APRIL 2006 Journal of Legal Action Group

LegalAction

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LEGAL ACTION GROUP SETS AGENDA FOR ACTION

New-look *Legal Action*!

This month sees a redesigned *Legal Action* with colour on every page. The new look is aimed at making the magazine easier to read and improving the way that we give you information. Over the coming months, *Legal Action* will be expanding its coverage to include every area of law that affects legal aid lawyers and advisers. *Legal Action* will also publish a new series of practical guides giving an overview of specific areas of social welfare law and suggesting sources of essential information for more detailed study.

We continually welcome your comments on, and contributions to, *Legal Action*, to ensure that we are giving the best service to all those working in publicly funded legal services.

The redesign of ***Legal Action*** has been very generously supported by the Law Society Charity, Matrix and the Nuffield Foundation. LAG would also like to thank Doughty Street Chambers, which has generously sponsored this issue of *Legal Action*.

Legal Action's new full-colour format is the biggest change to the magazine for many years.
If you have a comment or want to contact us, please e-mail: editor@lag.org.uk.

LAG

The purpose of the Legal Action Group is to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services.

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Speak as we would be spoken to

Since time immemorial, lawyers have had a reputation for obfuscation. In general, they are seen as an elite group that uses language designed to mystify rather than clarify and speaks in arcane phrases which imply superior knowledge. However, we now live in a world dominated by another form of jargon that leaves the uninitiated baffled and confused: the language of management. Over the past few years, various phrases have crept into the debate on legal services and legal aid provision which, on reflection, are not self-evidently helpful.

LAG admits to some difficulty with the following concepts, namely 'managed market and managed competition'. In economics, a free market and competition are seen as beneficial. In the legal aid world, the free market – where any solicitor could do legal aid work – disappeared with the Access to Justice Act 1999. Now only contracted organisations can do such work. The market and, therefore, the number of competitors have been reduced. With the recent proposals by Lord Carter on legal aid procurement, we now have more 'management' of the market to reduce the number of firms still further. 'Managed competition' is the route to achieve this, by selecting the few players left in the field through a price tendering process. It is by no means clear to LAG how narrowing the supplier base and losing diversity will benefit consumers which, of course, leads inevitably to the next question.

What does the phrase 'putting the consumer first' (much used by the Department for Constitutional Affairs (DCA)) actually mean? On one level, we all know the meaning of the words. But it is not obvious that consumers do come first. At least one million civil law problems go unsolved each year because people do not know that there is action they can take to deal with them or where to go for help. We also know from research that people's problems tend to come in clusters, with a personal crisis, such as an accident or loss of employment, leading to other difficulties. Yet the contracting structure of legal aid services prevents problems being resolved in a holistic way, and the emergence of advice deserts makes it more difficult for people to get face-to-face advice and representation when they need it.

In the language of markets and management, there are consumers and there are suppliers. However, the words 'supplier' and 'preferred supplier' also throw up a few problems. If the DCA is 'putting the consumer first' in legal services, lawyers and advisers are providers of these services. But in the language of the Legal Services Commission (LSC), they are 'suppliers'. So in the LSC's view of the world, it takes centre stage with lawyers and advisers defined only by their relationship to it. The LSC plays the diva even more in its introduction of the 'preferred supplier' scheme. Preferred supplier schemes are common in the public sector to ensure high-quality services from approved contractors which comply with certain agreed standards and specifications. Just like legal aid contracts, one might think. But the LSC offers more benefits to those 'preferred suppliers' whom it regards as providing a better service. This is pretty obscure stuff, and suggests that consumers who choose a non-preferred supplier may get an inferior service.

A phrase that appears less frequently at the moment is 'partnership working'. There was a time when the LSC was keen on it. Sadly, this now seems to have gone by the board, particularly with the LSC's decision to cut funding for specialist support services. This is a partnership that has taken a decidedly uncivil turn: termination of the contracts led to an angry meeting with the specialist support service providers, an early day motion in the House of Commons, and a summons from the Constitutional Affairs Committee to senior LSC representatives to explain themselves to it. Now the LSC has apparently told the Law Centres Federation that, after 20 years, its funding will end in March 2007. (See page 4 of this issue.)

While it is easy to poke fun at management-speak, there are serious issues at stake here. If legal aid suppliers are being restructured out of existence, let the debate at least be in plain English. Lawyers and advice agencies need to know that there is a sustainable future for their services. The present approach of the LSC is more like football, than legal services, management. The 'everyone hates us, we don't care' method is not the way to rebuild a relationship with organisations that the LSC needs to provide an essential service.

Contents

MPs' committee reports on 'compensation culture'

Adam Griffith, policy officer at Advice Services Alliance, writes:
The Constitutional Affairs Committee (CAC) has just published its report on the 'compensation culture'. The inquiry examined the UK's compensation system, including the effect of the move to 'no win, no fee' conditional fee agreements (CFAs), both the Compensation Bill and the NHS Redress Bill (which are presently in the Lords), and risk aversion in public bodies.

The CAC concluded that:

- There is no 'compensation culture', in terms of increased litigation, but there is evidence of excessive risk aversion, which the government and the Health and Safety Executive must address.
- Clause 1 of the Compensation Bill, which seeks to restate the common law of negligence, is unnecessary and may prove harmful.
- The move from legal aid to CFAs may have broadened access to justice, but it has had some unfortunate side-effects. The regulation of claims 'farmers' is welcome and overdue; issues to be addressed include advertising, potential mis-selling of insurance products and the quality standards that an authorised person needs to meet.
- The CAC was not satisfied that the proposed redress scheme for victims of medical negligence will work: the committee suggested that the scheme should be piloted before it is introduced nationally.

A feature article written by Adam Griffith detailing the CAC's recommendations will be published in May 2006 *Legal Action*.

Compensation culture, third report of session 2005–06 Volume 1, available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf.

Applications for this year's Law Society bursaries must be submitted by 13 April. Bursaries are open to postgraduate students and will contribute towards the cost of course fees. For more information and an application form, visit: www.lawsociety.org.uk.

Call to join e-mail update service

Theresa Harris, information manager at Advicenow, writes:
Advicenow, an independent not for profit website run by Advice Services Alliance, has just launched a free e-mail update service for professionals and is inviting *Legal Action* readers to sign up. *Advicenow* works closely with lawyers and advice workers to make sure it provides information on the topics clients need to know about.

The e-mail newsletter service aims to give up to date information on the latest developments on the *Advicenow* website, about new leaflets and topical guides, and will let e-mail readers have their say on current and future projects.

Visit: www.advicenow.org.uk or e-mail: update@advicenoworg.uk to sign up to the new service.

Judicial appointments: a brave new world?

From 3 April 2006, a newly appointed commission, chaired by Baroness Usha Prashar (pictured), first civil service commissioner and former head of the Runnymede Trust, will take over responsibility from the Lord Chancellor for almost all judicial appointments.

The Judicial Appointments Commission's composition was the subject of some debate during the passage of the Constitutional Reform Act (CRA) 2005. The commission will comprise the chair and 14 other commissioners:

news feature

LSC to end Law Centres Federation's funding

The Legal Services Commission (LSC) is to end its annual grant to the Law Centres Federation (LCF) after 20 years. The current grant, which will run from April 2006, supports the LCF's directorate and policy work, as well as its administration and running costs. It will not be renewed at the end of March 2007. Since the launch of the Community Legal Service (CLS) in 2000, six new Law Centres® have been established in partnership with the LSC; the latest is Kirklees Law Centre in West Yorkshire, which opened in October 2005.

Gillie Sharp, chair of LCF, said: 'This is a potentially devastating blow to LCF which has come without any consultation or warning from the LSC. It is a simply awful way to treat an organisation with such a long-standing relationship with the LSC. I fear for the future of all not for profit organisations which contract with the LSC ... If the cut goes ahead it will be difficult for LCF to continue as a viable national organisation.'

LCF is urging its supporters to write to Michael Bichard, chair of the LSC, and Bridget Prentice, minister for legal aid, to protest at the funding cut and ask that the LSC and the Department for Constitutional Affairs continue to support the federation.

In response to Gillie Sharp's comments, Crispin Passmore, director of the CLS at the LSC, said: 'It is completely incorrect for Gillie Sharp ... to say that we have reached our decision on the grant funding we provide to the LCF 'without warning or consultation'. The LSC's £165,000 grant to the LCF, which helps with their administrative costs, was always due to expire in March 2006. LCF were fully aware of this situation …

We have taken the decision to extend the grant for another year (until March 2007) on the basis that LCF use the year to find alternative funding. The fact that LCF have received a grant for a considerable time was a major contributing factor in our decision to extend the grant for an extra year. We did not have to do this ... I have invited Steve Hynes, director of LCF, to meet with me so we can discuss the reasons for our decision ...'

Meanwhile, the LSC has announced that it is setting up the first two Community Legal Advice Centres (CLACs) in Gateshead and Leicester. The CLACs are funded jointly by the LSC and local councils. They will be run as pilot projects for a limited period and are expected to open in winter 2006/2007.

Judicial members:
LJ Sir Robin Auld;
LJ Heather Hallett;
HHJ Frances Kirkham (a former solicitor);
DJ Charles Newman (a former solicitor); and
HHJ Goldring.

Lay members:
Professor Hazel Genn, University College;
Sir Geoffrey Inkin, former soldier and chair of the Cardiff Bay Development Corporation;
Francis Plowden, former accountant;
Harriet Spicer, founder of Virago Press; and
Sara Nathan, a former broadcasting executive.

Tribunal member:
HHJ David Pearl.

Lay justice member:
Dame Lorna Boreland-Kelly is the magistrates' representative.

Professional members:
Jonathan Sumption QC, who sits for the Bar; and
Edward Nally, former Law Society president, who sits for the society.

A number of other changes take effect under the CRA from April 2006, including:

- The Lord Chancellor's role as a judge will end.
- The Lord Chief Justice (LCJ) will hold the additional title of President of the Courts of England and Wales and be legally recognised as the head of the judiciary in England and Wales.
- The role of the LCJ will be significantly reformed and strengthened.
- The Judicial Office for England and Wales has been established to support the LCJ.
- In addition, a new Office for Judicial Complaints will be established to give effect to the new arrangements for the LCJ's handling of judicial disciplinary matters.

Article 8 is possession defence in 'exceptional circumstances' only say Lords

The court's latest answer to the question: can article 8 (the right to respect for private and family life and the home) of the European Convention on Human Rights provide a defence to possession claims is 'no, unless there are exceptional circumstances'. This decision was given by a 4 to 3 majority of the House of Lords in *Kay v Lambeth LBC* and *Leeds City Council v Price* [2006] UKHL 10.

In the past the court has answered the article 8 defence question in a number of ways: Lord Woolf MR said 'yes' in *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2001] EWCA Civ 595; a majority of the House of Lords said 'no' in *Harrow LBC v Qazi* [2003] UKHL 43; the European Court of Human Rights (ECtHR) said 'yes' in *Connors v UK* 27 August 2004, App No 66746/01; and a chamber of the ECtHR said 'yes' in *Blečič v Croatia* March 2006 *Legal Action* 28.

In *Kay v Lambeth LBC*, Lord Hope stated that *Qazi* was correctly decided, and that article 8 defences relying on defendants' personal circumstances should be struck out. Article 8 defences should only be entertained if they raise seriously arguable points that the law allowing the making of possession orders is incompatible with article 8 or if public authorities' decisions to seek possession are an improper exercise of their powers. Meanwhile, those advising the defendants in *Kay v Lambeth LBC* are considering making an application to the ECtHR.

A full analysis of the judgment in this case will be published in May 2006 *Legal Action*.

Specialist suppliers gain MPs' support in campaign against LSC funding cut

The latest report from the Constitutional Affairs Committee (CAC) describes the Legal Services Commission's (LSC's) decision to end funding for specialist legal support services as flawed, and one that may put vulnerable people at risk. See page 3 of this issue and February and March 2006 *Legal Action* 4.

Alan Beith MP, chair of the CAC, said: 'The LSC must look at this decision again. Apart from the concerns about the way this decision was made, we cannot accept that a telephone advice service for consumers can replace specialist advice to lawyers dealing with hugely complicated legal issues ... We are very glad that in public oral evidence to the committee, the Lord Chancellor has assured us that he will personally look at both the process and the decision itself.'

Meanwhile, the specialist support suppliers have been granted an injunction against the LSC and, as a result, the contracts – which were originally due to end on 19 July – will not now end before 19 October 2006.

Legal Services Commission: removal of specialist support services, fourth report of session 2005–06, available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/919/919.pdf and from TSO, £10.

Legal Aid Lawyer of the Year Awards 2006

Independent Lawyer magazine and the Legal Aid Practitioners Group are calling for nominations for the fourth Legal Aid Lawyer of the Year (LALY) Awards.

Nominations are being sought in nine categories:

- Crime;
- Immigration and asylum;
- Social and welfare;
- Mental health;
- Family;
- Team of the year;
- Young solicitor;
- Barrister of the year; and
- Young barrister.

The panel of judges, chaired by Cherie Booth QC, will also be making an award for outstanding achievement. The deadline for nominations is 13 April 2006.

For a nomination form, tel: 020 7501 6753 or visit: www.lapg.co.uk.

IN BRIEF

- Cardiff Law School has launched the 'Innocence Project' to give students the opportunity to work with local solicitors to investigate alleged miscarriages of justice. The project will be linked to Innocence Network UK, which aims to raise public awareness of wrongful convictions and encourage the setting up of such schemes.
For more information about the network, visit: www.innocencenetwork.org.uk.

- The Tribunals Service will be launched on 1 April. This new agency within the Department for Constitutional Affairs will provide common administrative support to the main central government tribunals. For more information, visit: www.tribunalsservice.gov.uk.

LAG is about to publish its policy statement, *Access to justice: agenda for action*, setting out its values and vision for access to justice in a time of rapid change for legal services. Here, Alison Hannah, LAG's director, summarises the policy principles and action points in the statement.

LAG sets agenda for action

Every year, millions of people experience one or more problems that need to be resolved through some part of our justice system. These problems can take the form of events that threaten livelihoods or even endanger lives.

LAG believes that equal access to justice and fair treatment by the justice system are fundamental rights within a democratic society – a view that underpins our mission and all of the principles set out in *Agenda for action*.

There are five principles underlying LAG's proposals in the policy statement. LAG has taken each of these principles in turn, looked at the facts, identified the problems and listed action points to maintain and improve access to justice for all.

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The Royal Courts of Justice in the Strand.

Sustainable legal and advice services

Sustainable communities are well-planned, safe and inclusive, and provide equal opportunities to their members. Legal and advice services have an important role to play in combating social exclusion and building community cohesion. LAG believes that:

- Plans for creating new communities or regenerating existing ones should include investment in publicly funded legal and advice services.
- The social value of legal aid work must be recognised and publicly funded to ensure that people are able to enter and remain in this field of work.
- The civil legal aid budget must be protected from spending on criminal legal aid.
- Different models of legal services are needed, but with independence and high-quality advice and legal services ensured.

Empowerment through legal literacy

The law is increasingly complicated and people have difficulty finding out and understanding their rights and responsibilities. Public legal education helps to build knowledge and skills, and enables people to play a full part in society.

- Public legal education should be an integral part of legal services.
- We need a national strategy for legal education to make it accessible to all.
- Court procedures should be simplified and access to legislation made easier, for example through their publication on the internet.

Accountability through the civil courts

The civil courts have a vital role to play in resolving conflict and holding public bodies to account for unlawful decisions. By delivering public justice, the civil court system underpins support for the law and access to it should be available for all.

- Courts should be adequately resourced: they should not be expected to be entirely self-financing through increasing court fees for users.
- Court buildings should provide easy access for everyone who uses them.
- The courts' role in checking the power of government and public bodies, and upholding human rights, must be recognised and protected.
- Public funding for cases where there is a public interest should be more flexible, and courts should have discretion to allow representative civil claims by appropriate bodies.

Justice beyond the courts

Many cases involving disputes between citizens and the state are dealt with through the tribunal system. Legal aid is not available for most tribunal hearings, making it difficult for unrepresented users to present their cases as effectively as possible. The law is often complex and tribunal hearings can be formal and intimidating.

Residents talk with citizens advice bureau staff about jobs, benefits and with banking advisers about personal debt, at an open day at the Beethoven Centre, Queens Park, London.

Fair and impartial criminal justice

The main purpose of criminal proceedings is to acquit the innocent and convict the guilty. The criminal justice system should operate to the highest standards of fairness and impartiality, free from political or operational interference.

- Everyone involved in criminal trials – including victims, witnesses and jurors – should be treated with respect. However, the system must give priority to the rights of suspects and defendants to a fair process and a fair trial.
- Victims' rights to information, protection and respect should be taken into account at all stages of the case.
- Anti-social behaviour orders and other civil orders should be used as a last resort only after other approaches have been tried, and should be proportionate to the behaviour in question.

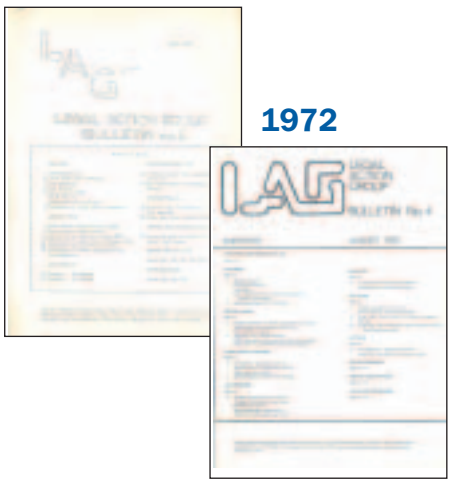
LAG is concerned that too many government policies in these areas appear to be driven by political or financial expediency. LAG would rather they were inspired by principles of fair and effective justice. We believe that it is timely to reassert our mission of promoting equal access to justice as a fundamental democratic right. *Access to justice: agenda for action* is a statement of LAG's policy principles, setting out action points that are linked to our mission. LAG is an organisation whose activities are underpinned by its mission. We are proud of what that mission represents. In these challenging times, LAG must nail its colours to the mast. We hope that, soon, these will be the colours of the government's own policy agenda.

- *Access to justice: agenda for action* will be available from 6 April 2006 at: www.lag.org.uk.

- Procedures for tribunal hearings must be simplified, and tribunal judges better trained to deal with unrepresented users.
- Training on the legal framework for administrative decisions should be given to public officials, to help them make transparent, justifiable and consistent decisions; this would encourage a 'right first time' approach.
- The court system must provide an appeal route for tribunal cases that raise important points of principle.
- There should be advice for individual users to enable them to exercise a genuine and informed choice of options for alternative dispute resolution (ADR). ADR should be explored and encouraged where it can provide an effective alternative.

This month Legal Action Group (LAG) introduces *Legal Action* with a fresh design and with colour on every page. *Legal Action*'s new look is the biggest change to the magazine for many years. However, it has been equally important for LAG to focus on what should remain the same – that *Legal Action* continues to be the prime source of information for legal aid lawyers and advisers.

From *LAG Bulletin* to *Legal Action*



1972

Newly formed LAG issues its *Circular No 1* in January – five duplicated A4 pages stapled together … By December, six issues have been produced; size is 24 pages, now printed and bound and called *LAG Bulletin* … December issue includes editorial 'Legal advice and assistance – where are we now?', news, research reports, features, a report of LAG's first general meeting on 18 November 1972 at the London School of Economics, 'Poverty lawyer's notebook', reviews, letters and half a page of advertisements (placed for free) … *LAG Bulletin* is edited by director Susan Marsden, and typed, duplicated and distributed to over 500 members by office manager Jean Dyer … annual subscription rates: firms £5.75, individuals £3.50 and students £1.

1973

LAG Bulletin, size 24 or 28 pages, is produced monthly from February … Clive Morrick joins LAG as assistant director and edits 'Poverty law and practice' section … Susan Marsden edits the rest and writes editorials and news … contributors to the *Bulletin* include: Andrew Phillips, Henry Hodge, Walter Merricks, Dawn Oliver, Simon Hillyard, Tony Lynes, Martin Partington, Stephen Sedley, Stuart Weir, Richard Drabble and Michael Zander.

1974

In January's issue, director Susan Marsden reports that subscribers number over 1,600 and concludes, 'Our target is to get a copy of the *Bulletin* into the office of every solicitors' firm and every general law library in the next three years.' Law and practice section expands covering planning, environment, housing, welfare law, legal aid, employment law, immigration, civil rights, consumer rights and procedure.

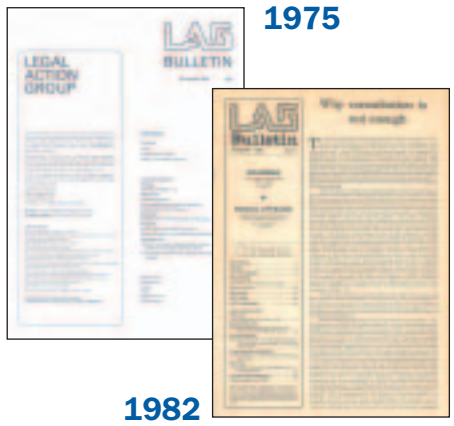
Office manager Jean Dyer keeps Legal Action *subscription records, produces address labels, types all copy, compiles the index and writes book reviews.*

1975

LAG Bulletin is redesigned in November with lighter weight paper and closer typeface to reduce number of pages … Paper changed to grey throughout to avoid show-through … Binders are sold for £2.

1976

Law and practice section now includes family law, children, European law, crime and mental health … Andrew Arden and Bill Nash act as consultants, writing and commissioning articles.



1975

1982

1978

Jenny Levin and Ole Hansen join LAG as co-directors and joint editors of *LAG Bulletin* … Jenny Levin writes and edits law and practice articles and campaigns on substantive law, especially family law and social security … Ole Hansen develops investigative journalism with particular emphasis on the legal system, legal aid, miscarriages of justice, magistrates' courts and official secrets, civil liberties, and complaints against solicitors … Subscribers exceed 4,000.

Delegate at LAG conference reading the first issue of Legal Action*'s 1996 redesign.*

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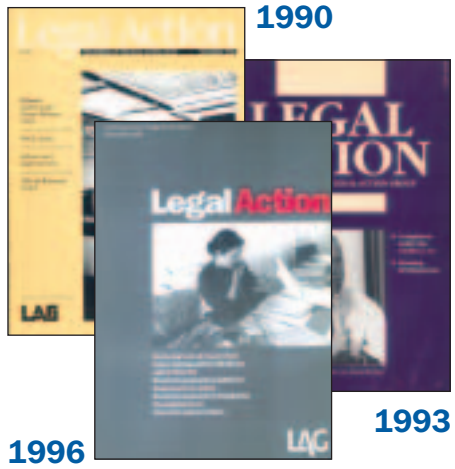

1990
Legal Action is redesigned with a new typeface and cream cover. Law and practice pages are no longer grey, but retain a grey margin strip.

1993
Legal Action's cover is changed to purple … Monthly updater expands to two pages.

1996
Lesley Exton, who became editor in 1995 after the death of Hilary Arnott, oversees *Legal Action*'s new design with grey, blue and red covers in rotation … Expanded updater section includes parliamentary updater.

1979
In February issue, first appearance of brief case summaries in an updater titled 'Recent developments'.

1981
National Association of Citizens Advice Bureaux takes out a bulk order for the *Bulletin*, so that every citizens advice bureau in the country receives a copy.

1982
LAG Bulletin is redesigned, splitting into 'white pages' with editorial on front cover, more news coverage, journalistic features, pictures and cartoons and 'grey pages' containing law and practice articles.

1984
LAG Bulletin is renamed *Legal Action* and new red masthead is designed … In February, Martin Partington reports on law reform in Australia in first article of LAG's 'new occasional series on developments in the legal services of other jurisdictions' … When Jenny Levin and Ole Hansen leave LAG, Louise ffoulkes and Sally Hughes, then assistant editor and researcher and features writer respectively, take over as editor and deputy editor.

1985
September sees the first appearance of quarterly 'Recent developments in housing law' series written by Jan Luba and Nic Madge.

1986
Roger Smith joins LAG as director and *Legal Action*'s general editor, with editorial assistants Sheila Kavanagh and Lesley Exton editing the white and grey pages respectively … *Legal Action* is redesigned with a picture on the front cover, which becomes glossy grey with red masthead, and news digest on the back cover.

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From left: Susan Marsden, Ole Hansen, Roger Smith and Jenny Levin cutting the cake at LAG's and Legal Action*'s 25th year party.*

1997
Legal Action's typesetting and page layout is brought in-house … LAG and *Legal Action* celebrate their 25th year.

2004
Legal Action is named Serial Publication of the Year by the British and Irish Association of Law Librarians in June.

2006
Legal Action is completely redesigned … the new format introduces colour on every page and retains *Legal Action* tradition with the return of a colour-coded law and practice section.

Police station law and practice update

Ed Cape continues his six-monthly series covering developments in law and policy affecting police station practice. He welcomes comments, and information about new developments and unreported cases.

POLICY AND LEGISLATION

Serious Organised Crime and Police Act 2005 and PACE Codes

A number of important amendments to the Police and Criminal Evidence Act (PACE) 1984 came into force on 1 January 2006 (see Serious Organised Crime and Police Act 2005 (Commencement No 4 and Transitory Provision) Order 2005 SI No 3495). Earlier amendments were explained in 'Police station law and practice update' October 2005 *Legal Action* 10, and most of the Serious Organised Crime and Police Act 2005 (SOCA) changes to PACE are now in force, except those that will permit fingerprinting without arrest and the appointment of designated civilians as custody officers (SOCA ss117 and 120 respectively). Revised PACE Codes of Practice came into force on the same date, as did a new PACE Code G: *Code of practice for the statutory power of arrest by police officers* (see Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005 SI No 3503 and Home Office Circular 56/2005: *Police and Criminal Evidence Act 1984: Revised codes of practice 2005 and accompanying guidance revised notice of rights and entitlements*). The major changes are as follows:

Arrest

Powers of arrest were completely overhauled, giving the police the power to arrest for any offence, subject only to a necessity requirement. Civilian powers of arrest were also changed along similar lines. In addition, the concepts of 'arrestable offence' and 'serious arrestable offence' were abolished as pre-conditions for the exercise of a number of police powers, and replaced by the requirement that the offence concerned be indictable (ie, indictable-only or either-way). These changes were fully explained in January 2006 *Legal Action* 24. See also page 26 of this issue.

Code G does little to deal with the concerns that the new powers significantly extend police powers of arrest, although para 1.2 makes the point that arrest 'represents an obvious and significant interference' with the right to liberty guaranteed by the Human Rights Act 1998 and the European Convention on Human Rights article 5. The most useful part of the code for defence lawyers is para 1.3, which states that:

> *use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used.*[1]

Furthermore, it states that powers of arrest must be exercised in a non-discriminatory and proportionate manner. Arresting officers must inform the person arrested of the grounds for the arrest and the reason why arrest was necessary (Code G para 2.2), and this information must also be entered in the officer's pocket book (Code G para 4.1) and on the custody record (Code C para 3.4).

Defence lawyers should, therefore, try to ascertain what information was given to their client, and also examine the custody record, and consider whether the arrest was lawful and, particularly in the case of arrests for minor offences, whether arrest was a proportionate response.

The new necessity requirement may have implications where the police arrest a person following his/her voluntary attendance at the police station. In *Al Fayed and others v Commissioner of Police of the Metropolis and others* [2004] EWCA Civ 1579, the appellants' argument that, in such circumstances, arrest should only be exercised on the ground of necessity was rejected by the Court of Appeal. The court found that the test was whether the arrest was *Wednesbury* reasonable. PACE s24(4) and (5) now provide that the arresting officer must have reasonable grounds for believing that arrest is necessary, and it may be argued that if the purpose of arrest is merely to facilitate an interview with which the suspect is willing to co-operate, the necessity condition is not satisfied. This will, in part, depend on whether the police wish to exercise any power that can only be exercised in respect of a person who is in police detention (see PACE s118(2)). A volunteer is not in police detention, but fingerprints and photographs can be taken with the consent of a person who is not in police detention.

'use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used'.

Search warrants

PACE s8 is amended by SOCA ss113 and 114 so that a search warrant is available in respect of a suspected indictable offence. Previously, it was only available in respect of serious arrestable offences. A 'specific-premises warrant' may be granted in relation to more than one set of premises (PACE s8(1A)(a)), and an 'all-premises warrant' may be issued in respect of any premises occupied or controlled by the person specified in the warrant (PACE s8(1A)(b)).

In the case of an all-premises warrant, the premises do not have to be specified in the warrant if the justice of the peace is satisfied that it is not reasonably practicable to specify them (PACE s8(1B) and Code B para 3.6(da)). If an application is sought for multiple entries, the number of entries authorised may be limited to a maximum or may be unlimited (PACE s8(1D) and Code B para 3.6(db)). A second or subsequent entry, or an entry of premises not specified in the warrant, must be authorised by an inspector or above who is not connected with the investigation (Code B para 6.3B). For guidance on the warrant procedure, see Home Office Circular 56/2005 (see above).

Identification

The statutory power to photograph suspects in police detention without their consent is extended, by an amendment to PACE s64A by SOCA s116, to certain people who are not in police detention. Photographs may now be taken of people where:

- They have been arrested;

■ They have been taken into custody by a constable having been arrested for an offence by a person other than a constable;
■ They have been made subject to a requirement to wait with a community support officer (to await the arrival of a constable); or
■ They have been given certain penalty notices (for example, under Education Act 1996 s444A, Road Traffic Offenders Act 1988 s54, and certain notices issued by community support officers or accredited persons).

Reasonable force may be used to take the photographs (PACE s117 and Police Reform Act (PRA) 2002 s38(8)). SOCA s116(5) amends the definition of a photograph in PACE s64A(6A) to include moving images. As a result, moving images are included in the provisions in PACE s64A(4), which governs the retention, use and disclosure of photographs taken under PACE s64A.

SOCA s118 added a new PACE s61A enabling an impression of footwear to be taken, without consent, where a person is detained having been arrested for, or charged with, a recordable offence and s/he has not had an impression taken in the course of the investigation of the offence, or an impression taken was incomplete or of inadequate quality to allow for satisfactory analysis or comparison. This puts footwear impressions in the same position as fingerprints and non-intimate samples in terms of the use of reasonable force, retention and speculative search: see Code D s4.

Code D Annex A has been amended so that where steps are taken in a video identification to replicate or conceal an unusual physical feature, the reasons for doing so must be recorded (paras 2A and 2B). Furthermore, if a witness asks to view such an image without the physical feature being replicated or concealed they 'may be allowed to do so' (para 2C).

In *R v Marcus* [2004] EWCA Crim 3387, decided before the amendment took effect, the police attempted to deal with an unusual physical feature by electronically masking the relevant part of the face on the image of the suspect and on those of the foils. When witnesses failed to pick anyone out, the police re-ran the identification with the masking removed. This was held to amount to a breach of Code D since the foils were not sufficiently similar to the suspect, as required by Annex A para 2. This decision will still be relevant despite the new provisions.

Designated civilians

A number of the SOCA's provisions have amended the PRA in respect of the powers of designated civilians. SOCA s122(2) amended PRA s42 to enable an inspector to direct that a designated investigating officer need not wear a uniform for a particular operation. SOCA Sch 8 paras 13, 14 and 15 extend the scope of search warrants that can be applied for by designated investigating officers as a result of PRA Sch 4. The power of designated civilians to stop and search, and to search and seize, are set out in Code A Annex C, and the power of designated civilians to use force is set out in Code C para 1.14.

Drug testing

PACE s63B permitted testing of persons *charged* with either a trigger offence[2] or an offence which an officer, of the rank of inspector or above, had reasonable grounds for suspecting had been caused by, or contributed to by, misuse by the person concerned of a specified Class A drug. The power is still not in force nationally, but only in selected police stations in certain police force areas.

From 1 December 2005, s63B was amended by Drugs Act (DA) 2005 s7 to permit testing following arrest for such an offence. Initially, the power to drug-test following arrest is being piloted within the police force areas of Greater Manchester, Nottinghamshire and South Yorkshire, but it is expected to be extended to other police stations operating drug-testing from April 2006. The powers are conveniently set out in Code C s17. See also Home Office Circular 49/2005 *Testing for presence of (specified) Class A drugs and assessment of misuse of drugs: The Drugs Act 2005 (Commencement Order No 3) Order 2005* (for restrictions on bail following a positive drugs test see October 2005 *Legal Action* 10).

DA s5 inserted a new s55A into PACE permitting x-rays and/or ultrasound scans to be taken where an inspector or above has reasonable grounds for believing that a person who has been arrested for an offence, and who is in police detention, may have swallowed a Class A drug, and was in possession of it with the appropriate criminal intent before his/her arrest.[3] Consent in writing is required, but refusal to give consent without good cause can result in inferences being drawn (s55A(9)): see Code C Annex K. These provisions came into force on 1 January 2006.

DA s8 amended Criminal Justice Act (CJA) 1988 s152, from 1 January 2006, so that the power of a magistrates' court to remand persons charged with certain drugs offences to the custody of a customs officer for a period of up to 192 hours is extended to enable such remands to be to the custody of the police. The purpose of such remands is to facilitate the recovery of evidence after a person is charged with an offence involving drug possession or drug trafficking where the person is suspected of having swallowed drugs. Code C generally applies to such people, although not s15: *Reviews and extensions of detention*. See, in particular, Code C note for guidance 9CA.

Terrorism

The President of the Queen's Bench Division issued a protocol, *Management of terrorism cases,* in January 2006, which has implications for what may happen after a person is charged with a terrorism offence.[4] The protocol applies where at least one of the offences charged is indictable-only, or is an offence involving serious fraud (or conspiracy, incitement or attempt in respect of either), and it is alleged by the prosecution that there is evidence that it took place during an act of terrorism or for the purposes of terrorism as defined by Terrorism Act 2000 s1. Generally, all such cases (wherever in England and Wales the person is charged) are to be dealt with initially by Bow Street Magistrates' Court. Therefore, if the person is charged outside the local justice area in which Bow Street Magistrates' Court is situated, s/he must be removed to that area as soon as is practicable and produced in that court as soon as is practicable after his/her arrival in the area, and, in any event, not later than the first sitting of the court after his/her arrival in the area.

Police and Justice Bill

The Police and Justice Bill, a 'package of measures to build safer, stronger communities and instil a culture of respect in society' was published on 25 January 2006.[5] The Home Secretary Charles Clarke indicated that one of the objectives of the legislation is to 'help free up police time to deal with more serious crime', so the bill sets out to give more policing powers to community support officers (CSOs). At present, the powers of CSOs vary across England and Wales and the bill will standardise and extend these powers (cls 4 to 6 and Sch 3).

Currently, where a person is granted 'street bail' under PACE s30A, or 'section 47(3)' bail (ie, bail where there is insufficient evidence to charge), bail conditions cannot be imposed. Clause 7 and Sch 4 will enable the police to impose conditions in these circumstances, and will grant a power of arrest for breach of the bail conditions imposed.

CJA 2003 Part 3 created a statutory scheme for conditional cautions (see October 2004 *Legal Action* 12). Although the scheme came into force in July 2004, it appears that very few conditional cautions have been imposed, possibly because the decision is for

the Crown Prosecution Service rather than the police. Nevertheless, as part of its plan to shift the criminal process away from the courts and towards summary punishment,[6] the government appears to be determined that they should be used, and the bill amends the objectives of conditional cautions to include 'punishing the offender' (cl 12). Furthermore, the conditions permitted will include financial penalties and attendance at a specified place at a specified time (for up to a total of 20 hours), and a power of arrest is granted for failure to comply with conditions (cl 13). The person may then be charged with the offence for which the conditional caution was imposed.

LEGAL ADVICE

The Criminal Law Committee of the Law Society has reissued its guidance document *Police station advice: Advising on silence*.[7] The guidance takes into account the court decisions on inferences from 'silence' which have been reported in 'Police station law and practice update' over the past few years, and considers their implications for both formulating advice at police stations and the strategies to be considered by defence lawyers. As regular readers of the update will know, these decisions have made it increasingly difficult to protect clients against the adverse effects of inferences under the Criminal Justice and Public Order Act (CJPOA) 1994.

It is imperative that lawyers advising clients at police stations understand the current approach of the Court of Appeal to the impact of legal advice on the drawing of inferences (see box for summary). The approach of the courts also emphasises the importance of considering whether a statement should be handed in, and where this strategy is to be adopted, the content of the statement and the timing of handing it to the police (see box).

The previous misconduct provisions of the CJA 2003 have resulted in the police frequently using police interviews to ask questions about previous convictions and other previous misconduct. See 'Police station law and practice update' October 2005 *Legal Action* 12, on which the guidance draws.

In some police force areas, interviewing officers are handing a notice to suspects indicating that they are likely to receive a sentence discount if they make admissions at the police station.[9] CJA 2003 s144 provides that in determining sentence, a court must take into account 'the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty'. Since proceedings have not commenced at the pre-charge stage, s144 does not apply. Usually, therefore, making admissions to the police will not reduce sentence any more than if the accused pleads guilty at the first opportunity at court, and any police attempt to persuade a client otherwise should be resisted. However, it should be remembered that admissions at the police station may have an impact on sentence if they lead to recovery of property, a significant reduction in risk to, or suffering experienced by, a victim, the release of other suspects, or where they lead the police to accept that the suspect played a minor role or to a decision to charge a less serious offence than might have been warranted by the circumstances.

CASE-LAW

Arrest

■ Nikonovs v Governor of HM Prison Brixton and the Republic of Latvia (interested party)

[2005] EWHC 2405 (Admin)

■ Hunt v The Court at First Instance, Antwerp, Belgium

[2006] EWHC 165 (Admin)

Extradition Act (EA) 2003 Part 4, giving effect to the European Council Framework Decision on the European Arrest Warrant (EAW) of 13 June 2002, grants police officers the power to arrest a person in the execution of a warrant issued by a judicial officer in another EU country.[10] The EA Codes of Practice B, C and D, which largely reflect the equivalent PACE Codes, came into effect in January 2004. Where a person has been arrested under a EAW, s/he must be taken before an appropriate judge as soon as practicable (EA s4(3)), and s/he may be held in custody at a police station until s/he is so produced.

These two cases are among the first appeal cases under these provisions. In *Nikonovs*, the accused was arrested at 11.55 am on Friday 16 September 2005, but was not brought before a judge until the following Monday (19 September). He could have been taken before a judge on the Saturday but, owing to an error, was not. When he did appear, on 19 September, his lawyers argued that he must be released since EA s4(5) states that if s4(3) 'is not complied with and the person applies to the judge to be discharged, the judge must order his discharge'. The judge refused the application, observing that Boston (Lincolnshire), where the accused was arrested, was some distance from London, where the judge was sitting. On a habeas corpus application to the Divisional Court, it was held that s4(3) employed the term 'practicable' rather than 'reasonably practicable', and the applicant clearly had not been produced before a judge as soon as was practicable and, therefore, must be released. The major point in *Hunt* concerned the requirement in EA s2(4) that the warrant must include certain details, including 'any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence'. This information was missing from the warrant which, together with the fact that the passage of time meant that it would be unjust and oppressive to return the accused to Belgium, led the court to allow the appeal and declare that his extradition to Belgium was barred by EA s14.

The EAW was intended to give effect to mutual recognition of judicial decisions across the EU, and to facilitate the rapid return of suspects and those unlawfully at large. These cases indicate that lawyers acting for such people must pay close attention to the provisions of the EA. It should also be noted that the expression 'as soon as is practicable' appears in a number of provisions in PACE, such as in relation to the requirement to take a charged person before a magistrates' court under s46.

Previous misconduct

■ R v Highton, Nguyen and Carp

[2005] EWCA Crim 1985

N was arrested and subsequently prosecuted for cultivating cannabis, a large quantity of plants having been found in the house where he lived with his brother with whom he was jointly indicted. During the course of the police interview, he denied that he was involved in cultivation, but did accept that he used heroin and methadone.

The prosecution persuaded the trial judge that the evidence of drug use was relevant and admissible under CJA 2003 s101(1)(d), ie, relevant to an important matter in issue between the accused and the prosecution. During cross-examination of the accused, the prosecution suggested that his heroin addiction meant that he would be desperate for money to fund his habit, and that that was a motive for becoming involved in the cultivation of cannabis.

The Court of Appeal held that the judge was wrong to hold that evidence of drug addiction was relevant to an important matter in dispute. Once the accused admitted that he thought the plants were a controlled drug of some kind, the only matter in issue was whether he was involved in the cultivation, and his drug addiction was irrelevant to that issue.

***Comment*:** Although the appeal was

successful on the facts, the case provides an important reminder that evidence of previous misconduct may come from what the accused says during the course of police interviews. There was no suggestion that, in principle, evidence of what the accused said in the police interview about his drug addiction was not capable of amounting to evidence of previous misconduct.

■ **R v Weir, Somanathan, Yaxley-Lennon, Manister, He and He**
[2005] EWCA Crim 2866
The appellant, Somanathan, was convicted of two offences of rape. A number of issues relating to evidence of previous misconduct arose at his appeal. It was noted above that evidence of previous misconduct may be admitted under CJA 2003 s101(1)(d) where it is relevant to an important matter between the accused and the prosecution. At trial the accused did not simply deny rape, but denied behaving improperly at any time. The court found that evidence of previous misconduct was therefore 'plainly relevant to an important matter in issue between the parties, namely the credibility of the complainant on the one hand and the

Extracts from *Police station advice: Advising on silence*

Inferences and legal advice

■ Where an accused gives evidence that they remained silent on the advice of their solicitor, the question for the jury or court is whether, in the circumstances existing at the time, it is reasonable to expect the accused to have mentioned the relevant fact or facts. This is an objective question.

■ The fact that the court or jury accepts that the accused genuinely relied on legal advice not to tell the police about facts on which they subsequently rely in their defence does not mean that they have to conclude that it was reasonable for the accused not to mention those facts. They may, for example, conclude that it was not reasonable to rely on that advice, or that the accused relied on the advice because it suited their purpose.

■ A court or jury may be more likely to conclude that reliance on legal advice not to put forward relevant facts was reasonable if there were 'soundly based objective' or 'good' reasons for that advice. The following may be regarded as 'good reasons':

- Little or no disclosure by the police so that the solicitor cannot usefully advise the client;
- The case is so complex, or relates to matters so long ago, that no sensible immediate response is feasible;
- The suspect has substantial difficulty in responding as a result of factors such as ill-health, mental disability, confusion, intoxication, or shock.

■ A court or jury is less likely to conclude that reliance on legal advice was reasonable if the advice was not based on 'good' reasons. The following are unlikely to be regarded as 'good reasons':

- A belief by the solicitor that the detention is unlawful;
- The absence of a written statement from the complainant;
- A belief that the complainant may withdraw the complaint;
- A belief that the police intend to charge whatever the suspect says in interview.

As a result, solicitors should approach the issue of advising clients on 'silence' with extreme caution, and where they do advise silence, should explain to the client that the fact that they are giving such advice will not necessarily prevent inferences from being drawn. Whilst solicitors must have proper regard for the decisions of the courts, if there are cogent reasons for silence solicitors must not flinch from advising accordingly, whilst ensuring that their clients are made aware of the risks of following that advice (pp7–8).

Handing in a statement

Handing a statement to the police setting out the relevant facts has been treated by the courts as 'mentioning' facts for the purposes of the silence provisions, and the same principle should apply to providing an account for the purposes of ss36 and 37 CJPOA 1994. This strategy should be considered where there are good reasons for informing the police of facts that are likely to be relied upon by the defence at trial (or for providing an account), whilst not wanting to place the client at risk of 'cross-examination' by the police (eg, because they are nervous or because police disclosure has been limited). However, note that handing in a statement will 'fix' the suspect with the defence, and may have the effect of providing the police with sufficient evidence to charge.

It was held in *R v Knight* [(2004) 1 Cr App R 9] that handing in a statement does not, in itself, prevent inferences from being drawn. If the defendant relies on facts at trial that were not mentioned in the statement, inferences can still be drawn from failure to mention those facts.[8] Therefore, the statement should set out the facts that have been disclosed by the police, and cover the essential features of the defence in as much detail as possible having regard to the prosecution case as far as it is known. Care must be taken to anticipate the facts that are likely to be relied on at trial, and also to anticipate any request to account under ss36 or 37 CJPOA 1994, and to deal with these in the statement. If there is more than one interview, or there is 'phased disclosure', the statement should be reviewed in the light of any information disclosed by the police during the course of a prior interview, or between interviews, and consideration given to handing in a supplementary statement.

Provided that the facts subsequently relied upon at trial are adequately covered, a statement handed to the police during a police interview should have the effect of avoiding inferences under s34(1)(a) (or under ss36 and 37), but will not prevent inferences under s34(1)(b). Normally the courts appear reluctant to draw inferences under s34(1)(b), but it could be particularly relevant if information is disclosed by the police during the interview that is not adequately covered in the statement. In these circumstances, as noted above, the solicitor should consider whether a supplementary statement should be handed to the police.

The solicitor must consider at what point the statement should be given to the police. Strictly, a statement only prevents inferences under s34(1)(a) if it is handed to the police during a police interview, so that it amounts to mentioning facts 'on being questioned under caution'. In a straightforward case where the solicitor is satisfied that the police have made adequate disclosure, it will normally be appropriate to hand in the statement at the beginning of the interview. However, in a more complex case or where the police have given no, or limited, disclosure it may be better to hand the statement to the police towards the end of the interview. In this case, before the interview ends, the solicitor should tell the police that before it is concluded they wish to have a private consultation with the client. The statement should then be drafted in consultation with the client, and handed in to the police at the resumed interview.

Normally it is better to hand a statement in rather than to simply read it out in the interview. If, before handing it in, the solicitor considers that the statement that has been prepared omits relevant information or includes information that should not be disclosed to the police, the statement should be re-drafted during a private consultation with the client. However, since such statements are covered by legal professional privilege, the police have no right to seize them (pp15–16).

defendant on the other'. A second issue concerned CJA 2003 s101(1)(f), ie, evidence to correct a false impression given by the accused. The court accepted that a simple denial of an offence cannot, for the purposes of s101(1)(f), be treated as a false impression given by the accused. However, in this case, the court found that the accused had put himself forward as a man who not only had no previous convictions but also enjoyed a good reputation as a priest. In these circumstances, evidence that he did not have such a reputation was admissible.

***Comment*:** By CJA 2003 s105(2)(b) a person can be treated as being responsible for the making of an assertion of good character where, inter alia, s/he does so on being questioned under caution or on being charged. Therefore, in advising clients in relation to police interviews, lawyers must consider the potential implications of asserting good character.

■ R v Renda, Ball, Akram, Osbourne, Razaq and Razaq

[2005] EWCA Crim 2826

Renda was convicted of attempted robbery. The police had arrested him after seeing what they believed to be a fight. The victim complained that Renda had followed him and had tried to rob him. In a prepared statement handed to the police, Renda denied that he had done anything at all and that, after making a false accusation, the victim had attacked him. At trial the issue was principally that of credibility of the victim and of the accused. During the course of his evidence the accused maintained that he suffered long-term brain damage as a result of a serious head injury incurred while serving as a soldier. He also stated that he was in regular employment as a security guard. However, in cross-examination he conceded that these assertions were not true. It was confirmed on appeal that by such assertions the accused was 'plainly seeking to convey that he was a man of positive good character', which opened the 'gateway' under CJA 2003 s101(1)(f).

The appellant, Ball, had been convicted of two counts of rape in respect of the same woman. His defence was that sexual activity had taken place with her consent. During the course of police interviews, the appellant told the police that most of the men in the local pub had had sexual intercourse with the complainant, and said: 'She's a bag really, you know what I mean, a slag.' The Court of Appeal upheld the judge's decision to permit cross-examination of the appellant about his bad character under CJA 2003 s101(1)(g), ie, that the defendant has made an attack on another person's character.

***Comment*:** Although in the case of *Renda* the assertions of good character were made during the course of the trial, the admission of evidence to demonstrate that the assertion was false or misleading would also have been possible if he had given a false impression during the police interview, or in the statement handed in to the police. In the case of *Ball*, CJA 2003 s106(1)(c) provides that for the purpose of s101(1)(g) a defendant makes an attack on another person's character if, inter alia, evidence is given of an imputation about that other person's character on being questioned under caution, or on being charged. Again lawyers must consider, when advising on the police interview or on a statement to be handed in to the police, the implications of an attack made by the accused on the character of another person.

CJA 2003 s106(2)(a) provides that evidence attacking another person's character includes evidence to the effect that s/he has committed an offence 'whether a different offence from the one with which the defendant is charged or the same one'. Thus, for example, telling the police that the offence was committed by a co-suspect could amount to attacking another's character. See also the recently decided, but pre-CJA 2003, case of *R v Blackford* [2005] EWCA Crim 3515, in which it was held that a defence of self-defence involving an assertion that the victim had attacked the accused first could amount to casting an imputation on the character of another person.

Silence

■ R v Johnson

[2005] EWCA Crim 3540

The appellant, a serving soldier, was required to empty his pockets by his company sergeant major (CSM). In his pocket was a chewing gum wrapper containing what proved to be cannabis. He told the officer that he did not know what the wrapper contained. On being interviewed he said that he had not seen the wrapper before, did not put it in his pocket and did not know that it was there. In a second interview, conducted under caution, he made no comment on legal advice.

At his court-martial, the appellant's defence was in line with what he had told the CSM, and the judge advocate directed that an inference could be drawn that his failure to mention the relevant facts in the second interview was because he had since invented his account. On appeal, it was held that given what the appellant had said to his CSM, it was not appropriate to invite the jury to draw an inference under CJPOA s34, and 'it was particularly inappropriate … to extend such an invitation on the basis that the claimant's lack of knowledge might be a late invention'.

***Comment*:** It was clearly wrong, on the facts, to direct the jury that it could draw an inference of recent fabrication but other inferences might have been possible, such as an inference that the appellant had no explanation that would stand up to scrutiny in the police interview. In deciding that inferences should not have been left to the jury at all, the decision is in line with that in *R v Beckles* [2005] 1 All ER 705, where the accused had told the police on being arrested what was, as it turned out, the essence of his defence put forward at trial.

These decisions reflect a much narrower view of the purpose of s34 than that put forward in cases such as *R v Howell* [2003] Crim LR 405 and *R v Hoare and Pierce* [2004] EWCA Crim 784 (see April 2005 *Legal Action* 19 and October 2004 *Legal Action* 15). This disagreement about the purpose of s34 can also be seen in some of the Court of Appeal decisions on whether a statement handed in to the police will only prevent inferences if it includes all of the facts relied on at trial, or whether it is sufficient for the statement to provide an outline of the defence. However, it may be that the court views statements made by suspects before they receive legal advice in a different light than statements made to the police after legal advice has been given.

■ R v Allan

[2005] Crim LR 716

The appellant was convicted of murder and conspiracy to rob, much of the evidence coming from a prison confession made to another prisoner, a police informant, who had been deliberately moved to be near the appellant, and who had 'pumped' the appellant on instructions from the police. The appellant had given a 'no comment' interview to police on legal advice. At trial he gave evidence relating to the prison confession (which, while not a full admission, was incriminating), that he had not told the police about.

The European Court of Human Rights decided that Allan did not receive a fair trial because of the evidence of the informant who had a large number of previous convictions and who had been paid a large reward following Allan's conviction. On a reference back by the Criminal Cases Review Commission, the Court of Appeal quashed the convictions on the grounds that the judge had given a defective direction on inferences to the jury, and also because the use of the informant to obtain admissions had infringed the appellant's common law right to silence and privilege against self-incrimination.

***Comment*:** The court held that the use of the informant was, in effect, a ploy to get

round the PACE protections. It would be wrong, said the court, 'for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the code and with the effect of circumventing it', and this was equally the case where they used a third party to conduct the interrogation. This may be compared to cases such as *R v Christou and another* [1992] 4 All ER 559 and *R v Bryce* [1992] 4 All ER 567. The court also found that the judge's directions on inferences where 'silence' was on legal advice were inadequate in that he did not direct the jury to consider the reasonableness of the appellant's decision in the light of that advice. (See also *Beckles* above.)

1 A provision that was inserted at the suggestion of the Law Society.
2 For definition, see Code C note for guidance 17E.
3 This is defined as intent to commit an offence under Misuse of Drugs Act 1971 s5(3) (possession of controlled drug with intent to supply) or Customs and Excise Management Act 1979 s68(2) (exportation etc with intent to evade a prohibition or restriction). See PACE s55A(10).
4 Available at: www.hmcourts-service.gov.uk/cms/files/management_of_terrorism_cases.pdf.
5 Home Office press release, 25 January 2006.
6 See the *Respect action plan* published by the Home Office Respect Task Force in January 2006, especially chapter 7, available at: www.respect.gov.uk.
7 The Law Society, *Criminal Practitioners' Newsletter No 63,* January 2006. The guidance was written by the author with the assistance of the Criminal Law Committee's Police Station Working Group.
8 Not all Court of Appeal cases are consistent on this point, but this appears to be the predominant view.
9 See Graham White, 'PACE or prejudice? – police 'advice' on sentence discount', *Criminal Practitioners' Newsletter* Issue 62, October 2005, p1.
10 A brief account of these provisions can be found in April 2004 *Legal Action* 12.

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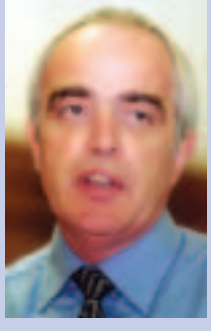

Local taxation update

Alan Murdie summarises cases and regulations dealing with various aspects of local taxation liability and enforcement over the past year.

POLITICS AND LEGISLATION

Revaluation in England postponed

Plans for a general revaluation of domestic dwellings in England by 2007 have been postponed, pending the conclusions of the inquiry by Sir Michael Lyons into local government, which is due to report at the end of this year. Council tax bandings in England were set to be revised under the Local Government Act 2003, with a new valuation list in force by 1 April 2007. Market value as of 1 April 2005 was to have been the effective date for valuation and banding purposes.

However, in a statement made by David Miliband, minister of communities and local government, on 10 October 2005, the government announced that this general revaluation had been abandoned. Legislative plans for a substituted date for revaluation were outlined and, on 13 October 2005, the government introduced the Council Tax (New Valuation Lists for England) Bill into parliament. The bill removes the requirement for a revaluation of domestic properties in England by 1 April 2007. It provides for future revaluation dates to be set by statutory instrument. The government does not envisage that there will be a revaluation until after the end of the present parliament. As a result, council tax valuations of dwellings in England will continue to be assessed on a theoretical sale price as at 1 April 1991. In the meantime, a new valuation list has been in operation in Wales since 1 April 2005, with the effective valuation date being the theoretical market value as of 1 April 2003.

Imprisonment for local taxation

Despite a handful of well-publicised cases involving pensioners in 2005 (see November 2005 *Legal Action* 17), the overall figures for committal to prison for council tax debt show a marked decline over the previous six years. In a parliamentary answer given on 2 November 2005, Fiona Mactaggart, under-secretary of state at the Home Office, gave the figures for the numbers of people committed to prison since 1997 as follows:

- 1997 – 357;
- 1998 – 194;
- 1999 – 101;
- 2000 – 41;
- 2001 – 29;
- 2002 – 21;
- 2003 – 30;
- 2004 – 26.

However, what these figures do not reveal is the extent to which committal is still being used to coerce payment by way of warrants suspended on terms. Similarly, it is not clear if these figures include instances where the warrant is issued and the debtor taken into custody in the court, but payment occurs before reception into prison.

Civil partnerships

From 1 April 2006, council tax legislation is amended as a result of changes introduced by the Civil Partnership Act (CPA) 2004. The CPA provides that two persons of the same sex may form a civil partnership and enjoy the same rights and responsibilities which accompany marriage between heterosexual couples. CPA Sch 27 para 140 also amends Local Government Finance Act (LGFA) 1992 s9 providing that two persons of the same sex living together will be treated in the same way as civil partners. Thus, joint and several liability is introduced into council tax for persons of the same sex (as applies with households comprised of persons of the opposite sex living together as husband and wife).

Changes consistent with the intentions of the CPA are also introduced by regulation from 1 April 2006. The Council Tax (Civil Partners) (England) Regulations 2005 SI No 2866 introduces various amendments to the council tax regulations for the financial year beginning 1 April 2006 to encompass civil

partners with respect to enforcement, discount disregard and job-related dwellings. Relevant amendments include provision to allow outstanding council tax from an executor or administrator on the death of a civil partner (as already applies under Council Tax (Administration and Enforcement) (CT(AE) Regs) Regulations 1992 SI No 613 reg 58 with married couples and couples living together as husband and wife) and the expansion of the meaning of a job-related dwelling for discount purposes to include those occupied by an employee with a civil partner (as already applies for spouses). The Council Tax (Exempt Dwellings) (Amendment) (England) Order 2005 SI No 2865 introduces a substituted definition of relatives to include persons linked by a civil partnership as well as persons linked by marriage in the case of Class W (dwellings occupied by a dependent relative).

Use of bankruptcy proceedings in enforcement

Perhaps the most serious trend in enforcement since last year has been the increase in the use of bankruptcy proceedings to recover sums of council tax. CT(AE) Regs reg 49 provides that where a liability order has been made, the sum owing may be deemed a debt under the Insolvency Act (IA) 1986.

Bankruptcy proceedings are complex and have been used relatively little with council tax debts because of the associated costs in presenting a creditor's petition. From anecdotal evidence received, it appears that during summer 2005 London local authorities were making at least four to five bankruptcy applications each week in the High Court in respect of council tax; given the reluctance and inability of many vulnerable debtors to participate in recovery proceedings this figure could potentially be much larger. To date, only one judgment in such a case has been reported: *Newham LBC v Takavarasha* (see below).

A number of factors seem to have encouraged a move towards the use of bankruptcy by billing authorities. Council tax bills have increased substantially, with the result that the cost of bankruptcy proceedings no longer exceeds the sums in local tax outstanding in many cases, particularly where debts from successive years are compounded. (In *Takavarasha*, the debt in the bankruptcy petition initially amounted to £2,752.64 and was then reduced to £1,998.77 with an award of discount). Increases in home ownership and house prices mean that many debtors may have a valuable asset which can be realised.

Other enforcement methods have become less attractive with distress and imprisonment now being hedged with important statutory and judicial safeguards. In contrast, the instigation of bankruptcy proceedings has a number of administrative advantages for a local authority at the early stages. Most debtors will find it difficult to contest proceedings unaided or even find a source of reliable free advice.

The only advantage to bankruptcy proceedings for a debtor is that any other enforcement measure is effectively prevented from being used thereafter, including imprisonment (see *Re Smith (A Bankrupt)* [1990] 2 AC 215). However, unless the debtor is living in rented accommodation, bankruptcy is likely to result in the loss of his/her home and severe financial hardship.

A local authority begins by obtaining a liability order from a magistrates' court which, more often than not, will be granted in the absence of the debtor. Where the total sum is £750 or more, the local authority is then entitled to serve on the debtor a statutory demand under the IA. This amounts to little more than an administrative act and saves instructing bailiffs to levy distress. The debtor must then either pay the debt or apply to court to have the demand set aside, a step which relatively few debtors will be able to take unaided.

Advice to council tax debtors where bankruptcy is used

A council tax debtor faced with bankruptcy proceedings by way of statutory demand has three basic options:

- Pay the debt;
- Reach an agreement with the local authority; or
- Apply to set aside the statutory demand within the time limit.

Grounds for seeking to set aside the statutory demand would include the fact that the tax has been paid or wrongly calculated (although this is actually a matter to take to the valuation tribunal). In practice, there may exist many potential grounds for disputing the sum in the liability order, including a failure to award relevant discounts or benefits, disputes about banding or even questions concerning liability to tax. In order to sustain an application to set aside a demand, a council taxpayer is likely to have to adduce some evidence and take the step of taking appropriate appeal proceedings.

Appropriate appeal proceedings will include:

- Applying to quash or vary the liability order on which the demand is based by an application to the magistrates' court or by way of judicial review; or
- Lodging an appeal to a valuation tribunal under LGFA 1992 s16 where grounds to challenge the amount of tax exist, arguing that they provide a basis for overturning the liability order on which the statutory demand purports to be based.

Otherwise, a liability order will be treated as valid and the court will be unwilling to reopen the question of whether it should have been granted.

If no action is taken, the local authority may then present a bankruptcy petition against the debtor. By the time the bankruptcy petition reaches court it will generally be too late for the debtor to challenge the liability order. Should a debtor then seek to go back to the magistrates' court to set aside the liability order, s/he will encounter the problems arising from the Court of Appeal judgment in *R (Mathialagan) v Southwark LBC* [2004] EWCA Civ 1689, [2005] RA 43 (see April 2005 *Legal Action* 12). The only other alternative will be judicial review where a number of difficulties are also likely to arise.

Once again, the High Court or county court will normally accept the liability order as validly issued and refuse to examine the grounds on which it was granted (although there are some indications in *Takavarasha* that a court might be willing to examine a claim where bona fide grounds of dispute arise).

Can the local authority prove it has obtained a liability order for Insolvency Act 1986 purposes?

Where the debtor has been unable to take any of these steps, the only other option will be to attend the bankruptcy hearing and put the local authority to proof about the existence of the liability order.

Indications that this may be a problem arise from the fact that the liability order may have been obtained months or even years before, with recent Divisional Court authority holding that the limitation period does not begin to run until the date that a demand notice is served (*Regentford Ltd v Thanet DC* [2004] EWHC 246 (Admin), 18 February 2004; April 2005 *Legal Action* 13). Furthermore, the computerised bulk summonsing procedures used by local authorities may not actually result in a hard copy of an individual formal order against the debtor signed or endorsed by a court. The most likely physical form of a document appears to be a summons list of names of debtors presented at a liability order hearing and signed by a magistrate and, in some cases, an electronic signature of stamp from the local authority is the only endorsement. This was an issue touched on by the Court of Appeal in *Mathialagan* in which Waller LJ

found '… it very surprising that the only document with a court stamp… [after a hearing] is not produced by the court, but is created automatically by the local authority's software, even though the local authority is a party to the proceedings' ([2005] RA 43, para 19).

That such issues have arisen in at least one case before the High Court was confirmed in a report by the Zacchaeus 2000 Trust, which provided McKenzie friend support to a pensioner with disabilities who was subject to bankruptcy proceedings by Camden LBC through the High Court in September 2005. Supported by a McKenzie friend, the debtor represented himself before the Bankruptcy Division of the High Court where proceedings were dismissed after three adjourned hearings where the local authority had either failed to produce relevant paper-work or establish that a liability order had been obtained as it had claimed.*

However, the possibility of a local authority making an error on the paperwork is hardly an adequate safeguard, particularly where the taxpayer may have received no notice of proceedings. Furthermore, the Court of Appeal has indicated in *Takavarasha* that in order to stand any chance of challenging a bankruptcy petition, the taxpayer ought to have some grounds to dispute the debt beyond never having received notice of liability order proceedings.

Furthermore, *Takavarasha* also hints at the possibility of there being grounds for judicial review where a local authority has acted unreasonably in pursuing bankruptcy. As yet untested arguments for resisting a bankruptcy order might include the application of the European doctrine of proportionality where the debt owed to the public authority is relatively small and the consequences severe, particularly in terms of disruption to family life (see *R (Stokes) v Gwent Magistrates' Court* [2001] JPN 766).

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CASE-LAW

Bankruptcy

■ Newham LBC v Takavarasha

[2005] EWCA Civ 850,
[2005] RVR 324,
17 June 2005

The appellant sought permission to appeal from an order dismissing his appeal against a bankruptcy order in respect of £2,752.64 owed in council tax. The council had obtained three liability orders against the applicant between 2001 and 2003. A statutory demand was served on the applicant in December 2003 but he took no action to set it aside. In April 2004, the council presented a bankruptcy petition to the High Court. In August 2004, the council reduced the amount to £1,998.77 in respect of a 25 per cent single person's discount.

At the hearing of the petition before the registrar, on 15 September 2004, the debtor arrived late at court by which time a bankruptcy order had been made in his absence. The applicant sought to appeal the order (as opposed to seeking a rehearing). His application was dismissed on 15 December 2004 by Nicholas Warren QC, then sitting as a deputy judge in the Chancery Division of Bankruptcy, and he sought leave to appeal from the Court of Appeal. He argued that an adjournment should have been granted and that at no stage had he seen the liability orders on which the petition was based.

The court (Chadwick LJ) refused leave to appeal. The court had to be satisfied that an important point of principle was involved to justify a second appeal. The question of whether the registrar should have adjourned the hearing on 15 September could have been addressed at the earlier appeal.

Regarding the liability orders, by 22 August 2004 the appellant was well aware that the local authority claimed it had obtained liability orders and he could have challenged proceedings either by:

■ Seeking out of time to set aside the statutory demand; or
■ Making it clear to the registrar that he disputed the liability orders.

Furthermore, the applicant had told the Court of Appeal that he was not denying owing council tax, only claiming that he had not seen the orders, which rendered his application purely technical. The underlying question for the registrar and the judge was whether there was a debt which was disputed on substantial grounds. There was no indication from the applicant whether such grounds existed or what they might be.

Regarding the intention to commence judicial review proceedings, the position was that the liability orders remained valid against the applicant until quashed. Assuming that the applicant succeeded in overcoming problems associated with delay in seeking judicial review, it might be that the court would quash the orders. If so, he would be entitled to make an application to annul the bankruptcy order. It would have been open to the judge to set aside the bankruptcy order on 15 December 2004 if he had been persuaded that there was a real dispute about the debt, but he had not been so convinced.

Regarding assertions made by the applicant about the behaviour of the council, the court considered:

That is not to suggest… that it would be acceptable for the council to behave in the way that Mr Takavarasha asserts that it has behaved: that is to say, to obtain liability orders behind his back and without telling him in order to store up a debt on which they could rely in order to bankrupt him in circumstances in which there was some form of personal vendetta stemming back to a period in which he had been employed by the council. Nor would it be acceptable for the council to treat him, as he asserts, in a way which differed from the way in which they would have treated somebody who was of white skin.

However, these were not matters which the Court of Appeal could investigate and adjudicate on in an appeal against a bankruptcy matter – the correct forum in which to litigate these points being judicial review or in the county court under the Race Relations Act 1976.

Comment: This decision illustrates the Kafkaesque difficulties facing a litigant in person where three complex areas of law – council tax enforcement, bankruptcy proceedings and civil procedure – become intertwined. However, it is useful for the light that it casts on the options which may be available to a taxpayer who becomes caught up in bankruptcy proceedings. Clearly, the Court of Appeal expects a debtor who disputes a council tax debt to make clear his/her objections at the earliest stage and to seek to set aside any statutory demand, even if out of time. It also emphasises the importance of a taxpayer putting forward any bona fide objection to liability or quantum

concerning the debt at the earliest stage; mere technicalities will not be of assistance.

Furthermore, although it was not a point taken during proceedings, it would appear that the council acted very late in the day in awarding a single person discount to the applicant. A similar case where a local authority had not established correctly the exact sum owing but, nonetheless, elected to pursue bankruptcy proceedings, might constitute grounds for complaint and review by the Local Government Ombudsman.

Right to a fair hearing

■ R (Aaalamini) v Thames Magistrates' Court

[2005] RVR 373

The applicant had a liability order for the sum of £970.16 in council tax due to Tower Hamlets LBC made against him in his absence by Thames Magistrates' Court. He maintained that he had received no notice of the hearing and that he had been prevented from telling the court he was exempt from tax.

Calvert-Smith J declined to grant judicial review. The applicant could have sought to set aside the liability order before the magistrates' court rather than seek judicial review. An alternative remedy was available and the local authority had stated that it was not prepared to enforce the order if an appeal for backdated benefit was lodged. The claimant was advised by the court 'as soon as possible to reinstate the case before the magistrates in any way he chooses'.

Comment: Judicial review is a discretionary remedy which may be refused where an alternative means of appeal exists. Unfortunately, following the decision of the Court of Appeal in *Mathialagan*, the power of justices to set aside a liability order in such a case is in some considerable doubt. Certainly, the Court of Appeal in *Mathialagan* endorsed the practice of reaching amicable settlements between local authorities and taxpayers in cases of dispute as being a sensible and preferred approach; the difficulties arise where no such settlement can be reached between the parties. This case waters down further what originally appeared to be an automatic right to set aside an order where notice of proceedings has not been received – as exists with other civil judgments in the High Court and county court.

Magistrates are also placed in a difficult position when faced with an application by a council taxpayer to quash a liability order. Whatever their decision on a set aside they may face an appeal, either from the debtor if they refuse to quash the order or by the local authority (citing *Mathialagan*) if they do. (For a fuller discussion see 'The magistrates' dilemma: Setting aside a liability order for local taxes' [2005] 169 JP 694).

Right to be heard

■ R (O'Connell) v Gosport BC

[2004] EWHC 3088 (Admin),
[2005] RVR 96

■ R (O'Connell) v Fareham Magistrates' Court and Gosport BC (interested party)

[2005] EWCA Civ 212,
[2005] RVR 373

The applicant sought judicial review of a decision of a magistrates' court to issue a liability order. The applicant objected to the liability order on the basis that a contractual obligation existed between the council and himself and that the local authority had failed to discharge its duties. He produced a written submission of 80 pages to this effect. On the morning of the hearing, the local authority produced a short written argument that the applicant was liable for council tax and had failed to pay. The district judge adjourned the case for two hours to enable the applicant to respond. The applicant left the courtroom and the liability order was issued in his absence. The district judge stated that he had read the whole of the council's case but not all of the applicant's material. The applicant sought judicial review against the exercise of discretion regarding the adjournment and then applied to the Court of Appeal claiming the right to a fair hearing had been breached.

The court (McCombe J) found no unfairness arising from the approach of the district judge in granting a short adjournment. The decision by magistrates to adjourn involved a discretion to be exercised with reference to all the circumstances. The district judge would have realised at a very early stage that the applicant's lengthy submission was irrelevant to the matter to be decided. Furthermore, the applicant had not given the judge any further opportunity to consider his defence through oral argument. Leave for judicial review was accordingly refused.

On appeal from the decision of McCombe J, the Court of Appeal (Sedley LJ) found no unfairness to the applicant. While the right to be heard was absolute, it had been necessary to look at relevant written arguments and establish what time and resources were necessary to resolve them. The district judge had identified the fundamental issue to be addressed in law – that the applicant had not paid his council tax and that he should be made to do so – and 95 per cent of the submissions of the applicant were irrelevant to the determination of that matter. Leave to appeal to the House of Lords was refused.

Comment: The idea that a contractual duty exists between a local authority and a taxpayer is a popular misconception of long-standing. In legal terms, the council tax is a rate arising from the setting of an amount in tax by a local authority needed for general expenditure, which is then apportioned among local inhabitants. Local taxation is a creature of statute and liability does not arise from common law principles of contract or from the provision of services.

The granting of an adjournment is often a crucial step in the determination of local tax proceedings as well as being a fundamental principle of natural justice. However, it is often only successful if the legal argument of the taxpayer arises from matters which can be the subject of an appeal before a valuation tribunal under either LGFA s16 (liability and calculations) or s24 (banding). The general importance of exercising the discretion to adjourn fairly to both parties in court proceedings was subject to a number of decisions in 2005, including *Commissioner of Metropolitan Police v Hooper* [2005] 1 WLR 1995 and *Jahree v State of Mauritius* [2005] 1 WLR 1952, and also in appeals before social security appeals tribunals (see Social Security Commissioners' decision: CIB/1009/2004).

Receipt of a summons proves service

■ R (Hunkins) v Coventry Magistrates' Court and Coventry City Council (interested party)

[2004] EWHC 3089 (Admin)

The applicant maintained that he had never been served with bills and reminder notices for council tax and knew nothing of proceedings. However, the council adduced evidence that the debtor had attended the council's offices before the hearing with a summons. The evidence of the local authority was not challenged as the applicant did not attend the hearing or provide any further explanation to the court.

The court (Munby J) dismissed the application. It accepted that obtaining a liability order against a person without notice of proceedings was a breach of natural justice. However, the facts that the applicant had attended the local authority's office with a summons and failed to provide any explanation to the court indicated that the applicant had been properly served with proceedings by post. As a result, the claim of breach of natural justice fell away. Permission for leave was refused.

Comment: Here the applicant seems to have laboured under the misapprehension that a claim that he had not received notice of proceedings would automatically entitle him to have the liability order quashed. As the court

stated, failure to receive a summons would provide grounds for judicial review of a liability order granted in absence, as indicated in the judgment of Hughes J, obiter, in *R (Lampkin) v Horseferry Road Magistrates' Court and Westminster City Council* (see below) and in earlier cases such as *R (Clark-Darby) v Highbury Corner Magistrates' Court* [2002] RVR 35, where it was held that a person was entitled to have a liability order, of which s/he had not had proper notice, set aside as of right.

However, in *Aaalamini*, relief by way of judicial review may be declined where an alternative remedy is available. This lack of an automatic right reflects the lack of comprehensive rules governing civil proceedings, in particular anything for magistrates' courts equivalent to the set aside powers available under Civil Procedure Rule 39.3, a point remarked on by Waller LJ in *Mathialagan*. In this case the applicant's claim was undermined by unchallenged evidence that he had received notice of proceedings and, therefore, no breach of natural justice could be sustained.

Judicial review of liability orders

■ R (Lampkin) v Horseferry Road Magistrates' Court and Westminster City Council

[2005] EWHC 312 (Admin)

The applicant sought to quash 11 liability orders for non-domestic rates obtained on three sets of premises between December 1999 and June 2002. A succession of letters were sent to the applicant at various addresses with which he had a connection but to which he did not respond. Finally, on 29 March 2004, the applicant was served with a statutory demand by which the total sum owing was over £102,000.

On 14 September 2004, the applicant sought judicial review to quash the liability orders. He maintained that he had been in ignorance of the rates demands on the properties and had not received notice of proceedings, having been in Spain at various material times. In its submissions, the local authority adduced evidence in the form of leases, VAT returns and other records which it argued showed that the applicant had been in rateable occupation in the relevant periods.

The court (Hughes J) dealt with the question of leave and the substantial argument at the same hearing. The court considered that the liability orders had been lawfully made and declined to grant relief to the applicant. The applicant was out of time in respect to challenging the orders, having delayed contacting the local authority and lodging proceedings. In judicial review, strict compliance with the time limits was to be expected and delay by legal advisers was not an acceptable reason for failure to act expeditiously. Furthermore, material clearly existed which strongly suggested that the applicant had been in rateable occupation at material times. The very clear pattern of letters, demands and summonses was established, every one of which was ignored. The court found that the applicant's claim never to have received any of them was implausible. This did not provide a discretionary basis for granting judicial review.

Comment: It was hardly surprising that this application failed. As with so many challenges in the High Court over liability orders, this was a case of 'too little, too late' in a less than meritorious application.

Costs against justices and tribunals

■ R (Davies) (No 2) v HM Deputy Coroner for Birmingham

[2004] EWCA Civ 207,
[2004] 3 All ER 543

The claimant sought judicial review of a deputy coroner's verdict. The judge found in favour of the coroner according to the law at the time. The claimant appealed, by which time the law had moved on, and she was successful. The deputy coroner elected to appear at the appeal. The appeal was successful leading the claimant to seek costs for both the earlier hearing and the appeal. The deputy coroner argued that there should be no costs order for either hearing.

The Court of Appeal (Brooke, Longmore LJJ and Sir Martin Nourse) undertook an extensive review of the history of costs against justices and tribunals. The court considered that the deputy coroner should not have to pay the costs of the appeal below, but did have to pay the costs of the present hearing. The claimant had been legally aided and the deputy coroner had elected to appear and had lost. As a consequence he had to pay the costs of the present hearing.

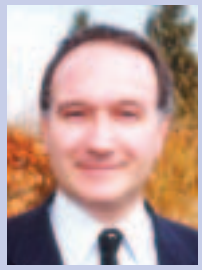
Distilling the principles from the authorities, developments such as the Human Rights Act 1998 and a growing number of unfounded High Court challenges, the Court of Appeal confirmed that when an inferior court or tribunal actively resisted proceedings by appearing, and was unsuccessful, it should become liable for costs following the event. If, however, it appeared in proceedings simply to assist the court in a neutral or amicus curiae role, then it would not ordinarily be liable and no order for costs would be made either for or against it. Inferior courts and tribunals remained liable where they behaved improperly, whether they appeared in proceedings or not. However, an award is only likely in a flagrant instance or where a party unreasonably declines to sign a consent order.

The court considered that there would be situations where it was right to exercise its discretion to award costs against a court or a tribunal. The prerequisites would be:

- That a party had to finance his/her own litigation without a source of external funds;
- That it would not be right to put the party to irrecoverable expense where a tribunal or inferior court had gone wrong in law; and
- That there was no other obvious candidate to pay the costs.

Comment: The last major review of this area was in *R v Newcastle-under-Lyme Justices ex p Massey* [1995] 1 All ER 120, which arose from the committal of a debtor for community charge. This case consolidates a number of decisions since and will govern awards of costs in local taxation cases where an unfounded litigant challenges a decision of a magistrates' court or a valuation tribunal. However, it will not apply where a local authority is a party to proceedings and the normal rule that costs will follow the event will apply.

* The author would like to thank the Rev Paul Nicolson of the Zacchaeus 2000 Trust for information on this case.



Alan Murdie is a barrister, who co-founded the Poll Tax Legal Group in 1990. He has been involved with many test cases concerning the community charge and has wide experience of liability order applications in the magistrates' courts. He is co-author, together with Ian Wise, of *Enforcement of local taxation: an advisers' guide to non-payment of council tax and the poll tax*, LAG, 2000, £15.

Seclusion before and after *Munjaz*

Saimo Chahal considers the wide-ranging implications of the House of Lords' judgment in *R v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex p Munjaz* [2005] UKHL 58, and discusses whether it represents a 'set-back for a modern and just mental health law' (per Lord Steyn), or much needed clarification '[allowing] hospital managers to give guidance on the care of patients for whom following the code is not appropriate'.[1] There can, however, be no dispute that the decision has given rise to a much needed debate on the ethics of seclusion, its necessity, and the safeguards required, as well as the dangers arising from its use.

Background

Seclusion has a long and ignominious history spanning over 150 years. There are two distinct views on the use of seclusion from:

- those who consider it to be a necessary and effective management tool for severely mentally disordered and dangerous patients; and
- those who view it as an outdated and degrading practice which should not be countenanced in an era where human rights are of prime concern.

History

In 1843, the Lunacy Commission noted that seclusion or solitary confinement was '[becoming generally used] in the treatment of the insane', most probably because of the widespread reduction in the use of mechanical restraint. It is noteworthy that, in 1858, the commission considered seclusion to be the compulsory isolation, during the daytime, of a patient confined in a room and separated from others. Patients were locked up at night anyway. In 1901, the commission's definition of seclusion was that a patient is confined to enforced isolation between 7 am and 7 pm.

By 1980, the government had introduced a policy to specify that the criteria for using seclusion were for the patient's safety and for the safety of others. This policy forms the basis of current thinking that seclusion should not be used as a punitive measure.[2]

What is seclusion?

The *Code of practice* to the Mental Health Act (MHA) 1983 defines seclusion as:

> *... the supervised confinement of a patient in a room, which may be locked to protect others from significant harm. Its sole aim is to contain severely disturbed behaviour which is likely to cause harm to others* (para 19.16).[3]

The guidance goes on to state that seclusion should be used:

- as a last resort; and
- for the shortest possible time.

The circumstances in which seclusion should not be used are:

- as a punishment or threat;
- as part of a treatment programme;
- because of a shortage of staff; or
- where there is any risk of suicide or self-harm.

The *Code of practice* deals with the necessity for clear, written guidelines on the use of seclusion, seclusion procedure, the need for regular reviews and the minimum requirements of the seclusion room. The code also covers the need for detailed and contemporaneous records to be kept in the patient's case notes of any use of seclusion and the reasons for it, as well as a step-by-step account of the seclusion procedure.

The *Code of practice* does not address issues about long-term seclusion. It ends with the statement that a multidisciplinary review should be completed by a consultant, or other senior professionals who were not involved in the incident which led to the seclusion, if the seclusion continues for more than eight hours consecutively or 12 hours intermittently over a period of 48 hours. The reader might be forgiven for thinking that, at worst, the power would be used to address a short-term or intermittent risk.

In *Munjaz*, the *Code of practice*'s failure to deal with longer term seclusion was cited as a shortcoming in that the *Code* was directed to the generality of mental hospitals and did not address the special problems of high security hospitals 'containing as they inevitably do the most potentially dangerous patients in the country' (per Lord Bingham).

What does seclusion mean in practice?

There are two recent and important pieces of research reviewing seclusion practices and policies in high security hospitals and medium secure units in England, Scotland and Wales for people with serious mental illnesses which indicate a fairly widespread use of seclusion.[4]

In addition, there are the findings of the Mental Health Act Commission (MHAC), which carried out a census in 2005 and noted significant rates of seclusion, particularly for black patients.[5] The Healthcare Commission's national audit of psychiatric facilities also found that approximately one-third of the 239 units audited, claimed that they used seclusion.[6]

The MHAC raises several areas of concern about the use of seclusion and makes a number of recommendations, such as the need for regulation of seclusion, and for its practice to be identified as a managerial intervention rather than an aspect of clinical treatment. Another recommendation is that services using seclusion or isolation should review their facilities and procedures, and audit incidents to ensure that patients' rights to privacy and dignity are not compromised unecessarily.[7]

Patient A: Rampton Hospital

A stated that he became unsettled because of concerns about the possibility of his case being reviewed and the threat of a return to prison. A asked to go into seclusion as he felt he was struggling to cope, needed time out and was becoming increasingly aggressive. The seclusion room was bare; it measured 12ft x 12ft and contained a mattress, a strong blanket and strong clothing for A. There was a toilet, sink and shower in an adjacent room, but this was kept locked.

On the second day of seclusion, A asked to use the toilet and shower but was refused access. A was advised that he had to use containers to relieve himself; these were then passed through a hatch which was also used to give him food and water. During seclusion, A was given finger food to eat, but had no opportunity to wash his hands after urinating and defecating in the containers provided. A asked if he could telephone his solicitor to tell her that he had been secluded but he was refused access to the telephone. A felt humiliated and degraded.

Examples of seclusion

It is commonplace for patients in high security hospitals to report that they have been placed in seclusion at some point. What is disturbing is the length of time which some patients have spent, or are spending, detained in this way. The reasons for, and the conditions of, seclusion can raise significant issues of concern pointing to human rights violations (see boxes for examples).

Patient B: Ashworth Hospital

B is detained in Ashworth Hospital. B had made threats to kill another patient on the same ward. He subsequently also made threats against his responsible medical officer (RMO). B has been in seclusion for over nine months. He refuses to take medication because of a history of undergoing catatonic seizures with psychotropic medication. However, B has stated that he would like to move to another ward, and to the care of a different RMO whom he trusts and with whom he enjoyed a good relationship in the past. These requests have been consistently refused. B is given some association time at the discretion of the clinical team. There is no end in sight to the determination of seclusion for B as he continues to make threats against the other patient and his RMO, although he states that he will not carry out his threats against the RMO. B feels that he is being punished by his RMO for the nasty things he has said about her.

B's case is by no means an example of the longest period that a patient has spent in seclusion. Ashworth Hospital has patients who have been in seclusion for two to three years at a stretch. It is patently absurd to suggest that there is a therapeutic benefit in these sorts of cases. It must also be highly questionable as to whether all alternatives have been fully explored and about the adequacy of any care planning in these circumstances.

Recent research

Recent research shows that there is no clear answer concerning whether seclusion is a valid therapeutic intervention, or merely a method of containment or a psychiatric emergency or a form of punishment. Furthermore, the effect of seclusion on the frequency of aggressive incidents is not known. The research also shows that the least restrictive principle is inconsistently used and creative alternatives to confinement are not always employed. Few other forms of treatment apply to patients with various psychiatric diagnoses, which are so lacking in basic information about their proper use and efficacy.[8]

It is well-established and understandable that patients who have been secluded look on the experience as a punishment and as a way of maintaining control. Patients experience a sense of fear, and feelings of being bad, of being vulnerable and of being punished. Patients are more likely to be secluded for physical aggression towards staff than towards fellow patients, black people are more likely to be secluded than white people, and females are more likely to be secluded than males.[9]

How does *Munjaz* fit into current practice?

Mr Munjaz was admitted to prison, transferred to a medium secure unit and then to Ashworth on 1 March 1994.

In the proceedings, he originally complained of four periods of seclusion during 2001 and 2002. The longest period of seclusion lasted for 18 days and the shortest for four days. However, these complaints were not pursued in the proceedings. The claim related solely to the lawfulness of Ashworth's seclusion policy and whether its departure from the MHA *Code of practice* could be justified.

The MHA *Code of practice*: instruction or guidance?

The secretary of state issued the *Code of practice* under MHA s118(1). The code's status was much debated in *Munjaz*, not least because the secretary of state decided to disown it. By a majority of three, the Law Lords found that the code was not binding.

It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so (per Lord Bingham para 21).

Ashworth's policy – which departed from the *Code of practice* – was found to exhibit the necessary 'cogent reasons' for deviating from it.

Following judgment in *Munjaz*, on 13 October 2005, MIND issued a hard-hitting press release in defence of the *Code of practice*. MIND argued that Lord Bingham and his supporters had 'sold the rights of individual patients down the river to protect the "authority" of the local manager'. MIND said that the judgment would make it impossible to regulate the care and treatment of people in the most vulnerable positions, and called for a change in the law. The MHAC has also been highly critical of *Munjaz*.

The European Convention on Human Rights and articles 3, 5 and 8

The Lords dealt with the European Convention on Human Rights ('the convention') quite shortly. The NHS Trust must not subject patients at Ashworth to treatment which is inhuman or degrading. The majority of the Lords said that there was no evidence that Ashworth had done so and, indeed, this was not suggested. Furthermore, the trust must not adopt a policy which exposes patients to a significant risk of treatment prohibited by article 3 (prohibition on inhuman and degrading punishment).

In relation to the applicability or breach of article 5 (right to liberty), this issue was first raised in the Court of Appeal. Lord Bingham said that article 5(4) would provide a successful challenge to an unlawful detention, but not to an order that the conditions of detention be varied. Lord Steyn argued that a period of seclusion involving total deprivation of any residual liberty was capable of amounting to an unjustified deprivation of liberty. The majority of the Lords disagreed.

Regarding article 8 (right to privacy), again, the majority view questioned whether article 8 was engaged given that the appeal was directed to the issue of the compatibility of Ashworth's policy with the convention. Lord Bingham went on to say, however, that if there was an interference under article 8(1), it was justified under article 8(2): seclusion was plainly necessary for the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. The use of seclusion was not disproportionate.

Comment: It is a shame that the case before the Lords was not the best of its sort on the facts. There are many more gross and serious examples of the use and abuse of seclusion which could have painted a more vivid picture for the Lords. It follows that the discussion about whether there was a violation of articles 3, 5 and 8 of the convention was extremely brief. This approach is at odds with the seriousness of the subject matter, which deals with the deprivation of fundamental rights and freedoms, not least in a case that reached the highest court in the UK on a public interest basis.

The status given to the MHA *Code of practice* has raised serious questions about the purpose of such codes. There is now urgent discussion about the *Code of practice* due to be issued under the Mental Capacity Act 2005. It has hitherto been assumed that, in general, the *Code of practice* (and, therefore, the policies devised in line with it) would be convention-compliant. It is now a

free-for-all with hospitals and trusts devising their own policies and taking their chances with the law.

What is most disappointing about *Munjaz* is that the case adjudicated on by the House of Lords does not even begin to address the everyday problems and concerns which lawyers and clinicians face when dealing with clients in long-term seclusion. Given that reform of the MHA is now firmly on the political backburner, there are potentially two routes forward. The first is to bring a case with more solid and compelling factual circumstances and seek to distinguish it from *Munjaz*. The second is to consider taking a challenge direct to the European Court of Human Rights on the ground that domestic remedies have already been exhausted. Either way, *Munjaz* is unlikely to be the last word on seclusion: a practice with origins in Victorian institutions could not be more destined for a clash with the human rights values of the 21st century.

1 Francis Lyons, '*Munjaz* decision', SJ 4 November 2005, p1306.
2 The Mental Health Act Commission, *In place of fear? Eleventh biennial report 2003–2005*, paras 4.224–226, available at: www.mhac.org.uk and from TSO, £25.
3 Department of Health and Welsh Office, *Code of practice Mental Health Act 1983. Published March 1999, pursuant to section 118 of the Act*, available at: www.dh.gov.uk/assetRoot/04/07/49/61/04074961.pdf and from TSO.
4 The two pieces of research are 'Research in brief', *Journal of Psychiatry and Mental Health Nursing*, 2005, 12, 380-382 by Steve Tilley and Mary Chambers and E Sailas and M Fenton, 'Seclusion and restraint for people with serious mental illness (Cochrane Review)', *The Cochrane Collaboration* (first version published 24 January 2000, reissued 2005). See: www.thecochranelibrary.com
5 *Count me in. Results of a national census of inpatients in mental health hospitals and facilities in England and Wales*, November 2005, available at: www.mhac.org.uk/census2006/docs/FINAL_web_pdf_censusreport_5th_1-0.pdf.
6 *The national audit of violence* (2003–2005) Final report, May 2005, p48, available at: www.healthcarecommission.org.uk/assetRoot/04/01/74/51/04017451.pdf.
7 See note 2, recommendations 43, 44 and 48.
8 E Sailas and M Fenton, note 4, p2.
9 Steve Tilley and Mary Chambers, note 4.

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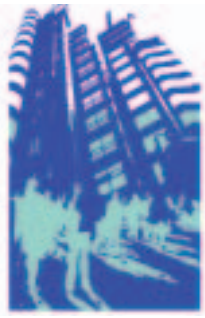
Owner-occupiers law review



In this annual review, Derek McConnell looks at the changes and developments in the law relating to owner occupation. Readers are invited to send relevant case notes to LAG or direct to the author.

POLICY AND LEGISLATION

Repossession statistics

In the second half of 2005, members of the Council of Mortgage Lenders (CML) repossessed 5,630 properties. This was 22 per cent higher than the 4,620 in the first half of 2005. The total number of repossessions in 2005 was 10,250, which was 70 per cent higher than in 2004. The CML, however, anticipates that the number of repossessions will increase to 12,000 in bot 2006 and 2007: CML press release, 3 February 2006.

Figures released by the Department for Constitutional Affairs (DCA) show that, in 2005, 115,352 mortgage possession actions were commenced in England and Wales resulting in 70,844 possession orders (including suspended orders) being made. The figures for 2004 were 77,856 and 46,409 respectively: DCA press release, 3 February 2006.

In February 2006, the CML issued its half-yearly report, *CML repossession risk review*, 'as part of the sustainable home-ownership initiative'. This contains fascinating data and insight into the CML's thinking on repossessions including observations such as: 'Rising house prices are an important protection against possession. They allow scope for lenient arrears management policies and provide equity for borrowers with problems to trade down or change tenure rather than face possession.'[1]

Consumer Credit Bill

On 18 May 2005, the Consumer Credit Bill, which had not been passed in the 2004/5 session of parliament, was reintroduced in the House of Commons. It has now completed its report stage in the House of Lords and is expected to come into effect in the spring. It contains significant amendments to the Consumer Credit Act (CCA) 1974. These include removing the £25,000 limit for regulated agreements, increasing the opportunities for a borrower to seek a Time Order and repeal and replacement of the 'extortionate credit bargain' provisions by allowing the county court to intervene where it is considered that the relationship between the lender and borrower has become 'unfair'.[2] See also Frances Ratcliffe 'Tinkering with time orders' September 2005, *Legal Action* 6.

Civil Procedure Rules changes

The 40th update to the Civil Procedure Rules (CPR) has amended Practice Direction (PO) 55 in relation to the information which lenders are required to provide concerning mortgage arrears when issuing possession proceedings. PD 55 2.5(3)(a) now only requires lenders to specify, in schedule form, the dates and amounts of all payments due under the mortgage arrangement or mortgage deed for a period of two years preceding the date of issue rather than, as before, the whole period during which there were arrears.

New CPR 55.10A also allows for the electronic issue of certain mortgage possession claims. The claims must be brought solely on the basis of default in the payment of sums due under a mortgage and cannot include a claim for any remedy except for payment of money due under a mortgage, interest and costs. The 'possession claims online' facility, which will be accessible via the Court Service website, will also allow for the filing of defences, the issuing of warrants as

'Rising house prices are an important protection against possession. They allow scope for lenient arrears management policies and provide equity for borrowers with problems to trade down or change tenure rather than face possession.'

Commission (LSC) statutory charge may be deferred (see Civil Legal Aid (General) (Amendment No 2) Regulations 2005 SI No 1802). A new reg 96A is inserted into Civil Legal Aid (General) Regulations 1989 SI No 339. The LSC may now only defer enforcement of the charge if it appears to the commission that it would be unreasonable for the assisted person to repay the amount of the charge. New reg 96B(1) enables the LSC to review any decision to defer enforcement at any time and again, unless it appears to the LSC that it would be unreasonable for the assisted person to repay the amount of the charge, it shall proceed to enforce the charge. Regulation 96B(2) provides that if the LSC continues to defer enforcement of the charge, it may also do so on such terms and conditions about repayment of the amount of the charge by way of interim payments of either capital or interest or both, as appears to the commission to be appropriate.

Right to buy

Housing Act (HA) 2004 s189 inserts new s121AA and 121B into the HA 1985, revising the duty on a landlord of a secure tenant to advise the tenant about the provisions of the 'right to buy' legislation. Such a landlord is now obliged to provide its secure tenants with a document containing information on the matters (and restricted to those matters) specified by the secretary of state.

With effect from 26 July 2005, the landlord is obliged to provide each of its new secure tenants with a copy of the document when the tenancy is signed for. The landlord must also supply to all its secure tenants, at least every five years, a copy of the document (see Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005 SI No 1735).

The document must contain prescribed information concerning when the right might be exercised, the procedure and a number of other issues relevant to the right to buy. The document must also alert the tenant to the fact that, as an owner, s/he will probably have to make regular payments such as mortgage payments and insurance premiums and that s/he is at risk of eviction if mortgage payments are not met.

ODPM guidance

With effect from 21 March 2005, the Office of the Deputy Prime Minister (ODPM) has issued revised general consents for local authorities to dispose of properties and land owned by them. The new guidance is entitled *The general housing consents 2005: section 32 of the Housing Act 1985*.[4] The consents are broken into eight sections and cover disposal of dwelling houses under the right to buy provisions of the HA 1985, including disposals of properties to tenants wishing to share with people who do not reside in the dwelling or who are not family members, disposals on shared ownership terms, the sale of land and vacant dwellings (to be demolished without being used for housing accommodation) and the sale of reversionary interests in houses and flats.

On 21 November 2005, the ODPM issued its *Mortgage sales guidance for local authorities and registered social landlords*.[5] The Regulatory Reform (Housing Assistance) (England and Wales) Order 2002 SI No 1860 created, with effect from July 2003, a new framework for local housing authorities to provide financial and other assistance for home repair and improvement. This guidance sets out the procedures which must be adopted by both local housing authorities and registered social landlords (RSLs) when providing mortgage finance. Local authorities' and RSLs' lending, by way of first mortgage on people's homes, are exempt from regulation under the Financial Services and Markets Act 2000 on the basis that a comparable quality of service is provided to their borrowers. This guidance sets out the requirements to ensure that this occurs. It regulates all aspects of the loan covering the initial application stage as well as issues arising after the loan has been completed, including where a borrower has financial difficulties. The guidance, in many respects, is similar in style to the Financial Services Authority's *Mortgage: Conduct of business sourcebook*.

Recent publications

The Joseph Rowntree Foundation has published a useful report: *Lending to higher risk borrowers: Sub-prime credit and sustainable home ownership* by Moira Munro, Janet Ford, Chris Leishman and Noah Karley. It investigates the emergence of 'sub-prime' lending to those who find it difficult or impossible to access mainstream mortgage finance and considers its implications for sustainable home ownership.[6]

CASE-LAW

Mortgage possession proceedings

■ Paragon Finance plc v Pender

[2005] EWCA Civ 760

In 1989, the defendants obtained from the claimants a secured loan to undertake repairs and improvements. In 1990, the lender varied the mortgage conditions allowing the claimant to change the interest rate from time to time. The claimant subsequently transferred its mortgage portfolio to a 'special purchase vehicle' (SPV) in accordance with a 'securitisation' arrangement entered into in 1987 in consideration for a sum which was funded by the SPV's issue of listed bonds carrying an entitlement to interest at a floating rate. The transfer of the legal charge from the claimant to the SPV was left uncompleted. The claimant took possession proceedings when the defendants fell into arrears.

Dismissing the borrowers' appeal, it was held that the right to possession conferred by the legal charge remained exercisable by the claimant as legal owner of the charge. The SPV had acquired an equitable title to the legal charge. The claimant had not breached its implied obligation not to exercise its power to vary the interest rate improperly or capriciously: *Paragon Finance plc v Nash and Staunton* [2002] 2 All ER 248 considered.

There was no evidence that when the legal charge was granted the securitisation arrangements were in place, which had the effect of qualifying the claimant's unqualified power to vary interest rates by imposing a maximum rate. Accordingly the allegation of failure to disclose the existence of that qualification at that date had not been made out on the facts. In any event such a failure, had it occurred, would not in itself have rendered the bargain an extortionate credit bargain within the meaning of CCA s138: *Broadwick Financial Services Ltd v Spencer* [2002] All ER (D) 274 considered.

Undue influence and misrepresentation

In *Royal Bank of Scotland plc v Etridge* (No 2) [2001] UKHL 44; [2001] 4 All ER 449, the House of Lords revisited the question of when an occupier can apply to the court to set aside a transaction giving security for another person's debts because of undue influence or misrepresentation. However, the issue of undue influence can also apply in respect of lifetime gifts.

■ Humphreys v Humphreys

[2004] WTLR 1425,
LS Gaz 10 March 2005, p26

The claimant exercised her 'right to buy' in 1989 at a 60 per cent discount. She was 64 years old and had difficulty reading anything complicated and was hard of hearing. The claimant and her son, who lived with her, went to a solicitor's office to sign the transfer deed and a legal charge. The purchase monies were all borrowed from a building society. The son and the solicitor spoke to each other but the claimant had no idea what was going on. On the same day as the purchase, the claimant executed a trust deed as her son had assumed responsibility for the mortgage payments. The trust deed provided that the

proceeds of any sale would be held for the son absolutely and that any sale would require the consent of both mother and son. The son paid the mortgage payments until 1994 and, after that, mortgage interest was paid by social security. In 2002, the claimant applied to have the trust deed set aside on the basis of the son's undue influence.

Setting aside the trust deed, it was held that the presumption of undue influence arose. The claimant had put trust in her son. The onus was on the son to prove that his mother had entered into the transaction with a full understanding of its implications and that the claimant had not had any legal advice about the documentation. There was no defence under Limitation Act (LA) 1980 or on the basis of equitable laches. So long as the undue influence persists, claims can be brought whatever the period since the transaction. However, once the complainant is no longer under the defendant's influence, a claim to set aside the transaction must be brought within a reasonable time or a defence based on laches will be available.

The claimant had not had a copy of the trust deed until 1998 and was, accordingly, unable to obtain legal advice until then. During the following four years, the claimant had maintained her challenge to the trust deed and her son had not been prejudiced by that further delay. Once the trust deed was set aside it was necessary to establish the extent of the parties' interests in the property. The claimant held the property on constructive trust for herself and her son. On the facts the key factor was the parties' contribution to the purchase price and this was assessed as 60:40.

In 'assisted' right to buy cases the court identified some issues which should be considered:

- Where there are several children it is preferable to see whether any others are willing to assume joint responsibility for the mortgage payments.
- A forfeiture provision should be included in a trust deed providing that, in the event of any forced sale by a lender, the person paying the mortgage should forfeit his/her interest.
- The trust deed should include express maintenance and repairing obligations.
- Consideration should also be given about whether a substitute property might be bought and, if so, the mechanics for that, and also whether the tenant exercising the right to buy should be entitled to retain at least part of the discount.

Beneficial interests

The courts continue to have to adjudicate on what, if any, beneficial interest a person may have in a property where at the outset, when the property was acquired, no trust deed was signed nor any other declaration about the person's share of the property's value expressed. In ***Stack v Dowden*** [2005] EWCA Civ 857, two unmarried partners purchased a home in joint names but there was no declaration of the trusts on which the proceeds of sale were to be held. In reviewing the authorities and, in particular, *Oxley v Hiscock* [2004] EWCA Civ 546, the court concluded that where a relationship-shared home is purchased in joint names, there must be clear evidence from which to infer a common intention communicated to each other of an intention that each should have a beneficial interest.

In *Oxley*, the court accepted that where a property is purchased as a home for the couple to live in, and each has made some financial contribution towards the purchase, and where the property is acquired in the sole name of one of them, and there is no express declaration of trust, a common intention to create a constructive trust may be readily inferred. In terms of quantification of the size of a person's beneficial interest, the court approved the observations in *Oxley* to the effect that each member of the couple is entitled, not by reference to some imagined agreement between the parties about shares, but on what the court considers fair having regard to 'the whole course of dealing between them in relation to the property'. In that context this includes the arrangements that they made from time to time in order to meet the outgoings (mortgage contributions, council tax and utilities, repairs, insurance and housekeeping), which had to be met if the couple were to live in the property.[7]

Mortgage lender's duty on sale

Bradford & Bingley plc v Ross

[2005] EWCA Civ 394

The lender issued proceedings for recovery of a shortfall on sale of the security. On appeal, the defendant argued that evidence had come to light which showed that the lender had sold the property to a connected company and that the claimant had failed to disclose this to the trial judge.

Allowing the appeal, it was held that there is no hard-and-fast rule that a lender might not sell a property to a company in which it had an interest. However, the party seeking to uphold such a transaction had to show that it was in good faith, and that reasonable precautions had been taken to show that it had attained the best price reasonably obtainable at the time of sale.

Meretz Investments NV and another v ACP Ltd and others

[2006] EWHC 74 (Ch)

The claimants issued proceedings seeking to set aside a sale by a mortgage lender on the basis that the power of sale had been exercised in bad faith. It was held that in considering whether a lender had a 'purity of purpose', a dissection of the lender's motives was likely to be difficult in practice. A power of sale was only improperly exercised if it was not part of the lender's purpose to recover the debt secured by the mortgage. Where, however, a lender had mixed motives or purposes, one of which was a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage, then its exercise of the power of sale would not be invalidated on that ground.

Negligence

Woolwich plc v Jones-Dunross and another

[2005] EWHC 1488 (Ch)

A husband forged his wife's signature on a transfer deed which was simultaneously charged to the claimant. The claimant's charge substituted a prior mortgage in favour of Abbey National. In possession proceedings the claimant accepted that its mortgage was ineffective against the wife but succeeded in a claim to be subrogated to the earlier charge in favour of Abbey National and to have an equitable charge on the husband's beneficial

interest. The wife issued Part 20 proceedings against the solicitors who had acted on the transfer and remortgage to the claimant, claiming negligence.

Dismissing the Part 20 claim, it was held that the solicitors owed the wife no duty of care as they had not acted for her, had no reason to believe that her signature had been forged and, in any event, the transaction had not caused her any loss as the claimant's mortgage had been ineffective against her. She could not claim in respect of a loss of the opportunity of claiming a transfer of the husband's beneficial interest in ancillary proceedings because such proceedings had not been in contemplation at the time of the transfer and remortgage.

Limitation

■ West Bromwich Building Society v Wilkinson and another

[2005] UKHL 44[8]

In October 1988, the defendants purchased a house with an advance from the claimant secured on the property. Only two payments were made and, in July 1989, an order for possession was obtained and executed in October 1989. On 14 November 1990, the property was sold at a shortfall. On 12 November 2002, the claimants issued proceedings for a money judgment for the shortfall. The defence asserted that the claimant's cause of action arose when there was default in paying the instalments and that, accordingly, the claim was statute barred. The county court judge gave summary judgment for the claimant.

Allowing the defendants' appeal, the Court of Appeal followed *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181; [2002] 4 All ER 544, and held that a covenant to repay the principal sum was to be implied into the legal charge along with a term that the claimant would not enforce its rights for as long as there was no default. However, in the event of default, the whole of the balance of the advance would be immediately repayable. The cause of action, that is the right to receive the monies due out of the sale of the security, arose in July 1989 and the claim was accordingly statute barred.

On appeal, the House of Lords rejected the lender's argument that LA s20 had no application because at the time the action was brought the money was not secured by a mortgage, the deed having been cancelled on the sale of the security. The claimant had merely a personal claim. As the mortgage was a deed the relevant limitation deed was LA s8, namely the expiration of 12 years from when the cause of action accrued, ie, the date of sale. The fact that at some point previously there had been a right to receive monies under s20 was irrelevant. The House of Lords rejected the argument, as this would have resulted in lenders being able to stop time running for limitation purposes by the act of sale. Section 20 did not cease to apply when the security was realised. The Court of Appeal decision in *Bartlett* was correctly decided.

Wilkinson clearly shows how important it is now for advisers to read the mortgage deed in any shortfall case to identify when the lender's cause of action arose.

Advisers will wish to consider carefully the case of ***Bradford & Bingley plc v Rashid*** [2005] EWCA Civ 1080 for what it says about without prejudice negotiations in mortgage shortfall cases. The defendant fell into arrears with his last payment being made on 3 January 1991. The claimant obtained possession and sold the security in October 1991 with a shortfall of a little over £15,500.

On 17 June 2003, proceedings were issued for payment of the shortfall and interest. The defendant asserted that the debt was statute barred in that the proceedings were issued more than 12 years from the date when the defendant had made his last payment. The claimant in turn relied on two letters, which had been written in September and October 2001 by an advice agency to the claimant on behalf of the defendant. It was claimed that these letters amounted to acknowledgments of the debt under LA s30. It was argued that these letters needed to be seen in context. In June 1994, shortly after the claimant had discovered the defendant's whereabouts, it had written to the defendant inviting him to enter into discussions about how the shortfall may be paid. The letter said: 'It is appreciated that you may well be unable to clear this shortfall in one payment but if you are able to do so, the Society may be prepared to waive a proportion of the shortfall as an incentive to adopting this course of action.' In the September 2001 letter the advice centre wrote to the claimant enclosing a financial statement claiming:

that at present, he is not in a position to repay the outstanding balance, owed to you. However, my client requests that once his financial situation is stable he will start to repay. This could be in … 2003/04.

The October 2001 letter said that '[The defendant] is willing to pay approximately £500 towards the outstanding amount as a final settlement.' Neither of the two letters was headed 'without prejudice'.

The Court of Appeal dismissed the claimant's appeal. The court accepted that letters need not be headed 'without prejudice' to be treated as inadmissible, based on the rule that gives the protection of privilege to without prejudice communications. The court approved the observation in *Rush & Tompkins v Greater London Council* [1989] AC 1280, p1299D:

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence … However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.

The Court of Appeal held that the two letters had to be considered in the context of the claimant's letter of June 1994, in which the claimant offered to negotiate to accept a lesser sum than was owed. In the September 2001 letter, the defendant was negotiating for some forbearance and seeking an agreement that the claimant should delay proceedings. The October 2001 letter was a clear offer to settle the claim albeit with a small sum on offer. In the event the claimant's appeal was dismissed on the privilege point in that the two letters were inadmissible and the court did not have to go on to consider whether the two letters did amount to an acknowledgment.

1 See: www.cml.org.uk/cml/media/mcomm/repossession.
2 The bill and associated background materials can be found at: www.dti.gov.uk/ccp/creditbill/keydocs.htm.
3 See: www.hmcourts-service.gov.uk/cms/2554.htm.
4 Available at: www.odpm.gov.uk/index.asp?id=1153643.
5 Available at: www.odpm.gov.uk/index.asp?id=1161631.
6 May 2005, £12.95.
7 See also 'Resulting and constructive trusts of land: The mist descends and rises' [2005] Conv 79.
8 See T Prime, 'Mortgage default, limitation and law reform' [2005] Conv 566.

Derek McConnell is a solicitor with SouthWestLaw in Bristol and co-author of *Defending Possession Proceedings* (6th edn, LAG, available in June 2006, £48). To pre-order see page 38 of this issue.

Police misconduct and the law

Stephen Cragg, **Tony Murphy** and **Heather Williams** continue their six-monthly review of developments in police misconduct law.

POLICY AND LEGISLATION

Amendments to powers of arrest under Police and Criminal Evidence Act 1984

All arrests made after midnight on 31 December 2005 are now governed by Police and Criminal Evidence Act (PACE) 1984 ss24 and 24A, as amended by Serious Organised Crime and Police Act (SOCA) 2005 s110(1). This includes arrests made in relation to events that occurred before that date. In 'Arresting developments: increased police powers of arrest', January 2006 *Legal Action* 24, Ed Cape explained the new powers in detail. Since his article was published, Code G, the new code of practice with a statutory power of arrest by police officers has been finalised.[1] (See also page 10 of this issue.)

Comment: It is a matter of real concern that there is now no form of 'seriousness threshold' to be met before a constable (as opposed to a Community Support Officer) can make an arrest.[2] The old arrest conditions have also been considerably diluted by the addition of such vague conditions as 'to allow the prompt and effective investigation of the offence'.

The only check on these new powers is a new requirement that an arresting officer should believe, on reasonable grounds, that an arrest was necessary. However, the exhaustive list of reasons, at s24(5), with which this necessity test can be met, is wide, and places a heavy reliance on an individual officer's discretion.

Some commentators have pointed out that the necessity test is, however, more stringent than that of *Wednesbury* reasonableness, proportionality or even reasonable grounds to suspect ('belief' arguably denoting a higher requirement of certainty than 'suspicion').[3] The burden for proving that s24(5) ground(s) necessitated an arrest also rests squarely on the arresting officer.

CASE-LAW

Harassment and assault

■ KD v Chief Constable of Hampshire and Hull

[2005] EWHC 2550 (QB)

The claimant succeeded in her action for assault and harassment regarding the conduct of a police officer, Hull, during an investigation into allegations that her daughter had been raped and beaten by the claimant's former partner. The claimant sued the chief constable as vicariously liable for the officer's conduct. The defendant denied the claim but, in the alternative, sought an indemnity from the officer, who was now retired (by claiming against him under Civil Procedure Rules (CPR) Part 20). Tugendhat J found that Hull had harassed the claimant by:

- obtaining from her, and recording in five witness statements, intimate details of her sexual relationship with her former partner that were not relevant to the crimes alleged by her daughter;
- repeatedly visiting her and telephoning her on the pretext of discussing the investigation; and
- touching her to comfort her when she became upset during their discussions.

As the information elicited and the repeated calls and visits had no legitimate connection to the investigation and were undertaken for his own gratification, Hull's behaviour did not fall within the potential defence contained in Protection from Harassment Act (PHA) 1997 s1(3)(a), namely conduct undertaken for the purpose of preventing or detecting crime. The touching of the claimant also amounted to an assault in that it was a technical battery.

The claimant was awarded £10,000 for anxiety and injury to feelings and a further £10,000 in aggravated damages for the additional distress caused by Hull's denial of all allegations during disciplinary proceedings and the civil trial. Hull was ordered to indemnify the chief constable in full. Claims for psychiatric injury and exemplary damages were rejected.

Comment: In upholding the assault claim, the court looked at the circumstances in which the claimant's apparent consent to the touching was given. It was emphasised that she was vulnerable at the time and dependent on Hull as he was investigating the offences against her daughter. Furthermore, he had misled her into believing that she was providing him with necessary information when she became distressed. Accordingly, Hull had wrongly put the claimant into a position where she needed comforting and, in so doing, had abused his position as a public servant. Consent is often raised in defence of assault claims in circumstances where claimants have submitted to, rather than genuinely accepted, intrusive physical contact from police officers; the common-sense approach to the issue in this judgment is welcome.

The case also provides a helpful example of how an officer's behaviour during an investigation stepped so far beyond the bounds of propriety as to amount to harassment. In considering the defence contained in PHA s1(3)(a), the court rejected submissions that the test was subjective, protecting an officer who believed s/he was acting for the purpose of preventing or detecting crime, even if his/her conduct was, in fact, excessive; in relation to events occurring after the Human Rights Act (HRA) 1998 came into force, the court was bound to interpret PHA s1(3)(a) as subject to the tests of necessity and proportionality in a case where, as here, the conduct complained of engaged article 8(1) of the European Convention on Human Rights ('the convention').

Harassment could be made out in an analogous situation where a male officer displayed a prurient interest in the details of a sexual offence reported by a female complainant. However, where the recipient of the harassment was the victim of the crime, it will, in general, be harder to define the point at which questioning or other contact becomes irrelevant to the investigation and thus improper.

■ Cummins v Home Office

21 October 2005,
Leeds County Court

Although a case against the Prison Service, this is a good example of the approach that the court should take in relation to unexplained injuries caused to those in custody. The claimant, aged 17, was detained in a Young Offenders Institution. During a struggle, he sustained injuries to his face as he was being taken to the segregation unit. The claimant's case was that he had been punched in the face a number of times. In the segregation unit, he was subject to a strip-

search, left naked for a short while, and then only provided with boxer shorts for the rest of the night. The following day, the claimant was produced in court and his solicitor took a careful account of the incident and noted his injuries. At trial, none of the officers were able to explain how the claimant had come by the injuries to his face.

The recorder applied the approach in *Sheppard v Secretary of State for the Home Department* [2002] EWCA Civ 1921. The Court of Appeal held that Strasbourg cases under article 3 of the convention (degrading treatment) to the effect that the state must provide a plausible explanation of injuries caused to those in custody meant, in domestic law, that if a defendant was unable to explain convincingly how the injuries occurred, a claimant would usually succeed in discharging the burden of proof.

On this basis, the claimant succeeded in his claim for assault. In addition, the claimant was successful in his claim that the circumstances of his strip-search amounted to a breach of article 3. The recorder applied the principles in *Iwańczuk v Poland* 15 November 2001, App No 25196/94, to the effect that although strip-searches are sometimes necessary, they must be justified for security reasons and carried out appropriately so as not to humiliate or debase a prisoner.

Comment: This case is a useful example of the application of convention law in the everyday environment of a county court case. The claimant in this case, whose behaviour had largely initiated the need for restraint and segregation, received only modest damages but, in other cases, the courts may be more generous.

Retention of personal data

■ The Chief Constables of West Yorkshire, South Yorkshire and North Wales Police v The Information Commissioner

12 October 2005,
Information Tribunal

Three chief constables appealed to the Information Tribunal against enforcement notices issued by the Information Commissioner, requiring them to erase conviction data held on the Police National Computer (PNC) relating to three individuals. In each case the commissioner issued the notice on the basis that the retention of the data infringed the third and/or fifth data protection principles contained in Data Protection Act 1998 Sch 1, (requiring that personal data shall be 'adequate, relevant and not excessive' in relation to the purpose(s) for which it is processed and not 'kept for longer than is necessary').

The chief constables asserted that although the convictions had occurred many years previously, the retention was justified by reference to the Association of Chief Police Officers' (ACPO) *General rules for criminal records weeding on police computer systems*, which, in some circumstances, contemplates conviction data being retained until death of the subject or until s/he reaches 100 years of age. This includes where the subject has been sentenced to terms of imprisonment that, when aggregated, total more than six months (including concurrent and suspended sentences) and for certain specified offences, including relatively minor crimes such as assault occasioning actual bodily harm.

The tribunal accepted that the retention of conviction data, which was intrinsically private in nature, engaged article 8(1) of the convention. However, it found that retention for policing purposes, including investigation, profiling and identification work, was justified under article 8(2) and did not infringe the third or fifth data protection principle. It decided that the appropriate course was to amend the enforcement notices so as to limit the data to a police access only regime.

Comment: Given the age of the only/last conviction in each case, the minor nature of the offences and the over-rigid reliance by the police on the letter of the ACPO guidelines, the decision that retention did not infringe the data protection principles or article 8(2) was, perhaps, surprising. The tribunal emphasised the primacy of the role of the police in judging the value of conviction data.

However, the decision does contain some helpful points for data subjects in an equivalent position. The tribunal rejected the chief constables' contentions that the ACPO document contained a set of rigid rules, legitimising retention of conviction data in any instance falling within the stated parameters; evaluation of the particular circumstances was required, if the issue was raised. The current rules were criticised as unsatisfactory and specific suggestions were made for improvement. The tribunal proceeded on the basis that the real damage or distress caused to a data subject lay in inappropriate disclosure rather than in the sheer fact of retention. It expressed surprise at the number of bodies that had potential access to the PNC, and this informed its approach to limit future access to the subject convictions to the police.

In one of the cases before the tribunal, the data subject had discovered that her spent conviction was disclosed to the then Police Complaints Authority in the context of an investigation into her unrelated formal complaint against an officer. The tribunal noted an apparent inconsistency between police forces in relation to this sort of disclosure but, disappointingly, was not more critical of this practice.

Abuse of process

■ Daar v Chief Constable of Merseyside Police

[2005] EWCA Civ 1774

The defendant chief constable applied to strike out the claim for false imprisonment and malicious prosecution on the basis that it was an abuse of process. The civil claim arose out of two incidents where the claimant had been arrested and subsequently prosecuted. The first prosecution resulted in his acquittal at trial. The second prosecution was dropped before trial.

The local authority, at the behest of the police, then obtained an anti-social behaviour order (ASBO) against the claimant, on the basis, in part, of his conduct during the same two incidents. The ASBO application was contested, and police officers and the claimant gave evidence before a district judge who found that the alleged behaviour was established to the criminal standard of proof (the applicable standard although the proceedings are civil in nature). The defendant contended that the civil claim was abusive as it raised issues of fact which had already been decided against the claimant when the ASBO was granted and relied on the rule against collateral challenge identified in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529.

The Court of Appeal upheld the decision to dismiss the strike out application. It concluded that the civil proceedings were not an affront to the administration of justice. Reliance was placed on the fact that, in the ASBO proceedings, the local authority had set out to prove the very facts on which the claimant had already been acquitted; although it may have been open to the authority to take this course, it was not abusive for the claimant to then bring civil proceedings consistent with the acquittal.

Comment: While the decision turned on the particular facts referred to, the Court of Appeal's approach displays a welcome flexibility to the application of the rule against collateral challenge, which is commonly applied to preclude civil claims that appear to run counter to an earlier criminal conviction. The court emphasised that the crucial question was whether, in all the circumstances, the party was misusing or abusing the processes of the court, and that this was a 'broad, merits-based judgment' in each case. Reference was also made to the balancing process to be undertaken between the claimant's right of access to the courts

(guaranteed by article 6 of the convention) and the protection of the justice process against manipulation.

As to the particular circumstances, the Court of Appeal left open the question of whether the conclusion would have been the same if the claimant had not been acquitted, for example, if both prosecutions had simply been discontinued. If the successful application for the ASBO had been made by the chief constable, rather than the local authority, additional considerations of res judicata and/or issue estoppel could have arisen.

Jury trial

The effect of Supreme Court Act (SCA) 1981 s69 (and County Courts Act 1984 s66) is that a claim for false imprisonment and/or malicious prosecution shall be tried by a jury unless the court is of the opinion that the trial requires a prolonged examination of documents or accounts, or any scientific or local investigation, which cannot conveniently be made with a jury.

■ Armstrong v Times Newspapers Ltd and others

[2005] EWHC 2816 (QB)

This judgment contains the first detailed examination of the circumstances in which it is appropriate for the court to order a jury trial of a particular issue, where the parties are agreed and/or the court has ruled that other aspects of the claim are more suitable for trial by a judge alone. The issue arose in a libel claim in which the parties were agreed that the action should be tried by a judge sitting alone, but they were in dispute about whether the meaning of the words complained of should be established as a discrete issue by a jury.

Mr Justice Eady rejected the submission that once a case fulfils the exclusionary criteria (unless the court exercises its discretion to order jury trial of the whole action), trial by judge of all aspects of the litigation was mandatory; SCA s69(4) empowered the court to direct trial by jury of a specified issue(s). However, the modern approach was to lean in favour of trial by judge alone once the exclusionary criteria had been shown to apply. The application for a jury was refused.

Comment: In *Phillips v Commissioner of Police of the Metropolis* [2003] EWCA Civ 382, the Court of Appeal had indicated that different issues of fact arising in the same case could be tried by different modes of trial. After some hesitation and a more detailed consideration of this question, Mr Justice Eady agreed.

This may be of assistance to a claimant in a civil action: where assessment of damages involves complex factual or medical issues, s/he may want to contend that liability should be heard by judge and jury, with quantum decided by judge alone. However, in keeping with other modern authorities such as *Phillips*, the general tenor of the judgment shows a strong inclination towards the perceived benefits of civil trials being heard by judges alone.

False imprisonment and arrest powers

■ R v Fiak

[2005] EWCA Crim 2381

The appellant was suspected by police to be in charge of a vehicle while under the influence of alcohol. He was told by an officer that he was being detained in order for the police to establish whether an offence had been committed. The officer checked his account, which was not confirmed, and a struggle ensued. The officer then arrested the appellant for being in charge of a motor vehicle and for assaulting a police officer with intent to resist arrest. The appellant argued, on appeal, that he could not have been resisting arrest, as he had only been told that he was 'detained' rather than 'arrested' up until that point.

The Court of Appeal rejected his appeal on the basis that the point from which the appellant was told he was being detained, to the point he was told he was under arrest, was all part of a single process. This process was not to be artificially compartmentalised or fragmented into a series of individual processes. In these circumstances, the officer's conduct was not rendered unlawful because she did not formally say the word 'arrest' until her brief investigation into the appellant's account was completed.

Comment: It was accepted in this case that the officer had both subjective and objective grounds for arrest, and took the time to check the appellant's account before exercising her discretion to arrest. PACE s28(1) envisages circumstances in which a person can be arrested 'otherwise than by being informed that he is under arrest', which happened in this case. This is consistent with the Court of Appeal's approach in *Taylor v Chief Constable of Thames Valley Police* [2004] EWCA Civ 858; April 2005 *Legal Action* 20.

■ R (Hawkes) v Director of Public Prosecutions

[2005] EWHC 3046 (Admin)

The appellant was arrested for breaching the peace after she refused to get out of a police car in which her son had been placed under arrest. When she eventually got out of the car and walked towards her home, an officer tried to detain her and she bit the officer's hand. The appellant was then further arrested for assaulting an officer and obstructing an officer in the execution of his duties. The appellant appealed the conviction for assault by way of case stated on the basis that her arrest for breach of the peace was unlawful.

The Administrative Court allowed the appeal. It found that there was no evidence to justify a conclusion that the appellant's conduct had involved violence or had a sufficiently violent content or connection before she was arrested for a breach of the peace.

Comment: As the court's sanction for a breach of the peace is a civil bind over, it is sometimes easy to forget that the level of conduct required to justify an arrest for breach of the peace is closer to Public Order Act (POA) 1986 s4 than to POA s5, and must involve a connection to violence which appears from the evidence. The court noted, in this case, that the officers would have had the power, short of arrest, to remove the appellant from the car with a view to preventing her from obstructing the officers.

■ R (H) v Crown Prosecution Service

[2005] EWHC 2459 (Admin)

The police were called to a pub where the appellant appeared to be drunk and arguing with door staff. Officers arrested him for being drunk and disorderly, and a struggle ensued. The magistrates found that the appellant was drunk but that his behaviour was not disorderly until after he had been arrested. A case was stated and the Administrative Court confirmed that it is disorderly (and not just drunken) behaviour that triggers liability for arrest under Criminal Justice Act 1967 s91(1). The police were, therefore, not entitled to arrest the appellant.

Comment: Police actions often arise in this context and so it is important to explore the precise facts leading to arrest.

Inquiries and inquests

■ R (D) v Secretary of State for the Home Department

[2006] EWCA Civ 143

D was a prisoner at Pentonville Prison and was a well-known suicide risk. However, despite having been placed on 15-minute documented watch, he was able to continue to try to take his own life in his cell. His last attempt left him with serious brain damage. An internal prison investigation took place, but D and his family had no right to participate in it and none of the investigation took place in public. In addition, the Prison

Service managed to lose important information informing its report, including D's medical and prison records. The Home Secretary proposed that the Prisons and Probation Ombudsman should carry out a new investigation into D's suicide attempts. However, the terms of reference meant that the new investigation would be in private, there would be no opportunity for D and his lawyers to cross-examine witnesses, and the ombudsman had no powers to compel witnesses to attend.

In the High Court, Munby J decided that this was not sufficient to amount to an effective, official investigation into such a serious case for the purposes of article 2 of the convention. The Home Secretary would have to arrange for a hearing in public, with rights to cross-examine and, potentially, compel witnesses to attend, and with the right to legal aid for D and his family.
In the Court of Appeal, the Home Secretary challenged all these requirements, but the court noted that his real complaints were the obligation to hold the hearing in public and that D must be given the opportunity to cross-examine witnesses. In relation to the public hearing issue, the Home Secretary argued that the relevant Strasbourg jurisprudence required 'a sufficient element of public scrutiny of the investigation or its results' (with its emphasis on the 'or') (see *Jordan v UK* (2001) EHRR 52, para 109). Therefore, an inquiry in public was not necessary and, indeed, a private investigation with publication of the report would be more likely to reach the truth.

The Court of Appeal took Munby J as requiring that oral evidence should be heard in public and that written evidence and submissions should be made public. It would be up to the chair of the inquiry who to call to give oral evidence and whether to allow oral submissions. The Court of Appeal decided that the investigation and collation of evidence did not need to be in public and noted, for example, that an investigation of a death in police custody would be carried out in private before the matter was examined by the coroner.

After reviewing the domestic case-law on article 2-compliant inquiries, the court decided that a public inquiry of the kind it had described was, indeed, necessary, and that simple publication of the inquiry report was not sufficient; at least in a case where a person in custody had nearly died as the result of a suicide attempt.

However, the court decided that there was nothing in the Strasbourg or domestic case-law which gave the right to the victim and his/her family to cross-examine witnesses at a public inquiry. It was noted that the Inquiries Act 2005 (which sets out guidelines for inquiries) does not go so far and states only that the procedure adopted by the inquiry must be fair. The court noted that fairness could be achieved by allowing cross-examination, but could also be met by allowing submissions on lines of questioning and investigation, or by providing proposed questions to counsel to the inquiry if one was appointed.

The court briefly found that it was a requirement of an article 2 inquest that D's representatives were given access, in advance, to all the relevant evidence. The court did not disturb Munby J's finding that funding for legal representation should be provided, describing this as manifestly reasonable.

Comment: This case usefully puts some detail into what an article 2-compliant inquiry should consist of. The court emphasised that it was not setting down a blueprint for all deaths and near misses in custody, but it is likely that it will apply in all cases where a person's life has genuinely been put at serious risk or s/he has nearly died, where the actions or inactions of state agents have, arguably, caused or significantly contributed to this situation. The case most obviously affects the Prison Service, the police and those responsible for detaining people under the Mental Health Act 1983. In relation to the police, it may well be that an investigation by the Independent Police Complaints Commission into a 'near miss' in police custody can provide the basis for a public inquiry, but will not be sufficient to satisfy the article 2 requirement itself.

■ R (Bennett) v HM Coroner for Inner South London

[2006] EWHC 196 (Admin)

The claimant's son, Derek Bennett, was shot dead by a police officer in July 2001. The officer stated that he believed that Derek Bennett was about to shoot him on a number of occasions during a chase. It later became clear that what was thought to be a gun was, in fact, a cigarette lighter realistically shaped like a gun.

At the inquest into Derek Bennett's death, the coroner decided that the evidence could not reasonably support a verdict of unlawful killing and, therefore, that verdict was not left to the jury. The coroner gave a direction that in order for the jury to return a verdict of lawful killing, it had to decide that the officer honestly believed that he was using such force as was reasonably necessary in all the circumstances. The jury did return a verdict of lawful killing.

The coroner's direction to the jury was accepted to be correct in English law, and the test to be applied in relation to lawful killing was the one applied generally in criminal courts and in inquests. However, the claim was that, in the light of article 2 of the convention, in cases involving killing by state agents such as police officers, it was inadequate. This was because article 2(2) allows deprivation of life using force which is no 'more than absolutely necessary' in circumstances such as self-defence or in effecting a lawful arrest. Such a test was said to be far stricter than the 'reasonableness' test used in English law.

The claimant was, of course, faced with the hurdle of the ruling in *McCann v UK* (1996) 21 EHRR 97 (the Gibraltar 'Death on the rock' case), where the Strasbourg court accepted the submission from the UK government that, in practical terms, the 'reasonableness' test (in that case in Gibraltar law) was applied domestically in the same way as an 'absolute necessity' test would be applied.

The court was also referred to the later case of *Bubbins v UK* 17 March 2005, App No 50196/99, which involved the shooting of a person with a replica gun where the European Court of Human Rights (ECtHR) made it clear that whether the force used was absolutely necessary had to be judged on the honest belief of the officers concerned, and then whether such force was proportionate.
Collins J, after reviewing these authorities, found that the ECtHR had considered the English law and what is required for self-defence, and 'has not suggested that there is any incompatibility with article 2'. He said:

> *… if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably. Thus, the reasonableness test does not in truth differ from the article 2 test as applied in* McCann.

Comment: This case was a brave attempt to tackle the apparent discrepancies between the convention and domestic law some ten years after *McCann* had dealt with the issue. The judge's approach, although rejecting the application, effectively means that the absolute necessity test has now become part of the domestic law of reasonableness in cases involving killings by state agents.

Vindicatory damages?

■ Merson v Cartwright and another (Bahamas)

[2005] UKPC 38,
13 October 2005

The case concerned a claimant in the Bahamas who had been assaulted, badly

treated at the police station, falsely imprisoned and maliciously prosecuted. As well as suing for the usual torts, she brought a claim for infringement of constitutional rights, there being a guarantee against torture or inhuman and degrading treatment under article 17 of the Bahamas Constitution and a right to liberty under article 19. The constitution also allowed for damages for breach of constitutional rights, but not if the court was satisfied that adequate compensation had already been awarded under the law. The judge awarded substantial damages for the torts (including aggravated and exemplary damages) and slightly more for the breach of constitutional rights by way of vindicatory damages. The appeal dealt with the question of whether the additional award of vindicatory damages was justified. The Privy Council found as follows:

18. … If the case is one for an award of damages by way of constitutional redress … the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. … In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.

The Privy Council found that although there might be some overlap between torts such as assault and infringement of constitutional rights, there was not a complete overlap and, in any event, the 'wholesale contempt' shown to the rule of law by the police made it a 'very proper' case for an award of vindicatory damages.

Comment: The case provides an interesting opportunity for claimants in police cases where there have been tortious actions by the police which also amount to a breach of convention rights. In appropriately serious cases of police misconduct, a claim could be made for damages under HRA s8 'to vindicate the right of the complainant … to carry on his or her life … free from unjustified executive interference, mistreatment or oppression'. These could be additional to exemplary damages, which are designed to punish the defendant rather than vindicate his/her rights. There would, undoubtedly, be resistance to this approach on the basis that an award would duplicate traditional awards and would amount to more than 'just satisfaction' for the purposes of the HRA. However, the way ahead has clearly been signalled by the Privy Council in a suitable case.

Costs

■ Daniels v Commissioner of Police of the Metropolis

[2005] EWCA Civ 1312

The claimant (a mounted police officer who was thrown from her horse) failed in her claim for negligence. The trial judge ruled that there was no reason to depart from the general rule that the losing claimant should pay the defendant's costs.

The claimant appealed, primarily on the basis that the judge had failed to take proper account of the fact that the defendant had rejected successive CPR Part 36 offers. The Court of Appeal held that it was entirely reasonable for a successful defendant, especially a public body such as the police, to contest what it reasonably considered to be an unfounded claim, in order to deter others.

Comment: This is an unsurprising decision, which follows a similar decision by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, regarding a successful party's entitlement to recover costs where he had refused mediation. The court's comments, at paragraph 32, about not penalising successful claimants or defendants for incurring 'necessarily' and 'unavoidably' disproportionate costs, may also be of use to successful claimants who are facing a challenge to the amount of costs incurred on the basis of *Secretary of State for the Home Department v Lownds* [2002] EWCA Civ 365.

■ Farag v Commissioner of Police of the Metropolis

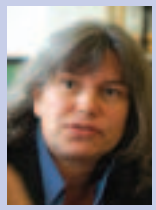
[2005] EWCA Civ 1814

The claimant claimed false imprisonment and multiple assaults. He pleaded seven issues in total. The jury found in his favour in respect of one assault and awarded him £1,465 in damages. The commissioner was ordered to pay all of the claimant's costs, without the court giving any reasons. The commissioner appealed. He argued that the claimant was only entitled to one-seventh of his costs, and that the offer to settle for £3,001, which he made to the claimant in 1997, should have been taken into account.

The Court of Appeal decided that there should be no order for the costs of the trial because the claimant had lost on many issues and the court should have had regard to the defendant's offer to settle, even though it had been made before the introduction of the CPR in 1999, and had been withdrawn in 2002.

Comment: It is noteworthy that the Court of Appeal did not apply a mechanistic approach, ie, simply divide the costs by the number of pleaded issues, as sometimes happens. Instead, it was influenced by the fact that the jury had awarded a 'not insubstantial sum' of £1,465 for the one assault it upheld. This judgment is also a reminder that the court is encouraged to consider 'all' the circumstances in deciding what order, if any, to make about costs under CPR Part 44.3(4).

1 *Police and Criminal Evidence Act 1984 Code G. Code of practice for the statutory power of arrest by police officers* is available at: http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACE_Chapter_G.pdf?view=Binary.
2 A civilian may only arrest without a warrant in respect of an indictable offence, and can also only arrest for an offence s/he believes has already been committed if the offence has, in fact, been committed.
3 Tim Owen QC, Alex Bailin, Julian B Knowles, Alison Macdonald, Matthew Ryder, Debbie Sayers and Hugh Tomlinson, *Blackstone's guide to the Serious Organised Crime and Police Act 2005*, OUP, October 2005, £29.95.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Recent developments in housing law

Nic Madge and **Jan Luba QC** continue their monthly series. They would like to hear of any cases in the higher and lower courts relevant to housing. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Housing Act 2004: commencement

The major provisions of Housing Act (HA) 2004 Parts 1–4 come into force in England on 6 April 2006. A host of secondary legislation takes effect on the same date including:

- Housing Health and Safety Rating System (England) Regulations 2005 SI No 3208, which make more detailed provision for the new 'hazards' standard in Part 1;
- Housing (Empty Dwelling Management Orders) (Prescribed Exceptions and Requirements) (England) Order 2006 SI No 367, which specifies when dwellings are excepted from the new power for local authorities to make Empty Dwelling Management Orders (EDMOs). The HA 2004 provides that all unoccupied dwellings are excepted for at least six months. This Order specifies ten additional exceptions. It also sets out the procedures with which local authorities must comply in seeking approval from a residential property tribunal to make an interim EDMO;
- Housing (Management Orders and Empty Dwelling Management Orders) (Supplemental Provisions) (England) Regulations 2006 SI No 368, which enable local housing authorities to deal with ground rents, service and other charges demanded in respect of any leasehold properties on which they make management orders or EDMOs;
- Housing (Interim Management Orders) (Prescribed Circumstances) (England) Order 2006 SI No 369, which outlines the circumstances in which a residential property tribunal can give a council authority to take over management of individual private rented properties that give rise to significant anti-social behaviour problems;
- Selective Licensing of Houses (Specified Exemptions) (England) Order 2006 SI No 370, which specifies the types of tenancies and licences that are exempt from the selective licensing provisions in HA 2004 Part 3;
- Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Regulations 2006 SI No 371, which set out the scope of mandatory licensing for houses in multiple occupation (HMOs), ie, that licensing will apply to those HMOs that comprise three or more storeys and are occupied by five or more occupiers in two or more households;
- Management of Houses in Multiple Occupation (England) Regulations 2006 SI No 372, which replace the Housing (Management of Houses in Multiple Occupation) Regulations 1990 SI No 830, and set out minimum management standards for all HMOs; and
- Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 SI No 373, which cover HMOs and selective licensing, and management orders. They include detailed provisions on the content of application forms for licenses, information to be held on public registers, and the publicity requirement for designations or revocations of additional licensing or selective licensing schemes. They also specify (for the purpose of the HMO definition) the additional circumstances in which persons are to be treated as forming part of the same household and when they are to be treated as occupying property as their only or main residence. The regulations also specify those types of buildings regulated by other provisions that do not come under the HMO definition. In addition, they specify the national minimum amenity standards acceptable for licensed HMOs.

PUBLIC SECTOR

Possession orders

■ Harlow DC v Hall

[2006] EWCA Civ 156, 28 February 2006

Mr Hall was a secure tenant who fell into rent arrears. Harlow obtained a suspended possession order in Form N28 which provided that he 'give possession … on or before 9 February 2005' and that he pay arrears of rent and costs totalling £1,919. The order also stated that it was not to be enforced so long as he made payments of £10 per week in addition to the rent. The first payment was to be made by 9 February 2005. He did not make the first payment and, on 10 February 2005, he was made bankrupt. On 28 May 2005, Mr Hall applied to discharge the possession order, arguing that the rent arrears were a debt provable in his bankruptcy and that the order for possession was precluded by Insolvency Act 1986 s285(3)(a) because it was a remedy against the property of a bankrupt. That application was dismissed by a district judge and, on appeal, by a circuit judge.

The Court of Appeal dismissed Mr Hall's second appeal. The fact that the debts became provable in the bankruptcy did not have the effect of paying them off. Liability remained although the means of enforcement changed. Furthermore, the Chancellor of the High Court said:

… the order required Mr Hall to give possession on 9 February 2005 … it was suspended in the sense that it was to take effect on a specified future date, but the obligation to give possession on or before 9 February was not qualified by the postponement of its enforcement … The distinction between suspending the execution of the order and postponing the date for possession is also made in s85(2). Accordingly it is … plain that the date on which the tenant 'is to give up possession … in pursuance of the order' for the purposes of s82(2) was 9 February 2005 whether or not the conditions prescribed by paragraph 5 for the postponement of its enforcement were observed. It follows that the secure tenancy had ended before the bankruptcy order was made on 10 February 2005.

Chadwick LJ said:

… it is not possible to treat the order made in the present case as an order which postpones the date on which possession is to be given beyond the date specified in paragraph 1; that is to say, to any date after 9 February 2005. It follows that the secure tenancy ended on 9 February 2005, the day before the bankruptcy order was made.

While it subsisted, the tenancy was property, but it did not subsist at the time the bankruptcy order was made and so s285 did not apply.

Note: If a secure tenancy is terminated, the former tenant loses all associated rights: repairing covenants, right to buy, right to

succeed, right to mutual exchange etc. The problem identified in this case is the change from the old form of N28 (suspended possession order), which was in force until 15 October 2001, to the current version. The effect of this decision is that the current N28 terminates the secure tenancy on the date specified even if the tenant complies with the conditions imposed. The effect is that all tenants against whom orders in Form N28 have been made since 15 October 2001 are tolerated trespassers.

Breach of suspended possession orders

■ Kensington and Chelsea RLBC v Richmond

[2006] EWCA Civ 68,
(2006) Times 27 February,
15 February 2006

Mr Richmond was a secure tenant of a flat. Kensington and Chelsea sought possession on the ground that he was causing a nuisance to, and harassing, his neighbours (HA 1985 Sch 2 Ground 2). On 17 December 2003, the trial judge made an order for possession but suspended it on condition that Mr Richmond complied with the terms of his tenancy agreement. The order also provided:

2. No warrant to issue without permission of circuit judge.

3. Order possession to remain in existence until 17 December 2004. Permission to claimant to apply for extension.

It was alleged that Mr Richmond broke the terms of the order, with the Court of Appeal stating that his behaviour, if it had taken place, 'exposed other tenants to a quite unacceptable type and level of interference with their daily lives'.

On 1 November 2004, Kensington and Chelsea applied for permission to issue a warrant for possession and, if the application and/or execution were not dealt with before 17 December 2004, an order that the suspended possession order be extended for a period of six months. The application was listed on 10 December 2004. Mr Richmond did not attend. HHJ Mackie QC ordered that the suspended possession order be extended for a further six months and that the application for a warrant be adjourned.

It was subsequently argued on behalf of Mr Richmond that the order had the effect of:

■ Changing the date on which Mr Richmond was obliged to give up possession;
■ Reviving the original tenancy;
■ Wiping the slate clean in respect of the alleged breaches up to the date of the order; and
■ Meaning that if Kensington and Chelsea wanted to rely on breaches after the order, it would need to start new proceedings.

HHJ Faber rejected that submission, holding that HHJ Mackie QC had simply been exercising case management powers.

The Court of Appeal dismissed Mr Richmond's appeal. The effect of HHJ Mackie QC's order was to keep in place the application to enforce the sanction imposed for the original breaches of the tenancy. The last thing that he saw himself as doing was to relieve the tenant from the consequence of those breaches. It was impossible to see this as an extension of the date on which possession must be given. Accordingly, the order did not have the effect of reviving the tenancy. Buxton LJ went on to say: 'If on [10 December 2004] Mr Richmond was indeed already in breach [of the suspended possession order], then the judge's order could not have the effect of changing the date on which possession was to be given, because that date had already accrued.'

Introductory tenancies

Reviews

■ R (Chelfat) v Tower Hamlets LBC

[2006] EWHC 313 (Admin),
10 February 2006

Ms Chelfat was an introductory tenant. On 5 March 2004, Tower Hamlets served a HA 1996 s128 notice of intention to commence possession proceedings on the ground that she was in arrears of rent. The notice stated that she had a right to seek a review of the decision and that any request had to be made within 14 days and be sent to the rent arrears section of the council. Ms Chelfat did not write to the housing officer named in the notice but instead wrote to Tower Hamlets' housing benefits section complaining of the decision and requesting a review. The benefits section assumed that her letter referred to a refusal of a claim for housing benefit. It carried out a review of that refusal.

Tower Hamlets then began possession proceedings and obtained a possession order. Ms Chelfat was aware of the proceedings but made no attempt to defend them or appeal the possession order. A warrant of possession was issued. Her solicitors wrote to the authority requesting a review of the decision. The possession warrant was suspended by consent so that the review could be carried out. On 19 August 2005, a review was held, but it concluded that Tower Hamlets was entitled to seek possession. Ms Chelfat sought judicial review of the decision to continue to seek possession. She relied on the fact that the review had not been carried out before the date specified in the notice as the date after which proceedings might begin (HA 1996 s129(6)).

Sullivan J dismissed her application. The decision whether or not to grant relief in the Administrative Court is essentially a matter for the court's discretion. In this case, Ms Chelfat's own former solicitors positively asked Tower Hamlets to carry out a review. In the light of the express agreement that there should be a review and that the warrant for possession should be suspended to enable it to be carried out, it was wholly inconsistent for Ms Chelfat to argue that the possession proceedings should not have been issued because there had not been any review within the timescale prescribed by s129(6). Against that background, as a matter of the court's discretion, it would be wholly unjust to allow Ms Chelfat's application. Sullivan J also stated that:

■ Section 128 does not require a tenant requesting a review of a s128 notice to complete any particular form or to make such a request in any particular manner; and
■ Since s129(6) is silent about the consequences of any failure to carry out a review within the time specified, the question of whether such a delay was fatal to a landlord's decision would turn on the facts. If the failure was due to a genuine oversight capable of being remedied, then there seemed to be no good reason to prevent a landlord from remedying the position.

Rent Act statutory tenancies

Occupation as a residence

■ Stephens v Kerr

[2006] EWCA Civ 187,
15 February 2006

Ms Stephens issued proceedings for breach of various covenants in her tenancy agreement and sought a declaration that she was a statutory tenant. Her landlord defended on the basis that she did not occupy the premises as a residence as she lived predominantly with a friend after being driven out by neighbours (RA s2(1)(a)). On a trial of a preliminary issue, a judge found that, on the evidence, Ms Stephens was a statutory tenant as the connection she had with the property was sufficiently great that it could be taken that she occupied it as her residence. The landlord appealed.

The Court of Appeal dismissed the appeal. The judge had approached the issue carefully and conscientiously. The findings were plainly open to the judge on the evidence available and the fact that a different judge might have reached a different conclusion was irrelevant. The only error was the judge's granting of permission to appeal. The appeal was unsustainable.

HOMELESSNESS

Priority need

■ Crossley v Westminster City Council

[2006] EWCA Civ 140,
23 February 2006[1]

The claimant, a single man aged 36, spent his childhood in care and lived 'on the streets' from the age of 17 except when in prison or in short-term hostels. He was addicted to hard drugs and had a history of treatment and relapse. He once overdosed and was only saved by emergency hospitalisation. He survived by begging, having been unable to sustain a claim for welfare benefits given his difficulty in dealing with authorities.

A drug outreach agency took him to Westminster's offices and helped him make an application for assistance under HA 1996 Part 7 (homelessness). The council provided interim accommodation during which his engagement with drug treatment improved. Westminster received medical advice that his physical condition did not make him more vulnerable than others on medical grounds and advice that he was not mentally ill. It decided that he did not have a 'priority need'. The council withdrew the interim accommodation, declined to provide accommodation pending review and upheld its decision that the claimant was 'not vulnerable' on review. HHJ Collins CBE allowed an appeal under HA 1996 s204 and quashed the decision.

The Court of Appeal dismissed Westminster's appeal. The reviewing officer had had to consider not only vulnerability by reason of physical or mental illness or disability but also vulnerability resulting from any 'other special reason' (HA 1996 s189(1)(c)) and/or as a result of having been in care (Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No 2051 article 5(1)). His decision letter (appended to the judgment) failed to take into account and evaluate material facts, inter alia, those relating to the overdose incident and the claimant's inability to manage his affairs without assistance. It was all the more important that decisions were made 'with especially careful regard for the statutory criteria and purposes and conscientious attention to the evidence' (para 14), where the issue of vulnerability lay in a 'grey area' for the exercise of local authority judgment, such that a decision may quite properly go either way.

Withdrawing or varying decisions

■ Tower Hamlets LBC v Deugi

[2006] EWCA Civ 159,
7 March 2006

In December 2003, Mrs Deugi applied to Tower Hamlets for assistance under HA 1996 Part 7 (homelessness) on the basis that she and her children had become homeless because of domestic violence. In January 2004, Tower Hamlets decided that she was not 'eligible' for Part 7 assistance on the ground of her immigration status. That decision was upheld on review, but the review decision was quashed in March 2004 on an appeal brought under HA 1996 s204(1)(a).

Tower Hamlets was therefore required to undertake the review again. It did not complete that review within 56 days or within the extended period agreed with Mrs Deugi. In October 2004, she appealed again, this time against the original (January 2004) decision as permitted by HA 1996 s204(1)(b).

Before that appeal was heard, the council conceded that the January 2004 decision had been wrong and purported to withdraw it. It issued a new decision in March 2005 that Mrs Deugi was eligible but not in priority need and suggested that the extant appeal be withdrawn (on the council paying the costs).

Mrs Deugi did not withdraw the appeal but pursued it. HHJ Roberts varied the decision of January 2004 to one that Mrs Deugi was owed the main housing duty (under HA 1996 s193).

The Court of Appeal allowed Tower Hamlets' appeal. It held that:

■ The judge had not been wrong to entertain the appeal against the purportedly withdrawn decision;
■ He would have been entitled to quash it or vary it to a decision that Mrs Deugi had been eligible and/or had priority need; but
■ He had gone too far in varying the decision to one that the main duty was owed.

The council was entitled to an opportunity to enquire into the alleged domestic violence and to satisfy itself about whether or not Mrs Deugi had become homeless intentionally. There was a real prospect that a rational council might, in the light of further enquiry, have found her intentionally homeless and that was sufficient to prevent a judge substituting his own decision.

Discharge of duty

■ Griffiths v St Helens Council

[2006] EWCA Civ 160,
7 March 2006[2]

St Helens owed Mrs Griffiths and her family the 'main housing duty': HA 1996 s193(2). After she had spent a period living in hotel rooms, the council found a private landlord willing to grant her an assured shorthold tenancy (AST) of a house for an initial fixed term of six months with the possibility of renewal. The council agreed to meet the shortfall between housing benefit and the contractual rent at least for the first six months. After initially accepting the offer and seeking a review of its suitability, Mrs Griffiths refused it. The council decided that its duty to her had ceased under HA 1996 s193(5) as she had been warned of the consequences of refusal. It upheld that decision on review. On appeal she contended that:

■ The offer had been unsuitable on the facts; and
■ The council could not obtain release from the s193 duty by refusal of an offer of an AST.

HHJ Mackay dismissed the appeal. (See January 2005 *Legal Action* 29.)

The Court of Appeal dismissed a further appeal (confined to the second ground). Where a local authority was putting forward an offer of an AST as a qualifying AST (s193(7B)), as a method of relieving itself of the s193 duty, a refusal of that offer could not bring the duty to an end: s193(7C). But where the offer of the AST is made as a method of performing the s193 duty (on the basis that it will continue if and when that tenancy ends) a refusal can bring an end to the duty by application of s193(5). Given the importance of that distinction, housing authorities should clearly explain the basis on which the offer is being made. If the authority is relying on HA s193(5):

> *The explanation should include statements to the effect (a) that the authority acknowledges that the accommodation would be temporary if the private landlord lawfully exercises his right to recover possession after the end of the fixed term; and (b) that, if that happens and assuming that the applicant's circumstances have not materially changed, the authority accepts that it would again become obliged to perform its duty under the section to secure that accommodation is available for occupation by the applicant* (para 42).

1 Yinka Adedeji, barrister, London, and Gillian Radford & Co, solicitors, London.
2 Adam Fullwood, barrister, Manchester and Stephensons, solicitors, St Helens.

Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder.
Nic Madge is a circuit judge. **They are grateful to the colleagues at notes 1 and 2 for supplying transcripts or notes of judgments.**

Benefit rates from April 2006

New weekly rates of benefits are specified in draft Social Security Benefits Up-rating Order 2006. They apply from the week beginning 10 April 2006. The draft Tax Credits Up-rating Regulations 2006 come into force on 6 April 2006.

*denotes no change from last year's figure.

Adoption

Statutory adoption pay
- Earnings threshold £84.00
- rate £108.85

Bereavement

Widow's benefit
- Widowed mother's allowance £84.25
- Widow's pension (standard rate) £84.25

Bereavement benefit
- Bereavement allowance (standard rate) £84.25
- Bereavement payment (lump sum) £2,000*
- Widowed parent's allowance £84.25

Children

Child benefit
- Eldest or only child (couple) £17.45
- (lone parent) £17.55*
- Other children £11.70

Disability

Attendance allowance
- higher rate £62.25
- lower rate £41.65

Disability living allowance
care component
- higher rate £62.25
- middle rate £41.65
- lower rate £16.50

mobility component
- higher rate £43.45
- lower rate £16.50

Industrial injuries disablement pension
- 18 or over, or under 18 with dependants 100% disabled £127.10

Carer's allowance £46.95

Incapacity

Incapacity benefit
- long-term £78.50

Short-term (under pension age)
- lower rate £59.20
- higher rate £70.05

Short-term (over pension age)
- lower rate £75.35
- higher rate £78.50

Maternity

Statutory maternity pay
- Earnings threshold £84.00
- standard rate £108.85

Maternity allowance
- Standard rate £108.85
- Maternity allowance threshold (for variable rate) £30.00*

Paternity

Statutory paternity pay
- Earnings threshold £84.00
- rate £108.85

Retirement

State pension
- Category A or B £84.25

Pension credit

Standard minimum guarantee
- single £114.05
- couple £174.05

Additional amount for severe disability
- single £46.75
- couple (one qualifies) £46.75
- couple (both qualify) £93.50

Additional amount for carer £26.35

Savings credit threshold
- single £84.25
- couple £134.75

Capital

Amount disregarded £6,000*

Amount disregarded:
- care homes £10,000*

Deemed income £1* for each complete £500* or part thereof over above amounts

Housing costs

Deduction for non-dependants:
- as for income support (IS)

Severe disablement allowance

Basic rate £47.45
- adult dependant £28.25

age-related addition
- higher rate £16.50
- middle rate £10.60
- lower rate £5.30

Unemployment

Jobseeker's allowance (JSA) (contribution-based)

Personal rates
- Under 18 £34.60
- 18–24 £45.50
- 25 or over £57.45

Income support and jobseeker's allowance (income-based)

Personal allowances: income support (IS)

Single person aged under 18, usual rate £34.60
- Under 18, higher rate payable in specific circumstances £45.50
- 18–24 £45.50
- 25 or over £57.45

Personal allowances: jobseeker's allowance (JSA)

Single person aged under 18, usual rate £34.60
- 18–24 £45.50
- 25 or over £57.45

Personal allowances for both IS and JSA

Lone parent
- under 18, usual rate £34.60
- under 18, higher rate payable in specific circumstances £45.50
- 18 or over £57.45

Couple, both under 18 £34.60
- both under 18, one disabled £45.50
- both under 18, with responsibility for a child £68.65
- one under 18, one 18–24 £45.50
- one under 18, one 25 or over £57.45
- both 18 or over £90.10

Amounts for dependent children

Personal allowance (under 20) £45.58

Family premium/family premium lone parent rate £16.25

Enhanced disability premium – child rate £18.13

Disabled child premium £45.08

Premiums for both IS and JSA

Pensioner (under 75)
- Single (JSA only) £56.60
- Couple £83.95

Pensioner (enhanced) (75–79)
- Couple £83.95

Pensioner (higher) (80+)
- Single (JSA only) £56.60
- Couple £83.95

Disability
- Single £24.50
- Couple £34.95

Enhanced disability premium
- Single rate £11.95
- Couple rate £17.25

Severe disability
- Single £46.75
- Couple (one qualifies) £46.75
- Couple (both qualify) £93.50
- Carer £26.35
- Bereavement £26.80

Housing costs

Deduction for non-dependants

Aged 25 or over, receiving IS or income-based JSA, aged 18 or over, not in work or gross income less than £106 £7.40*

Adults earning gross income

£338 or more £47.75*

£271–£337.99 £43.50*

£204–£270.99 £38.20*

£157–£203.99 £23.35*

£106–£156.99 £17.00*

Capital

Upper limit £16,000

Amount disregarded £6,000

Upper limit (claimant/partner 60 or over) £16,000

Amount disregarded (claimant/partner 60 or over) £6,000*

Child's limit £3,000*

Tariff income

£1* for every complete £250* or part thereof between amount of capital disregarded and capital upper limit

Housing benefit (HB) and council tax benefit

Personal allowances: housing benefit

Single person	
16–24	£45.50
25 or over	£57.45
Lone parent	
under 18 (HB only)	£45.50
18 or over	£57.45
Couple	
both under 18 (HB only)	£68.65
one or both 18 or over	£90.10
Dependent children	
Under 19	£45.58
Pensioner	
Single person	
60–64	£114.05
65 or over	£131.95
Couple	
one or both 60–64	£174.05
one or both 65 or over	£197.65

Premiums: housing benefit

Family	£16.25
Family (lone parent)	£22.20 *
Child under one	£10.50 *
Pensioner (under 75)	
Single	£56.60
Couple	£83.95
Pensioner (enhanced) (75–79)	
Single	£56.60
Couple	£83.95
Pensioner (higher) (80+)	
Single	£56.60
Couple	£83.95
Disability	
Single	£24.50
Couple	£34.95
Enhanced disability premium	
Single rate	£11.95
Disabled child rate	£18.13
Couple rate	£17.25
Severe disability	
Single	£46.75
Couple (one qualifies)	£46.75
Couple (both qualify)	£93.50
Disabled child	£45.08
Carer	£26.35
Bereavement	£26.80

Non-dependant deductions: housing benefit

Aged 25 or over, receiving IS or income-based JSA, aged 18 or over, not in work and gross income less than £106	£7.40 *

Adults earning gross income

£338 or more	£47.75 *
£271–£337.99	£43.50 *
£204–£270.99	£38.20 *
£157–£203.99	£23.35 *
£106–£156.99	£17.00 *

Personal allowances: council tax benefit

As for HB, except that personal allowances are not payable for young people aged 16 and 17

Premiums: council tax benefit

As for HB

Non-dependant deductions: council tax benefit

Adults earning gross income	
£338 or more	£6.95 *
£271–£337.99	£5.80 *
£157–£270.99	£4.60 *
less than £157	£2.30 *
others, aged 18 or over (and not receiving IS)	£2.30 *

Capital

Upper limit	£16,000 *
Amount disregarded	£6,000
Upper limit (pension credit guarantee) from October 2003	no limit
Amount disregarded (claimant/ partner 60 or over)	£16,000 *
Child disregard	£3,000 *
Amount disregarded of residential care/nursing home	£10,000 *

Tariff income

£1* for every complete £250* or part thereof (or where claimant/ partner 60 or over, £1* for every £500* or part thereof) between amount of capital disregarded and capital upper limit

Working tax credit (per annum unless otherwise stated)

Threshold	£5,220 *
Elements	
basic element	£1,665
30-hour element	£680
couple and lone parent element	£1,640
disability element	£2,225
severe disability element	£945
50+ return to work element (16–29 hours)	£1,140
50+ return to work element (30 hours or more)	£1,705
childcare element:	
80% of weekly cost for one child up to costs of £175*	
80% of weekly cost for two or more children up to costs of £300*	

Child tax credit (per annum unless otherwise stated)

Threshold	£5,220 *
Threshold (entitled to child tax credit but not working tax credit)	£14,155
Second threshold	£50,000 *
Elements	
family element	£545 *
baby element	£545 *
child element (per child)	£1,765
disability element	£2,350
severe disability element	£945

Other benefits

Statutory sick pay	
Earnings threshold	£84.00
Standard rate	£70.05
Guardian's allowance	£12.50

Dependency increases

Adult dependants: for spouse or person looking after children, where claimant receiving:

retirement pension or own insurance	£50.50
long-term incapacity benefit or unemployability supplement	£46.95
severe disablement allowance	£28.25
carer's allowance	£28.05
short-term incapacity benefit (over pension age)	£45.15
short-term incapacity benefit (under pension age)/ maternity allowance	£36.60

Child dependants: claimant receiving

retirement pension, widowed mother's allowance, widowed parent's allowance, short-term incapacity benefit (higher rate) and long-term incapacity benefit, carer's allowance, severe disablement allowance, industrial death benefit (higher rate), unemployability supplement or short-term incapacity benefit (over pension age)	£11.35 *

updater

Legislation

CRIMINAL LAW

Serious Organised Crime and Police Act 2005 (Commencement No 5 and Transitional and Transitory Provisions and Savings) Order 2006 SI No 378

The provisions of the Serious Organised Crime and Police Act 2005 article 2(1) are brought into force on 1 March 2006. The provisions listed in article 3 are also brought into force on that date.

The provisions listed in the Schedule to this Order and article 5 are brought into force on 1 April 2006 and the provisions referred to in article 6 also come into force on that date except so far as they extend to Scotland. The provisions listed in article 7 are brought into force on 6 April 2006 in England and Wales only.

Criminal Defence Service (Funding) (Amendment) Order 2006 SI No 389

This Order amends the Criminal Defence Service (Funding) Order (CDS (F) Order) 2001 SI No 855.

CDS (F) Order Sch 2 deals with solicitors' fees. The amendment confers a right for solicitors to apply for the reclassification of certain offences when having their fees decided. The right relates only to indictable offences classified within Class H when they are not listed in the Table of Offences at the end of Sch 4. The way an offence is classified will decide whether it may be possible to receive fees at more than the prescribed relevant rates. In force 13 March 2006.

Anti-social Behaviour Act 2003 (Commencement No 6) (England) Order 2006 SI No 393

This Order brings Anti-social Behaviour Act 2003 ss48 to 52 into force, to the extent that they are not already in force, in England, on 6 April 2006.

Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006 SI No 512

This Order continues in force, for a period of one year, beginning on 11 March 2006, Prevention of Terrorism Act (PTA) 2005 ss1–9, which would otherwise expire at the end of 10 March 2006 under PTA s13(1).

These provisions enable the secretary of state to make a control order against an individual where he has reasonable grounds for suspecting that the individual is, or has been, involved in terrorism-related activity and it is necessary to impose obligations on that individual for purposes connected with protecting members of the public from a risk of terrorism.

EMPLOYMENT

Transfer of Undertakings (Protection of Employment) Regulations 2006 SI No 246

These regulations implement Council Directive 2001/23/EC ('the directive') on the approximation of the law relating to business transfers. They revoke the Transfer of Undertakings (Protection of Employment) Regulations (TU(PE) Regs) 1981 SI No 1794.

The provisions introduced by these regulations are similar to those included in the TU(PE) Regs 1981. They also include provisions taking advantage of certain policy options conferred by the directive. In force 6 April 2006.

Management of Health and Safety at Work (Amendment) Regulations 2006 SI No 438

These regulations amend Management of Health and Safety at Work Regulations (MHSW Regs) 1999 SI No 3242 reg 22, which concerns civil liability for breach of the duties imposed by those regulations.

The effect of these regulations is to extend protection to employees against claims by third parties, in circumstances where employees may owe a duty to third parties under MHSW Regs reg 14. In force 6 April 2006.

IMMIGRATION

Immigration Services Commissioner (Designated Professional Body) (Fees) Order 2006 SI No 400

This Order specifies the fee to be paid by the designated professional bodies to the Immigration Services Commissioner for the purpose of meeting the costs incurred by her in discharging her functions under Immigration and Asylum Act 1999 Part V. In force 16 March 2006.

Immigration (Passenger Transit Visa) (Amendment) Order 2006 SI No 493

This Order amends the Immigration (Passenger Transit Visa) Order 2003 SI No 1185 (the 2003 Order). Article 3 of the 2003 Order requires, subject to certain exemptions, a transit passenger (as defined) to obtain a transit visa when passing through the UK from one country or territory on his/her way to another country or territory.

Article 2 of this Order adds Malawi to the countries listed in 2003 Order Sch 1, the nationals or citizens of which must have a transit visa in order to pass through the UK. In force 2 March 2006.

PRACTICE AND PROCEDURE

Criminal Procedure (Amendment) Rules 2006 SI No 353

These rules add the following new provisions to the Criminal Procedure Rules (CP Rules) 2005 SI No 384:

- A new Part 15 (preparatory hearings in cases of serious fraud and other complex, serious or lengthy cases in the Crown Court);
- A new Part 18 (warrants);
- A new r39.2 (appeal against refusal to excuse from jury service or to defer attendance);
- A new r57.15 (external requests and orders);
- A new r65.11 (appeal against order following discharge of jury because of jury tampering). In force 3 April 2006.

SOCIAL SECURITY

Child Benefit and Guardian's Allowance (Miscellaneous Amendments) Regulations 2006 SI No 203

These regulations amend the Child Benefit and Guardian's Allowance (Administration) Regulations 2003 SI No 492 and the Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003 SI No 494. In force 10 April 2006.

Guardian's Allowance (General) (Amendment) Regulations 2006 SI No 204

These regulations amend the Guardian's Allowance (General) Regulations 2003 SI No 495 to reflect the fact that persons in respect of whom child benefit is payable after their 16th birthday are no longer referred to as children, but as qualifying young persons, as a result of the Child Benefit Act 2005. In force 10 April 2006.

Child Tax Credit (Amendment) Regulations 2006 SI No 222

These regulations amend the Child Tax Credit Regulations (CTC Regs) 2002 SI No 2007.

- Reg 1 provides for the citation and commencement of the instrument and includes a transitional provision, which prevents a person aged 19 or over from becoming a qualifying young person as a result of the amendments.
- Regs 2 to 5 amend the CTC Regs. They align the treatment of qualifying young persons for the purposes of the CTC Regs with that contained in the Child Benefit (General) Regulations 2006 SI No 223 (see below). In force 6 April 2006.

Child Benefit (General) Regulations 2006 SI No 223

These regulations make general provisions relating to child benefit, including provisions concerning residence, and consolidate the provisions contained in the Child Benefit (General) Regulations 2003 SI No 493 with amendments reflecting the extension of child benefit authorised by the Child Benefit Act 2005. In force 10 April 2006.

Social Security Pensions (Low Earnings Threshold) Order 2006 SI No 500

This Order is made following a review by the secretary of state, under Social Security Administration Act 1992 s148A(1), of the general level of earnings in GB with a view to establishing whether, and if so by how much, the amount of the low earnings threshold for the purposes of the Social Security Contributions and Benefits Act 1992 should be increased for future tax years. As a result of that review, it appears to the secretary of state that the general level of such earnings during the period from 1 October 2004 to 30 September 2005 has increased by 3.4 per cent.

This Order directs that the low earnings threshold for the tax years following 2005/2006 shall be £12,500. In force 6 April 2006.

Social Security (Deferral of Retirement Pensions etc) Regulations 2006 SI No 516

These regulations apply in relation to the deferral of retirement pensions, shared additional pension and graduated retirement benefit. In force 6 April 2006.

Recommendations to increase personal injury limit for small claims

We write to you to express our deep concern over the House of Commons Constitutional Affairs Committee's (CAC) proposals to effect change to the small claims court personal injury (PI) limit, contained in its recent report: *The courts: small claims*.

The CAC took evidence from several interest groups and organisations but we do not think that those who either gave or heard the evidence appreciated several fundamental points.

First, there appears to have been no appreciation of the sheer number of claims and, thus, victims who would become disenfranchised from the current compensation regime. Victims are usually represented by experienced PI lawyers and that representation is effectively provided 'free', although this fact is often overlooked or misunderstood by casual observers. Often, this leaves those observers with the wrong impression that victims have to pay their own lawyers. They do not – we all now operate on a 'no win no fee' basis. If our client loses s/he pays nothing in relation to costs and if s/he wins we recover costs only from the opponent, who is usually insured.

Our research has demonstrated that in excess of 70 per cent of all PI claims would fall within the proposed limit of £2,500. That would lead to the majority of victims' claims being outside the current regime where they can secure proper legal representation effectively for 'free'. Why should the majority of victims lose this right?

Second, the issue seems to have centred on the level of injury that a victim has suffered and the related level of compensation that it would attract. This is a valid issue but scant regard seems to have been given to the law involved. How can an unrepresented claimant be expected to appreciate the intricacies of The Manual Handling Operations Regulations 1992, for example?

The insurance industry will see a massive reduction in claims as the unrepresented public will clearly be reluctant to make a valid claim and this reluctance will probably filter through to those with higher-value claims.

The Civil Justice Council has recently issued its views on the landscape for legal costs in PI. It has recommended that predictive or fixed fees, set at reasonable levels in all PI claims, is the way forward – we agree with this. Predictive fees were introduced to motor PI claims in October 2003 and that, in our experience, reduced legal costs by between 20–25 per cent.

Currently, the legal profession in private practice provides the vast majority of accident victims with 'free' legal assistance on a 'no win no fee' retainer. If these proposals are implemented, the majority of victims will either have to represent themselves – at a disadvantage – or pay for that representation, thus diminishing the actual compensation they receive in real terms. How can either proposition be in the public interest?

Of further concern is the economic impact on the provision of 'high street' legal services. PI work provides important revenue to the majority of small and medium-size law firms. Many of these firms provide other legal services such as crime and family law that are under-resourced in terms of legal aid funding. If the majority of revenue from PI law is lost many accessible law firms will close and those that remain will question whether they can actually continue to subsidise other important services.

The winner, if these proposals are implemented, will be the insurance industry. It will control accident claims from 'cradle to grave', virtually unopposed, with few checks and balances in place to address the inevitable inequality of representation.

Keith Teare, managing partner and head of personal injury, JST Lawyers, Liverpool.

We welcome readers' letters and comments on *Legal Action*, which we will publish, subject to space. The editor reserves the right to shorten letters, unless it is stated that a letter should be published in full or not at all. Closing date for letters for the next issue is Monday 10 April. Send your letters to LAG at 242 Pentonville Road, London N1 9UN or e-mail: editor@lag.org.uk.

letters reviews

'The Exonerated'
written by Jessica Blank and Erik Jensen, directed by Bob Balaban

'The Exonerated' is a beautifully crafted and riveting account of how six innocent people, Robert, Sunny, Delbert, Gary, David and Kerry, came to be accused and convicted of the most heinous crimes imaginable. In their own words, it tells of their lives on death row and what life has been like since their exoneration and release.

Missing almost entirely from the stories are the defence lawyers. Kerry says: 'My court-appointed attorney was the former DA who jailed me twice before. He was paid $500 and, in Texas, you get what you pay for.' Sunny says: 'We both had no good attorneys, no dream team, no expert witnesses, and so he [her husband] was convicted and sentenced to death.' Her conviction and death sentence came soon after.

Perhaps it should not come as a surprise that a US government which declines to pay for an adequate defence to prevent wrongful convictions in the first place (Lord Carter et al, please note) also neglects to compensate those innocents it has tried to kill. However, it was still shocking to learn that none of the six exonerated has received a dime in compensation.

There are some famous names among the revolving cast. The night I went, these included Aidan Quinn (Madonna's squeeze in 'Desperately Seeking Susan') and Stockard Channing (Abbie in 'The West Wing' and, more importantly to those of us of a certain age, Rizzo in 'Grease'). Later in the run, the likes of Danny Glover will appear. However, this is anything but a 'starry' performance. The script is constructed almost entirely from public records and interviews with the six individuals. The actors sit in a row behind podiums, allowing the words and experiences of the exonerated to deliver their own power.

With no financial help from the state, the exonerated are left to sink or swim on their own. Amazingly, some of them manage to not just swim but fly. Sunny Jacobs – the only woman among the six – was robbed of almost everything. Her husband was executed; she spent 16 years on death row; and her two young children grew up without her (and were put into care after her parents died in an accident). Yet, somehow, she has managed to find peace and create a new life for herself (she even plays herself on stage at some points during the show's run).

As Sunny says, forgiveness and a life well lived are the best revenge.

Fiona Bawdon, freelance journalist, London

Until 11 June, Riverside Studios, Crisp Road, Hammersmith W6, Tuesday to Sunday 7.45 pm, Sunday mat 4 pm, £25 (£18.50 concessions). Tel: 020 8237 1111 or visit: www.theexonerated.co.uk.

LAG ▶ Books ▶ *Community Care Law Reports* ▶ Training ▶ *Legal Action* ▶ Supporters Scheme ▶ In-house training

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/Heather Williams
April 2005 ◆ Pb 0 905099 91 5 ◆ 760pp ◆ £37

Community care

Community Care and the Law
3rd edn
Luke Clements
2004 ◆ Pb 1 903307 19 8 ◆ 758pp ◆ £37

Crime

ASBOs
a practical guide to defending Anti-social Behaviour Orders
Maya Sikand COMING SOON
July 2006 ◆ Pb 1 903307 41 4 ◆ c500pp ◆ £45

Abuse of Process
Colin Wells COMING SOON
July 2006 ◆ Pb 1 903307 46 5 ◆ c450pp ◆ £45

Defending Young People
in the criminal justice system 3rd edn
Mark Ashford/Alex Chard/Naomi Redhouse COMING SOON
May 2006 ◆ Pb 1 903307 34 1 ◆ c900pp ◆ £48

Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ◆ Pb 1 903307 25 2 ◆ 502pp ◆ £37

Reconcilable rights?
analysing the tension between victims and defendants
Edited by Ed Cape
2004 ◆ Pb 1 903307 31 7◆ 148pp ◆ £15

Defending Suspects at Police Stations 4th edn
Ed Cape/Jawaid Luqmani
2003 ◆ Pb 1 903307 21 X ◆ 912pp ◆ £42

Employment

Maternity and Parental Rights
a parent's guide to rights at work
3rd edn COMING SOON
Camilla Palmer/Joanna Wade/Katie Woods
Sept 2006 ◆ Pb 1 903307 40 6 ◆ 500pp ◆ £28

Employment Law
an advisers' handbook 6th edn
Tamara Lewis NEW
Oct 2005 ◆ Pb 1 903307 36 8 ◆ 804pp ◆ £28

Employment Tribunal Claims
tactics and precedents
Naomi Cunningham
March 2005 ◆ Pb 1 903307 33 3 ◆ 440pp ◆ £25

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/Rebecca Tuck/Betsan Criddle
2004 ◆ Pb 1 903307 29 5 ◆ 758pp ◆ £37

Discrimination Law Handbook
Camilla Palmer/Tess Gill/Karon Monaghan/Gay Moon/Mary Stacey
2002 ◆ Pb 1 903307 13 9 ◆ 1264pp ◆ £45

Gypsy and Traveller law

Gypsy and Traveller Law
Edited by Marc Willers/Chris Johnson
2004 ◆ Pb 1 903307 26 0 ◆ 488pp ◆ £29

Housing

Homelessness and Allocations
7th edn COMING SOON
Andrew Arden QC/Caroline Hunter
July 2006 ◆ Pb 1 903307 38 4 ◆ c700pp ◆ £45

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Nic Madge/Derek McConnell/John Gallagher/Jan Luba QC
June 2006 ◆ Pb 1 903307 30 9 ◆ 750pp ◆ £48

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a guide to Leasehold Valuation Tribunals
Francis Davey/Justin Bates
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Nic Madge
2003 ◆ Pb 1 903307 10 4 ◆ 1264pp ◆ £39

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/Andrew Dymond
2002 ◆ Pb 1 903307 14 7 ◆ 320pp ◆ £29

Housing and Human Rights Law
Christopher Baker/David Carter/Caroline Hunter
2001 ◆ Pb 1 903307 05 8 ◆ 252pp ◆ £19

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tenants' rights 3rd edn
Jan Luba QC/Stephen Knafler
1999 ◆ Pb 0 905099 49 4 ◆ 420pp ◆ £29

Human rights

Human Rights Act Toolkit
Jenny Watson/Mitchell Woolf
2003 ◆ Pb 1 903307 15 5 ◆ 256pp ◆ £22

European Human Rights Law
Keir Starmer QC
1999 ◆ Pb 0 905099 77 X ◆ 960pp
◆ *Reduced from £35 to £25*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights
2nd edn
Sue Willman/Stephen Knafler/Stephen Pierce
2004 ◆ Pb 1 903307 24 4 ◆ 788pp ◆ £39

Law reform

Beyond the Courtroom
a lawyer's guide to campaigning NEW
Katie Ghose
Oct 2005 ◆ Pb 1 903307 35 X ◆ 350pp ◆ £20

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Parole Board Hearings
law and practice NEW
Hamish Arnott/Simon Creighton
Jan 2006 ◆ Pb 1 903307 42 2 ◆ 350pp ◆ £24

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a practitioner's guide
Leslie Thomas/Danny Friedman/Louise Christian
2002 ◆ Pb 0 905099 97 4 ◆ 544pp ◆ £42

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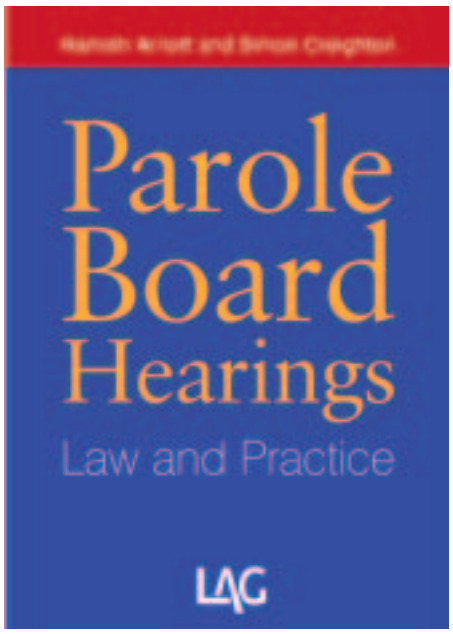

Public law

Judicial Review Proceedings
a practitioner's guide 2nd edn
Jonathan Manning
2004 ◆ Pb 1 903307 17 1 ◆ 720pp ◆ £34

▶ Training
Spring/Summer 2006

Defending Anti-social Behaviour Orders for Criminal Defence Practitioners
19 April (half-day) pm
£100 + VAT 3 CPD Hours – Course grade: B/I/A/U
Trainers: Ian O'Rourke/Naomi Redhouse

Recent Developments in Gypsy and Traveller Law
9 May
BIRMINGHAM
£185 + VAT 6 CPD Hours – Course grade: U
Trainers: Chris Johnson,Timothy Jones, Marc Willers

Bringing an Appeal to the Social Security Commissioners
16 May (half-day) pm
£149 + VAT 3 CPD Hours – Course grade: B/I/A/U
Trainers: Andrew Bano/Howard Levenson

Parole Board Oral Hearings
17 May
£185 + VAT 6 CPD Hours – Course grade: B/I
Trainers: Hamish Arnott/Simon Creighton

Housing Law: a practical introduction
24 May
£185 + VAT 6 CPD Hours – Course grade: B
Trainers: Diane Astin/John Gallagher

Supervision Skills in Civil Cases
7 June
£185 + VAT 6 CPD Hours – Course grade: I
Trainers: Brenda Bloch/Maxine Klein/Vicky Ling

Defending Possession Proceedings
14 June
£185 + VAT 6 CPD Hours – Course grade: B/I/A/U
Trainers: John Gallagher/Derek McConnell

Introduction to Mental Health Review Tribunals
21 and 22 June
£425 + VAT 12 CPD Hours – Course grade: I
Trainers: William Armstrong/Phil Fennell/ Dr Rob Ferris/Simon Foster/Bill Jackson/ Robert Robinson/Lucy Scott-Moncrieff

Community Care Law Reports

Community Care Law Reports (CCLR) is the only law reports service devoted to community care issues and the rights of vulnerable people to accommodation and services. ***CCLR*** has established itself as an essential information service by providing high quality and authoritative coverage of this complex area of law.

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- ***Editorial review*** – a round up placing the reported cases in context.
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Essential reading for practitioners, local authority legal, social services and housing departments, health authorities, law libraries and the voluntary sector.

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noticeboard

Conferences and courses

Legal Aid Practitioners Group
Planning for Financial Survival, Back to Basics for Legal Aid Firms
11 April 2006
9.30 am–5.00 pm
Southampton
£260 + VAT for members, £495 + VAT for non-members
6 hours CPD
This course will take you back to the basics of calculating the cost to the firm of each fee earner, using that information to prepare realistic budgets and cash flow projections, and understanding the impact of your average case cost on your profitability.
For more information:
Tel: 020 7960 6068
E-mail: kate@lapg.co.uk
www.lapg.co.uk

LAG
Defending Anti-social Behaviour Orders for Criminal Defence Practitioners
19 April 2006
2.15 pm–5.15 pm
London
£85 + VAT if booked before 31 March, £100 + VAT if booked after 31 March
3 hours CPD
Defence practitioners are dealing with a dramatic increase in the number of applications for anti-social behaviour orders, both free-standing and on conviction. The evidential and tactical considerations are complex and this half-day course is designed to equip the practitioner with the knowledge and skills needed in this unfamiliar area.
For more information:
Tel: 020 7833 2931
E-mail: courses@lag.org.uk
www.lag.org.uk

Immigration Law Practitioners' Association
Introduction to Immigration Law: getting started, the first step to accreditation
25 April 2006
2.00 pm–6.15 pm
London
£160 for ILPA members, £320 for non-members
4 hours CPD
For more information:
Tel: 020 7251 8383
E-mail: info@ilpa.org.uk
www.ilpa.org.uk

LAG
Recent Developments in Gypsy and Traveller Law
9 May 2006
9.15 am–5.15 pm
Birmingham
£157.25 + VAT if booked before 31 March, £185 + VAT if booked after 31 March
6 hours CPD
This is a full-day course for individuals at the updating level. This course is designed for legal aid practitioners, Gypsy and Traveller advice and liaison workers and voluntary sector workers with a basic knowledge of Traveller issues.
For more information:
Tel: 020 7833 2931
E-mail: courses@lag.org.uk
www.lag.org.uk

Lectures, seminars and meetings

LAG in association with Garden Court Chambers and Doughty Street Chambers
Community Care Law Reports practitioner seminars
4 April 2006
6.30 pm–8.30 pm
London
Free to *CCLR* subscribers, £25 + VAT for non-subscribers
1.5 hours CPD
Speakers:
Nicola Mackintosh (Mackintosh Duncan) speaking on funding and Martin Westgate (Doughty Street Chambers) speaking on costs
For more information:
Tel: 020 7833 2931
E-mail: lag@lag.org.uk
www.lag.org.uk

London Criminal Courts Solicitors' Association
Working Dinner
24 April 2006
7.15 pm
London
£45
Guest speaker: Alison Saunders
The work of the Serious Organised Crime Agency (SOCA) will have a dramatic impact on the way serious crime is investigated and prosecuted in the UK. Alison Saunders will talk about the new powers and the work of SOCA generally.
For more information:
Tel: 020 7837 0069
E-mail: sandra@admin4u.org.uk
www.lccsa.org.uk

Human Rights Lawyers Association
Positive Obligations and Proportionality
26 April 2006
6.00 pm
London
Free for HRLA members, £10 for non-members
1.5 hours CPD
For more information e-mail:
SMontgomery@barcouncil.org.uk
www.hrla.org.uk

Young Solicitors Group
Social Policy Talk
3 May 2006
12.30 pm–2.00 pm
London
£15 for members, £18 for non-members (includes buffet and a glass of wine)
Liberty's director, Shami Chakrabarti, will give an up-to-date look at the latest issues concerning human rights.
For more information contact Jill Goldsworthy:
Tel: 020 7392 2930
E-mail: publicity@toynbeehall.org.uk
www.toynbeehall.org.uk

Access to Justice Alliance
Calling all citizens advice bureaux, legal aid lawyers, Law Centres® and independent advice centres. The Access to Justice Alliance is organising a public meeting and lobby of parliament on the afternoon of 24 May 2006 on the continuing crisis in civil legal aid. More details will be announced in next month's *Legal Action*. ***Please put this event in your diaries!***

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July: 19 June
August: 17 July
September: 14 August
October: 18 September
November: 16 October
December: 13 November

To place an advertisement in the next edition of *Legal Action* contact Landmark Publishing Services, tel: 020 7692 9292, fax: 020 7692 9393, e-mail: landmark@lps.co.uk

Police Misconduct: legal remedies

4th edition

by John Harrison, Stephen Cragg and Heather Williams

Now in its fourth edition, *Police Misconduct: legal remedies* is a unique and practical guide for practitioners and advisers covering the two major routes to remedying police misconduct, police complaints and civil actions in the courts.

This book equips the reader with the essentials for advising on the full range of procedures, strategies and tactics available. It provides thorough procedural advice and step-by-step guidance from pre-issue considerations through to jury trial and appeal. There is detailed guidance on the most common torts – false imprisonment, malicious prosecution and misfeasance – and clear analysis of developing causes of actions against the police such as negligence, privacy, discrimination and claims under the Human Rights Act. It outlines other available remedies such as judicial review and inquests, and includes a unique guide to obtaining compensation for wrongful convictions from the Home Office.

Since the last edition of this book, the legal background to the field of police misconduct has transformed. The fourth edition has been substantially rewritten and expanded to include a major analysis of developments such as the Independent Police Complaints Commission, new police discipline systems, constitutional changes to the organisation of the police and ever-widening police powers.

Contents include:

- The constitutional and organisational position of the police
- Police complaints
- Discipline and criminal prosecution
- Intentional torts to the person
- Abuse of power including malicious prosecution and misfeasance in a public office
- Negligence and related actions
- Wrongful interference with land and goods
- Human rights and discrimination
- Suing the police: pre-action considerations
- Bringing the action – issue of proceedings to exchange of witness statements
- The civil action trial
- Damages
- ECHR (process of taking a case to Strasbourg)
- Inquests, judicial review and other remedies
- Guide to obtaining compensation for wrongful convictions

Authors:

John Harrison is a solicitor and partner at Sharpe Pritchard in London.

Stephen Cragg is a barrister at Doughty Street Chambers in London specialising in human rights, actions against the police and public law.

Heather Williams is a barrister at Doughty Street Chambers in London specialising in civil liberties, actions against the police, human rights and discrimination law.

Stephen Cragg and Heather Williams write a twice-yearly Police Misconduct update for Legal Action.

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