and Justice Bill 2009 which will remove the right of defendants to choose whether to have a "virtual court hearing": 27 January 2009.

12-066 and 14-022 Fair trial; the rules of natural justice and the judge's behaviour

R. v Cordingley [2007] EWCA Crim 2174, report and comment at [2008] Crim. L.R. 299 was a horrendous case of judicial bad behaviour, in which **the CA said the judge "should be ashamed" of his rudeness and discourtesy**. Pre-trial, a judge queried several times why a trial estimate of three days was necessary and warned he would require an explanation for the waste of court time at the end of the trial. Counsel was refused 10 minutes to marshal his papers after transfer from another courtroom. Although D was of previous good character and had been on bail, bail was withdrawn. The judge refused to direct that D should be given the clean clothes that had been brought for him. The defendant consequently remained in the same clothes until the afternoon of the third day and broke down in tears in the witness box because he had not been allowed to shower or change. He was convicted. The CA quashed the conviction, saying the safety of the conviction did not depend just upon the safety of the evidence but on the observance of due process.

"It is to be remembered that every defendant, and this is no more than elementary, is entitled to be tried fairly – that is courteously and with due regard to the presumption of innocence. This appellant was not tried fairly. There was a failure of due process by reason of the judge's conduct."

12-068 Judicial Fact-finding in jury trials

See R. Pattenden, "Pre-verdict judicial fact-finding in criminal trials with juries" O.J.L.S. 2009, 29(1), 1-24.

12-071 Appeals and Judicial Review from the Magistrates' Court etc.

The whole appeal structure in criminal proceedings is a mess. In 2007, the Law Commission published a consultation paper, *The High Court's Jurisdiction in Relation to Criminal Proceedings* (Law Com CP 184). See editorial comment at [2008] Crim. L.R. 175.

12-075 Grounds of appeal

"Lurking doubt" and the CA's attitude to overturning juries' and judges' findings of fact: for further reading see in-depth analysis by R. Pattenden, "The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division" [2009] Crim. L.R. 15.

12-076 Getting off on a technicality

P.J.T. Fields has written an excellent critique of *R. v Clarke and McDaid* [2008] UKHL 8 and the trend it reversed – of substance over legalism. He quoted Lord Steyn in *A-G's reference (No. 3 of 1999)* [2001] A.C. 91 that there must be fairness on all sides in a criminal case, requiring the court to consider a "triangulation of interests...the accused, the victim...and the public." **He pointed out that Parliament had progressively required co-operation from the accused over 40 years:**

- Alibi notice under the Criminal Justice Act 1967
- Providing samples in drink-driving cases, under the Road Safety Act 1967
- Amending the right of silence under the Criminal Justice and Public Order Act 1994
- The requirement to serve a defence statement under the CPI Act 1996
- This trend culminated in the Criminal Procedure Rules 2005. There is a duty to co-operate. The court's job is to actively manage cases and identify issues early. Prior to this, the D could sit back and state glibly that everything was in dispute and it was up to the Crown to prove its case.

Fields then reviewed the pre-Clarke case law which made points such as "The days of ambushing and taking last minute technical points are gone" and "Criminal trials are no longer to be treated as a game" - cases emphasising the overriding objective of the Criminal Procedure Rules. **He suggests that the 2005 Rules were, then, part of a continuing trend, not a "sea change", as they have often been called.** The Auld Review 2001 said a criminal trial was not a game, under which a guilty defendant should be provided with a sporting chance. Commenting on *Clarke*, the law lords applied a literal interpretation to the statutory requirement for a signed indictment but the trend in previous cases shows that courts have not felt slaves to precedent or the value of words. The absence of a signature made not the slightest difference to the conduct of the trial. In reality, anyway, the indictment is signed by unqualified admin staff. The decision ignores Lord Steyn's "triangulation of interests".

12-088 CCRC to be more active

Richard Foster, the new chair of the Criminal Cases Review Commission, said that before he took over, the referral rate to the CA had fallen to an all-time low and he was encouraging staff to be much more bold in referring to the CA: interview on Radio 4's *Today* programme, 5 January 2009.

12-088 critiques of the CCRC

Simon Cooper, in "Appeals, Referrals and Substantial Injustice" [2009] Crim. L.R. 152 revisits the relationship between the CA and the CCRC. He points out that the new s.16C of the Criminal Appeal Act 1995, inserted by the Criminal Justice and Immigration Act 2008 was **aimed at referrals by the CCRC to the CA based on a change in the law** and aims to stop these where the CA itself would not have granted a time-extension for such an appeal. He says this mischief was "more imagined than real". He says it is not surprising that if someone was convicted on an interpretation of the law that has now been declared incorrect, they wish to appeal. They would feel just as much injustice as someone in a case where new evidence establishes they did not commit a crime. The CA has always been fearful of "floodgates" but, for example, there has not been even a single appeal from someone convicted under the *Caldwell* interpretation of recklessness, since *G* [2003] UKHL 50 said it was wrong. Anyway, the CA has never granted appeals just because the law has changed. They always require evidence of a "substantial injustice".

Also on this subject, Nick Taylor, commenting on the case of *Stock* [2008] EWCA Crim 1862, felt that **the CA had interpreted "exceptional circumstances" justifying a referral, too narrowly**. "If the CCRC is to seek to mirror the approach of the Court of Appeal and therefore only refer those cases in which there is a genuine "real possibility" of the conviction being overturned based on the Court of Appeal's self-imposed restrictions, then the meaning of "lurking doubt" will be virtually empty. This was not the intention behind the 1995 legislation": [2009] Crim. L.R. 188, at 190.

12-090 Causes of wrongful convictions

Laurence Elks, in his overview of the first ten years of the CCRC, comments that some causes of wrongful convictions have faded away, such as oppressive interviews, some persist, such as late-returned briefs, and there are new ones, such as rapid developments in expert evidence: see review of his book, published by JUSTICE, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission*, [2009] Crim. L.R. 52.

12-094 more consequences of the Sally Clark case

Dr David Southall, who was found guilty of serious professional misconduct after accusing another mother of murdering her son, has been allowed by the GMC to return to child protection work. The GMC had recommended striking him off the medical register after the second finding in December 2007, but this was overturned by the High Court.

12-096 Expert evidence

Andrew Roberts says that the principal weakness concerning the reception of expert evidence is that its development has been based on pragmatism rather than principle. He calls for a judicial statement of principle, which may depend on acknowledging that we have to use fundamentally different procedures from those used for normal testimony: "Drawing on

Expertise: Legal Decision-making and the Reception of Expert Evidence” [2008] Crim. L.R. 443.

Chapter 13 Lawyers

13-003 LPC

This will be more flexible from 2009. It will be split into two parts and may be taken in two stages, with different providers. Evaluation of achievement will be by a statement of outcomes. Students can tailor their course to suit their needs.

Pupillage Review

A review is being carried out by Derek Wood, at the request of the Bar Standards Board.

13-005 Promoting diversity

The Black Lawyers Directory promotes them and serves clients who desire to use the services of firms with sound diversity strategies: <http://www.onlinebld.com/index.html>

In October 2008, Lord Bach announced a project called *Barriers leading into law*. 32 aspiring students will be given sponsors or “life coaches” by members of the MoJ: 23 October 2008.

13-040 direct access to the Bar

See Westminster Law School, *Straight There, no Detours: Direct Access to Barristers*, published November 2008, claims 90 per cent of users found that instructing a barrister direct provided better value for money but direct access was criticised by the President of the London Solicitors Litigation Association. He is quoted as saying that the Bar is not geared up to do the admin that goes with litigation. They are not used to seeing clients and their advocacy skills are likely to be dissolved if they start having to deal with admin: (2008) 158 N.L.J. 1693. <http://www.barcouncil.org.uk/news/press/641.html>

See Bar guide to the circuits, promoting barristers
<http://www.barcouncil.org.uk/news/press/639.html>

13-051 advocacy: consequences of the Access to Justice Act 1999

At the Bar Conference 2008 (October), the chairman of the Criminal Bar Association said there had been a “huge rise” in the number of solicitors with higher court advocacy certificates and some were “truly appalling”. Also, some CPS advocates who were leading murder prosecutions were barristers who left the bar because they could not make more than a modest living. He said it was “upsetting” to watch **“the destruction of the system” by “cheap and inadequate labour”**. In February 2009 he repeated the complaint to the European Bar Presidents’ conference.

13-052 Silks

The **controversy** over the entire QC system continues. A November 2008 survey by the Law Society attracted 170 respondents. Over half considered that the QC rank “should become a broader mark of excellence among lawyers” and over half felt that the Law Society should withdraw its support of the rank if the rank is not open to a wider range of lawyers. The survey says ‘few have a good word to say for the new system’ and only one regarded it as an improvement on the old system. The rank is restricted to advocates so solicitors have always

felt that it does not serve to promote them in any way, as a profession. They campaigned for many years to abolish the rank, a story I tell in the 2008 edition. 11 respondents to the survey were still in favour of abolition, considering the rank outmoded. The online survey results are reported in *Queen's Counsel Appointments* on the Law Society website at www.lawsociety.org.uk/documents/downloads/qc_survey_results.pdf. They make interesting reading. In the penultimate "silk round" in January 2007, of 98 new QCs, only one was a solicitor. 3 of 4 applicants were appointed in Feb 2009. The rank of silk is just one of the ways in which solicitors have always felt niggled that the Bar asserts claims to be the superior profession. In this round, there were only 247 applicants compared with 333 last year. The research showed that a lot of people were put off applying by the cost: £2,500, plus £3,500 if successful, plus the cost of letters patent.

13-054 Progress on Tesco Law and the Legal Services Act 2007

From March 2009, the Solicitors Regulation Authority will, subject to Parliamentary approval, be able to regulate legal disciplinary practices. The new Legal Services Board has set out its five year business plan.

13-054 supplementary info on the LS Act

Scrutiny of the draft bill by a joint committee of the Lords and Commons ensured that the Bill was substantially amended. Clementi wanted the reforms to be in the public interest, not just the consumer's interest. The committee re-introduced public interest. Also, the committee felt Falconer sought to "nationalise" the legal profession by controlling appointments to the LS Board and thus shaping its politics. The bill "ping-ponged" between the two houses as ministers backed down on various points: E. Fennell, "Protecting the country's silver", *Times*, 20 November 2007.

The Law Society thinks over-regulation may discourage barristers and solicitors from forming partnerships: see their response to the Bar Standards Board's consultation: March 2009.

Credit crunch

Linklaters, the second biggest law firm in the world, with 500 partners and 3,000 fee earners, is making up to 120 junior lawyers redundant in London. Other law firms are paying new recruits to go on sabbatical.

Chapter 14 Judges

Public attitudes towards judges

Newspapers are full of articles scandalising the public over soft sentencing. This is not new. The *Mail* and the *Express* and *Sun* report every paedophile case and criticise the sentencing. An article by J. Roberts and others, "Public Attitudes to Sentencing of Offences Involving Death by Driving" [2008] Crim. L.R. 525, reports research which demonstrates that with the exception of one offence, **the public have greater tolerance for current and recommended sentencing practices than is generally supposed.**

14-022 The Rule against bias

Helow v SS for the Home Dept. [2008] UKHL 62: the test is whether a fair-minded and informed observer (neither complacent nor unduly sensitive or suspicious), having considered

the relevant facts, would conclude that there existed a real possibility that the judge was biased. The question is one of law, to be answered in the light of the relevant facts. This may include a statement from the judge as to what he knew at the time but there was no question of cross-examining the judge.

14-081 The continuing attempt to diversify

In October 2008, the Judicial Appointments Commission commissioned independent **research to find out what attracts people to or puts them off applying to the senior judiciary**, surveying 6000 members of the judiciary. Prof. Dame Hazel Genn interviewed recent HC appointees and 29 highly qualified barristers and solicitors and she cited some of the (hilarious) responses in her Hamlyn lectures on civil justice in December 2008. The review report is on the Judiciary website and is referred to in news release 01/09, 7 January 2009. It is worth a read!

*“It’s a very jolly life **not** being a judge. Getting loads of money, making jokes and doing really interesting work. You do really unusual, fascinating things working with people you like. There is lots of flexibility, long holidays, no bureaucracy. Why would you stop?” [Female silk]*

“I have no interest in full-time appointment....Five-fold reduction in income. Less control over professional life and I would feel bound to go on Circuit.....I have young children...I like to have dinner with my husband and friends rather than talk to a load of High Court judges.....The hours of service.....60-70 hours..... judges have a huge workload and other activities. I can take a week off if I want to. The loss of autonomy and flexibility is an issue... The idea of spending the next 15 years of my life being a High Court judge doing rubbish work is frankly too depressing to contemplate...”

14-081 Fairness of New Appointment System

Judge David Page is seeking **judicial review after he was not shortlisted for a deputy DJ post after sitting a written test**. He says it did not test his judicial skills. He thought it was part of the process yet it was used to sift out 60 people for interview from 850 applicants. He thinks the JAC does not have power to use a written test, it is not a holistic approach and it discriminates against mature, better experienced applicants: F. Gibb, "Written tests are no guide to your ability to be a judge" *Times*, 29 January 2009.

No wigs – new gowns

From 1st October, judges in civil cases wear no wigs, and a new type of robe distinguished by different colour tabs: CA gold tabs, HC red tabs, HC masters, pink, DJs blue and circuit judges wear their existing gown with lilac tippet.

Judges and Age Discrimination

Two judges are bringing an employment tribunal age discrimination claim against the MoJ, challenging the compulsory retirement age of 70. Lord Woolf, former LCJ thinks the UKSC will be deprived of some good judges because of the 70 age limit under the Judicial Pensions and Retirement Act 1993. **Lords Bingham and Carswell will not be able to sit**: F. Gibb, “Forcing out judges at 70 ‘threatens supreme court’”, *Times*, 2 February 2009.

In the meantime, the ECJ has ruled that Member States can pass legislation that differentiates according to age, but they had to satisfy a high standard of proof that their aim was legitimate. *R. (Incorporated Trustees of the National Council on Ageing (Age Concern*

England)) v Secretary of State for Business, Enterprise and Regulatory Reform
Case C-388/07 Judgment 5 March 2009.

Further Reading

Remember to check the Judiciary website, which contains many intelligent and informative judges' speeches. For example, there are three recent speeches on judicial diversity.

Chapter 15 Magistrates

The Magistrates' Association are very concerned about what they perceive as an attack on their independence: the Coroners and Justice Bill says they MUST follow the Sentencing Guidelines Council's guidelines. See F. Gibb, "En garde! Magistrates ready for battle over punishments", *Times*, 26 Feb 2009.

The magistrates' recruitment website is now on the Direct Gov website. Click on the link from the Ministry of Justice site. The attractions of being a magistrate are spelled out in plain English. You can download an "interactive" application form. Note that advisory committees still select magistrates.

Further Reading

The Justice of the Peace and Local Government Law

The Magistrate

Both on *Westlaw*

Chapter 16 Jury

2. Selection of Jurors

Really annoying, rubbishy article

You should disregard an article by Cheryl Thomas, "Exposing the Myths of Jury Service" [2008] Crim. L.R. 415. I demolish it in a letter to the editor of the *Criminal Law Review*, at [2008] Crim. L.R. 888, pointing out that all her "myths" are invented or are not myths but well-founded. She was the author of one of them. Also the article purports to reproduce statistical information from her 2007 research report but does not tally with it at all. Her invention of a litany of jury "myths" in her 2007 Min of Justice research report 2/07 is unfortunate, because its findings on why BME groups are under-represented on juries are very useful and are the result of a lot of carefully executed empirical research. I cited the useful results of this report in my 2008 book, ignoring her attack on me but in 2008 she went far too far – her article is provocative rubbish. As I said, her 2007 research is informative and very welcome. Reporting it as dispelling myths distracts attention from its valuable results. Judge for yourself. I had decided to remain silent and not react to the attack until I read my own students rubbishing my work in their June 2008 exam papers.

16-030 Jury equity

On 11 March 2009, Kenneth Batchelor was acquitted of murdering Matthew Clements as he tried to break into his house. The circumstances were very similar to the Tony Martin case ten years earlier. K. Burgess in "Homeowner Kenneth Batchelor cleared of murder after shooting dead intruder", *Times* 11 March 2009 reports that

[He] fired a shotgun at “very close quarters” at 42-year-old Matthew Clements, who had climbed the scaffolding of his home to try to force open an upstairs window. Mr Batchelor had received a barrage of threatening phone calls from Mr Clements, a 20-stone nightclub bouncer, who was demanding maintenance money from the Batchelor family following a former relationship between his girlfriend and Mr Batchelor's brother Gary, which produced three children. The jury at Maidstone Crown Court took just one hour unanimously to acquit Mr Batchelor of the murder of Mr Clements who, the court heard, had an “explosive temper” and had become “fixated” with demanding money from the Batchelor family.

Chapter 17 Legal Services

Generally, if you want to read the Government's version of the state of legal aid and keep an eye on its plans and the reasoning behind them, see the Legal Services Commission website, NOT 'legal services reform' on the Ministry of Justice website as, misleadingly, this is about the reform of lawyers' business structures and regulation.

The Government's story right now is that we spend more per capita on legal aid than any other country in the world.

To read intelligent analysis and critique, then go to the Legal Action Group website and click on 'Magazine'. This gives the editorials from *Legal Action* and lots of useful articles. In March 2009, LAG is publishing *The Justice Gap*, to coincide with the 60th anniversary of legal aid, first provided in the Legal Aid and Advice Act 1949. They argue that legal aid has fallen short of its original aims and there is “a marked difference between the numbers of cases pursued to enforce rights and the many potential cases that people never take up as they are either not aware of their rights or they decide it is not worth the trouble to take it further – this is ‘the justice gap’”. For example, in the Feb 2009 edition of the magazine, Jon Robins reported that their research for the book began in Dover Magistrates' Court, watching 35 housing repossession cases, where “traumatised” people were subject to proceedings from their mortgage lenders and making last-minute negotiations. The provision of legal advice was arbitrary and the beleaguered CAB adviser running the help desk said “Homeowners arrive unsure of what is going on, totally ill-informed and prepared to lose their home because they think there is no alternative.”

He also wrote an article in the *New Law Journal*, complaining of the lack of legal aid in tribunals. He said only seven per cent of families of personnel killed in Afghanistan or Iraq received legal aid for representation at the inquests. Inquests for deaths in custody *are* within the scope of legal aid, following the McPherson Report: “The Justice Gap” (2009) 159 N.L.J. 131. (It was held in *R (Main) v Minister for Legal Aid, Times*, 18 Dec 2007, an inquest was an inquisitorial not an adversarial process so the coroner could reasonably be expected to carry out a proper investigation so legal aid for families of those killed in a railway accident was not necessary to avoid a breach of Art 2 of the E Conv HR).

17-016 Contingency fees

Legal in Scotland and generally illegal in E & W, they are permitted for lawyers representing people in employment tribunals, who often take a 33 per cent cut of the winnings. Prof Richard Moorhead found that 12 per cent of employment cases were backed by contingency fees. Only one third of lawyers were prepared to act on a “no win no fee” basis because of the 25-30 per cent chance of losing and the fact that the cap for unfair dismissal compensation is £63,000 and the average award is £3-4,000: see Jon Robins in the N.L.J., above.

17-018 consultation on means testing in the Crown Court

This was launched on 6 November 2008. In announcing it, the Min of Justice press release said,

“Funding for legal aid has risen unsustainably in the last 25 years and now stands at more than £2 billion a year. The median cost of defence in the Crown Court is £2,500. And in 85% of cases costs are less than £5,000. There are around 117,000 legally aided defendants in Crown Court each year”.

17-040 Fixed fees cause decline in providers

The Legal Action Group are concerned at the decline in the not-for-profit sector of legal service providers. I quote from the Feb 2009 editorial of their magazine, *Legal Action*, available on their website. (See ELS website update below).

“There are currently around 400 not for profit (NFP) Legal Services Commission (LSC) contract holders. These include citizens advice bureaux (CABx), Law Centres® and independent advice centres. The number of NFP contracts grew rapidly from 1998 when legal aid contracting was opened up to them after it had been piloted successfully in the sector under the Conservative Lord Chancellor Lord Mackay; however, the number of NFP contracted agencies has been falling recently mainly because of the implementation of fixed fees in October 2007. LAG is concerned that unless the sector can adapt, many more NFP agencies will drop out of legal aid work after the current contracts end in March 2010. This will be a loss to the many thousands of clients with whom the services are accessible and popular.”

LAG says some agencies have cut back on the work they do and others have been forced to close. While the Legal Service Commission presents this as efficiency, LAG feels fixed fees will force all providers to do less for clients. The editorial also points out that sole contracts for housing, debt and welfare advice look set to end so 80 per cent of not-for-profit agencies will have to expand services or enter into consortia in order to continue with legal aid work. LAG argues that the tendering process should be put back for a year or there will be mass closure of advice outlets just when the public needs help. See also the very useful editorial in Dec 2008, setting present legal aid provision in its historic context and again complaining that the civil and criminal legal aid budgets are not ring-fenced and the civil budget continues to be robbed for criminal cases, especially “very high cost cases”.

The Administrative Justice and Tribunals Council (replacement for the Council on Tribunals) notes that in tendering for new civil contracts in 2010, the LSC wants to concentrate legal assistance into bigger regional units. They are concerned over the consequences for justice in tribunals. (Remember that people cannot get legal aid for representation in most tribunals so are reliant on advice). In mental health review tribunals applicants are entitled to legal aid. They think service providers to high security mental hospitals will be severely reduced and users whose liberty is at stake (inmates) should retain an unfettered right to choose their legal aid provider. Roger Smith, reporting this, comments “The future of legal aid may well now be beyond rational debate”: “Beyond satirical debate?” (2009) 159 N.L.J. 212.

Carolyn Regan, chief executive of the LSC pointed out that the consultation on the 2010 civil legal aid contracts has now closed. She denied that it had ever been the intention of the LSC

to reduce the number of providers and diminish client choice “but to focus our budget more specifically on where clients are located and their needs”: (2009) 159 N.L.J. 292.

17-042 Fat cats and ‘Very High Cost Cases’

Nevertheless, barristers boycotted a VHCC panel set up in January 2008. Instead, the Legal Services Commission has decided to create a panel of litigators and a list of accredited advocates for VHCCs. Litigators will be able to negotiate their fees and advocates, contracted for individual cases, will be paid graduated fees for core advocacy tasks and negotiated rates for case specific tasks. In May 2008, a convicted drug offender avoided a confiscation order of up to £4.5 million, because 30 barristers refused to act for the fixed fee of £175 per day and the defendant could not pay for his own advocate because his assets were frozen. The judge accepted D could not have a fair trial on the point: F. Gibb, “Drugs offender keeps £4.5m after 30 barristers refuse to take his case”, *Times*, 6 May 2008.

Review of civil advice

In December 2008, Lord Bach was appointed to review the availability of civil legal advice. His group will report in March 2009. (MoJ 4 Dec 2008).

17-048

Jon Robins, of LAG, says the LSC has at last acknowledged that clients face clusters of legal problems and its latest consultation suggests tendering for social welfare law providers across the country offering ‘the full range and breadth of service’: (2008) 158 N.L.J. 1659.

Costs in Legally Aided Cases

From October 2008, a legally aided party who wins a case can receive costs and they are paid to a charity, the Access to Justice Foundation, who will give the money to a voluntary organisation providing legal support.

One third of LSC employees are to lose their jobs.