Exposing the Myth – Jury Research Human Trafficking

CBQ

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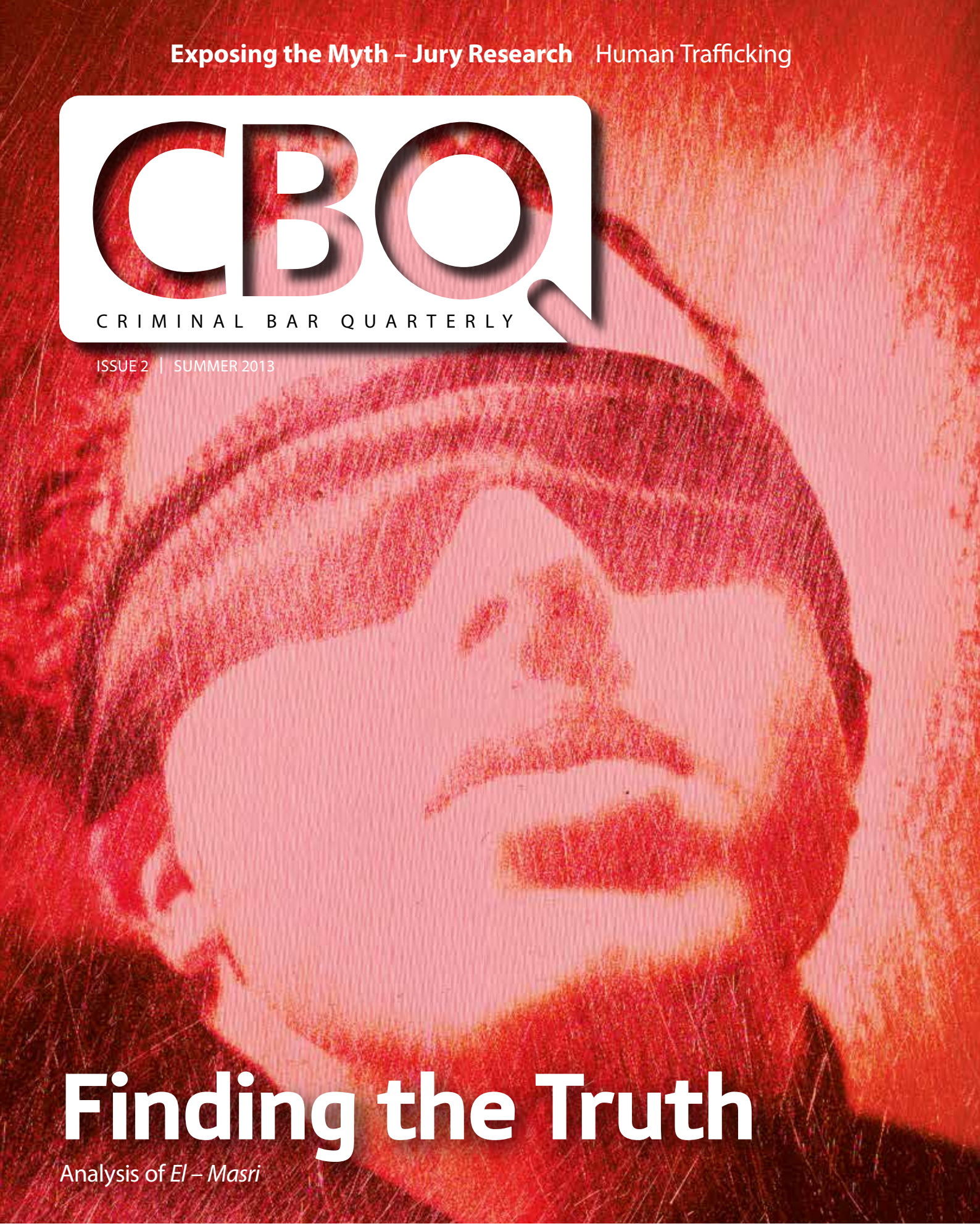

Finding the Truth

Analysis of *El – Masri*

WITNESS COMPETENCY HEARINGS

Questioning vulnerable witnesses

Publication of

THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

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VIEW FROM THE EDITOR

Fight the Good Fight

EDITOR
John Cooper QC

Over the last few months I doubt whether I've seen so much unity between the two branches of the legal profession. I honestly believe that Mr Grayling thought that he could drive through his hopelessly ill-conceived plans by causing division between both the Bar and solicitors.

With important leadership from this Association and the inspirational actions of the circuits, there can be no doubt that whatever opinion the Justice Secretary had of publicly funded lawyers, he now knows at least one thing, we are not going to be walked all over by a man who has shown little understanding and appreciation of the vital role that the Criminal Justice system has in sustaining a fair and democratic society.

It was brought home to me recently when I spoke at the London Criminal Courts Solicitors' Association protest in Parliament Square on May 22. During my address to the hundreds of colleagues who attended that event, I suggested that for the duration of our campaign at least, we should stop referring to ourselves as barristers and solicitors but simply as legal professionals, emphasizing the complete unity and common purpose in our cause.

The presence of the CBA at that protest and at all the others that have taken place throughout the country stands testament to the central role that the CBA is taking in this important fight. From the Ministry of Justice roadshows, the sell-out meeting of the South Eastern Circuit and including the support of our colleagues on the Northern Circuit who led the way, the CBA can look back at this time with a great deal of pride in what it has done.

In many respects *CBQ* represents less frantic times when the Criminal Bar might have been able to at least take a breather and read articles that are not only related to legal practice but were also entertaining. We continue to do this, as well as reflecting these unprecedented events.

It is right and proper that the *CBQ* also extends its gratitude to the vital work of this Association and in particular its Chair, Michael Turner QC. ■

25 Bedford Row

A Line in the Sand

CHAIRMANS COLUMN

Michael Turner QC

This is not a speech to depress and demoralize but one that I hope will make us all realize that with unity and effort we can save the professions and the independent judiciary from oblivion.

I invited Marylyn and Dan (new to the Bar) to speak tonight because I knew you would have no stomach for platitudes from a judiciary who appear to have been effectively muzzled (with too few notable exceptions) from voicing dissent to proposals which will ultimately destroy their independence and so affect the public interest.

Marylyn and Dan I hope remind us all of careers just starting and beginning to blossom that we are fighting for, and fight we will.

When I started ranting about the likes of Eddie Stobart's taking over our legal profession a lot of people thought I was exaggerating for effect. You now know I was not. Eddie Stobart's has now declared their hand and it tells you everything you need to know about the future. He has disdainfully likened the solicitor profession to wounded animals waiting to die. They tell us they have 1,000 barristers at their disposal, they publish no list. Curiously, it is the exact number who are registered on the Bar Council direct access register. Like a corporate blood sucker all they have done is fool the public by placing themselves as a middleman between the Bar and the public, collecting a fee for what the public could directly access for themselves. What has the Bar Standards Board done about it. Precisely nothing. They really are good value for the £6m we pay them.

Some were even more incredulous when we suggested QASA was a "sham" designed to con the public into thinking that when choice of representation is removed from them a quality badge provided by the BSB guaranteed them anything. It does not.

An actual exchange that took place between a lawyer and the MoJ civil servant at the road show in Leeds in May:

The Barrister

Q: do you accept PCT will lead to lower quality?

The Civil Servant

A: I'd accept it will be a different level of quality

You only have to look at the grading system deployed to rank to the in house CPS to realize that the only route to excellence is through client choice and a competitive market.

It was Max Hill QC who started a trend that I hope I have followed. A philosophy of drawing lines in the sand never to be crossed, of communicating with those we represent and most importantly seeking to put your wishes into effect.

> "Once the Bar has been dispersed, and the corporates move in as suppliers, those remaining at the Bar will be forced in-house. The Bar will then be trained within a corporate setting. The ethics and integrity of the profession will disappear to be replaced by an interest only in a corporate philosophy."

I hardly need to reiterate what effect these proposals will have on the legal profession. But I do want to highlight just two.

PCT is not proposed for the Crown Court in this round, but the effect of the proposals are as catastrophic on the publically funded criminal bar as they are on the solicitors profession. The cuts proposed are a stated 30% from VHCC cases (40% in reality) and minimum of 17.5 % from graduated fee cases (likely 25%). The impact of these cuts will make it uneconomic for criminal barristers to remain in chambers. Many will work from home or give up altogether. That will have a devastating effect on the number of pupillages available, already at an all time low.

Currently, 1,700 students pass through Bar school, competing for 340 pupilages. With no training for the Bar available, the Bar will wither on the vine and die. The vast reduction in pupillages has a commensurate impact on E & D within the profession, effectively paving the way for white male, self-financing entrants.

Once the Bar has been dispersed, and the corporates move in as suppliers, those remaining at the Bar will be forced in-house. The Bar will then be trained within a corporate setting. The ethics and integrity of the profession will disappear to be replaced by an interest only in a corporate philosophy. As with solicitors, the new fee structure incentivizes the guilty plea providing a source of conflict between the barrister and the best interests of their client.

Our Judges are largely drawn from the Bar. They are hugely regarded worldwide for their intellect and independence. Indeed, the Government rely on tax revenues produced by those seeking to litigate their disputes in the English Legal system. As a result of that reputation. The disappearance of the Bar will lead in a short time to the disappearance of an intellectually rigorous and independent judiciary. More importantly still, it is the independence of the judiciary which underpins our democracy.

There are many reasons for not liking QASA and one of them is the

Plea Only Advocate, it is a bone that has the potential to split apart the professions which are at present united in a manner that I hope remains for evermore. This Government are past masters at chucking a bone in a corner and watching two dogs fight over it, whilst they pick the carcass bare. One must understand why solicitors have been forced into the Crown Court, it is because they were forced to sign up to a grad fee scheme that simply did not properly remunerate them. The way to get rid of Plea Only Advocates is by ensuing all sections of the professions are properly remunerated for the work that they do.

> Return the magistrates' court to it's pre-2005 position and levy the banks will give you £2B and more, to preserve a system revered the world over.

There are still those within our profession that inform me we are in a recession and that we must give way just a little bit. What I say is why?

Our fight is not a selfish one it is for the preservation of our democracy itself. The Government fails to understand why the legal aid system leeks money like a sieve. We know, because we see the delays in our court rooms on a daily basis, caused by interpreters who do not speak the language of the defendant or the jury. Of privatized prison escort services who cannot get their charges to court on time or at all. And, when by some miracle they do, they bundle up their confidential documents and jury bundles without a by you leave from the court as happened recently at the Old Bailey in a nine-handed murder to catastrophic effect. Requiring the intervention of independent counsel and consequent delay.

We are told that the CPS in its current form represents a saving to the tax payer of £27m a year. An internal Inspectorate report exposed that figure as nonsense because it only represents savings in counsel fees without taking into account the cost of the in house advocate. When you do that, £27m disappears into the minus. Then you have to take into account the cost to the public of the disasters many and various as they are, often caused by a disclosure system that is broken. The sad reality is that the CPS is costing the tax payer at least £100m more than ever before.

Quite apart the vast savings the Government would achieve if they choose to run the system without utilizing corporate entities and cheap inexperienced labour, it has the ability to produce the £2B at a stroke.

In 2005, the magistrates' courts were dragged away from the Magistrates' Courts Association and was taken into the MoJ and an annual cost of over £1.5B. The Magistrates' Association was probably the best example of David Cameron's big society in action. No longer.

We are told that the fraud cases utilize the vast majority of the criminal legal aid spend. Frauds on banks who care little for creating fraud proof systems because, they never have to pick up the bill. They are allowed to right of the money stolen against tax, the ensuing criminal case is then investigated and prosecuted at the tax payers expense and in the event of conviction the civil action is delivered to the banks on a plate at minimal cost.

Return the magistrates' court to it's pre-2005 position and levy the banks will give you £2B and more, to preserve a system revered the world over.

Mr Grayling is keen to trumpet the income produced by the Commercial Bar but again he fails to understand what they readily accept that it is the reputation of the Criminal Bar worldwide that attacks that work in the first place.

We are no longer in this fight on our own, quite apart from the solicitors profession, whose numbers are to be cut by three quarters, to be put on unworkable tiny contracts. The Unions are fully in support and why, because their funds will be devastated by supporting their members who fall above the threshold for legal aid. Equally, the solicitor base which is so essential to supporting their membership will disappear, the small offices all around the country rely for their survival on legal aid. None of them will be in a position to bid for a contract. This is not about politics with a big P, this is about understanding and supporting what is going to befall the man in the street aswell as ourselves. You will all know by now that the Labour Party has finally backed our campaign. More diverse political groups will follow. After a hard fought campaign the Press are beginning to show real concern and interest. We are no longer powerless to act. Over and above responding forcefully to the consultation *via* a committee headed up by Max we have briefs out on all aspects of the consultation. Both timing and competition.

We have to be as one on a national basis not in little pockets. Not on a Circuit basis.

This is a fight across the country and can only be one with a unity of purpose in harness with the solicitor profession. We have already said NO to QASA and that stance will be supported by solicitor profession who, even if forced to sign up will not attend accreditation centres or complete their forms.

We can terminate our VHCC contracts on a unilateral variation of 30% and more, without recoupment and the solicitor's profession will (can) do likewise.

We can refuse to accept work under the new graduated fee rates and the solicitors profession will follow suit by not sending in house advocates as replacements into the Crown Court.

We welcome our friends in the Judiciary by our side, but regardless, we will take on this battle together, in unity with our sister profession and others. ■

We are acting not out of self interest but public interest, We Will Do Right , Fear No One and Win.

Michael Turner QC

(This was the abridged version of the speech Michael Turner QC made at the Criminal Bar Dinner on May 10 2013).

Witness Competency Hearings – A Test of Competence

Preface
Questioning vulnerable witnesses

Contributor
Penny Cooper

In 1958 Lord Goddard, the then Lord Chief Justice, said this in relation to the calling of a five year old witness:

> "The court deprecates the calling of a child of this age as a witness ... The jury cannot attach any value to the evidence of a child of five; it is ridiculous to suppose that they could … in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again." *R. v. Wallwork* (1958) 42 Cr. App. R 153

Nowadays things are very different; children as young as four sometimes give evidence in criminal trials. This "includes a number of children who were three when the police interviews were undertaken, some of whom were giving evidence about events that happened when they were two" (Marchant, 2013).

Witnesses, including children, must be competent. The legal test of competence is set out in s.53 of the Youth Justice and Criminal Evidence Act 1999 and includes:

> "(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.
> (2) Subsection (1) has effect subject to subs.(3)…
> (3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to –
> (a) Understand questions put to him as a witness and
> (b) Give answers to them which can be understood.'

The present Lord Chief Justice in *R. v. B* [2010] EWCA Crim 4 explained,

> "These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions."

A party or the court of its own motion can raise the issue of a witness's competence. It is for the party calling

the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings." (s.54 (2)). In determining the competency of a witness the court treats the witness as having the benefit of any special measures which the court has given or proposes to give. A hearing to determine competence is heard in the absence of the jury, if there is one. Expert evidence may be received by the court on the issue and the witness may be questioned where the court considers that is necessary.

In March in *R. v. F* [2013] EWCA Crim 424, the Court of Appeal found that the approach to the competency hearing was "seriously flawed". The Court of Appeal set out guidance which reinforces the modern approach outlined in *R. v. B* in 2010. The witness in F, referred to as H, was profoundly deaf and had mild to moderate learning difficulties. The defence raised the issue of H's competence. Why they did so is not dealt with in the judgment. H had made her complaint promptly and in the ABE interview, in which she was assisted by a deaf intermediary and a signing interpreter, she was able "to give a comprehensible account of her allegations relating to both offences charged" and "with time and patience an account emerged which revealed alleged offences and when, where and how they came to take place". F denied the allegations.

At the competency hearing the Judge did not watch the entire ABE interview but only asked to see half a dozen questions to "get the flavour of it". A "brief extract" was played in court. Prosecution counsel asked some questions

of a general nature which were answered satisfactorily. H was asked to point to different parts of her body. It was made clear that the signing interpreter would have to point to body parts as part of the question; she was not prepared to do finger spelling. However, the intermediary suggested that H could be asked to point to drawings or pictures and indeed the intermediary had brought anatomical drawings with her to court but her suggestion was not taken up. Afterwards H saw the drawings and indicated that she could point to places where she said she had been touched. Defence counsel also asked questions to which H gave intelligible answers. Finally, the Judge asked questions, which made clear that the witness had difficulty dealing with concepts of time and abstract matters, including what a daffodil looked like. The Judge concluded that H was not competent, the Crown appealed on the basis that the competency hearing was flawed, the Court of Appeal agreed.

Treacy LJ referred to *R. v. B* (above) and reiterated the principle that "the trial process must cater for the needs of witnesses". "The competency test is not failed because the forensic techniques of the advocate or the processes of the court have to be adapted to enable the witness to give the best evidence of which he or she is capable. It is our clear conclusion that the hearing did not effectively explore H's ability to communicate." In other words it was not that H had failed the competency test, but rather the way the test had been conducted had failed H.

The Court of Appeal recognized that questioning vulnerable witnesses "requires not only training, flexibility and sensitivity, but also time and patience". It also sent the message to advocates that preparation is key: "The shortcomings of this process seem to us to owe much to a lack of preparation and a lack of ability to respond flexibly to the difficulties which arose."

How then should advocates prepare? Where the witness has an intermediary advocates should follow the intermediary's recommendations and, insofar as it is not covered in the report, seek their advice on how to communicate their intended questions. The intermediary's duty is to the court, they are not a witness supporter and they must not discuss the evidence with the witness so this will not result in "telegraphing" cross-examination to the witness when seeking the advice of the intermediary in this way.

Even if the witness has not had an intermediary at interview, it does not necessarily mean that one is not needed at trial. It may be necessary to make a "late" application because the witness's communication needs have been unnoticed until now. If there is no intermediary for the vulnerable witness counsel "should not take it upon themselves to decide what the communications needs are of any of their potentially vulnerable witnesses, and, in particular, children."(Bar Council, *Special Measures Guidance*). It may be possible to obtain information from the parent or carer (in the case of a young child) or from the witness or (with their consent) from their family/ support worker/social worker for example.

In addition, the Advocacy Training Council has issued detailed guidance via The Advocate's Gateway web site (theadvocatesgateway.org), launched on April 26, 2013 by the Attorney General. The materials on the site include 11 "toolkits" with advice on questioning the vulnerable. For example an advocate planning to question a child or young person should read "toolkit 7". It covers how to structure questions and practical tips such as giving the child the choice of using live-link or not; live-link will not always aid questioning. In one case (*Counsel*, November 2012) both advocates went into the live-link room where the child was questioned and the Judge and jury were able to monitor the proceedings from the court room. An advocate planning to question a witness with an autism spectrum disorder will read in "toolkit 3" for example, why it could be counterproductive for the advocate to insist in eye contact, that those with autism tend to take language literally so it would also be unhelpful to say "let me paint you a picture" and that it may help to write down the question for the witness. It is important to note that ground rules should be set before a vulnerable witness is questioned (see toolkit 1c, "Ground rules hearings").

Each toolkit contains the statement: "Questioning that contravenes principles for obtaining accurate information from a witness by exploiting his or her developmental limitations is not conducive to a fair trial and would contravene the Codes of Conduct".

In other words it would be unethical to take the approach "I now know what will disrupt communication with this witness so I will ask questions in such a way that they are less likely to understand the question or give an answer that would be understood and then I'll argue they are not competent". To do this would constitute an unfair manipulation of the witness; it would be contrary to the interests of justice. Trying to use the witness's communication needs against them is surely a sign of a very poor advocate; a good advocate concentrates on the evidence, not on exploiting a witness's communication difficulties.

R. v .F also provides a reminder that counsel should consider carefully whether a competency hearing really is necessary and "even if competency is assumed or ruled upon in favour of the witness by the Judge, the Judge is under a continuing duty to keep the matter under review." Counsel may choose to avoid delay and expense associated with a separate competency hearing and keep their questioning powder dry until the actual trial; they are "not precluded from raising the issue during the course of the trial if matters develop in a way which justifies it."

Whether the vulnerable witness is questioned at a competency hearing or at trial or both one thing is for certain, lack of preparation will bring into question the competence of the advocate.

These days the Court of Appeal does not "deprecate" the calling of vulnerable witnesses but it will deprecate advocates who do not adapt their questioning.

Toolkits, information on intermediaries and cases, including *R. v. B* and *R. v. F*, can be found at theadvoatesgateway.org and web site access is free. ■

The author is Chair of the Management Committee of The Advocate's Gateway and is a professor of law at Kingston University London.

Defending Victims of Human Trafficking

Preface

What is human trafficking?

Contributors

Felicity Gerry and **Emilie Pottle**

The Palermo Protocol

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.

On April 22, 2013, the Organization for Security and Co-operation in Europe (OSCE) published a paper making policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team. The paper was drafted by Ryszard Piotrowicz, Professor of Law at Aberystwyth University, member of the European Commission's Group of Experts on THB and of GRETA, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings, and Liliana Sorrentino, expert on THB and benefited from expert contributions by Parosha Chandran, barrister at 1 Pump Court Chambers, London and Patricia Le Cocq of the Belgian Centre for Equal Opportunities and Opposition to Racism and Georgina Vaz Cabral of the OSCE-OSR/CHTB. We cannot improve on their introduction:

Trafficking in human beings is a massive phenomenon of modern-day slavery, which sees millions of individuals deprived of their liberty and freedom of choice, exploited with coercive and abusive means for a variety of purposes ranging from sexual and labour exploitation, to forced criminality and to the removal of organs or any other illicit lucrative form of exploitation. Very few receive assistance and protection as victims of a serious crime; more often they are arrested, detained and charged with immigration offences, for soliciting prostitution or engaging in illegal work, making false statements or they are fined for violations of administrative laws and regulations. Furthermore, the increasing prevalence globally of human trafficking for enforced criminality also exposes victims of trafficking to committing a multitude of offences such as, but not limited to, theft, pick-pocketing, drug trafficking, cannabis cultivation and fraud. It is often a deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities. It is therefore not uncommon that victims of trafficking commit criminal offences or other violations of the law directly connected with, or arising out of, their trafficking situation. In these situations they often come to the attention of the authorities primarily as offenders and they may not be easily recognized as actual victims of a serious crime. Therefore, States should be fully aware of these developments in order to

enable accurate victim identification and effective investigation of the trafficking crime, as well as to ensure effective protection of victims' rights, including non-punishment of victims for offences caused or directly linked with their being trafficked.

Why does this matter to criminal practitioners?

Putting aside pre-conceived notions of criminal liability, the modern approach to modern slavery is non punishment, that is; not to prosecute even clear criminal offending. For practitioners, in the right case, it will be possible to argue that a trafficked individual should not be prosecuted at all, or that they should not be punished. To really understand the issue of trafficking and the principles of non punishment, it is worth reading *Rantsev v. Cyprus* and *Russia Application no. 25965/04* (Strasbourg January 7, 2010) where the the court held that human trafficking falls within the protective scope of the non-derogable rights of art.4 of the European Convention of Human Rights and that a positive obligation on States to investigate human trafficking arises where circumstances give rise to, or ought to give rise to, a credible suspicion that the person had been trafficked.

The UK is a party to the "Convention on Action against Trafficking in Human Beings 2005". The convention includes certain obligations towards the victims of trafficking, including:

Article 26- Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so,

It is important to identify that an individual is a victim of trafficking. The OSCE paper continues:

> "Victims of trafficking are victims of serious crimes and human rights violations. Under international law, States are obliged to ensure the protection of the rights of victims, including the right to be accurately identified as trafficked adults or children, and it is this identification that is the gateway to their protection …Victims of trafficking are also witnesses of serious crime. The non-punishment provision will, if applied correctly, equally and fairly, enable States to improve their prosecution rates whilst ensuring critical respect for the dignity and safety of all victims of trafficking who, but for their trafficked status, would not have committed the offence at all … a human rights approach calls for governments and parliaments to take the lead in their national jurisdictions to ensure that legislation and policy are not negatively impacting on the protection of rights of trafficked persons".

The importance of identifying victims correctly was recently emphasized in case of *M and Others v. Italy and Bulgaria Application no. 40020/03* (July 31, 2012) which departed from the lower threshold of "credible suspicion" applied in the *Rantsev* case. The applicants, a Roma family from Bulgaria, came to Italy on the promise of work from another Roma family of Serbian origin. The applicants complained that their daughter had suffered ill-treatment, sexual abuse and forced labour at hands of the Serbian family in Italy. They alleged that the Italian authorities failed to protect her or punish the perpetrators, and instead of investigating the circumstances complained of, the police instituted criminal proceedings against the girl and her mother for perjury and false accusations. The government counter claimed that the situation amounted to a typical marriage according to the Roma tradition. The court found a violation of art.3 for ineffective investigation but went on to find the art.4 ground inadmissible as the applicant had provided insufficient evidence to prove there had been an instance of human trafficking thus placing the burden of proof on the applicant which will in some cases be an uphill task .

Ongoing cases

There is no excuse not to be aware of our duties to trafficked victims: In the *Blackstone's Quarterly* update for Spring 2013, we were reminded that The Trafficking People for exploitation Regulations 2013 (SI 2013 No. 554) implement Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 on preventing and combating trafficking inhuman beings and protecting its victims and replace Council Framework decision 2002/629/ JHA: "They lay down certain requirements to be observed by the police during investigation of trafficking offences with a view to providing protection for child complainants, and enhanced protection for child complainants. They also provide for amendments to special measures regime under YJCEA 1999; these have the effect of affording similar protection to complainants in trafficking offences to that afforded to victims of sexual offences"

These obligations are not limited to witnesses. Back to the OSCE paper (which is well worth a read in full): "The rationale for non-punishment of victims of trafficking is that, whilst on the face of it a victim may have committed an offence, such as irregular crossing of a State frontier or theft, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect. States have a duty to provide qualified and trained officials to identify and help victims of trafficking. International obligations arise from a number of sources but for criminal practitioners with limited time"

Trafficking issues typically arise in cases involving the following offences:

- Causing of inciting/ controlling prostitution for gain.
- Theft (in organized "pick-pocketing" gangs).
- Cultivation of cannabis.
- Immigration offences.

In practice, the UK complies with its duty *via* the Code for Crown Prosecutors which requires prosecutors to advise police to make inquiries about whether there is a reasonable possibility that the suspect was trafficked; and:

If new evidence or information obtained supports the fact that the suspect has been trafficked and committed the offence whilst they were coerced, consider whether it is in the public interest to continue prosecution. Where there is clear evidence that the suspect has a credible defence of duress, the case should be discontinued on evidential grounds.

Even where the circumstances do not meet the requirements for the defence of duress, prosecutors must consider whether the public interest is best served in continuing the prosecution in respect of the criminal offence. The following factors are relevant when deciding where the public interest lies:

- is there a credible suspicion that the suspect might be a trafficked victim?
- what is the role that the suspect has in the criminal offence?
- was the criminal offence committed as a direct consequence of their trafficked situation?
- were violence, threats or coercion used on the trafficked victim to procure the commission of the offence?
- was the victim in a vulnerable situation or put in considerable fear?

And if the Crown still decide to proceed? The obligation falls on us as advocates to consider a judicial review, seek a stay or remind the sentencing Judge of the UK's obligations under the Convention.

In *R .v. N; R .v. LE* [2012] EWCA Crim 189, the court made clear that art.26 did not prohibit the prosecution or punishment of victims of trafficking *per se*, but did require the Prosecutor to give careful consideration as to whether public policy calls for a prosecution. *Per* the Lord Chief Justice:

21. Summarizing the essential principles, the implementation of the United Kingdom's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the Crown Prosecution Service, however strong the evidence may be, to decide that it would be inappropriate to proceed or to continue with the prosecution of a defendant who is unable to advance duress as a defence but who falls within the protective ambit of art.26. This requires a judgment to be made by the CPS in the individual case in the light of all the available evidence. That responsibility is vested not in the court but in the prosecuting authority. The court may intervene in an individual case if its process is abused by using the "ultimate sanction" of a stay of the proceedings. The burden of showing that the process is being or has been abused on the basis of the improper exercise of the prosecutorial discretion rests on the defendant. The limitations on this jurisdiction are clearly underlined in *R. v. LM*. The fact that it arises for consideration in the context of the proper implementation of the United Kingdom's Convention obligation does not involve the creation of new principles. Rather, well established principles apply in the specific context of the art.26 obligation, no more, and no less. Apart from the specific jurisdiction to stay proceedings where the process is abused, the court may also, if it thinks appropriate in the exercise of its sentencing responsibilities implement the art.26 obligation in the language of the article itself, by dealing with the defendant in a way which does not constitute punishment, by ordering an absolute or a conditional discharge.

What are my obligations when I suspect a client has been trafficked?

In many ways this is not a wholly new approach for those of us working in the courts of England and Wales. Here there will be cases when a client may be guilty in law but there is a positive obligation not to prosecute that fundamentally engages the public interest test for any prosecution. It follows that there is an obvious and basic approach:

(i) Make representations about discontinuance/the Crown offering no evidence: Make inquiries, and remind the Crown of their obligations under the Convention (both to consider discontinuing the case and to refer the client via the National Referral Mechanism "NRM" to an specialist support service).
(ii) Consider the defence or duress.
(iii) Consider whether JR is appropriate if a decision to prosecute is made.

Appeals

There will also be cases where trafficked clients have been convicted in breach of the obligation under art.26 and an appeal will need to be considered or a referral to the Criminal Cases Review Commission (CCRC). In a recent lecture at the CBA Spring Conference, CCRC Commissioner Penelope Barratt gave a list of common features of these cases as follows:

- Evidence, often very clear, that the applicant was a credible victim of human trafficking.
- Legal representatives that did not advise – or incorrectly advised – on availability of a defence or grounds for representations to the CPS or an application to stay.
- Failure to observe own guidelines by police/CPS.
- Guilty pleas entered.

All of these create potential for miscarriage of justice which can be avoided with awareness, identification and effort. It has already taken time for State obligations to kick in and there are still concerns about treatment of victims on the ground in terms of investigation and prosecution which can only be assuaged by principled advocates taking the time to advise on evidence and secure an acquittal for trafficked clients. ■

On May 22, 2013, the Court of Appeal held that the UK is bound by art.8 of the EU Trafficking Directive (2011/36). This means that in cases where a child is found in criminal exploitation and the child has been trafficked, they shall not be prosecuted. The court also pointed out that it is their responsibility of the Crown Prosecution Service (CPS) that no trafficked child should be brought before a criminal court as a defendant when the crime is a consequences of trafficking. The CPS says they will revise their guidance to form a tighter safety net for these types of cases for both adults and children in trafficking situations. There is a duty for the law enforcement agencies to investigate the traffickers. * See www.antislavery.org

Barristers
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Both specialize in serious cases involving the vulnerable and are preferred counsel for the Equality and Human Rights Commission.

Finding the Truth

Preface

Criminal investigations and the truth – *El -Masri v. Macedonia*

Contributor

Ramya Nagesh

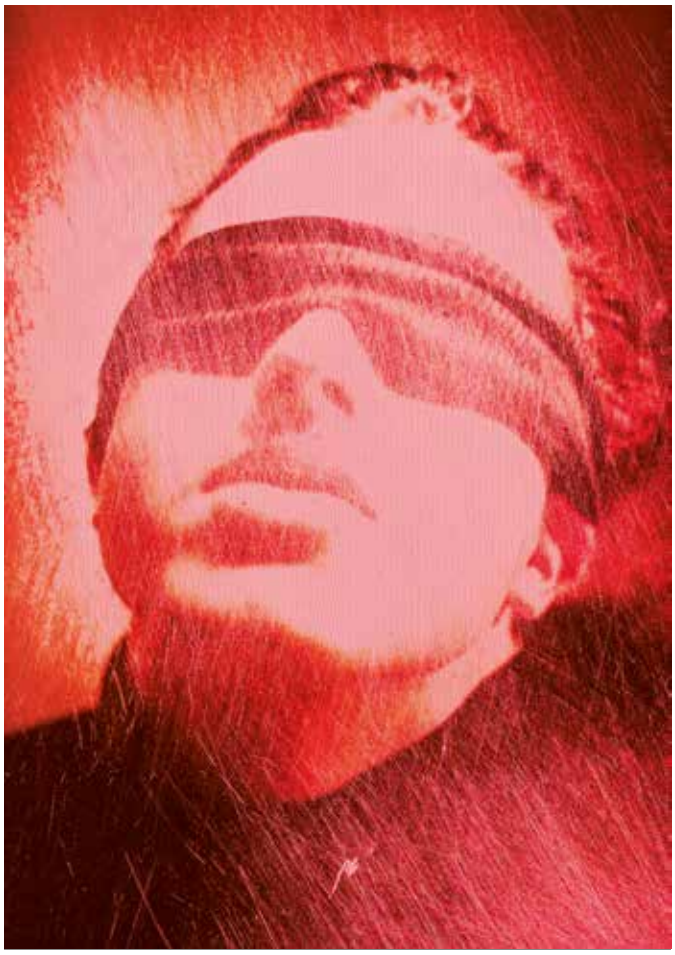
The right to know the truth about criminal violations is – ideally at least - at the core of every criminal investigation and procedure. For centuries, this has been the aim not only of the individual victim, but of society as a whole. On December 13, 2012, in *El-Masri v Macedonia*, (39360/09) the European Court of Human Rights ("the court") took this a step further by referring to an explicit fundamental right to the truth. This is not necessarily a novel concept in international law in general, and has been implicit in certain Convention rights for some time. The court's decision does, however, raise interesting questions as to the scope and place of such a right: whilst the court were unanimous as to the existence of the right in some form, the majority referred to it as an intrinsic part of the investigation process, one concurring minority opined it was best placed as a remedy, and another concurring minority stated it was so intrinsic as to render explicit reference needless.

Background Facts

The case concerned an allegation of extraordinary rendition nine years before, and several alleged Convention violations arising out of that. The applicant, Mr El-Masri, was a German citizen of Kuwaiti origin. On December 31, 2003 he was at the Macedonian border when his passport prompted suspicion. He was interrogated about his ties with Islamic organizations and groups, was then taken to a hotel and detained under continuous watch, without access to the outside world. When he attempted to leave, he was threatened with a gun to his head. After approximately 23 days of this detention, Mr El-Masri was blindfolded, handcuffed and taken to Skopje airport where he was stripped, beaten and sodomised with an object. He was then flown, blindfolded, to a country that he and the court later determined was Afghanistan. Here, he was transferred to a prison, where he was to spend four months, interrogated and beaten.

On May 28, 2004, Mr El-Masri was given a change of clothes and left at the Albanian border, still with no explanation, where he was picked up by local officials and transferred back to Germany (It eventually transpired that the CIA were responsible for his rendition to Afghanistan; it was a case of mistaken identity).

An action was filed on behalf of Mr El-Masri in the United States; the courts there refused to hear the application, citing state secret privilege as the reason. An



investigation report produced by Macedonia found no truth to the allegations; a similar report produced by Germany expressed doubt as to the Macedonian version of events. Eventually, Mr El-Masri took his case to the European Court of Human Rights in a claim against Macedonia.

The Court's Decision - Overview

The European Court found, first, Mr El-Masri's account of his capture and rendition to be factually accurate. Having made this determination, they found violations of Article 3 (the right to be free from torture and inhumane or degrading treatment), Articles 5 (the right to be free from arbitrary imprisonment), 8 (the right to private and family life) and 13 (the right to an effective remedy).

It is worth noting that the Macedonian authorities at first denied that Mr El-Masri underwent the experience he claimed; they produced a report indicating that Mr El-Masri had voluntarily stayed in a hotel in Macedonia. By the time of the hearing, they admitted that he was interrogated in Macedonia at the request of the United States and that they had handed him to the CIA. The court found that there was substantial evidence to prove Mr El-Masri's account. It was for this reason that the right to an effective criminal investigation was raised, and was to become the subject of scrutiny by the court.

The Court's Decision: the Right to Truth

The decision of the court is interesting for a number of reasons: the court described the actions of the CIA as amounting to torture or inhuman treatment, it found Macedonia to be responsible for the violations, albeit that the rendition was carried out by the American authorities, and the court discussed the existence of a right of both victims and society as a whole to truth. A number of third party interveners referred to the right to truth: the United Nations Commission on Human Rights, Amnesty International and the International Commission of Jurists referred to it as of particular importance in the context of secret renditions and alleged widespread impunity. Redress gave it a wider place in criminal investigations as a whole, and highlighted the risks of allowing the truth to remain hidden, even in the face of national security arguments. Interestingly, Redress submitted an expert psychological report stating that public recognition of the truth and proper acknowledgment could play an integral role in a victim's recovery.

In the context of its discussions on the application of art.3, the court stated:

> "… the court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of 'extraordinary rendition' attracted worldwide attention and triggered inquiries […] [The European Parliament's inquiries] revealed that some of the States concerned were not interested in seeing the truth come out. The concept of 'State secrets' has often been invoked to obstruct the search for the truth…"

The court therefore recognized and articulated the right to truth as applying both to the victim and to society as a whole. Implicit in this statement were hints of a consideration of how the right may weigh against state confidentiality. However, the majority stopped short of characterising the right as free-standing or in fact as anything more than part of an effective investigation: Mr El-Masri's argument that he was entitled to a freestanding right to truth under art.10 of the Convention (freedom of expression) was rejected, with the majority stating that the right was already implicit in arts.2 and 3.

Concurring Opinion 1: the right to truth as a remedy

Whilst the court unanimously found violations of Mr El-Masri's substantive rights, it was divided as to the scope and proper place of a right to truth; accordingly, the concurring separate opinions focused upon this. The first concurring opinion favoured a place for the right to truth under art.13 (the right to an effective remedy). In setting out their opinion Judges Tulkens, Spielmann, Sicilianos and Keller stated that first, in cases of enforced disappearance in particular, the proceedings were shrouded in such secrecy that the right to ascertain the facts of what happened are of great importance; secondly, the right to truth is not in itself a novel concept – it is implicit in arts.2 and 3 of the Convention; thirdly, therefore to allow the right to a truth place in art.13 would simply be to shed light on an already existing reality; fourthly the widespread impunity with which enforced disappearances are practiced in many jurisdictions gives real substance to the need for an effective remedy, which includes the right of access to relevant information about the alleged violations.

The idea of ascertaining the truth as a form of remedy does lend it an important angle that it otherwise might not have. For both victims of crimes and their family, acknowledgment of the harm suffered, particularly when at the hands of a powerful actor such as the state, may often be more important than monetary compensation. The psychological impact of denial and lack of acknowledgment is rightly recognized in this way; acknowledgment of the harm wrongfully done to others is arguably part of the premise upon which the legal system is built.

Concurring Opinion 2: No need to reiterate a right to truth

The second concurring opinion took a different view. It stated that the right to truth did not need to be explicitly set out as a distinct right: it was inherent in arts.2 (the right to life) and 3 (the right to freedom from torture and inhuman treatment), and derived from them. Both articles include an inherent right to an effective investigation. Judges Casadevall and Lopez Guerra considered it evident, therefore, that any investigation complying with these Articles must necessarily represent a serious attempt to establish the truth of the matter. In this sense, separating the right to truth from the right to an effective investigation became artificial and redundant in practice. The interesting aspects of this argument are: first, that it is perhaps the most practical: it must logically follow that for a criminal investigation to be truly effective, it must seek out the truth. It can rarely be said with absolute certainty that the truth has been discovered, so the objective must be to honestly and seriously seek it out. Cases where this aim has not been followed will result in what is clearly an ineffective investigation. Secondly, this analysis confines the right to truth to criminal investigations arising from violations of specific Convention rights, committed by the State. This is reflective of the court's case-law. In allowing the right to truth to leave these boundaries, there is the potential for it to apply to criminal investigations of actions committed by individuals, and possibly, in a wider sense, to defendants.

Conclusion

The decision of the court highlights that there is an instinctive consensus that a right to truth does exist in some form; however, opinion clearly remains divided as to its scope, form or place in the existing legal system, and discussions as to this remain in their infancy. To what extent or whether at all the right to truth will become enforceable in its own stead - and its impact on the domestic criminal process - remains to be seen. Until greater clarification is achieved, criminal practitioners may do well to bear in mind the potential for an emerging enforceable right. ■

6 Kings Bench Walk

Exposing the Myth of Jury Research

Preface

The debate on juries and jury research

Contributor

Cheryl Thomas

No one listening to the *Today* programme the morning after the first Vicky Pryce jury was discharged could have been more surprised than me to hear the former Director of Public Prosecutions, Lord MacDonald, state that it is impossible here to conduct research with juries about how they reach verdicts.

Nothing could be further from the truth. I have been conducting just this type of research with real juries at Crown Courts in this country for a decade and am currently doing so.

So what did Lord MacDonald say, and why was it wrong?

According to Lord MacDonald: "In other jurisdictions, under controlled conditions, researchers are allowed to question jurors, to come to some conclusions about the way they are deliberating and how the process works. If you have a better understanding of that, then perhaps it's easier to frame directions to juries that they will follow and understand." He was right to say this information would be helpful. But he was wrong to claim that this kind of research cannot be done here. Two in-depth studies by the UCL Jury Project (in 2007 and 2010) have demonstrated that empirical research about how the jury process works can be successfully conducted with juries in our courts. And this research has contributed to the way Judges approach directions.

The myth of s.8

It appears the reason Lord MacDonald made this comment is that, like so many others before him, he fell into the trap of believing the "myth of s.8". Section 8 of the Contempt of Court Act 1981 makes it a criminal offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations."

For over three decades since it was introduced, commentators have routinely and incorrectly claimed that s.8 makes research with actual jurors "impossible" if not "illegal" in this country. This is simply untrue. Section 8 prevents one specific thing: individual jurors in individual cases telling someone outside the jury what they or their fellow jurors said in their deliberating room.

Where does the confusion come from?

The main error people make about s.8 is to think that if you could just ask a juror (or hear) what was said in deliberations this would explain how the jury system works. But this fundamentally misunderstands how juries and jury research works.

For example, we can all agree that juries should not be racially biased. What s.8 prohibits me as a researcher from doing is waiting around at a court until an all-White jury convicts a Black defendant and then asking those jurors: "Did the you convict the defendant because he was Black?"

Those jurors who consciously believed they did convict the defendant because he was Black are highly unlikely to tell me so. More importantly, because we are not always consciously aware of all the factors that affect our decisions, this question is impossible for most people to answer reliably.

So this approach can never answer whether juries in this country are systematically biased against defendants based on their race. This means s.8 is actually a good thing because it prevents us from conducting bad jury research that can be highly misleading. But then how do you answer the question about juries and racial bias?

We did two things. First we reconstructed an actual case on film and then asked a large number of real juries at court to try the case. They all saw the identical case, shot for shot and word for word. The only difference was that some juries saw a Black defendant, some a White and others an Asian defendant. Then we also examined every single actual jury verdict in every Crown Court in England and Wales from 2006-08, and calculated the conviction rate based on the race of the defendant. In both instances there was no evidence that juries were systematically biased against defendants based on race.

Existing jury research

Since 2002, we have conducted extensive research with real

juries at numerous courts around the country fully within the legal parameters of s.8. That research has already been able to answer a substantial number of key questions:

- Who does jury service and are they representative of local communities?
- Do male and female jurors decide cases differently?
- Do juries refuse to convict defendants of certain offences?
- Is there a postcode lottery in jury trials?
- Is it true that juries acquit more often than they convict in rape cases?
- Do jurors understand the jury process?
- Are juries trying cases based on the evidence and law?
- Do jurors understand Judges' legal directions?
- Do juries want more information about how to conduct deliberations?
- Are jurors affected by media coverage of their cases?
- How many jurors search the internet for information about their cases?
- Do jurors know what to do about improper conduct?

We are now researching:

- How exactly are jurors using the internet?
- How do jurors interpret the internet use rule?
- What would jurors do if something improper happened during trial?
- What kind of deliberation guidance do juries want?
- Do jurors find written directions helpful?
- What do juries think about Judges' summing up?
- What effect does pre-recorded or live link evidence have on juries?
- What effect do other special measures have on juries (screens, intermediaries, etc)?
- What effect does hearsay and anonymous evidence have on juries?
- How do different types of advocacy affect juries?
- What tools can be given to jurors to help them understand and do their job to the best of their ability?

So the idea that s.8 somehow prevents us from understanding how the jury system works is nothing but a myth. And it is time to lay that myth to rest once and for all.

So why do people continue to believe the myth?

Two groups are responsible for perpetuating the myth of s.8 and seem to take every opportunity to argue for its repeal: journalists and (some) academics. The media presumably do this because they would like to report interviews with jurors about what was said in the deliberating room, especially in controversial cases. It is therefore not very surprising that Lord MacDonald's statement has been repeated widely in the press (including *Times, Daily Mail, Telegraph, Express, Scottish Herald, Huffington Post*, Society of Editors). Academics who continue to claim it is impossible for them to do jury research reveal a worrying lack of understanding and approach to research.

Both groups are misguided.

Those who would like to repeal s.8 would do well to consider seriously the clear and strong views of jurors themselves on this issue. Almost all jurors (82%) said they felt very strongly that jurors should not be allowed to speak about what happens in deliberations.

How to conduct jury research

Appearing with Lord MacDonald on the *Today* programme was the former Lord Chief Justice, Lord Woolf. He was less willing to suggest that jury research was impossible or needed, saying: "Some very carefully organized, responsible research may be a good thing, but it would have to be treated with great care." It certainly does and it certainly is.

All the research carried out by the UCL Jury Project has to meet what we call the "3 Rs test": is it realistic, reliable and responsible?

Most research that calls itself jury research is in fact not done with actual jurors but with volunteers or students. A fundamental principle of all our research is that it is done exclusively with actual juries at Crown Courts.

Another problem is that sample sizes are often not large enough or representative enough to draw any reliable conclusions. In our 2010 study, *Are Juries Fair?*, we based our findings on over half a million charges against all defendants, in all courts which resulted in over 68,000 jury verdicts.

Researchers' responsibilities

Jury research carries substantial responsibilities. Researchers must be very careful not to put jurors in a position where they could disclose information and commit a criminal offence.

It is also crucial that research is conducted in close consultation with those ultimately responsible for the jury system: HMCTS, Ministry of Justice and the judiciary. In my experience this has never resulted in any unwarranted interference. Instead it has ensured that the research is rigorous and useful.

According to crime science expert Ronald Clarke: "Merely seeking to explain and understand is to fiddle while Rome burns." In our research we also believe it is important not simply to look for problems with the jury system but to test possible solutions to any identified problems. Our current research tests out possible new tools to help jurors better understand the jury process.

The future of jury trials and research

Our understanding of juries cannot be based on a single case, like the first Vicky Pryce trial. That jury was unable to reach a verdict, and research clearly shows that this is highly exceptional. When juries are asked to deliberate and reach a verdict they do so 99.4% of the time.

The future of trial by jury needs to be based on reliable empirical evidence about what jurors do, what they think and what helps them do their job to the best of their ability. Not a single exceptional case. And nothing in the current law prevents jury research in this country that will help achieve this. ■

This article first appeared in *Counsel* magazine February 2013.

Studies by the UCL Jury Project - Are Juries Fair? (2010)
http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf
Diversity & Fairness in the Jury System (2007)
http://4wardeveruk.org/wp-content/uploads/2009/08/p.Diversity-Fairness-in-the-Jury-System.pdf

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The Telephone Murder

by Ronald Bartle
Wildy, Simmonds & Hill, 2012

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Price £19.99

There may be some English murders that are more famous than that of Julia Wallace in 1931. But there can be very few famous murders that are more *English*, for the crime took place in a setting of such stereotypical suburban blandness that it might have been created for a sketch by Ronnie Barker or Monty Python.

The enduring fame of the Wallace murder derives from the fact that so many of the facts are uncontested and yet opinions differ so wildly on who committed it. No less an authority than the author Raymond Chandler described it as the greatest murder-mystery in history.

William Wallace led a life that he himself described as "ill-starred". He had been invalided out of the Great War. He had a jobbing career in different fields, and at the time of Julia's murder he was working as an insurance agent. His hobbies included chess and the violin, both of which he played with more enthusiasm than ability. By his own admission marrying Julia counted as his life's greatest achievement.

Whether Julia shared that view is debatable, given that by the more rigid standards of the class system of her day she had married beneath herself, William's means being distinctly less than those of her father. The couple had no children.

One day, upon arriving at his chess club, William was given a message which had been left by telephone. It asked him to come to an address on the other side of town after work the next day for a potential insurance deal. He recognised neither the name of the caller nor the address. Nevertheless, the next day he attempted to keep the requested appointment, before discovering that the address was fictitious. Upon returning home he found Julia lying on the floor: she had been battered to death by a blunt instrument.

There was no sign of forced entry and only a paltry sum of money missing. There was no murder weapon and no suspect other than William himself.

All hinged on the identity of the telephone caller. Quite coincidentally the line had been undergoing maintenance at the time, which enabled the police to trace the call to a kiosk very close to the Wallace home. Either William had made the call himself to provide an alibi, or it had been someone else getting him out of the way. Either way, the caller was the killer.

The police calculated that it was possible for Wallace to have left the message and arrived at the club when he did, though only marginally. The staff member at the club who took the message said the caller was not Wallace, though one wonders how conclusive that view could have been with 1930s technology and the resultant inferior sound quality.

The same applied to the day of the murder: it would have been possible for William to have committed the crime before leaving the house on the false trail of the insurance appointment, but only just, especially given that William was hardly a robust physical specimen capable of a short burst of violent energy followed by a speedy disposal of the murder weapon and any other incriminating evidence.

In the event, William was charged and convicted, despite the Judge's summing up being mostly in his favour. He was then sentenced to death, but managed to appeal successfully.

His appeal made a small footnote in legal history since it was the first time the Court of Appeal had allowed an appeal because the weight of evidence did not exclude reasonable doubt, rather than because there had been a defect in the trial process or similar.

Since then the murder has formed the basis of two television series and a number of books, and many contrasting theories have been advanced in each. The latest is *The Telephone Murder* by Ronald Bartle, a retired barrister and former magistrate.

Mr Bartle has done a careful job in examining the evidence with his evident criminal expertise. He takes apart a number of previous theories including the most popular alternative suspect of Richard Parry. This leaves William Wallace himself, though it has to be said Mr Bartle has produced neither a smoking gun nor a compelling rebuttal of the weaknesses of the case against him.

On the other hand, the chief problem with any alternative to Wallace is the lack of motive. It is not difficult to imagine a motive for Wallace himself: perhaps Julia had been unfaithful, or humiliated him about his failure to keep her in a lifestyle to which she had previously been accustomed.

But why would anyone else want Julia dead? The Wallaces scarcely had enough possessions to justify a potentially violent robbery, and jilted adulterers (if there was one) are much rarer murderers than cuckolded husbands. It is therefore hard to disagree with Raymond Chandler's verdict that "Wallace could not have done it – but neither could anyone else".

On further investigation it seems that Mr Bartle has omitted some interesting findings, including the contention that Julia Wallace was much older than she claimed, though I think he is right not to bother with the idea that Wallace had an accomplice (who could Wallace have known that would have agreed to such an act?).

His book serves as an interesting introduction to the case for first time readers and some stimulating material which aficionados of the case may ponder. But I am sure he would be the first to admit that it will not be the last word – nor will that of anyone else in a case the trial judge rightly described as "unexampled in the annals of crime".

James Wilson

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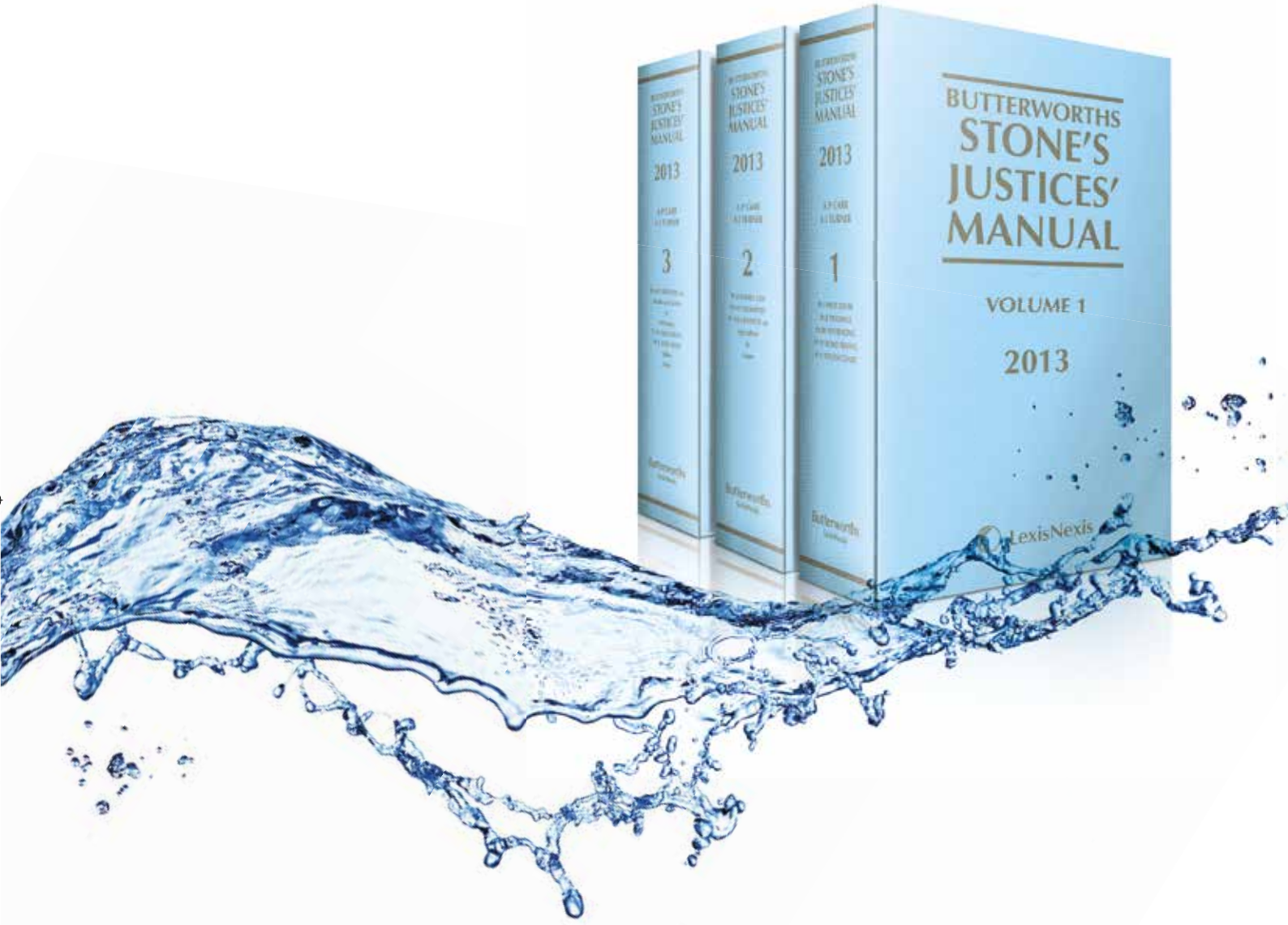

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