dence. The formal cross-examination of witness 1, following which he can hardly ever be recalled, followed by the formal cross-examination of witness 2 is fun for the advocates and can be good theatre, but the rather gladiatorial and artificial nature of the cross-examination process may not be the best way of arriving at the truth, although it sometimes can be. At least in some cases, I can see much for hot-tubbing or concurrent evidence as it is more respectably, if less evocatively, known. Under the chairmanship of the judge the lawyers and experts get round a table and discuss the evidence and their views on it. Of course, particularly in the light of what I said earlier, it would be wrong to form any sort of clear view that we should either avoid, or go over to, hot-tubbing generally, until we have gathered a statistically meaningful number of cases with hot-tubbing experts, and a statistically meaningful number of cases where the normal adversarial approach is adopted. With such evidence it should be possible to assess the relative merits of the adversarial and hot tubbing systems.

32. There is much criticism of litigation both by those inside and those outside the litigation world – and indeed there is much mystification about litigation among those inside and outside the litigation world. I have always thought that much of the criticism could be met and much of the mystification blown away by making the simple point that litigation reflects human nature. Take the example of the frequently cited fact that many expert witnesses are frequently accused of bias in favour of the client. Of course, there is an enormous temptation to an expert to be biased. The expert is paid by the client – often handsomely; the expert sees documents which support the client's case or excite sympathy for the client; the expert may well have given initially optimistic advice (not least because otherwise he would not have got the job), and will want to stick with that advice if at all possible; the expert frequently attends meetings so that he or she feels part of, or sucked into, the client's team, and therefore regards himself as having to advance the client's case; the adversary nature of litigation will atavistically influence the expert to fight the other side.

33. All this may sound rather gloomy. It is not meant to. It is merely meant to identify some of the potential challenges with expert evidence arising out of human nature and the nature of the trial process, and to suggest how we might address and mitigate those problems. The great majority of experts do their best to be objective and professional, and for most of those experts their best is really pretty good. In any event, litigation, at least according to Sybille Bedford in the memorable title of her excellent little book on the Bodkin Adams trial is "The Best We Can Do". In doing our best in this connection, we should accept that we cannot eradicate the vagaries and imperfections of the human condition or of the nature of the trial process, but that does not exonerate us from ensuring that we do as good a job as possible in discouraging or neutralising these vagaries and imperfections. Our common law traditions and practices, of which we have every reason to be proud, are well adapted to do this, given that they are based at least as much on pragmatism and experience, as they are on principle and theory.

Lord David Neuberger, November 2014

Hostages: Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Glen Cameron,Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, John Twomey, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Romero Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan Thakrar, Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Frank Wilkinson, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Thomas Petch, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert Knapp, William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Jamil Chowdhary, Jake Mawhinney, Peter Hannigan, Ihsan Ulhaque, Richard Roy Allan, Carl Kenute Gowe, Eddie Hampton, Tony Hyland, Ray Gilbert, Ishtiaq Ahmed.

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MOJUK: Newsletter 'Inside Out' No 504 (20/11/2014)

Stacey Hyde Wins Appeal Against Murder Conviction

A young woman who killed her friend's violent boyfriend has had her murder conviction overturned by the court of appeal. Stacey Hyde was 17 when she killed 34-year-old Vincent Francis at the house he shared with her friend. Hyde denied murder and said she was in fear for her life but she was convicted at Bristol crown court in 2010. The court of appeal overturned her murder conviction on Thursday. But Lord Justice Laws ruled after an application for retrial by the crown that Hyde should face a retrial for murder. The retrial is scheduled to take place in the new year.

Scottish CCRC Refers Case of Archibald Paterson to the High Court

On 21 February 2013, at Glasgow High Court, Mr Paterson was convicted of murder and sentenced to life imprisonment with punishment part of 18 years. A consecutive sentence of 2 years was imposed in respect of a charge of attempt to defeat the ends of justice. The same sentences were imposed upon his co-accused. The Commission has decided to refer the sentence imposed in respect of the charge of attempt to defeat the ends of justice to the High Court on the grounds of comparative justice (his co-accused's appeal in respect of that sentence having been successful) and because, further to a subsequent decision of the High Court, no sentence ought to have been imposed consecutively to a life sentence. This release release should not be treated as forming part of the SCCRC's statement of reasons.

Surge in Violence at HMP Elmley Lays Bare Prison Crisis *Alan Travis, Guardian*

A shocking inspection report detailing a 60% rise in violence and 11 "mini-riots" in 11 months at an ordinary local prison in Kent has revealed the depths of the prisons crisis facing the justice secretary, Chris Grayling, Extra temporary staff were immediately drafted into Elmley jail on the Isle of Sheppey after a report by Nick Hardwick, the chief inspector of prisons, revealed that urgent action was needed to stabilise the prison. The chief inspector's report, published on Wednesday 12th November, says that Elmley, which has 1,252 men packed into cells meant for 985, is, like many other jails in the south-east of England, struggling to deal with the pressures created by large-scale staff shortages. There have been five suicides at the jail in the past two years.

"This inspection revealed very serious concerns. At the heart of the prison's problems was a very restricted and unpredictable regime. Association, exercise and domestic periods were cancelled at short notice every day. We witnessed many examples of prisoners being turned away from education and work because prison officers were not available for supervision. About 15% of the population, or almost 200 men, were unemployed and they routinely spent 23 hours a day locked in their cells." The inspection in June found that 200 prisoners were being held three to a cell designed for two, while 416 were doubled up in single cells.

While levels of violence at the jail were comparable to those at similar prisons, they were deteriorating quickly: "The overall number of fights and assaults had increased by 60% over the past year and the trend was upwards," Hardwick reports. "Over the previous 11 months there had been 11 acts of concerted indiscipline when prisoners had refused to return to their cells. There had been none in the 12 months before that." Hardwick says that while the

inspection team was inside the jail, plans were being made to introduce a much more restricted regime the following week until temporary staff could arrive to relieve the pressure.

Michael Spurr, chief executive officer of the National Offender Management Service, said that 23 temporary officers were deployed to Elmley the week after the inspection enabling a fuller regime to be introduced: “Permanent recruitment is under way and Elmley will continue to receive support from other prisons until vacancies are filled to ensure that the prison can continue to operate properly and safely at all times.”

However, prison reformers pointed to two other reports, on Brixton and Bristol prisons, published by the independent monitoring boards on Wednesday that confirm that such staff shortages are endemic across the south of England. Bristol is described as being at “bursting point” while at Brixton the staffing levels “ignore the needs of running the prison safely and humanely”.

The chief inspector said he would start work immediately on the investigation requested by Grayling into the scale of monitoring of prisoner’s confidential phone calls to their MPs and in a small number of cases to their lawyers. At least one call to the office of the Liberal Democrat justice minister, Simon Hughes, was monitored as well as five or six to the office of Jack Straw when he was justice secretary. Grayling apologised to the Commons for “any interception of communications between a prisoner and their constituency MP” but insisted that the “unacceptable” monitoring had been accidental rather than any intentional strategy by the prison service to listen in to calls.

Ministry of Justice - Crackdown on Violence in Prisons

There were 3,427 assaults on staff in the 12 months to June 2014, 25% were referred to the police, but the majority were dealt with by adjudication. The new joint protocol produced by the Prison Service, Crown Prosecution Service (CPS) and Association of Chief Police Officers (ACPO) will set out that when there are serious assaults on prison staff, the perpetrators will be prosecuted unless there is a good reason why not.

The protocol will also provide robust guidelines for joint working between prisons, police and CPS to ensure that wherever possible prisoners who commit serious assaults on staff or other serious crimes – such as hostage taking, arson, absconds -are punished through the courts. It will help to improve crime reporting and information sharing and most importantly it will improve the service to victims of crime in prisons, especially hard-working prisons staff. It will be fully implemented in prisons in England and Wales before the end of the financial year.

It is already the case that there is a presumption that sentences for offences committed in prison will be served at the end of, rather than alongside, the initial prison sentence. The protocol will help reinforce this. This new approach sits within the Prison Service’s wider violence reduction strategy, focused on reducing violent behaviour and making the most of the latest technology such as body worn cameras. Work is already underway in London aimed at tackling gang related crime in London prisons.

The MOJ has also put forward new legislation in the Serious Crime Bill now going through Parliament to ensure that prisoners who possess knives and other offensive weapons in prison will face prosecution under a new criminal offence punishable by up to four years in prison. This will further strengthen the measures available to tackle the most serious violence in our prisons.

Prisons Minister Andrew Selous said: "I am delighted that this new approach to investigating crime in prisons will ensure that those that attack staff are prosecuted and fully brought to justice. It will mean that more of the prisoners who assault staff will spend longer behind bars. Violence in prisons is not tolerated and assaults on our hardworking staff are unacceptable.

by one of the parties. And the rules of court and a succession of judgments reinforce and re-emphasise the requirement of independence, despite the inevitable pressure that expert witnesses face from their clients, who are paying them, and the desire to win. It can be said that the decision of the Supreme Court in Jones v Kaney, which removed the expert’s immunity from suit when giving evidence, may have served to increase that pressure, as even when giving evidence to the court the expert not only needs to bear in mind his duty to the court, but also his duty to his client.

27. Having discussed a few concerns, I am bound to say that it does not seem to me that one should simply concentrate on expert witnesses, when considering expert evidence. In this connection, it is an incontrovertible fact that it is the lawyers who make the rules, and so the more cynically inclined might say that this is why expert witnesses are subject to the rule that they have to be strictly impartial and tell the truth in an unbiased way when advocates are free to advance any argument they wish, however little they believe in it, provided that they think that it will advance the interests of the client. I think that such a view is a little harsh, and in the end untrue, but one can well see how the unworthy thought might float to the surface of some people’s minds. However, whatever the fair or justified analysis, I do think that improving the value and dependability of expert evidence does not depend solely focussing on expert witnesses.

28. Thus, to pick up a thread I started on earlier, although there is no doubt that Professor Meadow’s performance in some cases, including the Sally Clark case, was open to criticism and gave rise to serious concerns, the fact that no one in court seems to have seriously set about challenging his unreliable statistical evidence also seems worrying. That is not meant as a criticism of any individual, but it does demonstrate that, if we are to improve the standards of expert evidence, we have to look at all those involved in litigation and not just the experts. Practitioners and judges have to understand the relevant technicalities and statistics better than they currently do.

29. In the field of patents, to which I was a judicial newcomer in 1998, there were a couple of valuable procedures in complex scientific cases. The first was to provide the Judge at the start with a detailed primer whose contents were approved by both sides. The second was for the Judge to sit with an assessor, that is a wholly independent expert whose job was to educate the Judge on any general issue, without expressing views as to the appropriate outcome.

30. I also think that equality of arms as between the experts is also a factor which helps ensure a higher quality of impartiality. The fact that an expert witness, witness 1, knows that he has to face an expert witness, witness 2, on the other side, and that witness 2 will presumably be briefing the advocate who is to cross-examine witness 1, should help concentrate the mind of witness 1 on ensuring that his evidence is at least credible. Unless there is equality of arms when it comes to expert witnesses, witness 1 will be sorely tempted, sometimes subconsciously no doubt, to over-egg his evidence, or at least not to take quite as much care as he might have done if he knew that there was someone as expert as he was testing and challenging his evidence. It is for that reason that I am a little nervous about a single joint expert. However, as I indicated when I was a first instance judge in the early days of the CPR, in Pattison v Cosgrove, limiting the parties to a single joint expert against the will of one of the parties was a course which can and should be adopted if it is proportionate, bearing in mind, inter alia, the amount of money involved. Further, while the 2011 Supreme Court decision in Jones v Kaney has its downsides, it should help to ensure that the expert witness does his homework before giving his evidence, both in his report and in the witness box.

31. I also would join Sir Rupert Jackson in wondering whether the present system of consecutive cross-examination of expert witnesses is always the best way to go about testing the expert evi-

tion, namely the rule that any hypothesis was good so long as it was not and could not be shown to be wrong – eg the sun always rises is a hypothesis which seems to be right, and should only be discarded when the sun doesn't rise – at which point none of us will be there to enjoy the falsification). However, when an expert is instructed to act for a client, I suspect that he may very well adopt the Popper approach, and start with what he hopes or expects will be his final position and then work backwards to prove that it is right. Human nature being what it is, it is almost inevitable that he will start with the proposition that his client is in the right.

22. Another feature of human nature which surfaces in the field of expert witnesses is the human desire to clothe our instincts in respectable quasi-scientific terms and to express our feelings as if they were based on logic rather than emotion. There is no doubt that DNA matching by reference to statistical databases is reliable and can and should be the subject of expert evidence, which can evaluate the statistical probabilities of a particular sample of DNA (eg that from a criminal defendant) having the same source as another sample of DNA (eg that found at a crime scene). However, DNA, although a very complex molecule consisting of a double helix, each of the two helices is made up of a very long series of four different and easily identifiable bases, and therefore each sample of DNA is recordable by reference to an objective and clear criterion, namely the sequence of the bases in the helices.

23. The same is not true of footwear marks, as the Criminal Division of the Court of Appeal pointed out and decided in R v T. As the Court pointed out at para 80, an "approach based on mathematical calculations is only as good as the reliability of the data used". And when they turned to examine the database, there was a woeful shortage of evidence as to the number or geographical distribution of different types of relevant styles and sizes of shoes available. The Court therefore ruled out the presentation of evidence which purported to express a mathematical or statistical assessment of the evidence.

24. Connected with this is the question of fingerprint evidence. The whorls and other patterns we are all so familiar with cannot be analysed and categorised ain the same way as DNA with its different sequences of identifiable and classifiable bases. Yet, as Sir Brian Leveson put it a few years ago [9], "the language of certainty that examiners are forced to use hides a great deal of uncertainty." That is not, of course, to say that fingerprint evidence is inherently questionable in terms of its value. People experienced in looking at and analysing fingerprints can give important evidence upon which convictions can properly be justified. But the probative value of fingerprint evidence cannot safely or properly be expressed in mathematical terms, in the same way as DNA evidence.

25. In case what I have said so far sounds rather negative, fingerprints provide a useful topic on the back of which to bring in another aspect of science and technology, which is not merely a more positive point than those which I have been making so far, but is also a much wider point. It is to draw attention to the enormous amount of hard work, ingenuity and sheer intelligence and commitment which have resulted in the ever-accelerating scientific and technological advances over the past 350 years. In March 2012, a paper was published, which suggested that the reliability of fingerprint evidence could be expressed in qualitative terms. Now I am not suggesting that this was the most impressive piece of scientific research ever published or even that it is correct: I am not qualified to say. But it is splendidly typical of the scientific world to worry away at problems and seek to come out with an answer. It is interesting to note, in the light of the Court of Appeal's observations in the R v T case, that great weight was given by the authors of the article to the existence of a large and reliable database.

26. We expect expert witnesses to be independent and balanced, even though they are paid

able. I do not underestimate the hard work and challenges that prison staff face on a daily basis which is why we have been working extremely closely with the police and CPS to tackle this issue. We have always had a complex and challenging prison population but are taking appropriate steps to ensure that we carefully manage the increased levels of violence."

Attorney General Jeremy Wright said: :This protocol will make it clear that prosecution should usually follow when prisoners assault hard-working prison staff. Prison officers deserve the greatest clarity and the best protection we can give them. These new guidelines will provide additional guidance to prosecutors, who review all charging decisions in accordance with the Code for Crown Prosecutors. It will ensure that different police force and CPS areas pursue prosecutions of crimes within prison in a consistent and efficient way. While it is right that there should be some local prioritisation of crime investigation and prosecution, all agencies want to ensure that serious crimes in prison are dealt with fully by the criminal justice system.

Recalls to Prison

What proportion of recalls to prison were fixed-term recalls in the latest period for which figures are available. Under-Secretary of State for Justice (Andrew Selous): Between 1 April and 30 June 2014—the latest period for which data are available—there were a total of 4,216 licence recalls. Of those, 42% were fixed-term recalls.

Philip Davies: Most people around the country believe and expect that when a criminal is released from prison early, if they commit another offence before the end of their original sentence they will be sent back to prison for at least the full duration of that original sentence. As the Minister has confirmed, however, 42% of recalls are just 28-day fixed-term recalls. In the first nine months of last year, 1,260 burglars were given 28-day fixed-term recalls, instead of serving the full length of their original sentence. Will the Minister revisit that scandal, which alarms many of our constituents and puts them at unnecessary risk of becoming victims of crime?

Andrew Selous: My hon. Friend has taken a long-standing and serious interest in this issue. Fixed-term recalls can be used only when the offender does not pose a risk of serious harm to the public. When recall prisoners are assessed to pose a risk of serious harm to the public, they are given standard recalls to serve the remainder of their sentence in prison, and will be released earlier only if it is safe to do so. Under the Criminal Justice and Courts Bill, offenders who do not comply with their licence and are highly likely to commit further breaches if released are deemed unsuitable for fixed-term recall. We therefore have measures either in place or in the pipeline to exclude high-risk and prolific offenders from fixed-term recalls.

Chris Grayling Makes Pledge Over Probation Conflict of Interest Fears *Alan Travis*

In his first public comment on the potential conflict of interest facing the chief inspector of probation, whose wife's company has won the largest single number of probation contracts, the justice secretary admitted to MPs that the issue needed to be addressed. However, he tried to dismiss concerns by defending the role of married couples in public life and saying the conflict of interest facing Paul McDowell, the chief inspector of probation, and his wife, Janine, deputy managing director of Sodexo Justice Services, could be compared to the possible roles of Yvette Cooper and Ed Balls in a future Labour government.

"Clearly, the issue is under discussion and it will need to be addressed," said Grayling, promising to update MPs in due course. He went on: "We should also remember that people in public life are sometimes married to other people in public life. We should be extremely

careful before we start to damn them because of that situation or we may risk losing some extremely able people from our public life." Grayling, who employs his wife, Sue, as his executive secretary paid for out of his parliamentary allowance, added: "Simply put, I hope that the Ministry of Justice, were it to fall under the leadership of a Labour government, would not be disadvantaged by the fact that the putative home secretary [Cooper] is married to the putative chancellor of the Exchequer [Balls]. We have to consider these things very carefully and deal with them in a mature and sensible way, and we will seek to do that."

Labour demanded an inquiry into the conflict of interest facing the chief inspector of probation, who was appointed by Grayling, after the Guardian reported that his wife's company had been given "preferred bidder" status for six out of the 21 regional contracts to take over parts of the probation service in England and Wales from next year. Sodexo is in partnership with the crime reduction charity Nacro to take over the supervision of tens of thousands of offenders. McDowell was the chief executive of Nacro until his appointment as chief inspector of probation. McDowell and the justice ministry have told the Guardian they will examine whether it is possible for the conflict of interest to be managed in an appropriate way by the chief inspector withdrawing from inspecting the work of his wife's company.

The shadow justice secretary, Sadiq Khan, challenged Grayling this week over McDowell's role and the chief inspector's "silence" over the "huge turmoil and massive problems" in the probation service. Grayling confirmed that despite an open invitation to raise any concerns about public safety arising out of the probation reforms directly with him, McDowell had not done so. But he said a detailed report on the Transforming Rehabilitation programme will be published shortly. "[McDowell] has highlighted a number of areas we are addressing. The report will set out in detail some issues, many of which preceded the current reforms and go back many years, on how to improve performance on probation.

Khan, said Grayling's attempts to dismiss concerns about the chief inspector's private company links by drawing a parallel with two married MPs was "frankly ludicrous". "This must not deflect from very serious questions about what the justice secretary knew at the time of the appointment of Mr McDowell, what he did or didn't tell the justice select committee ahead of their pre-appointment scrutiny hearing, and how it will be possible for the chief inspector to fulfil his role given his links to Sodexo and Nacro. What we need at this time of turmoil is a strong, fearless and independent chief inspector of probation."

Defendants Should Never be Tried Anonymously *Owen Bowcott, Guardian*

Lord Thomas of Cwmgiedd said it would undermine the tradition of open justice if defendants were rendered anonymous. Thomas, who is the most senior judge in England and Wales, was commenting on the legal principles behind the prosecution of Erol Incedal who was initially described in court only as AB. The media, including the Guardian, raised concerns about the precedent and challenged the procedure initiated by the Crown Prosecution Service. Incedal was eventually identified following a court of appeal hearing. Speaking at his annual press conference, Thomas said: "We don't want a situation where there are anonymous defendants and [where] the matter has to come to the court of appeal to resolve it. There needs to be much clearer guidelines … so that the prospect of an anonymous defendant is something we would never see again in the courts. I believe passionately in justice and if justice is not open it's not justice."

He said it was hard to think of a situation where a defendant would be required to remain anonymous during a trial. "This is something that should be looked at properly … We can't have something like this happening again." Thomas also opposed proposals made in a report commis-

ages depending whether the comparable was better or worse than the subject property. Now, this had the appearance of being objective, but an enormous amount depended on the factors which the expert surveyor chose, the weight he decided to give them, and the percentage adjustments he chose to make. The choice of factors was entirely subjective, although it is fair to say that common sense played a large part. As to weight and adjustments, they had to be expressed in figures, ie in an apparently objective quantitative way, but of course they almost always represented the subjective and qualitative views of the surveyor.

18. This again reflects general human experience: we clothe subjective assessments with an apparent, but specious, respectability by purporting to quantify them in figures. If a lawyer says to a client that she thinks that the client has a 75% chance of winning the case, that would be meaningless; it would merely be a colourful way of saying that she thought that he would win but there was a real chance, but not a very great one, that he would lose. Logically, I suppose, it would mean that, if the client was going to get £1m if his claim succeeded, he should settle for £750,000. In a more principled sense, I suppose that, if the lawyer's advice was reliable, she should have won three-quarters and lost one-quarter of all the cases where she had advised that her clients had a 75% chance of winning.

19. More generally, the notion of dispassionate, detached scientist is something of a myth. Anyone who has read about Einstein's visceral dislike of advanced quantum theory, with his well known (if questionably attributed) observation that "God does not play dice" will appreciate the role of a scientist's moral or instinctive feeling. So too, there is a degree of political instinct observable in many, but by no means all, of those involved on either side in the debate about climate change. Anyone who has read about the current debate about the validity of the string theory (or, more properly, hypothesis) will be able to detect the passionate nature of the commitment to the correctness of the hypothesis by certain scientists who have given up fifteen years of their working lives on the basis that it is correct. And anyone who has sat on a patent case will appreciate that some scientists, even eminent scientists, can become very committed in their emotions and very one-sided in their approach to evidence, either because of their instinctive quasi-proprietorial feeling towards a particular view or because of a commitment to their clients' case – or both.

20. In this connection, it is relevant to mention the work of the great philosopher, Karl Popper. One of his two great contributions was his insight into the way in which scientific discoveries are made. The popular view is that a research scientist investigating a problem will start with the currently available information and knowledge and work through a series of logical steps to arrive at an answer to the problem. Far from it said Popper. The scientist conceives of a possible answer and then works backwards to justify it – if he can. That makes sense when you think about it. Remember those puzzles we had as children: there are six entrances to the maze, and only one of them leads to the centre. The natural and instinctive thing to do is to start with one entrance and then, when and if it doesn't work, move onto the next and so until you find the right entrance. But of course we quickly realise (or some clever clogs tells us) that the best and quickest way to solve the problem is to start at the centre and work outwards till you get to the right entrance.

21. The trouble with that approach may be that it can be more likely to lead to errors. The scientist who has the bright idea immediately has a vested interest in proving it is right, and when he thinks he has proved it, he has an even more vested interest in defending the idea and his proof. That's human nature. (It didn't worry Popper because he relied on falsifica-

the less good hospitals, because GPs and indeed the less good hospitals refer the most difficult patients to the best hospitals leaving the less good hospitals with the more routine cases.

13. And the general public understanding of statistical evidence is pretty woeful. Take the opinion polls which we frequently see in the newspapers. If last month's figures showed Labour on 35 and the Conservatives on 32, a 3% Labour lead, and this month's figures showed Labour on 32 and the Conservatives on 34, a 2% Conservative lead, the headlines would trumpet an enormous change. Yet the margin of appreciation on the figures in most of these polls, assuming that they are properly representative, is, I believe, +/– 3%; therefore the two sets of figures are wholly consistent with no change during the month in question. Indeed, 5% of the time I believe that the figures are not even within the +/– 3% range. One can understand why newspapers do not mention that fact: it draws the sting from the story, but even most otherwise well-informed people don't appreciate it, because we are not particularly well educated in mathematics and science.

14. Another good example is the TV interviewer who incredulously challenged a statistician's evidence that once there are more than 23 people in a room, the chances are more than 50% that two people in the room will share the same birthday, and with 70 people in the room the chances are over 99%. The presenter pointed out that there are 80 people in the audience, and then said "anyone who shares my birthday of 10 January, put your hand up", and nobody did. He then turned to the statistician triumphantly. Of course, the interviewer made an elementary mistake. It is one thing to say ask whether any two people out of 23 or 70 have the same birthday; it is quite another to ask whether any of the remaining 22 or 69 people share a particular person's birthday – ie have their birthday on a specified day.

15. Failure to understand figures was, I think at the root of the problem in the sad case of Professor Meadow, the expert witness who famously told a jury in the Sally Clark case that the chances of one couple losing two children through cot deaths was 73 million to 1. The primary error in this was that it wholly ignored the possibility of the two deaths being connected – both from what has loosely been called a cot death gene, and because of something in the environment in which the two babies were sleeping. However, it also suffered from another more subtle statistical error, namely an error appropriately labelled prosecutor's fallacy.

16. Professor Meadow's evidence also reveals another cause of expert fallibility, namely emotional commitment to a theory or principle. Professor Meadow had been responsible for developing and publishing the theory of Munchausen Syndrome by Proxy in 1973, which made him famous, and led to him giving evidence in 1993 at a trial of a nurse who was convicted of poisoning several of her patients to death. He thereafter became an acknowledged, indeed renowned, expert witness in cot death cases where foul play was suspected, and gave expert evidence in relation to several such cases which resulted in conviction. In those circumstances, he would scarcely have been human, if he had not become emotionally attached to his topic. He was eventually found guilty of professional misconduct and struck off, but, on appeal, while the finding of a degree of misconduct was accepted, striking off was held to be too severe a sentence and it was quashed.

17. Quite apart from not understanding figures, many people, including some judges and arbitrators, are over-impressed with figures: they give a respectability to evidence, even when they are in fact are wholly subjective. My practice at the bar involved quite a few property valuation cases. The surveyors had to come up with a figure, and they normally did this by looking at comparables, that is transactions in relation to other properties – ideally as similar as possible to the subject property. However, the comparables had to be adjusted to allow for differences between them and the subject property. A favourite exercise was to identify various factors and then add and subtract percent-

sioned by the Labour party for quotas to increase the number of senior judges who are women and from ethnic minorities. "I believe quotas are unnecessary and there's a huge disadvantage in them," Thomas said. Other initiatives were being pursued to improve diversity on the bench, he said, including recruiting senior partners from law firms who retire in their early fifties.

What Measures A Trial Judge May Legitimately Take To Protect A Vulnerable Witness

1. We shall now give judgment in two conjoined applications for leave to appeal against conviction submitted by JP and Lubemba. They have been referred to the court by the Registrar to be heard together because they each raise the same issue, namely what measures a trial judge may legitimately take to protect a vulnerable witness, without impacting adversely on the right of an accused to a fair trial.

2. In addition to the Contempt of Court Act order above, the provisions of the Sexual Offences (Amendment) Act 1992 apply to both applications. Where a sexual offence has been committed against a person, no matter relating to that person shall be included in any publication that is likely to lead members of the public to identify that person as the victim of the offence during their lifetime. This prohibition applies unless waived or lifted; it has not been waived or lifted. In the circumstances an order under section 39 of the Children and Young Person's Act 1933, the provisions of which are also engaged, is unnecessary.

Conclusions - JP - 47. As far as the application in JP is concerned, we unhesitatingly give leave. With respect to the judge, who no doubt had the child's best interests at heart, we simply do not understand what he was saying as a matter of law, why he concluded the child could not be cross examined and why he did not allow defence counsel to try a few sensitively phrased questions. It is not clear to us whether he had concluded the child was not competent to give evidence, not fit to give evidence, or it would not be good for her to give evidence. These difficulties might not have arisen had it been arranged for him to introduce himself to the witness at the same time as the advocates did.

48. The judge's approach was wrong in a number of respects. If his visit was designed to assess her competence, he should have taken the parties with him or used the live link in their presence. He should not have questioned her alone (See section 54 (6) of the Youth Justice and Criminal Evidence Act 1999). If his visit was merely designed to introduce himself properly to her and he unexpectedly began to question her ability to participate, he should have informed the parties of his concerns and sought their submissions, before making a ruling. He should have considered whether any other special measures such as the services of an intermediary might benefit the witness (section 54 (3)). Furthermore, he could have considered calling for an expert to assist him.

49. If he had then concluded, on a sound basis, that the witness could not be cross-examined, he should have re-visited the provisions of section 27 of the Act and the decision to allow the video recording to be played. He should have considered whether or not it was admissible where the prosecution could not tender the witness as required by section 27 (5) of the Act. Finally, and most importantly, the judge should have openly and clearly given far greater consideration to the impact upon the fairness of the trial of prohibiting the defence from testing the evidence of the main prosecution witness.

50. In all those circumstances we feel that we have no choice but to allow the appeal and to quash the conviction. We will hear submissions in a moment as to whether or not a re-trial is sought.

Lubemba - 51. In Lubemba, on the other hand, Judge Carr did not go too far in trying to

protect a vulnerable witness. As we have already explained, a trial judge is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate.

52. We have no doubt Ms Akuwudike was doing her best to examine the child in short, non-confrontational questions; she was far from aggressive. But, as she herself conceded, she fell into the trap of asking questions which were more suited to an adult witness than a child. Many of her questions were what are called "tag" questions which children find confusing, some of her questions were simply too long and some too complex. In our view, the judge was bound to intervene when he did. The interruptions were not excessive, they were justified, and they did not prevent counsel from testing the evidence. We note that Ms Akuwudike sat down stating that she had no further questions before the judge had a chance to impose any kind of guillotine upon her. This does not surprise us. As Ms Milsom observed, the issues were extremely straightforward and Ms Akuwudike had ample time to put what she needed to put in the time allowed. If any matters remained that the defence considered important, such as the crime report, it would have been open to Ms Akuwudike to ask for a little more time and or she could have invited the prosecution to make admissions.

53. We are satisfied, therefore, that the judge exercised his case management powers entirely reasonably and did nothing to undermine the fairness of the trial. We refuse leave to appeal against conviction. http://www.bailii.org/ew/cases/EWCA/Crim/2014/2064.html

IPCC to Investigate Police failures to Act on Child Abuse Intelligence

Essex, North Yorkshire and North Wales police forces are to be investigated over alleged failures to act on intelligence relating to indecent images of children. The three forces made referrals to the IPCC in relation to intelligence they received from the Child Exploitation and Online Protection Centre (CEOP). After careful assessment they will now be independently investigated.

IPCC Deputy Chair Sarah Green said: “There is rightly considerable public concern about how police forces deal with sexual offences involving children. The IPCC takes this issue seriously and proactively contacted all forces and asked them to review their handling of intelligence to determine the scale of any issues. Our investigations will examine carefully how intelligence from CEOP was dealt with by these three forces.” On 30 September we received a referral from Essex Police relating to the force’s delay in responding to the information provided by the National Crime Agency (NCA) in November 2013. The information led to the force’s contact with Martin Goldberg prior to his death. The IPCC also received a number of complaints from individuals affected by the case. On 6 October, the IPCC wrote to the chief constables of all police forces in England and Wales. They were asked whether their force received material from the NCA originating from Project Spade, and if so to review the way they treated it to determine whether or not there are matters that should be referred to the IPCC. As a result we received referrals from North Yorkshire Police and North Wales Police.

The IPCC has also received a referral from the National Crime Agency (NCA) relating to intelligence received by the Child Exploitation and Online Protection Centre (CEOP) in July 2012. The referral detailed a failure to distribute that information to UK police forces until November 2013. The intelligence was provided to CEOP by Toronto Police in Canada as part of Project Spade and related to customer details of purchasers of DVDs and videos. The IPCC has still not received all the information it requires from the NCA. Once this happens the assessment will be completed.

light was both waves and particles – or maybe that it was neither and that waves and particles were each merely an incomplete metaphor as to the nature of light.

7. But myths are not merely something which existed in the distant, or even not so distant, past. Let me refer to two more recent examples. In 1901, a Harvard psychologist, who went under the faintly memorable name of Edwin Boring, translated a German paper rather ineptly, as a result of which it became received wisdom in the English speaking world that different parts of the tongue, as shown on a rough plan of the tongue, detected different tastes. This belief continued unabated until 1974, when a certain Virginia Collings published findings which conclusively showed that all parts of the tongue were equally sensitive to different tastes.

8. And to move forward to the present day, according to the Wall Street Journal of 28 October 2014, “the top scientist guiding the U.S. government’s nutrition recommendations made an admission last month that would surprise most Americans. Low-fat diets, Alice Lichtenstein said, are ‘probably not a good idea.’ It was a rare public acknowledgment conceding the failure of the basic principle behind 35 years of official American nutrition advice. ” And it turns out that the famous five a day fruit and vegetable intake recommendation is not only baseless but unsound, as ten a day, according to a UCL study last year, is what is required.

9. Expert witnesses and indeed the courts would do well to bear this sort of potential development, change of tack and correction of mistakes in mind. And it is clear that some judges at least are well aware of the potential for shifting sands when it comes to expert evidence. Dame Elizabeth Butler-Sloss P observed in one case: "The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark."

10. We are said to live in a rational and scientific age, and compared with the world before the 17th century, we do. But it is by no means a world of absolute rationality: indeed, if it was, it would not be a human world. We live in an environment which is heavily influenced in its thinking and environment by physics - energy, transport and communications being three obvious examples of vital ingredients of modern life which are only possible because of strict application of the rules of pure and applied mathematics. However, one of the problems of the modern age, which feeds into expert evidence, is the unsatisfactory way in which figures are used and understood by the great majority of people. Most people, for instance, do not understand the enormous importance of statistical evidence, and, if it is available, they do not understand how to test its reliability, or even what it really means. And let me make it clear that I do not pretend to have a particularly deep knowledge or understanding myself.

11. Statistically reliable information at its best can be very powerful, even conclusive, as evidence. However, statistical information is potentially susceptible to pitfalls for the unwary. Thus, if one is to say that a particular medical procedure is not one which a competent doctor should have performed in certain circumstances, the best evidence on the issue might be thought to be reliable statistics showing that the treatment does more harm than good or is much less effective than the alternative treatment. But how often is such evidence available? And, when it is, do we know whether is reliable? Those two questions reveal a conflict. On the one hand, statistical evidence, if reliable, can show pretty clearly whether a particular view about the procedure in issue is in fact properly based on hard evidence.

12. On the other hand, there are so many potential hidden pitfalls in the form of false assumptions or other explanations that the figures can be positively misleading. Thus, what are in fact the best hospitals for a certain procedure may have worse mortality rate than

expert witnesses, and indeed any other people who are in any way involved with expert evidence, to be able to see the function of the expert witness in its broader context. Furthermore, if those people appreciate the role of the expert witness and expert evidence in its wider context, they are likely to perform their role as expert witness, or whatever function they may have in connection with expert evidence, more effectively, confidently and authoritatively.

3. An expert witness is a witness who gives opinion evidence to the court on technical, scientific or other specialist issues, which the court considers appropriate for expert evidence, and any such evidence should represent the expert's honest independent opinion based on his knowledge and experience. As Saunders J said long ago in a case heard in the reign of Mary Tudor, "if matters arise in our law which concern other sciences or faculties we commonly apply for the aid of the science or faculty which it concerns" [1]. And, as the great Lord Mansfield CJ said more than two hundred years later, "in matters of science the reasoning of men of science can only be answered by men of science" [2]. So, expert witnesses are a well-established feature of litigation, but they are unusual in that they are entitled to give evidence not of fact but of opinion, based on knowledge and experience.

4. The first point I want to make concerns the nature of knowledge, an epistemological point if you like. Experts and their views are very much creatures of their time, even in a field which may seem to be as black and white as elementary physics. An expert's view on what is, in principle, a timeless issue may be perceived as being "right", because it complies with the generally accepted contemporary view of the time, even though it will be thought to be completely wrong-headed later. Thus, what now appears to be the crazy medical practice of bleeding, or drawing blood from all ill or weak patients, was generally accepted as self-evidently beneficial for over two millennia. Galen's medical writings, although containing much rubbish, were treated as almost a sacred tract for nearly fifteen hundred years from around 200 AD. That was so even though we now know (or should I say "strongly believe"?) it to be harmful in most cases and fatal in some. Yet an expert witness who denied the value of the practice even in an 18th century trial would have found his evidence unceremoniously rejected.

5. Or take a fundamental and apparently wholly objective and binary issue: does light consist of waves or particles? From around the middle of the 11th century, the leading work on optics by the Arabic scientist Alhazen appeared to establish that it consisted of tiny particles, and that is what any educated natural philosopher would have said for the next 500 years or so. But, at least in Western Europe, from about 1630, the generally accepted view among educated people was that the philosopher Descartes had shown that light to consist of waves not particles. However, by the end of the 17th century, there were two competing views, both strongly held by respectable scientists: followers of the great Isaac Newton believed that he had shown that Descartes was wrong and that light was made up of particles, whereas followers of Christiaan Huygens equally strongly believed that he had demonstrated that light was waves: an expert could have held either view, although the wave theory seemed to have more adherents.

6. A century later in 1803 the experiments of Thomas Young appeared to show pretty clearly that light consisted of waves not particles, and subsequent experiments during that century seemed to clinch the point. So any respectable 19th century expert would unhesitatingly rejected the notion that light was made up of particles. However, hardly was the point apparently clinched when along came the quantum theory and Louis de Broglie's work established that light not merely consisted of both waves and particles but did so at the same time – so-called wave-particle duality. So from about 1930, any expert would have said that

Three Deaths in Six Months in Leeds Police Custody

IPCC are set to look into possible links between three incidents where suspects died after being held in custody at a new £34 million police headquarters in Leeds. The death of Robert Ward on October 28 was the third time in less than six months that someone has died in the days after being detained at West Yorkshire Police's Elland Road district base. The IPCC announced that it is looking into the events between Mr Ward, 26, being arrested on October 7 and his death in hospital. "The IPCC's independent investigation will examine how Mr Ward was able to retain any substances while in custody, how he managed to take them, whether he was sufficiently supervised and if the necessary risk assessments were conducted." He was twice taken to a hospital in Leeds, where he was examined and received medical attention before being returned to Elland Road police station.

Woman Can Have Legal Aid to Sue Police For False Imprisonment *Owen Bowcott*

An attempt to deny legal aid to a woman suing the police for false imprisonment has been defeated in the high court, overturning restrictions imposed following government cuts. The decision by Mr Justice Dingemans is the latest in a series of judicial setbacks for the Legal Aid Agency (LAA) and the Ministry of Justice, which are trying to reduce spending in the courts. The LAA had argued that legal aid should only be provided if it could be shown that officers had acted both unlawfully and maliciously in depriving an individual of their liberty. The requirement that officers intended to act illegally threatened to prevent many cases being brought against forces by people who had been illegally detained or mistreated.

Sunita Sisangia was held at Wembley police station in north-west London following a dawn raid on her flat allegedly on the grounds of harassment. Officers released her more than 13 hours later after deciding that the matter was a civil dispute and no crime had been committed. The Independent Police Complaints Commission subsequently upheld her complaint against officers. Sisangia applied for legal aid to sue the Metropolitan police but was refused permission.

The LAA said that following cuts imposed by the Legal Aid, Sentencing and Punishment of Offenders (Laspo) Act 2012 she was not entitled to support because there had been no deliberate or dishonest abuse of power. But the judge ruled: "The claim for false imprisonment related to an arrest that was deliberate and that resulted in harm to Ms Sisangia that was reasonably foreseeable, thereby satisfying the provisions [in the act]." He added: "It would be surprising … if the legislature had left the phrase 'abuse of position or power' to be added as an additional requirement to a partial definition … There does not seem to be much point to define a phrase with a minimum content, and then to leave the additional requirements undefined.

Trudy Morgan, a solicitor at the law firm Hodge Jones & Allen who represented Sisangia, said: "The decision is a significant victory for civil liberties in this country and I am pleased that we have been able to ensure funding, both for our client's case and future cases of false imprisonment. Being able to hold state authorities to account for unlawful loss of liberty is an important constitutional safeguard. Before Laspo, cases of false imprisonment were always funded by legal aid and restricting funding only to dishonesty cases was never the stated intention of parliament. The situation where people who had been unlawfully detained by the state had no recourse to public funding in order to hold the state to account was unacceptable. Practitioners have noted an increasing tendency for the Legal Aid Agency to focus on reasons to refuse funding, presumably in a bid to further reduce the legal aid bill. If this is indeed the case, it means that there is a real danger of narrowing the scope of funding beyond what was intended by parliament."

The latest defeat for the justice secretary, Chris Grayling, follows a decision in

September that the consultation process involving reducing solicitors' contracts was "so unfair as to amount to illegality". In July, the high court ruled that Grayling's introduction of a residence test to decide eligibility for legal aid was discriminatory and unlawful. An MoJ spokesperson said: "We are disappointed by this judgment and understand the Legal Aid Agency are considering whether to appeal. We believe the LAA are right that the Laspo Act passed by parliament intended that only cases involving the most serious allegations of misuse of power by public authorities should receive legal aid funding. We made tough choices to make the necessary savings whilst still ensuring legal aid remained available where people were most in need of a lawyer. Legal aid is still available where life or liberty is at stake, where people are at serious risk of physical harm, where domestic violence is involved and where someone is at risk of homelessness." The LAA is considering whether it will appeal.

Asylum-Seekers 'Wrongly Deported' On Drug Smuggler's Evidence *Chris Green*

Theresa May is facing fresh embarrassment amid allegations that the Home Office has for years been relying on the work of a convicted drug smuggler who lied about his qualifications to help it determine sensitive asylum cases – which may have resulted in hundreds of people being wrongly deported. The unnamed individual works as a language analyst for Sprakab, a Swedish firm which since 2000 has been paid by the Home Office to study audio recordings of people claiming asylum in Britain. It often uses the firm's judgements – which are based on 20-minute telephone interviews – to support its rejection of asylum applications.

Allegations have now surfaced in Sweden suggesting that the man is a convicted criminal who fabricated parts of his CV. Several independent linguistic experts have also cast doubt on the quality of his work, which earlier this year was criticised by the UK's Supreme Court as offering "wholly inappropriate" views on whether an asylum-seeker sounded convincing.

Law Commission : Domestic Violence Should be Specific Criminal Offence

A specific criminal offence should be created to deal with cases of domestic violence, the Law Commission has suggested in a consultation launched on Wednesday. The proposal follows comments made during the summer by both the prime minister, David Cameron, and Labour's shadow home secretary, Yvette Cooper, supporting the introduction of an offence dedicated to dealing with domestic violence incidents.

Any new offence would be a response to widespread concerns that domestic violence is not being effectively policed, the commission said. It would also alert social services in future to the fact that an individual had a history of aggression against a partner. "In addition to the wrong implicit in all unjustified acts of violence, domestic violence involves wrongs peculiar to it: abuse of trust and destruction of the sanctity of a relationship," the consultation observed. "It has also been argued that the prosecution of offences of domestic violence has a part to play in correcting the power imbalance between the sexes."

But, the commission conceded, there are also fears that such an offence "would create a misleading impression that domestic violence is primarily an offence against family relationships, to be distinguished from 'real' violence." Separate new offences of inflicting minor injuries and of transmitting infectious diseases might also help to clarify the archaic law, according to the body, which is charged with reviewing legislation.

The proposals are contained in a paper which proposes far-reaching reform of the Offences Against the Person Act 1861. The legislation refers to legally outdated concepts such as

munity. For offenders leaving custody, National Health Service guidance sets an expectation that prisoners are either registered with a general practitioner (GP) practice before they leave or are provided with the necessary information to register with a GP on release and, where possible, provided with support in doing so. The Transforming Rehabilitation reforms within the justice system should enable continuity of care through the prison gate by supporting offenders from custody to community.

Registration with a GP ensures access to the healthcare services that the offender needs. Quality and Surveillance Groups (QSGs), which have been established at both local and regional level, enable partners across the health and care system to share information and intelligence about the quantity and quality of care across their localities, including those services accessed by ex-offenders on their return to the community. Where a QSG identifies issues or concerns about the quantity or quality of care being provided in their area, members will be able to coordinate any action that is needed to respond to these concerns.

The Department of Health and Ministry of Justice have jointly funded an initiative to improve the "through the gate" provision for prisoners who are dependent on drugs and alcohol. Ten prisons in the North West are currently piloting a range of innovative interventions to provide more intensive support and supervision for people leaving custody which include the use of peer mentors, recovery housing services and take-home naloxone as they return to the community.

New York Taxpayers to Pay $9 Million in Wrongful Conviction Settlement

New York City, its Housing Authority, and the State of New York have agreed to pay $9 million to Danny Colon, 50, and Anthony Ortiz, 44. Both men spent 16 years in prison before their convictions in a 1989 double murder — a drive-by shooting — were overturned in 2009. A spate of wrongful convictions and settlements in Brooklyn have prompted closer scrutiny of illegal tactics and official misconduct that resulted in tainted and wrongful convictions.

Lord Neuberger, President of the Supreme Court, Expert Witnesses

[If we are to improve the standards of expert evidence, we have to look at all those involved in litigation and not just the experts. Practitioners and judges have to understand the relevant technicalities and statistics better than they currently do - Advocates are free to advance any argument they wish, however little they believe in it, provided that they think that it will advance their interests - Expert witnesses give evidence not of fact but of opinion, based on knowledge and experience - Cross-examination process may not be the best way of arriving at the truth]

1. In some of my spare time (such as it is), I am fond of reading books about history. And my favourite history books are often those which take a particular event (often a rather obscure or limited event) and use it to cast a light on the overall flavour and nature of the character and society of the period and the country in which the event occurred. What, you may wonder, has that got to do with expert witnesses? Well, many of the problems of expert evidence which seem to me to throw light on and illuminate a number of broader features of human experience and nature, of science and technology, and, more particularly, of litigation and the judicial process. And, as you have a packed, focussed and practical series of sessions ahead of you on the topic today, I thought that I might say one or two things about a few of those wider aspects today.

2. At first sight, such a conceptual and indirect approach to the topic of expert evidence may seem a little theoretical, even highfalutin', for what is meant to be a practical conference on the topic. However, it seems to me that it is right in principle for people who are or who aspire to be

required to examine and assess them.

177. Taking Mr O'Flaherty's statements at face value, it is unclear what specific consequences would flow from a decision to allow Mrs Rajavi to come to the United Kingdom. It is revealing that most of what is feared is already happening or has occurred in the past. Generalities such as that contained in Mr O'Flaherty's first statement, that "ramping up of rhetoric may … provoke an uncontrolled public reaction" really do not provide any tangible evidence that the admission of Mrs Rajavi to the United Kingdom carries a particular risk.

178. Moreover, the inherent unpredictability of such events as have occurred in the past makes any forecast of what might or might not happen in the future extremely difficult. The circumstances of the sacking of the British Embassy in 2011, for instance, demonstrate the problem associated with making this type of prediction. Such events could well occur whether or not Mrs Rajavi is allowed to come to the United Kingdom. Mr O'Flaherty's first statement vividly illustrates this. In 2009 some of the United Kingdom's locally engaged staff were arrested and accused of involvement in the unrest which followed disputed Presidential elections in Iran. This was something which was, presumably, entirely unforeseen. The throwing of acid bombs into one of the British compounds, shortly before Mr O'Flaherty's first statement was made on 10 October 2011, appears to have been an entirely random attack, unprovoked by any action on the part of British authorities. According to Mr O'Flaherty, even when tensions in the bilateral relationship ease, United Kingdom based staff members have problems with access to Iranian authorities.

179. All of this paints a picture of unpredictability and arbitrariness. Any assessment of the risk of adverse consequences must therefore be of a general, non-specific nature. While this court must have due regard to the assessment that Mr O'Flaherty has made of the risk (and to the judgment that the Home Secretary has made based on that assessment), it must not lose sight of the fact that the risks cannot be explicitly identified nor can they be precisely defined. They are a loosely expressed agglomeration of possible outcomes.

180. By contrast, the interference with the appellants' article 10 right is direct and immediate. Article 10 rights are, in any context, of especial significance but the critical importance of free speech in this case should not be underestimated. Our Parliament is the sovereign part of our constitution. Its laws prevail over everything else. The courts accord greater deference to the decisions of Parliament than to those of any other body. When a distinguished group of Parliamentarians wishes, in the interests of democracy, to conduct a face-to-face exchange with someone whose views they consider to be of critical importance, only evidence of the most compelling kind will be sufficient to deny them their right to do so. This court has a bounden duty to uphold that right unless convinced of the inescapable need to interfere with it. I have not been brought to that point of conviction. I would therefore allow the appeal and quash the decision to maintain the exclusion of Mrs Rajavi from the United Kingdom.

Offenders: Health Services *House of Lords 11 Nov 2014 : Column WA34*

Lord Beecham to ask Her Majesty's Government what plans they have, in the light of the recently published report of the Care Quality Commission on health services in prisons and other custodial institutions, to investigate the commissioning and provision of health services for ex-offenders on their return to the community.[HL2478]

Parliamentary Under-Secretary of State, Department of Health (Earl Howe) (Con): Offenders often have complex health needs and poor health outcomes and it is important that care they have been receiving in custodial settings continues when they return to the com-

"felony" and "misdemeanour". It also includes virtually obsolete crimes such as "impeding escape from a shipwreck". There are almost 200,000 prosecutions each year under the 1861 Act, including offences popularly known as ABH (causing actual bodily harm) and GBH (grievous bodily harm). Creating a separate offence of causing minor injuries would enable far more offences to be dealt with by magistrates courts rather than more expensive crown court trials. "Minor injuries, which are likely to receive short sentences, are generally more suitable for magistrates court trial," the report said. A new offence of transmitting infectious diseases could help clear up the legal confusion surrounding communicating HIV and other infections, the report said.

Professor David Ormerod QC, Law Commissioner for Criminal Law, said: "Violent behaviour results in almost 200,000 prosecutions each year. The harms caused can be grave and have a significant impact on victims and society. But the law under which violent offences are prosecuted is confusing and out of date. Our scoping paper lays a substantial foundation for a clear, modern statute providing a coherent scheme of structured, clearly defined offences that can be readily understood and efficiently prosecuted. We are asking consultees to tell us how the law can best be reformed to achieve this goal." *Owen Bowcott,*

'Kesia's Law' Passes: Children First, Defendants Second

Arrested 17 year olds can no longer be detained overnight at police stations, following a late amendment to the Criminal Justice and Courts Bill. The change addresses a legal anomaly allowing the definition of 'juvenile' to include those under the age of 18 years. It follows a campaign by the legal charity Just for Kids Law who highlighted the plight of the families of three arrested 17 year olds who, following detention, committed suicide. In the High Court case of R (HC) v. Secretary of State for the Home Department – the High Court declared it unlawful to treat 17 year-old detainees as adults and to deny their right to have a parent present with them in custody. Lord Justice Moses concluded that 'the need to include 17 year-olds within the scope of those afforded special protection in custody seems almost unanswerable'.

Our Addiction to Criminalising Human Behaviour a Mockery of Private Responsibility

If poisoning your foetus with alcohol is a crime, why is it not a crime to abort it? If alcoholism in pregnancy is "attempted manslaughter", as a QC told the court of appeal this week, surely abortion is murder. Indeed if alcoholism before birth criminally harms a baby's life, what about alcoholism and a dozen other cruelties after birth? How many are the misdeeds we inflict on our children to which Britain's "cult of criminality" should now turn its attention?

We need a philosopher – as Raymond Chandler would say – and we need one fast. All we get are bloody lawyers. The motive for this week's court case in London had nothing to do with the health of mother or child. It was blatantly financial. A local council is acting on behalf of a seven-year-old girl – "CP" – who suffers from acute "foetal alcohol syndrome". The claimed cause was her mother's drinking during pregnancy. The suit is intended to shift the cost of caring for her from the council to the Criminal Injuries Compensation Authority on the grounds that the girl is victim of "violence against the person".

In America hundreds of (mostly black) mothers are now jailed for this offence, to whose benefit it is unclear. In the British case the mother is not charged with any crime, but it is argued that a crime took place. Since the offence is against a person and a foetus is not a person, such playing with words must have far wider implications – on abortion, for example.

The advance of criminal law into these recesses of private morality is ominous. Fertility and embryology have been relatively free of legal wrangles in Britain, despite such high-profile cases as Diane Blood's 1997 bid to obtain her dead husband's semen. Scientists and their ethics committees have struggled to regulate an area of biology now evolving by leaps and bounds. When serving on one such committee I learned that two inputs were of little help: those of religion and the law. Individual priests and lawyers might be perfectly open-minded but their professional background could curse them with dogma, prejudgment and false certainty. The moral complexity of genetic engineering, gamete selection and foetal surgery ran way ahead of old concepts of right and wrong. When really does "life" begin? How far should we manipulate an embryo? What is a "too late" abortion? Where does parental responsibility end and state responsibility begin?

My response to this week's case was initial horror at a squad of lawyers charging over the hill into an area of private tragedy, and for money. They see the mother as responsible for consciously disabling her child, but I assume they distinguish between a mother aborting a foetus and a mother harming a foetus she intends to bring to life. In the first case she "harms herself," in the other she harms a future live person. It seems a fine distinction.

I still cannot see how we can call something a crime without a criminal agent. In cases such as thalidomide and traffic accidents, compensation is paid that acknowledges the foetus as distinct from the mother. But excessive drinking is a deliberate act. If it is a crime, the mother must be the criminal. This wedge can only be driven on towards the American treatment of women who endanger their foetuses in this way.

The response from most sensible people is that foetuses are not persons, whatever they turn out to be. Alcoholic mothers therefore need warning, care and treatment, not criminalisation. In extreme cases – say, where an alcoholic woman seems determined to conceive when drinking – the courts can order sterilisation. But beating mothers about the head with blame, punishment and, in the case of wealthy ones, presumably huge compensation payments, can only make things worse.

If the court of appeal throws this case out, we might hope to focus similar tolerance on drug abuse, shop-lifting, antisocial behaviours and petty crimes for which imprisonment is such a primitive answer. Britain is prison mad. When that old softie Margaret Thatcher left power, there were 45,000 Britons in jail. The number has doubled. Then there were 130 jailed shoplifters. Now thousands pass through prison each year for offences treated in most of Europe like a parking violation. I have on file cases of Britons recently imprisoned for crimes as relatively mild as abusive tweeting, poll-rigging, Boat Race obstructing, cathedral desecrating, job-application falsifying, expenses fiddling, urinatingon a war memorial, speeding-point switching, licence fee non-paying, and googling in court. Lord Baker, when home secretary, thought of rationing jail-crazy magistrates to a fixed number of cells each week, after filling which they would not be able to give custodial sentences.

When Ken Clarke as justice minister tried to rein back this lunacy, David Cameron sacked him. Now we have the proposed crime of "emotional violence" – including "reducing self-esteem" by calling someone fat – showing there is no limit to the law's ambition. To be against jailing people for such offences is not to condone what they do, merely to apply some sense of proportion.

The mob craving to bring coercive law into every realm of human behaviour has long troubled ethicists. Oxford's Jonathan Glover sought to apply moral precepts to everyday life in his excellent book, Causing Death and Saving Lives. He quoted from Karamazov the brother's euphoric cry that "everyone is responsible for everyone else and in every way". It was, he

There's an on-going duty on behalf of the authorities, and especially West Midlands Police, to actually get to the bottom of what happened," Mr Winters said. These families have received a very poor service in terms of justice and truth and closure - they've got nothing near it at all."

Families of the victims have criticised police, accusing them of withholding information over the years and say 40 years on from the bombings they still do not have the answers they need. Calls for a fresh investigation into what happened were denied by West Midlands Police in April.

Supreme Court Ban on Iranian Dissident Entering UK Not Unanimous

This appeal related to the Secretary of State's decision to maintain the prohibition on an Iranian dissident entering the United Kingdom and whether this decision was a disproportionate restriction of the rights of the Appellants to freedom of expression. The first to fifteenth Appellants are cross-party members of the House of Lords and the House of Commons ("the Parliamentary Appellants"). The sixteenth Appellant, Mrs Maryam Rajavi, is a dissident Iranian politician resident in Paris who has been excluded from the United Kingdom since 1997. The Parliamentary Appellants wished to invite Mrs Rajavi to address meetings in Westminster to discuss important diplomatic issues relating to Iran, and Mrs Rajavi was and is willing to come. The Secretary of State maintained Mrs Rajavi's exclusion on foreign policy/security grounds, in particular because there was a risk that, if permitted to enter the UK, there would be retaliation by the Iranian regime including the risk of damage to the British Embassy in Tehran and mistreatment of embassy staff. The Appellants contended there had been interference with their Article 10 rights (freedom of expression) caused by decisions of the Secretary of State in 2011/2 to maintain Mrs Rajavi's exclusion from the UK. The Appellants' application for judicial review was dismissed by the Divisional Court and their appeal dismissed by the Court of Appeal who both held the exclusion to be justified and proportionate. The Supreme Court dismissed the appeal by a majority of 4-1.

Lord Kerr would have allowed the appeal. The courts will accord respect to the executive's assessment of the risks and consequences of Mrs Rajavi's being admitted to the UK, though it is not required to "frank" that decision. However, it is for the court to assess the importance of the right infringed. The court is both competent and constitutionally required to make such an assessment and it would be an error to attach special weight to the Home Secretary's view on this point. In this case, only the most compelling and pressing circumstances would justify a restriction on the right. The Home Secretary identifies solid countervailing factors, but the court should take into account the fact that these matters are unpredictable and that any retaliation would be perverse and rooted in anti-democratic beliefs. The risks cannot be precisely identified but the interference with the Article 10 right is direct and immediate.

Lord Kerr's Conclusions: 175. The courts of this country have been given momentous obligations by the Human Rights Act, none more so than the duty to decide whether interferences with Convention rights are justified. Parliament has decided that decisions of all public authorities, including government itself, should be subject to that form of independent review.

176. In conducting the review of government decisions, courts must, of course, be keenly alive to the expertise and experience that ministers and public servants have by reason of their involvement in affairs of state, an involvement that courts cannot possibly replicate. But if the power and the duty to conduct fearless, independent review of the justification for interference with Convention rights is to mean anything, close, dispassionate and independent examination of the reasons for interfering with those rights must take place. Convincing reasons for the interference must be provided – convincing, that is, to the court that is

cerns are shared by the local authority, so she has not been running a fanciful case... Without legal aid, therefore, the mother, on her own, would be facing two advocates pursuing a case against her. On any basis that cannot be equality of arms. She is the party with the least ability, the greatest vulnerability and she should have had the benefit of legal representation." Hallam said she would write to the Legal Aid Agency and the president of the family division of the high court, Sir James Munby, to make them aware of "what is happening in these courts".

Shadow justice secretary Sadiq Khan called for an urgent review of the legal aid cuts in light of the judge's comments. He said: "This is a damning attack by a senior judge on the havoc wreaked in our courts by the government's ruthless attacks on access to justice. It's shocking that someone so vulnerable has been left all at sea in a very complex legal setting. What hope is there for justice being achieved if one of the parties is so unfairly disadvantaged in this way? There needs to now be an urgent review of the impact of the government's legal aid cuts. People's confidence in our justice system is being undermined as it becomes the preserve of the rich." The woman involved in the case, which was settled by agreement in August, received some legal advice pro bono from a clerk at a solicitor's office, Cygnet Law, local to her in Middlesbrough. Peter Medd, solicitor and managing director at the firm, said he supported calls for a review of the changes to legal aid. "The nature of children cases is that they require the courts to make decisions in the best interests of the subject child, requiring often very difficult balancing exercise in respect of competing aspects of the child's welfare," he said. "The decisions made by the family courts are decisions which will have significance potentially for the rest of a child's life."

A Legal Aid Agency spokesperson said: "This application was declined after failing to meet the standard tests on the merit of the case. Issues around the applicant's ability to effectively present her case in court were not made apparent in the application from the solicitors and no application to review the decision was received. As a matter of course the LAA will review the case file in the light of the comments made by the judge."

Brazilian Police Kill 11,000 People in Five Years *Source Telegraph*

Brazilian police killed more than 11,000 people between 2009 and 2013 for an average of six killings a day, a public safety NGO said Tuesday. The study by the Sao Paulo-based Brazilian Forum on Public Safety said police nationwide killed 11,197 people over the past five years, while law enforcement agents in the United States killed 11,090 people over the past 30 years. "The empirical evidence shows that Brazilian police make abusive use of lethal force to respond to crime and violence," the report said. In addition to using excessive force, Brazilian police frequently execute suspects, said Bruno Paes Manso of the University of Sao Paulo's Center for the Study on Violence. He called it "a practice rarely investigated."

Birmingham Pub Bombings: Lawyer Renews Call For Inquests

A lawyer for the family of one of the 21 people killed in the Birmingham pub bombings is calling for inquests to be held for the victims. There have been no inquests since two bombs exploded at the Mulberry Bush and the Tavern in the Town in November 1974, which also injured 182 people. Human rights lawyer Kevin Winters said he will be writing to West Midlands Police and the relevant coroner. Inquests would allow access to certain material never before disclosed.

As well as establishing inquest hearings, Mr Winters said he would be pursuing several others avenues of action. This may include action against authorities under European Human Rights legislation, looking at "serious issues" about the previous flawed West Midlands Police investigation and within that "the deliberate peddling of the view that they had caught the perpetrators".

said, heavy with "nightmare implication". Such paternalism – or perhaps control freakery – led the last Labour government to create 4,300 new offences through 50 criminal justice acts. It led Tony Blair to justify war against one state after another, for its own good. Glover asked only that we "work out what things are most important and then try to see where we ourselves have a contribution to make". We cannot spend our lives trying to save the lives of others, least of all others' unborn infants. There must be some room left for private responsibility. The ethics that swirl round childbirth can seem so intractable that every case is a moral blind alley.

In 2012-13 there were 252 diagnoses of foetal alcohol syndrome, 80 of which are awaiting the outcome of the current claim. If the court somehow contrives a "crime without a criminal" so as to gain compensation, the impact on thousands of distressed mothers will surely be appalling. The best hope is that publicity for this case will merely promote healthier pregnancy – and perhaps persuade us that what causes harm does not have to be a crime.

Shoplifter Assault case PC Dismissed From Met Police

A Metropolitan Police officer who punched a suspected shoplifter before pinning her to the ground has been dismissed from the force. PC James Kiddie, 46, was found guilty in February of common assault at the Uniqlo store in Regent Street, London in November 2012. CCTV footage showed him pushing the woman, grabbing her by the hair and punching her as she lay on the floor. The Met said he had been now been dismissed without notice. *BBC News*

Government Admits Secret Services Eavesdrop on Lawyer-Client Communications

MI5 and GCHQ have for years operated a policy allowing their staff to intercept communications between lawyers and their clients and use the legally protected material "like any other intelligence", according to documents released today.

The Government has for months resisted legal attempts by two Libyan victims of rendition to force it to disclose whether it sanctions intelligence agents to eavesdrop on lawyer-client communications after arguing that disclosure of its policy would damage national security. But documents now disclosed in the case confirm for the first time that the intelligence services allow staff to "in principle target the communications of lawyers" and use the resulting material for covert work, including disclosing it to "an outside body".

The principle of legal professional privilege (LPP), which allows advice and discussions between lawyers and their clients to remain confidential, is one of the oldest and considered as one of the most inviolable in the English legal system. It is regarded as essential for the administration of justice, not least by preventing any parties in a case from gaining access to the communications of the opposing side.

The policy of MI5, GCHQ and MI6 on the interception of legal material is a key issue in a claim being brought on behalf of Abdel Hakim Belhadj and Sami al Saadi, two Libyans who along with members of their families were kidnapped and sent for torture and imprisonment by the regime of Muammar Gaddafi. Mr Belhadj last week won a Court of Appeal ruling allowing him to sue the Government for his rendition to Libya in a joint CIA-MI6 operation in 2004. Lawyers for the men are bringing a separate case before Investigatory Powers Tribunal (IPT), which investigates complaints about the use of covert techniques by public bodies, seeking to establish whether privileged information was illegally used by British officials in their torture cases.

Cori Crider, a director at the legal charity Reprieve, which is jointly bringing the case, said: "It's now clear the intelligence agencies have been eavesdropping on lawyer-client conver-

sations for years. The question now is not whether, but how much they have rigged the game in their favour in the ongoing court case over torture." The documents disclosed by Government lawyers, which date from at least 2011, are the first time that the framework under which intelligence staff are allowed to intercept legally privileged communications has been made public. The guidance issued by MI5 acknowledges that material subject to LPP is "amongst the most sensitive sort of information that may be obtained by the Security Service".

The document makes it clear that intelligence including conversations, emails or phone calls between lawyers and their clients can be intercepted. It adds: "The confidentiality of lawyer-client communications is fiercely guarded by the law and any departure from it in the national security context must be narrowly construed and strictly justified." But the guidance makes clear that once legal clearance has been obtained, LPP material can be used for the routine work of the intelligence services. It states: "In principle LPP material may be used just like any other item of intelligence, eg to generate enquiries, mount a surveillance operation or task an agent. Where necessary and proportionate it may also be disclosed to an outside body."

Lawyers for Mr Belhaj and Mr Al Saadi said the documents exposed "major loopholes" in the policies operated by MI5 and GCHQ and claimed they showed that MI6 provided its officers with only "minimal" guidance. Ms Crider said: "MI6's 'policies' are so hopeless they appear to have been jotted down on the back of a beer mat. This raises troubling implications for the whole British justice system. In how many cases has the Government eavesdropped to give itself an unfair advantage in court?"

Sex Workers – We Can Explain What Decriminalisation Would Mean *Niki Adams, ECP*

This week, the tide turned against attempts to attack sex workers by criminalising their clients. An amendment by the Labour MP Fiona Mactaggart to the modern slavery bill (based on Swedish prostitution law) was dropped, despite cross-party support. This came after a plea from sex workers that mobilised hundreds of individuals and organisations, including the Hampshire Women's Institute, Women Against Rape, the Royal College of Nursing, church groups, trade unionists, academics, lawyers and anti-racist and anti-poverty campaigners, to write letters urging MPs to oppose the legislation.

The English Collective of Prostitutes argued that criminalising clients would undermine women's safety, drive prostitution further underground and sabotage sex workers' efforts to keep safe by displacing us to remote areas. Others questioned a crackdown on people who are trying to survive in the face of austerity policies which have increased poverty and therefore prostitution. LBGTQ groups called for an end to this "last vestige of Victorian moralism", asking why some feminists had allied themselves with evangelical Christians who oppose gay marriage, sex outside marriage and abortion.

Mactaggart's justification for attacking "demand" (clients) is that "prostitution is an extreme form of exploitation". But exploitation is rife in many industries, including the agricultural, domestic and service industries, particularly at a time of increasing poverty, decreasing wages and insecure employment, and no one suggests that domestic work or fruit-picking should be banned. Efforts to address exploitation have focused on empowering workers to insist on their rights. Why this double standard with sex workers? And why not decriminalise women working collectively from a premises (a brothel), where it is 10 times safer than working on the street? Mactaggart's claim that "80% of women in prostitution are controlled by their drug dealer, their pimp, or their trafficker" had already been discredited, including by the BBC. Another claim that France has agreed a similar policy was undermined by evidence that the French Senate, having conducted a thorough investigation which

concluded that criminalisation would endanger sex workers, has stalled on any further action.

In the past it's been hard for sex workers, burdened by illegality and stigma, to speak up. Not this time. Scores of women, trans and male sex workers wrote to MPs, outraged that their views, and the experiences of Swedish sex workers in particular, were being ignored. Swedish sex workers have said that since clients have been criminalised, they have been treated worse by the authorities; as the stigma attached to prostitution has increased, women have become less able to report violence to the police, some have had their children taken away and there have been reports of suicide.

Many people objected to the conflation of prostitution and violence which presumes that sex workers don't know the difference between a consenting sexual transaction and forced sex. Women Against Rape pointed out that: "To target men who have not been accused of violence just because they purchase sexual services, diverts police time and resources away from reported rapes and sexual assaults." Speaking in the Commons debate, Labour MP John McDonnell, who co-ordinated opposition within parliament, mirrored many of these concerns, saying: "We must listen to sex workers." He was backed by the Conservative MP Crispin Blunt.

Without taking sex workers' experience into account there can be no protection, only repression. The raids on Soho flats last year, done in the name of freeing victims of trafficking, are one example. Two hundred and fifty police broke down doors and dragged handcuffed immigrant women in their underwear onto the streets. Women describe daily humiliation, bullying and threats: "The police wait outside my house to catch me when I leave … they jeer at me, and make sexually explicit jokes. I'm strip-searched and they sometimes leave the door open so the male officers can see in." Is it feminist to ignore the views and experiences of the women most affected by any legislation you propose? Full decriminalisation of prostitution, as in New Zealand with its proven record on health and safety, is now on the agenda for public debate.

Legal Aid Cuts Denied Mother a Fair Hearing *Daniel Boffey, Observer*

A senior family court judge has condemned the injustice of the newly pared-back legal aid system after an illiterate mother of four, with poor sight and hearing, was forced to represent herself in a court hearing over the custody of her children. In an unusual step, Judge Louise Hallam warned that the woman, who cannot be named for legal reasons, was not being given the opportunity of a fair trial and that she believed others around the country were also being let down. Hallam told the hearing: "If legal aid is being refused to people such as this, I am satisfied that injustices will occur … Mothers in her situation should have proper and full access to the court with the assistance of legal advice." Parents involved in custody battles are no longer eligible for legal aid following cuts imposed by the justice secretary Chris Grayling in April last year. As a result, tThe number of parents in cases involving children without legal representation has since jumped by 48%.

Ministry of Justice figures, obtained by Slater & Gordon under the FIA, show that for the first time a majority of such parents are not legally represented. In the first nine months since the cuts came into force, just over 50,400 of the 88,300 parents involved in family court cases relating to children in England and Wales had no legal representation – almost six out of 10.

Judge Hallam said that she had been informed there were only "eight or nine" cases where exceptional legal aid had been granted in custody cases. In the case before the judge, the mother, whose former husband was granted assistance with his legal fees because the local authority supported his case for custody, was said to have hearing, speech and learning difficulties.

Yet Hallam said that the mother's case for custody needed to be heard. The judge said: "The mother still has concerns about the father's care for the children and many of those con-