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MOJUK: Newsletter 'Inside Out' No 780 (04/12/2019) - Cost £1

Perverse Incentives: The Strange Economics of Criminal Legal Aid

James Thornton, Justice Gap: In England and Wales, aspiring criminal lawyers (like any other lawyer) receive for to five years of university education, followed by a further one to two years on-the-job training before they qualify. In contrast, somebody stopped by the police, arrested or even appearing before a criminal court, will have little understanding of the laws that will soon determine what happens to them.

Whilst the right to defend one's own case exists, many would expect the option of a specialist to do so on their behalf, to match the trained prosecutor they would be up against. However, what happens if you cannot afford to hire a criminal lawyer? Many countries have a system of publicly funded criminal defence lawyers to advise, assist and represent the poor. In England and Wales (unlike, say, the USA), this service is almost exclusively provided by the private sector. Provided that your case is considered of sufficient merit and your income falls below a particular threshold (both assessed by government), the government pays your lawyers' fees (often via 'fixed' amounts for particular kinds of work) and also sets the rate of those fees. This is called 'legal aid'.

However, there are concerns with the operation of this scheme. Defence lawyers report these fees have been cut and undermined by inflation over many years. The Law Society of England and Wales says there is a 'looming crisis' in the high average age of duty solicitors (those 'on-call' to assist detainees and defendants at police stations and courts) – the fees are so low that new recruits decide to practice in other areas of law. Likewise, the Bar Council's latest survey of members suggests that well over half of criminal barristers feel unfairly paid.

One of the things I am interested in is whether (and, if so, how) this environment of austerity affects the work criminal defence lawyers do. When fees are reduced, what happens? Does it affect work on poor defendants' cases? Could it lead to inefficiencies, or even miscarriages of justice? I decided to find out by asking those at the coalface, in a number of lengthy and anonymous interviews with criminal barristers and solicitors at various career stages and in various parts of England and Wales. I was humbled by the dedication and passion of those I spoke to. I also made some concerning findings. Lawyers I spoke to identified three key areas where dwindling fees, in the context of the payment system (largely by fixed fees for particular work), might affect defence work:

1) Plea advice: In some instances the lawyer involved felt they would earn more for one plea (guilty or not guilty) than the other. Particular circumstances were always important (e.g. issues in the case, particular offence/s, the client), but, for example, some serious and complex cases due to be dealt with in the Crown Court would attract much greater fees if the plea was 'not guilty' and there was a trial than if the defendant in the same case were to plead 'guilty'. In other circumstances (for example, some cases in the magistrates courts) the opposite was true: a quick guilty plea would be the best financial outcome for the lawyers involved.

A cynic would say there are financial incentives to advise particular pleas and, indeed, none of the lawyers I spoke to anticipated significant difficulties in influencing clients in this way, albeit that they themselves never did it. The dilemma is complicated further by the reality that it is not always clear what the 'best' advice is. Take a client the lawyer believes is almost certain to be convicted on the evidence. It might be said it is in this client's best interests to receive some robust advice, to wake them up to the reality that they are more than likely going to be convicted. With an early guilty plea they are entitled to a third off any sentence. There may also be the opportunity for a reduced charge, and/or a prosecution agreement to plead guilty based upon less serious facts than originally envisaged. Opportunities that may be lost in the event of pleading not guilty.

Here, robust advice could potentially save the client from a custodial sentence. Others would outline options in a more neutral manner, even if this results in a worse outcome for the client. Strong arguments could be made in favour of either approach. However, if both are legitimate strategies, but one approach is financially advantageous to the lawyer involved (all other things being equal), lawyers told me they are placed in a difficult position.

2) Cases undertaken: Interviewees also considered that many cases were financially self-defeating to take on, whereas others were so remunerative that even one or two of them could be the difference between having a profit and not. Cases could fall into either category for the most arbitrary of reasons. For example, the self-employed were considered frequently at risk of failing the means test for legal aid. Not because they made too much money, but because they would struggle to find sufficient evidence to prove it, particularly if in custody. Likewise, the merits test for legal aid was considered at risk of being failed if the particular client was not at risk of a severe enough sentence.

Conversely, a client receiving benefits and with a terrible criminal record (or even serving a suspended prison sentence – i.e. immediate custody for any further crimes committed unless good reasons exist not to) would be almost certain to be granted legal aid and therefore financially advantageous to have. Other examples included some long and complex Crown Court trials. Of course, not every case can be avoided, but other coping mechanisms were mentioned too: e.g. performing less work on them, or passing them on to someone early in their career, who would therefore take the case for the experience/their CV.

3) Thorough working: The nature of any fixed payments scheme is that the incentive is to spend as little time as possible for each fee. It is better to spend time on three cases (3x fixed fees) vs spending the same portion of time on one case (1x fixed fee). One example that was given was unused evidence disclosed by the prosecution. This does not affect the calculation of how high the fixed fee is – and therefore the fee is the same whether there are two pages of disclosed evidence to read vs 100 pages. One interviewee gave the example of the barrister and solicitor watching over 100 hours-worth of CCTV footage. All of this could be useless to your case, but you cannot know until you look at it. Other examples included appeals advice, staff training (for solicitors' firms), assessing experts' evidence and interviewing independent witnesses. In each case, as one lawyer put it 'you either do the job properly and lose money or you don't do the job properly'.

Hard margins: None of these, in themselves, need necessarily affect the work that defence lawyers do. Nor are the dilemmas raised unique to criminal lawyers. As a lecturer, I too get paid the same whether I spend hours preparing for a lecture or do nothing at all and 'wing it' on the day (provided the lecture seems 'good enough' to stop anyone complaining!)

However, the difference is that there is little incentive for me to do less (apart from laziness). Contrast that with a lawyer who can, instead, spend that time doing work for other clients that is more remunerative or who gets obvious financial punishment from a plea decision. Current fees also make the stakes uniquely high here: time and again, I was told that, in the current financial environment, these sorts of issues about how much time is spent on which cases and which categories of work or types of pleas, often mean the difference between having a profit and not. To what extent this leads to defence lawyers selfishly following their financial self-

interests at the expense of clients is unclear. The kind of research I did doesn't establish how widespread or not it is (given the numbers of people spoken to relative to the total number of practitioners in England and Wales). What is interesting though is how lawyers experience the current setup as rewarding practices which many of them view as 'poor work' and punishing diligence (with insolvency, in some cases). Whilst one could be highly critical of defence lawyers on this basis, my argument is that it is all very well for me or others to say that lawyers ought to subscribe to a particular set of values (fighting injustice, standing up for the client etc.) that I deem laudable – incentives be damned. However, if having and acting on those values to their full potential sets one up commercially to fail, then that is a pointless goal. The problem is as much that the current financial conditions do not sustain, let alone encourage, those sorts of client-focused values as it is that some lawyers might not hold them.

F v M (Appeal: Finding of Fact)

B1. This is an appeal brought by a father ('F') against a determination of fact made by Her Honour Judge Scully (hereafter "the Judge"), at the conclusion of a fact-finding hearing which she conducted, in Children Act 1989 private law proceedings, in May 2019. The proceedings concern the parties' two-year old child, N.

2. By his appeal, F challenges the following judicial finding: "On [date] 2016, at the father's property, an act of sexual intercourse commenced between the parties, to which they were both in agreement. At some point during intercourse, the mother changed her mind, whether because of discomfort or the fear of ejaculation or both. The mother told the father to stop and not to ejaculate inside of her. I find that he did not do so, and by then the sexual act had ceased to be consensual. In failing to stop and failing to withdraw before ejaculation against her wishes, by the definition in the Act, the father perpetrated a rape upon the mother." The "Act" referred to in the final sentence of the Judge's finding above is a reference to the Sexual Offences Act 2003.

3. By the Appellant's Notice, F presents altogether nine Grounds of Appeal, which in combination seek to challenge the finding that he "raped" the mother.

4. Permission to appeal was granted, on the papers, by Cohen J on 29 October 2019; he considered that F's case was arguable, reasoning his decision thus: (2) The Judge's essential finding is that the [F] ejaculated whilst having consensual intercourse with [M] when he knew that she did not want him to ejaculate as she was not taking contraceptive precautions. He thereby raped her. (3) [F]s evidence is that he intended to withdraw in time but misjudged things. The Judge made no finding that this was other than accidental. (4) Sections 1 and 79(2) of the Sexual Offences Act 2003 define rape but commentary in Archbold at para.20.23 is suggestive that rape only occurs in such situations when the man intends to ejaculate inside the woman despite her objection. I point up at this stage because it is important that, contrary to Cohen J's reprise of the "essential finding" in his point (2) above, at the time the father ejaculated, the intercourse had on the Judge's finding "ceased to be consensual".

31. (Conclusion) Having heard, read and considered the arguments on this appeal carefully, I am satisfied that i) The Judge's finding which I have set out at [2] above was not "demonstrably contrary to the weight of the evidence" (see [19] above); on the contrary, it seems to me that the Judge was amply entitled on the evidence to reach the conclusion that the sexual intercourse between M and F in 2016 became non-consensual and therefore a serious sexual assault; ii) There is nothing in the Judge's decision-making process which can be identified as "plainly defective so that it can be said that the findings in question are unsafe" (see [19]

above); indeed, I am satisfied that the Judge appropriately reviewed all of the available material, and faithfully recorded in her judgment all of the points for and against her ultimate conclusion; iii) It was in fact immaterial to the Judge's conclusion, or the identification of potential future risk, whether F had or had not ejaculated inside M's vagina, given that M had objected to F's continued penetration of her; F's focus on that issue in the appeal was in my judgment misplaced; iv) F had perpetrated a serious sexual assault on M. While there are powerful reasons why in the family court the Judge's description of events and behaviour should not strongly adhere to criminal law concepts and language (see [29]/[30] above), F has failed in this appeal to persuade me that the judge was wrong to refer to the assault, by reference to the Sexual Offences Act 2003, as 'rape'.

32. In the circumstances, the appeal must be dismissed.

Queen V Edward Corr

[1] This is a reference by the Director of Public Prosecutions for Northern Ireland under Section 36 of the Criminal Justice Act 1988 as amended by Section 41(5) of the Justice (Northern Ireland) Act 2002. At the hearing of the reference we granted leave to challenge, as unduly lenient, the concurrent sentences of 18 months imprisonment (9 months in custody: 9 months on licence) imposed on 4 July 2018 by a Crown Court judge ("the judge") on Edward Corr ("the respondent") for two offences, namely: (a) possession of firearms and ammunition with intent by means thereof to endanger life or cause serious damage to property, or to enable some other person by means thereof to endanger life or cause serious damage to property contrary to Article 58(1) of the Firearms (NI) Order 2004 ("the 2004 Order"), and (b) possession of a prohibited weapon namely a Skorpion sub machine gun, contrary to Article 45(1) of 2004 Order.

Discretion as to whether to quash the sentence

[60] We consider that the sentence was unduly lenient but that does not mean that it must be quashed. Rather even if it is decided that a sentence is unduly lenient there is discretion as to whether to quash the sentence – see Attorney General's Reference (No: 1/2006) Gary McDonald and others [2006] NICA 4 at paragraph 37.

[61] The respondent has now served the custodial element of his 18 month sentence and accordingly if the sentence was quashed and this court imposed an increase in sentence that would involve him returning to prison. Ordinarily that is a factor to be taken into account by way of a reduction to the sentence to be passed under the principle of double jeopardy, see R v Loughlin (Michael) (DPP Reference No 5 2018) [2019] NICA 10 at [35]. However on the unusual facts of this case we take it into account as a factor of some minor weight at this anterior stage in exercise of discretion as to whether to quash the sentence.

[62] A feature of particular importance and a factor which has considerable weight in this case is that by this reference the prosecution is seeking to advance for the very first time an entirely new case. That is unfair to the respondent because it exposes him to the risk of a significantly greater sentence on an entirely new basis not advanced before the judge. It is also unfair to the judge who gave detailed consideration to the sentencing exercise as it was advanced before him. The prosecution have the obligation to place before the trial judge any arguments or material that is relevant to the issue upon which the judge is called upon to make a decision. We consider that on the facts of this case this amounted to conspicuous unfairness to the respondent.

[63] We have taken into account the countervailing interest in an appropriate sentence

being passed on the respondent. We note that by this judgment we have identified various matters that should assist in any future sentencing exercises. On the facts of this case and taking all those factors into account we consider that the feature which we have identified in the previous paragraph taken in combination with the fact that if the sentence was quashed and an increased sentence was passed then this would mean that the respondent would return to prison means that in the exercise of discretion that the sentence should not quashed.

Conclusion: [64] The sentence that was imposed was unduly lenient. [65] For the reasons we have given we do not quash the sentence.

Former Met Police Chief Calls For Focus On 'Very Tattered' Justice System

Owen Bowcott, Guardian: There are no votes in prisons – literally. So the system is left to rot. A strategic review of the entire, underfunded and "very tattered" criminal justice system in England and Wales is needed, a former Metropolitan police commissioner has urged.In a strongly worded attack on almost a decade of uncoordinated, Conservative-led cuts, Lord Blair of Boughton warned there had been a "substantial degrading" of the system since his retirement in 2008.Delivering the annual Longford Trust lecture in London on Thursday evening, Blair said: "I am alarmed by the way in which the pattern of decline in policing provision, which I know about, is not only echoed but sometimes amplified across the courts, prisons, prosecution services and probation."The British legal system and its police service were once the envy of the world … they look very tattered now … My overriding image of those of us who care about criminal justice in its widest sense is that of the frog being boiled slowly, so it does not really notice."The frog is not jumping out of the pan. I wish it was."

The decay of the criminal justice system should be a central debate in this election, he suggested. Instead there has only been "a rather unthinking bidding war about how many extra police each main party is going to provide in the future". Blair added: "In my view, the system is not yet actually broken but it is so neglected as to be a matter of serious national concern and our citizens need to be engaged in deciding how it should be repaired and improved." His speech, he noted, focused on those who had been in government for most of that period: the Conservatives, who have had "their grip on the Home Office and the Ministry of Justice" since 2010.

He described the creation of police and crime commissioners in England and Wales as a "a solution in search of a problem". It had "achieved nothing substantial but has had the deleterious effects of cementing the staggeringly inefficient 43-force structure into place and of shielding the Home Office from responsibility for the most completely obvious of all changes which have befallen the police: deep and unprecedented cuts in funding". Blair criticised Ken Clarke, then justice secretary, for settling with the Treasury so quickly in the initial round of budget cuts in 2010. He said: "The result was a reduction in the MoJ budget of an unprecedented scale, which led to the deepest cuts to legal aid, prisons and courts in living memory."

When Blair left office, the paid workforce of the Met was 51,600 people; by 2018-19, it was down to 40,200 - a reduction of more than 20%. Funding to the Met in 2008-9 was £3.2bn; 10 years later, it was £2.6bn. Given inflation over that period, Blair calculated that the Met's current budget "is 39% less than mine was in real terms when I left office". The service to the public has had to be reduced in scale "perhaps none more deeply than neighbourhood policing, the most visible component in public reassurance".

The contraction of the remainder of the criminal justice system had coincided with inadequate mental health provision and a lack of crime-reducing local authority youth services, he said. "The apparent lack of thought-through policies revealed in the election process about criminal justice

means that Brexit is hiding all this but, when that is over, there must be a public debate … All major parties need to acknowledge that the criminal justice system is in genuine trouble, which will not be solved by throwing more money only at what is supposed to be the most visible part of it, the police, without a plan." As Sir Ian Blair, he led the Met from 2005 to 2008. Dame Cressida Dick, the current commissioner, had been due to give the speech but could not because of the restrictions of political purdah during the election. Blair's comments suggest how compartmentalised each section of the criminal justice system has become, partially, perhaps, because of the rigorous need to keep the judiciary, prosecutors and police independent of one another. Lawyers, Labour politicians and even some judges have been raising concerns about deep cuts to legal aid and the courts that they say have reduced access to justice.

Concerns Over String of Incidents At HMP Bronzefield Where Baby Died

Hannah Devlin and Diane Taylor: Guardian: The death of a newborn baby girl in a cell at HMP Bronzefield in September came after a string of concerning incidents involving pregnant women at the prison in the past two years, the Guardian has learned. On at least four occasions in this period, women held at the privately run Surrey prison have given birth in distressing and potentially unsafe circumstances, including one woman who gave birth in her cell and another who was left in labour at night-time supported only by another pregnant prisoner.

The revelations raise questions about the safety of pregnant women in prison and come as calls grow for an end to their detention in all but the most exceptional circumstances. The Ministry of Justice does not collect any central figures on the numbers of pregnant women, births or stillbirths within the prison estate. But the Guardian has obtained hospital records that suggest there has been a steady increase in the number of babies born to prisoners in the past five years. In 2017-18, unpublished findings by the Nuffield Trust suggest that one in 10 of these women gave birth in cells or ambulances.

The prison reform campaigner Jean Corston said: "To me it seems absolutely counterintuitive to have pregnant women and women giving birth in prison. There aren't many women who should be in prison at all but certainly not pregnant women. No woman at the end stage of pregnancy should be in a cell." In December 2017, one woman suffered a stillbirth and another baby was admitted to neonatal intensive care, in both instances after women were transferred from Bronzefield to hospital at a late stage of labour. In the latter case, it is understood that the woman alerted the prison to concerns two days before she was eventually taken to hospital.

Board meeting minutes from Ashford and St Peter's NHS trust, from July 2018, refer to the two incidents, stating: "Adverse outcomes were reported in both cases … significant learning and process change were identified for both hospital and prison teams." The minutes state that Bronzefield, Europe's largest female prison, intended to review its policy concerning the transfer of pregnant women to hospital and its criteria for risk assessment.

Sodexo Justice Services, which runs the prison, said that following the December 2017 incidents it had worked with Ashford and St Peter's Hospital and changed arrangements with its midwives. It added that there is a pregnancy scanner on-site at Bronzefield for use by midwives who hold clinics several times a week, which reduces the need for off-site appointments, and that it has a dedicated escort team to accompany women to off-site appointments when they are needed. Sodexo said it could not comment on individual cases.

The Guardian also heard of a woman who alerted prison staff that she was in labour in July 2018. She was not seen by a midwife and was left in labour during the night, supported only

by another pregnant prisoner. In March 2019 a woman, understood to have been in the prison on remand, gave birth in her cell with no midwife or doctor present. A nurse reportedly delivered the baby. Former prisoners, including one from Bronzefield, said midwife appointments and scans were frequently missed as a result of prison staff shortages and described the humiliation of attending scans and obstetric examinations in handcuffs while accompanied by officers.

NHS Digital records obtained by the Guardian show that 67 babies born in hospital to prisoners or women in police custody were recorded in 2018-19 compared with 43 in 2013-14, with a steady year-on-year increase. Experts said these figures were likely to be significant underestimates. The overall female prison population has remained roughly the same, with 3,850 women imprisoned in 2015 and 3,830 in 2019.

Separately, an audit by the Nuffield Trust, shared with the Guardian ahead of the publication of a report next year, show that in 2017-18 six births took place outside of hospital, presumably in cells or ambulances, accounting for about one in 10 births to prisoners recorded by the NHS in that year. The finding appears to undermine the suggestion last month by the justice minister Lord Keen that births in cells were distressing but a “rare occurrence” and were the result of “the unpredictability of labour”. Dr Miranda Davies, a senior research analyst at Nuffield Trust, said the rate of births outside hospital was deeply concerning. “Prisons are no place for a woman to give birth,” she said. “They are not staffed with round-the-clock midwives who are trained to support women in labour and there is no access to the range of pain relief options that a woman might use if she gave birth in hospital.”

The MoJ said that Sodexo had not incurred contractual penalties relating to the levels of care to pregnant women in custody in the past three years. The MoJ declined to comment on recent incidents at HMP Bronzefield. Naomi Delap, the director of the charity Birth Companions, called for an end to the imprisonment of pregnant women and new mothers in all but exceptional cases. “Until that happens, the lives of mothers and babies will continue to be put at risk,” she said. “The recent tragedy in HMP Bronzefield is a terrible illustration of the fact that prisons are not safe or suitable places for pregnant women and babies.”

John Bowden: Fallacy of Rehabilitation and Prison Reform has Disappeared

The rise of far-right popularist nationalism throughout Europe (a euphemism for neo-fascism) and the U.S and the inevitable electoral victory of a British Tory party charged with overseeing the shift in economic dependency of British capitalism from Europe to the U.S heralds an approaching dark age for the poorest and most marginalised groups in Britain, and the finale replacement of the Welfare State with the Law and Order or carceral state, a repressive apparatus focused fundamentally on social control and the eradication of protest and non-conformity, especially amongst the most powerless.

In preparation for the potential social unrest caused by the economic consequences of Brexit and the total embrace of U.S neo-liberal capitalism. The current right-wing tory government announced significant resourcing of the police and prisons, justifying it by the inevitable criminalisation of the poor and disobedient; disappearing the social problems caused by poverty and gross economic inequality into prisons has always been a strategy of capitalism. However, this criminalisation will be extended to visible political protest and unrest and as in those states and societies less and less disguised by 'liberal democracy'. The prison experience will extend beyond the lives of the poorest and most socially marginalised and into the lives of all those who politically confront and challenge too directly the power of the state

and the economic elite whose interests it enforces and defends.

The increasing social and political division and polarisation of British society will inevitably reveal the true nature and purpose of the capitalist state as an instrument and weapon of social control and repression. This process of criminalisation of the political became more evident with the introduction of "Anti-Terrorist" legislation and laws against Irish Republican activists during the Northern Irish "troubles", and then subsequently against those who sought to publicly expose the behaviour of the U.S and its main ally Britain in their "War on Terror" in the Middle East.

During the 1984 miners' strike when miners and their families struggled to defend and protect their jobs and communities, Margret Thatcher described them as "The enemy within "and therefore deserving of the most brutal repression as implied traitors of the country. As social and political division and conflict grow within the heartlands of imperialism so the methods of repression perfected against the rebellious colonised will be re-used against the socially and politically rebellious within the imperialist homeland.

Moreover, within the prisons themselves, microcosms of the broader social reality, the incarcerated are held in increasingly inhumane conditions. Just as "liberal democracy" and the welfare state have eroded and revealed the real nature of the capitalist state, so the fallacy of rehabilitation and prison reform has disappeared, and the real brutal and inhuman nature of prisons is nakedly revealed. Neo-liberal, or laissez-faire, capitalism is almost a reincarnation of Victorian-era capitalism when the poor and unemployed existed in absolute poverty, and those amongst them that were criminalised were thrown into penal warehouses of suffering and cruelty, all in the interest of sustaining the wealth, privilege and power of an amoral social elite.

As political resistance to the growing third-world conditions of the poor in a Britain colonised by American multi-national corporations grows. So, the criminalisation of that resistance will also increase and, as in states less disguised by "democracy", prison will become an inevitable experience of political activists. Now. Therefore, is the time for those political activists to recognise a common struggle with the "Lumpen Proletariat" that now mostly populate this country's hellish prisons.

Scotland: Victims to Benefit From New Charge on Criminals

Humza Yousaf, Scottish Legal News: Offenders will be required to contribute to the cost of supporting victims of crime from today. A new financial penalty will be imposed on all criminals who are sentenced to pay a court fine and the money raised will be banked in the Victim Surcharge Fund. Victim support organisations will be able to apply to the fund to cover the costs of providing short-term and practical support such as new windows and locks for house breaking victims or funeral expenses for families of murder victims. The charge applies to crimes committed from today and payments from the fund will start to be made in six to 12 months’ time. Justice Secretary Humza Yousaf said: “Experiencing crime can be an isolating and frightening experience and we are committed to improving the experiences of victims in our justice system. "It’s only right that criminals should pay towards helping victims to recover and move on with their lives. The money raised through the surcharge will pay for practical support that will make a real difference to victims and their families. While Scotland’s long-term fall in crime means fewer people fall prey to criminals, we are continuing to invest £18 million annually to improve support, advice and information for victims. This new fund will be a valuable addition to support available. Over the coming year we will also be carrying out further work to better understand where the gaps are in how Scotland supports victims and witnesses.”

Cases the Changed us: Maxwell Confait

Maxwell Confait, a male prostitute known as Michelle, was throttled and his body discovered in a burnt-out flat in Catford, South London in 1972. Three innocent boys were jailed for his murder after making confessions that medical evidence subsequently demonstrated could not have been true. It is a grim case largely forgotten by all except the more diligent students of criminal law however the Law Society president Christina Blacklaws selected it for inclusion in a new Justice Alliance publication celebrating the 70th anniversary of the legal aid (see here). 'Public concern led Parliament, via a public inquiry and then a Royal Commission, to pass the Police and Criminal Evidence Act (PACE),' wrote Blacklaws about the Maxwell Confait case.

The pamphlet features a case for each year of the legal aid scheme and serves as a powerful reminder of how our society has been shaped for the better thanks to our publicly-funded system of legal advice. Outrage over the treatment of the three youths – Colin Lattimore, Ronnie Leighton, and Ahmed Salih – was soon to be eclipsed by a shocking roll call of miscarriage of justice scandals (Birmingham Six, Guildford Four, Cardiff Three et al), the introduction of PACE irrevocably changed British policing.

Following a report by the former High Court Judge, Sir Henry Fisher, the government set up the Royal Commission of Criminal Procedure which ultimately led to, not only PACE, but the setting up of the Crown Prosecution Service under the Prosecution of Offenders Act 1985. PACE replaced what were known as the Judges' Rules which previously covered the treatment of suspects for which which there were no sanctions if breached. Around the time of the Confait case, the British public's attitude towards our boys in blue was undergoing a major trasnformation. Dixon of Dock Green, the genial flat-footed bobby played by Jack Warner, was being superseded in the popular imagination by the gritty Z-Cars with Detective Chief Inspector Charlie Barlow a bully who used verbal, occasionally physical, abuse while interrogating suspects.

The concerns that gave rise to PACE well pre-dated Maxwell Confait's death. NLJ contributor Professor Michael Zander, now the Emeritus Professor at London School of Economics, has written that the controversy over treatment of suspects in police stations had become 'a running sore' by the time of an ill-fated report of the Criminal Law Revision Committee in 1972 which had been eight years in gestation. The committee's work had been in vain because of a stand off furore over the recommendation that 'adverse inferences' be drawn from a suspect's silence in the police station. So controversial was that idea that it effectively killed off the report. It would take more than two decades years before the Criminal Justice and Public Order Act 1994 introduced that fundamental retreat in a suspect's rights. PACE tackled a number of areas of growing public concern: 'fitting up'; the treatment of suspects in police station and in the cells; the length of detention without being charged; the conduct of interviews; and access to lawyers. Notably PACE introduced the tape recorder into police interviews.

The three boys had fallen under suspicion after they were picked up by the police on suspicion of lighting a series of fires. They were held without a lawyer and without contact with parents. By two in the morning and after many hours of oppressive interrogation, they signed their statements sealing their fates. They were obviously vulnerable – the youngest was just 14 years old and the eldest was 18. Earlier this month the makers of a BBC Two documentary Catching Britain's Killers: The Crimes That Changed Us interviewed the brother of the eldest of the three, Colin Lattimore. He had learning difficulties, could neither read nor write and had the mental age of an eight-year-old. 'No way was he capable of murdering anyone,' his brother Gary said. 'He was scared of his own shadow…. He was a boy in a man's body.' The police surgeon and

the pathologist initially put the time of Confait's death as somewhere between 8PM and 10PM when the boys had alibis. At trial they appeared to change their minds saying that the murder could have happened as later as 1AM. None of the boys had alibis for that later time.

In 1975, the then phone secretary Roy Jenkins sent the case back to the Court of Appeal which, in turn, insisted that three be exonerated. But their ordeal was not over. Jenkins ordered Sir Henry Fisher to lead a formal inquiry. The former judge's remit was to look at what were known as the Judges' Rules, previously covering the treatment of suspects; however he also insisted as a condition of his chairmanship that he should also be free to find any individual guilty of the crime. Fisher shared the concern of the Appeal judges over oppressive police interviewing but, bizarrely, went on to re-incriminate two of the boys. When he died in 2005 the barrister Louis Blom-Cooper felt obliged to write to the Independent to correct a flurry of obituaries that mentioned his chairing of the inquiry that ultimately delivered much needed reform but overlooked this embarrassing detail. Blom-Copper, who was barrister to the three boys, called Fisher's finding of guilt 'absurd' and had been 'further trumped by the official acceptance of the confessions'. 'It demonstrated how often one finds that a brilliant legal mind is less than adept at understanding how human beings behave and the proper inferences to be drawn from factual material,' he wrote. As a result of the Fisher inquiry the boys had to be cleared all over again. This time by the attorney general Sir Michael Havers in the House of Commons.

The Illegality of "Loss of Time Orders" by the Court of Appeal

(A loss of time order dictates that some of the time that the applicant has spent in custody awaiting appeal will not count towards their sentence, effectively putting back the release date.)

1. For too many years there has been a trend for the Court of Appeal to 'award' loss of time for what they deem appeals without merit.

2. The so called 'awards' seem to range from 14 to 90 days and rarely any longer. Loss of time orders average at 28 days and are usually imposed in 'non cou1sel' applications.

3. It is difficult to award loss of time when counsel advances an appeal because it would invoke the presumption that counsel was not competent and may lead to a ground of appeal.

4. What are though "loss of -time'' orders and are they legal per se?

5. The Court of Appeal found loss of time orders upon the Criminal Appeal Act 1968, s.2929. - (1) The time during which an appellant is in custody pending the determination of his appeal shall, subject to any direction the Court of Appeal may give to the contrary, be reckoned as part of the term of any sentence to which he is for the time being subject. (2) Where the Court of Appeal give a contrary direction under subsection (1) above, they shall state their reasons for doing so, and they shall not give any such direction where - (a) leave to appeal has been granted; or (b) a certificate has been given by the judge of the court of trial ....

6. Key words in s.29(1) are the legislators using the "appellant" and the "determination of appeal."

7. For jurists who practise at the criminal bar of England and Wales will no doubt concede that a defendant only becomes an "appellant" once leave to appeal by the Single Judge is granted?

8. During the application stage, a defendant is only an "applicant" until such time as the application is evaluated and leave to appeal is granted. If refused, a defendant remains an "applicant" even before the Full Court on a renewed application for leave to appeal.

9. S.29 however, clearly uses the word "appellant." yet s.29(2)(a) clearly accentuates that no loss of time orders can be awarded if leave to appeal has been granted.

10. S.29(1) also refers to the period upon which any loss of time orders can be awarded as being: "pending the determination of his appeal.

11. An appeal is "determined" only after it has been advanced in Court either by: (a) counsel (non-counsel application on the papers)

12. An appeal is not "determined" until it is before the Full Court who "determine" whether to grant or refuse the appeal.

13. Why, thus, is the Court of Appeal awarding loss of time for 14-90 days in regular fashion?

14. It is important to note that the Criminal Appeal Act 1968 is not the first piece of legislation dealing with criminal appeals.

15. There are the following: * Criminal Appeal Act 1907 * Criminal Appeal Act 1964 * Criminal Appeal Act 1966

16. None of those and certainly the Criminal Appeal Act 1907 would never have considered the concept of a defendant seeking an appeal to risk "loss of time" orders.

17. Up until 1968 certain offences, specifically capital offences, there was a mandatory obligation of the Court of Appeal determining whether the conviction was safe and satisfactory.

18. With the advent of truly remarkable orators/advocates at the criminal bar who were able and persuasive, it became apparent to· the Court of Appeal that some judicial barriers had to be imposed to ensure that the so-called "guilty" had to be placed at risk when appealing and defended by the luminaries of the English Bar.

19. Reviewing the discussions held in the House of Commons in Hansard, the legislators - who were not persuaded by the then Treasury Counsel - ensured that s.29 would be limited to the risk of losing only a day or so (if the judgement was reserved) and allowed for a challenge when having a conflicting Statute namely the use of the word "appellant" and then not allowing the Court of Appeal to impose loss of time on those who had obtained leave to appeal and becoming "appellants."

20. There were few loss of time awards until the then Lord Chief Justice Widgery issued a practice direction: Criminal Practise Direction (Appeal) 68E

21. Widgery, CJ issued the practice direction in 1980 in essence warning counsel and using the term "applicant":

22. The statement by Widgery, CJ stated the following: " Both the Court and the single judge have. power in their discretion to direct that part of the time during which an applicant is in custody after lodging his notice of application for leave to appeal should not count towards sentence."

23. That was the point when Widgery, CJ and subsequently the Court of Appeal thereafter took "a wrong turn."

24. The Criminal Appeal Act 1968 s.29 refers only to an "appellant" and not to an "applicant" and that places the Practise Direction issued by Widgery, CJ as seriously flawed and misguided.

25. Following the misguided application of s.29 the Court of Appeal in following Widgery, CJ in the cases of: R -v- Hart; R -v- George; R -v- Clarke; R -v- Brown (2007) 1 Cr. App. R 31, CA: were wrongly decided following a flawed Practise Direction.

26. Whether the right to liberty under Art.5 of the Human Rights Act 1998, nor the right to a fair trial under Art.6 of the same act are violated by the application of the Criminal Appeal Act 1968 s.29 was advanced in the European Courts of Human Rights in the case of: Monnell and Morris -v-UK 10 E.H.R.R.205 and the government of the UK took much comfort on a decision in its favour.

27. However, what was not argued at that hearing was: Protocol N0.7 Convention for The Protection of Human Rights Article 2 Made in Starsbourg.22.XI.1984

28. The problems arising from the European Convention of Human Rights is that there are regular "protocols" and as time passes jurists and human rights 1awyers bring to the attention of the Court and legislators' new matters.

29. Protocols are rarely read by lawyers or the judiciary until such time as they are brought to the attention of the Court or if any issues arise where the law has advanced.

30. The 7 Protocol Art.2 states: " Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

31. There is a Statutory right to appeal a conviction or sentence and that right cannot be diluted with the threat of "loss of time" awards.

32. The Statute, namely the Criminal Appeal Act 1968 s.29 is crystal clear when using the word "appellant" that was transferred to "applicant" by Widgery, CJ in an exercise of erroneous and flawed judgement and followed thenceforth.

33. The Criminal Appeal Act 1968 is a penal statute and as such requires strict interpretation with any doubts.to be resolved in favour of the defendant/accused/appellant.

34. As a consequence of Widgery, CJ taking a wrong turn in misinterpreting the Criminal Appeal Act 1968 s.29 in 1980 thus followed by all judges of the Court of Appeal thence after it follows that loss of time awards/orders/directions are wholly contrary to law for the reasons stated and every single loss of time order imposed by the Court of Appeal since 1980 at the very least must be forthwith revoked.

35. Further, until such time as the legislators consider or amend the Criminal Appeal Act 1968 s.29 the Court of Appeal must issue no loss of time directions.

36. Jurists advising on appeals should be free to be compliant with the 7 Protocol of the ECHR which was affirmed by the United Kingdom, without the fear and/or risk of anything other than the usual harsh words by the Court of Appeal on applications that do not quite meet the necessary standards.

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Maryland: Three Men Exonerated After Serving 36 Years For Murder of Teenager

Three men incarcerated for 36 years in Maryland were exonerated on Monday in the killing of a Baltimore teenager, after a review of their case. Alfred Chestnut, Ransom Watkins and Andrew Stewart were expected to be released from prison hours after a judge cleared their convictions and prosecutors dropped the charges. They were teenagers when they were sentenced to life in prison in 1984. “On behalf of the criminal justice system, and I’m sure this means very little to you gentlemen, I’m going to apologize,” the circuit court judge Charles Peters told the men, the Baltimore Sun reported. Chestnut, Watkins and Stewart were arrested on November 1983 for the slaying of 14-year-old DeWitt Duckett. The teenager was accosted over a basketball jacket and shot in the neck while walking to class at a Baltimore high school. The case was reopened earlier this year by the office of the Baltimore city state’s attorney, Marilyn Mosby, after Chestnut sent a letter to the Conviction Integrity Unit. The Washington Post reported Chestnut included exculpatory evidence he uncovered last year.

Prosecutors now say police reports show multiple witnesses told police that that suspect, who was 18 at the time of the crime, was the shooter. One student saw him flee the scene and dump a gun as police arrived at Harlem Park junior high school, but authorities at the time focused their investigation on the trio. The new suspect was shot to death in 2002.

An assistant prosecutor working on the case told the court in 1984 that the state did not have any reports that would have raised doubts about the defendants’ guilt even though police records had statements involving the 18-year-old and also showed trial witnesses had failed to identify the

teenagers in photo lineups. A judge sealed those documents, but Chestnut obtained them through a public records request last year. “Everyone involved in this case school officials, police, prosecutors, jurors, the media, and the community rushed to judgment and allowed their tunnel vision to obscure obvious problems with the evidence,” said Shawn Armbrust, executive director of the Mid-Atlantic Innocence Project, which represents Watkins. He added: “This case should be a lesson to everyone that the search for quick answers can lead to tragic results.”

Guardian View: Outlaw the ‘Rough Sex’ Defence

Men who kill women must not be allowed to blame them in court for asking to be harmed. There are many reasons to be upset by the violent death of Grace Millane, the backpacker from Essex who was murdered a year ago in a New Zealand hotel room by a man she met on the dating app Tinder. Speaking after her killer (whose name has yet to be released) was convicted, the victim’s father described the murder of his “beautiful, loving, talented” daughter as barbaric. Since she was strangled on the eve of her 22nd birthday, the 27-year-old murderer has continued to inflict pain. The defence offered at his trial, that the death was the accidental result of a sex act that she had requested, meant that her parents sat through a trial in which intimate details were picked over and broadcast across the world. New Zealand has the reputation of a safe, welcoming country. It is horrifying to know that this young woman’s trip of a lifetime ended with her bruised body being stuffed into a suitcase and buried in the bush. To learn that these appalling events are part of a pattern adds to the horror. In the last five years, 20 UK women have been killed by men who used “rough sex”, often involving strangulation, as a defence. In around half of these cases, the defendants have either not been jailed or had sentences or charges reduced (from murder to manslaughter or, in Scotland, culpable homicide).

Another factor that links cases of women killed or injured during sex is the role played by pornography. Ms Millane’s murderer viewed clips of child sexual abuse after he killed her, and took photographs of her body. In four out of the last 10 killings of this kind, perpetrators watched pornography either immediately before or after. The internet has enormously enlarged the audience for porn, and changed the nature of the content – with user-generated and more extreme varieties more prevalent. Now, the sharp increase in the use of the “rough sex” defence, combined with the rising popularity of once-niche BDSM practices such as choking, appear to show that sexual behaviour is changing. The law needs to catch up. Consenting adults who engage in alternative sexual practices should not be criminalised because other people find these distasteful. But action is needed to reduce the risk of people being seriously harmed (seven UK men, as well as 59 women, have been killed by men who blamed “rough sex”), and to prevent victim-blaming of the kind seen in the Millane trial.

The Labour MP Harriet Harman is leading efforts to amend the domestic abuse bill in such a way as to eliminate the defence of consent in cases of actual bodily harm, serious injury or death (bringing into statute a prohibition that already exists in case law). The next parliament should support these changes. New Zealand, where Millane was murdered, should consider similar steps. An age verification system intended to restrict access to pornography was cancelled last month and the next government must not duck the challenge of regulating the internet because it is difficult. As a first step, ministers should invest in research to strengthen understanding of pornography’s influence in society. The domestic abuse bill is just one element in what must become a much bigger effort to reduce intimate partner violence, the majority of which is inflicted on women and girls.

Sally Challen Legacy to be Tested in Two Criminal Appeal Hearings This Month

Two appeals by women convicted of the murder of their respective abusive male partners will be considered by the Court of Appeal in December. A panel of three judges will hear Farieissia Martin’s renewed application to appeal her conviction on the morning of 3rd December and a separate panel of three judges will consider the full appeal by Emma-Jayne Magson at an all-day hearing on 10th December.

Ten months after Sally Challen’s successful criminal appeal, the group who campaigned to overturn her murder conviction, Justice for Women, are supporting two other women who seek to challenge their murder convictions. The campaign group, who are supporting a major research project on women who kill abusive partners conducted by the charity Centre for Women’s Justice, are highlighting the injustice women who have been subject to coercive control and domestic violence face when tried for killing their abusive partners. They argue that many women who have killed their violent partners are wrongly convicted of murder because the criminal justice system has failed to keep up with the increased understanding we now have of how coercive control operates and can impact on a victim’s response.

Farieissia (Fri) Martin was just 22 years old, a young mother to two small children, when she was convicted of the murder of her partner Kyle Farrell in 2015. Fri stabbed Kyle with a kitchen knife during a heated argument in which Kyle had attempted to strangle her. She is serving a minimum tariff of 13 years. Fri had experienced years of violence and coercive and controlling behaviour at the hands of the deceased but her defence team at trial failed to obtain evidence of its impact on her mental state. Following her conviction, her family contacted justice for women and a new legal team obtained medical evidence supporting a diagnosis of post traumatic stress disorder caused by the previous violence she had been subjected to and highly relevant to her mental state at the time of the offence. Earlier this year Fri’s application to appeal was rejected by the same single judge, who had also rejected Sally Challen’s application to appeal in 2017. Fri will be represented on 3rd December, by the legal team behind Challen’s appeal, Harriet Wistrich and Clare Wade QC (Garden Court Chambers).

Clare Wade QC is also representing Emma-Jayne Magson (instructed by solicitor Louise Bullivant of Aitken Harter solicitors).Emma was granted leave to appeal by the full court in November 2018 Her appeal against conviction will be heard on Tuesday 10th December. On 4th November 2016 Emma, then aged 23, was convicted of the murder of her violent partner, James Knight who had died of a single stab wound. On 7th November 2016 she was sentenced to life imprisonment with a minimum term of 17 years. On Tuesday 10thDecember, the Court of Appeal will consider fresh evidence in relation to two grounds of appeal. The first ground involves the availability of fresh evidence showing that at the time of the offence Emma was suffering from an Emotionally Unstable Personality Disorder which stems from her childhood exposure to domestic abuse in the family home, parental neglect, bullying and the death of her sister.

The second ground of appeal is focussed on Emma’s failure to participate effectively in her trial. Another expert will give evidence of Emma’s neurodevelopmental and comprehension difficulties to show how she understood little of the proceedings at trial. It will be argued that the appointment of an Intermediary throughout the full trial process would have been appropriate given Emma’s disadvantages. Emma did not give evidence so her experience of domestic abuse, both as a child witness and adult victim was not heard by the jury.

Harriet Wistrich said of both cases: “We hope the growing understanding of how domestic violence and coercive and controlling behaviour can trap women in very abusive relationships will

assist the appeals of two women who, at most, should have been convicted of manslaughter not murder. Both vulnerable women killed in desperate circumstances, yet at trial the context for their actions was not properly understood or explained, resulting in serious miscarriages of justice ." Louise Bullivant added, "In Emma Jayne Magson's case, she was additionally disadvantaged due to her neurodevelopmental difficulties which prevented her full participation in the trial process"

Family members of both women appealing their convictions with be present at the court of appeal and can be available for comment. Justice for Women invite supporters to join them outside the Royal Courts of Justice, Strand at 9.30am on 3rd December and 10th December. More details about these cases can be read here - Emma-Jayne Magson / Fri Martin . A documentary about the case of Sally Challen will be screened on BBC2 on 9th December at 9pm.

Tory Manifesto: Boris's Clampdown on 'Soft Justice'

The Conservative party manifesto delivered on its well-trailed promises of 20,000 new police officers, 10,000 more prison places and a ratcheting up of sentencing powers. A raft of criminal justice policies were unveiled which would represent a clampdown on the perceived excesses of 'soft justice' as identified by the prime minister including enhanced top and search powers, a 'root-and-branch' review of the parole systems, a victims' law and a pledge to maintain the ban on prisoners voting from jail. A Tory government under Boris Johnson would represent a major shift towards bolstering the rights of victims and away from protecting defendants. 'Delivering justice does not just mean treating defendants fairly, but doing right by victims,' the manifesto said. 'So we will pass and implement a Victims' Law that guarantees victims' rights and the level of support they can expect.'

The Johnson government also promises a royal commission on criminal justice – the first since the 1993 Runciman commission established on the day that the Birmingham Six were released from prison as a result of concerns about miscarriages of justice. According to the manifesto, the Conservatives would 'always back the brave men and women of our police and security services'. There would be increased use of stop and search ('as long as it is fair and proportionate'), more tasers and body cameras, and a new court order to target 'known knife carriers' making it easier for stop and search. 'Anyone charged with knife possession will appear before magistrates within days not weeks. Those who use a knife as a weapon should go to prison,' it continued.

Back in May, Boris Johnson set out his stall on justice issues in a controversial column for the Daily Telegraph which ridiculed our 'cockeyed crook-coddling criminal justice system'. In particular, he lambasted 'the Leftist culture' of the criminal justice 'establishment' and accused parole boards of being 'simple slaves to political correctness'. On to stop and search, the former mayor of London asserted that it was 'not racist or discriminatory' despite evidence that black Britons were nine time more likely to be stopped. A Tory government would mean tougher sentencing for the worst offenders and (again as widely trailed) the party would end 'automatic halfway release from prison for serious crimes' and for child murderers there would be 'life imprisonment without parole' – despite concerns that ministers don't understand the present regime.

The Conervative also promised 'sobriety tags' – ankle bracelets to detect alcohol levels in sweat – for those whose offending was 'fuelled by alcohol'; all well as tougher community sentences by 'tightening curfews and making those convicted do more hours of community payback to clean up our parks and streets'. For prisons, the manifesto pledged £2.75 billion ('already committed') to refurbishing and creating modern prisons. The Tories also promised a Domestic Abuse Bill (the original bill having been shelved as a result of Johnson's unlawful decision to prorogue the Commons) as well as support for victims and refuges. One in six refuges have closed since 2010. There was no mention of legal aid. The words 'access to justice' did feature but only in the context of a somewhat opaque section on the need for constitutional reform. 'After Brexit we also need to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people… . We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government' The manifesto suggested both that judicial review should be available 'to protect the rights of the individuals against an overbearing state' while ensuring that it was 'not abused to conduct politics by

Boy Wrongly Branded as 'Naughty' Awarded £30 Million Damages

Duncan Lewis, Legal News: A seven year old boy delivered by a caesarean section birth had encephalopathy, hypoglycaemia, sepsis, seizures, and pulmonary hypertension has been awarded £30 million in damages from the NHS. He was labeled 'naughty' for most of his life and was excluded from school on a daily basis. His family suffered five years of misdiagnosis following his birth Medical evidence obtained revealed that the child's volatile behaviour was due to a birth injury. The instructed medical expert, a paediatric neuropsychiatrist, provided a diagnosis of autistic spectrum disorder and concluded that the boy would not have had this but for the brain injury. He also diagnosed him with ADHD which 'he probably would have had anyway but which the brain injury made more severe.'

The High Court approved a settlement of £30 million to fund his ongoing problems. University College London Hospital NHS Trust Foundation apologised over the birth injury and said they hope the money will help provide for his future. Causation: brain injury or autism? These type of cases are not straightforward. This is because autism can occur where there has been no breach of duty or negligence. If a child is diagnosed with autism, expert evidence is needed to establish whether the autism has been caused by breach of duty or negligence. In this case the evidence demonstrated that his brain injury had caused the boy to have autistic spectrum disorder and a severe form of ADHD. Consequently, this means experts in this field may have different views on the cause of injury, including whether the injury has a genetic or environmental cause. A spokesman of University College London Hospital NHS Foundation Trust stated that 'experts found it difficult to assess the cause of injury and establish whether there was a genetic reason for some or all of the neurodevelopmental problems'. However, the Claimant's expert, a paediatric neuropsychiatrist, was able to demonstrate that the brain injury had caused him to have an autistic spectrum disorder and a severe form of ADHD

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