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Malleable Memory and the Reliability of Witness Evidence

Sarah Murray, Litigatin Futures: One of the topics explored by a recent panel of international experts at London International Disputes Week was the malleability (and thus fallibility) of human memory and the resultant impact on reliable witness evidence. Memories are not fixed but are fluid and malleable. As part of an organic supercomputer (the brain), each time they are 'retrieved', they can be rewritten unwittingly by new information or perceptions coloured by the dispute. The processes involved in both litigation and international arbitration exacerbate these issues through numerous interactions with witnesses' memories.

Typically, practitioners prepare witness statements from relevant documents long after the events in question. The statements are then 'confirmed' by the witnesses. Months later, the witnesses refresh their memories of events by re-reading documents and their statements before cross-examination. A common plea (see Johnny Depp's cross-examination in his libel claim) is that a witness did not read his statement properly or know all of its contents because the lawyers prepared it. Both the international arbitration community and the judiciary recognise these concerns. The International Chamber of Commerce has produced a report summarising research into this topic and suggesting ways that practitioners can minimise the adverse effects.

For some years, judges have treated witness evidence as less reliable than contemporaneous documents. But is this an issue solely with witness evidence or do those assessing it play a part? As outlined during the panel by Raymond Aghaian, partner at Kilpatrick Townsend, this is particularly acute in the US where jury trials still play a large part in commercial cases and imprecisions and perceptions are paramount as a result. Even for the highly trained judiciary, appearances still matter. Nick Dunne, commercial litigation partner at Walkers in the Cayman Islands, noted that, for judges, the most helpful witnesses were not necessarily those who were ruthlessly truthful about what they could and could not remember, but rather those who had prepared carefully and came across as straightforward and confident, even when their memories may be tainted.

These difficulties have led to suggestions that artificial intelligence (AI) could replace human judges. Swathes of the legal profession view this suggestion with scepticism, partly because, at present, AI judges cannot assess contextual matters that affect witnesses' behaviour and play into their evidence. As such, is the real issue with witness evidence itself and are we, therefore, reaching a stage where we might dispense with it in commercial cases? As Heather Murphy, barrister at XXIV Old Buildings, put it: "Witnesses in commercial cases have effectively outsourced their memories to their Outlook emails."

Judges can obtain a near-complete contemporaneous chronology of events from just the documents. AI could be used to predict where 'truth' in a commercial dispute lies by analysing the documents more quickly and accurately than humans can. However, AI cannot accurately assess the effect of the feelings and perceptions that give context to a dispute and resultant human behaviour.

To try to address these issues, practice direction 57AC establishes new rules for trial witness statements. The witness and lawyer must follow, and certify compliance with, a statement of best practice. This limits the documents put to the witness and prohibits practitioners from preparing an outline statement to form the basis of the first interview. Documents will still play a key role in witness evidence, but witnesses must identify how their recollection was refreshed by the document (Global Display Solutions Ltd v NCR Financial Solutions Group Ltd [2021] EWHC 1119 (Comm)). Finally, proponents of an abolition or reduction of witness evidence point to potential costs savings for the parties as well as time saving for the courts. However, the matters currently covered by witness evidence will still need to be covered, probably by lengthier and more laborious submissions. A hope for time and cost savings may, therefore, be overly optimistic. It also underestimates the need for justice to be seen to be done and the benefit to litigants of 'telling their story'.

Ultimately, to abolish or further limit witness evidence would be a seismic step for the English legal system, built on common law principles. However, as highlighted by Emanuele Breggia, partner at Hi.lex in Milan, the civil system used in Italy (as well as widely on the continent) also has its problems. Here, witness evidence is used minimally, which means that it can be difficult to get a first-hand account of events and all-important context for a dispute. As such, simply reducing the courts' use of witness evidence isn't the solution. It is possible that, in the not-too-distant future, our memories and feelings will be capable of external download before they become tainted with their metadata overwritten by more recent attempts to access them.

Until then, increased awareness amongst practitioners of the malleability of memories and strenuous efforts to avoid affecting them is probably the only route open to us without a fundamental change in the nature of English litigation. The issue should, however, be watched with interest.

Dalian Atkinson Killing: Police Officer Found Guilty of Manslaughter

Dalian Atkinson, 48, died on 15 August 2016, following use of force by officers of West Mercia police. This included multiple and prolonged use of Taser, baton strikes, and kicks to the head. In a historic trial, PC Benjamin Monk has been found guilty of the manslaughter of Dalian Atkinson. Until today Wednesday 29th June 2021, no police officer has been found guilty of murder or manslaughter following a death in police contact or custody in England and Wales in 35 years. A verdict on charges against another officer involved, PC Mary Ellen Bettley-Smith, for section 47 Offences Against the Persons Act 1861 (Actual Bodily Harm), is awaited.

Following the jury's verdict, Dalian's family made the following statement: "Dalian Atkinson is much missed by all his family and friends and the footballing communities of the clubs he played for in his long and successful career as a professional footballer, especially Ipswich Town, Sheffield Wednesday and Aston Villa. "The past five years have been an ordeal for Dalian's family. We knew years ago about the terrible injuries inflicted by PC Monk on Dalian, but have been unable to talk about them due to the criminal process. We are hugely relieved that the whole country now knows the truth about how Dalian died. While it has been hard for us not to be able to talk about the details of Dalian's death, it has been even harder to sit through this trial and to hear PC Monk try to justify the force he used. On the night he died, Dalian was vulnerable and unwell and needed medical attention. He instead received violence, and died with PC Monk's boot lace prints bruised onto his forehead. We have been sickened to hear PC Monk try to minimise the force he used on Dalian and exaggerate the threat he posed. Fortunately, the jury has seen through the lies and the pretence. We would like to thank the jury members for all their hard work and attention. The fact that this case has taken nearly five years to get to trial is completely unacceptable, especially when you consider that the PC Monk's identity was known to the prosecuting authorities from Day One. By contrast, the murderer of George Floyd was convicted less than a year after his death. Our system for prosecuting police officers must work better in future to get rid of these unjustifiable delays. No more excuses

– no more delays. Dalian's footballing talent led him to achieve great things in his life. Our sincere hope is that now that the truth about his death is known, and justice has been done, we can start to remember him not for the manner in which he died, but for the way in which he lived." Kate Maynard of Hickman and Rose Solicitors, who represents the family, said: "This is the first manslaughter conviction in the modern era of a police officer using excessive force in the course of duty.This is a landmark conviction. I hope it is a watershed moment for accountability of police officers in this country. Police officers involved in fatalities have all too rarely faced criminal proceedings; even internal police disciplinary proceedings remain unusual, despite over 25 years of independent investigations by the IOPC and its predecessor. It is striking that even before the first anniversary of George Floyd's death in Minneapolis, the police officer who murdered him had already been convicted. By contrast, PC Monk was able to blame the five year delay on his vague and variable evidence; and that delay caused Dalian's family significant anguish and uncertainty. They were forced to wait patiently for almost half a decade to hear the details of what happened on 15 August 2016. While the wheels of justice have, in this case, turned far too slowly, today's guilty verdict must mark a turning point for the IOPC and CPS. Until now, they have failed to give the public confidence that police officers who break the law by using excessive force on duty will be held fully accountable. That has to change: the CPS need to place more trust in juries and end the past reluctance to prosecute police officers, including after critical findings at public inquiries, inquests or civil proceedings."

Deborah Coles, Director of INQUEST, said: "The prosecution of police officers is a rarity in the UK. Today's guilty verdict reflects the evidence of excessive police violence. It is historic and sends a strong message that police are not above the law. However, the prosecution of a few police officers does not address the racism and discrimination embedded in policing. Since Dalian's death the roll out and use of Taser by police has risen significantly, despite the well-known risks these weapons pose to people with mental or physical ill health.

Dalian's death is not an isolated case but part of a systemic problem. For decades, Black men, particularly those in mental health crisis, have disproportionately died following use of force by police. True justice requires structural change across our society and its institutions to address racism, and respond better to mental ill health and state violence."

1972: Undercover Policing Inquiry Identifies First Suspected Miscarriages of Justice

The inquiry into undercover policing operations in England and Wales has referred the first suspected miscarriages of justice identified through its investigations to a dedicated panel set up by the Home Office. The case, involving 12 individuals, relates to an incident on 12 May 1972 when political activists attempted to stop the British Lions rugby team departing the Star and Garter Hotel in Richmond. Fourteen activists, including the undercover officer HN 298, using the name Michael Scott, were subsequently arrested and charged with obstructing the highway and obstructing a police officer in the execution of his duty. Thirteen of the individuals – including HN 298, Christabel Gurney and Ernest Rodker – were convicted of both offences, one – Professor Jonathan Rosenhead – was convicted of highway obstruction only, and another was acquitted. The inquiry said that, based on the evidence it had received to date, the undercover officer pleaded not guilty in his cover name of Michael Scott, and his true identity was not revealed to the prosecutor or the court. As part of its terms of reference, the Undercover Policing Inquiry seeks to identify suspected miscarriages of justice that might have occurred due to an undercover policing operation or an operation not being disclosed when it should have been. Suspected cases are referred to a miscarriages of justice panel

comprising two senior members of the Crown Prosecution Service (CPS) and two from the police, which decide whether further action is required, such as a referral to the Criminal Cases Review Commission (CCRC). In a statement, the inquiry said further suspected miscarriages of justice may be identified as it progresses chronologically through its investigations into undercover policing operations in England and Wales from 1968 to the present.

ECtHR Bolsters 'Right to be Forgotten'

The so-called 'right to be forgotten' took another step forward in human rights law when judges of the European Court of Human Rights ruled in favour of a man with historical convictions relating to a fatal road accident. In Hurbain v Belgium, the editor of Belgian newspaper Le Soir appealed a domestic order ordering him to anonymise an article in its electronic archive naming the driver, convicted in 2000. After serving his sentence and being rehabilitated in domestic law, the driver applied in 2010 for the article to be removed from online archives or anonymised. In 2016 Belgium's Court of Appeal ruled that to keep the article online could cause indefinite and serious harm to the driver's reputation, giving him a 'virtual criminal record'. It found that the most effective way to ensure respect for his private life, without disproportionately affecting freedom of expression would be to anonymise the article by replacing the individual's full name with the letter X.

On appeal, the ECtHR was asked to rule on whether the interference with the editor's Article 10 rights had been necessary. In a chambers ruling the judges agreed by a majority of six to one with the domestic judgment, finding that the online article was of no value in terms of newsworthiness and that, 20 years after the events, the identity of a person who was not a public figure did not enhance the public interest. Meanwhile online anonymisation would not affect the integrity of the original article, which would remain in the print archives. The judges therefore found that the domestic courts had been entitled to conclude that the requirement of proportionality of interference with the right to freedom of expression had been met. There had therefore been no violation of Article 10 of the ECHR. The court added that its conclusion did not imply any obligation on the media to check archives on a systematic and permanent basis. Both sides have three months in which they can refer the case to the Grand Chamber of the court for a final ruling.

ECtHR Orders UK to Pay Damages Over Family Court Judge's Findings

Monidipa Fouzder, Law Gazette: The European Court of Human Rights has ordered the UK to pay €24,000 in respect of non-pecuniary damages and €60,000 in respect of costs and expenses, to a social worker who became aware of criticisms of her conduct only when a family court judge delivered an oral judgment at the end of a hearing. The social worker went to the Court of Appeal, which found that the process by which the judge arrived at his criticisms was 'manifestly unfair' and set aside the adverse findings. However, in SW v United Kingdom, published yesterday, the Strasbourg court said the social worker suffered prejudice personally and professionally which the Court of Appeal's judgment did not remedy.

The case stems from childcare proceedings in which the social worker was called as a professional witness. After the oral judgment was delivered but prior to it being finalised, the family court judge held a series of hearings which addressed submissions by the social worker. Some changes were made to the text, but the adverse findings remained and the decision not to grant her anonymity was maintained. The judge directed his judgment to be sent to the social worker's local authority employer and advised that it be shared with relevant professional bodies. A psychiatrist reported that receiving the family court judge's findings had been

a 'highly traumatic experience' for the social worker, triggering post-traumatic stress disorder.

The ECtHR said: 'The Court of Appeal did not afford the applicant appropriate and sufficient redress for her complaint under Article 8 of the convention. It has not been suggested that any other remedy was available to the applicant which would have provided her with the opportunity of obtaining such redress. It is not in dispute that she would only have been entitled to damages for misfeasance in public office if she could show that the judge had knowingly or recklessly abused his power and either intended to cause her harm, or was recklessly indifferent to the probability of causing her harm. Furthermore, the government expressly accepted that she could not have made a claim for damages under the Human Rights Act 1998 because any attempt to establish the necessary lack of good faith on the part of the judge would have been unlikely to succeed.'

The social worker was represented by Michael Oswald of Bhatt Murphy Solicitors. Oswald told the Gazette: 'While this judgment vindicates SW, she should have been able to look to the courts in this jurisdiction to remedy breaches of her fundamental rights. Section 9(3) of the Human Rights Act prevented her doing so. The government should act to remove that provision's incompatibility with Article 13 to make effective remedy for all such breaches available in domestic courts.'

CCRC Need Extra £1m to Recruit Experienced Case Workers

Jon Robins, Justice Gap: The head of the miscarriage of justice watchdog has called on ministers for £1m extra funding to increase the number of case workers with the expectation that any new money must be 'ring-fenced' from extra demand caused by more applications as a result of the Horizon Post Office scandal. The House of Common's justice committee shone more light on the long term funding crisis at the Criminal Cases Review Commission with MPs hearing the group was struggling to recruit experienced case workers and that its fee for commissioners was one third that of comparable roles.

In response to questions from MPs, the CCRC chair Helen Pitcher said that she and chief executive Karen Kneller had been 'very clear about what we need' in talks with the Ministry of Justice (MoJ and that the recent Westminster Commission report was 'also very clear in its recommendations. 'Both Karen and I said we needed at least another million, and that was before we realised the magnitude of the Post Office issue,' she added.

Earlier in the year a report by the All-Party Parliamentary Group on Miscarriages of Justice reckoned that the group has suffered the 'biggest cut' of any part of the criminal justice however as long ago as 2008 the group's then chair Graham Zellick went on the record about the urgent financial problems. The Westminster Commission revealed that the CCRC received just £5.93m in 2019 compared to £9.24m in 2004. Its report reveals that the average workload for case review managers climbed from 12.5 in 2010 to 27 in 2017.

The CCRC is presently waiting for confirmation of increased funding from the MoJ. 'We want both to protect and enhance the casework frontline so we can have more case review managers and more commissioners, but we also want to do more outreach and engagement work so that people who need our services are aware of us and can find us,' said Kneller. She added added: 'If we do get several hundred more Post Office cases, we will be going straight back to the MOJ to say we need to ring-fence funding to deal with that'. 'It is still quite shocking that many members of the legal profession are unaware of our existence or do not quite understand the role that we play. That is down to us. It is down to having the resourcing to do that. We absolutely need more funding.' Labour MP Maria Eagle raised concerns over the change

in commissioners' tenure from generous salaries to a relatively modest day rate (£358) as a result of a controversial MoJ review. Those concerns led to the Westminster commission calling on the watchdog to 'demonstrate its independence' from government.

Pitcher gave a robust defence of the changes. 'There is a myth that goes around that says commissioners are on one day a week. That is not true,' she said. In her words, commissioners 'flex up' according to demand and that was 'enormously helpful for us when we have issues such as the Post Office, Shrewsbury 24, and a couple of other linked cases where we need more commissioner time'. 'That is why we have referred more cases in the last financial year than we have ever done before,' she insisted. She also claimed that the new arrangements increased commissioners' independence. The changes were resisted by former commissioners who have since left the CCRC on the basis that they compromised their independence. Not so, according to Pitcher: 'My argument would be that, if the organisation is your sole employer for pay and rations, that could lead to a slowing down and a caution in your decision making, which we do not want as an organisation and we do not support.'

The Tory MP Dr Kieran Mullan asked them about a 30% drop in commissioner days over the last year. Pitcher dismissed concerns saying that drop 'reflected case loads'. 'Where the rubber will hit the road is as we get more and more cases, which we anticipate not only in relation to the Post Office but we anticipate that there could be more claims of miscarriages of justice because of the delay in cases coming to court for prosecution, witnesses' memories fading and so on,' she continued. 'We would need significantly more funding as that unfolds, and we really anticipate it will unfold post pandemic and also in relation to the Post Office.' However Pitcher acknowledged that commissioners' day rate was an issue. 'My commissioners will freely admit that the other elements of their portfolio fund underpin the money they get from the CCRC, and that cannot be right,' she said. Luckily, they are all passionate about miscarriages of justice and do it because they believe in our core purpose, not because of what they actually receive in remuneration.'

The CCRC's chief exec said that the commissioners' fee had dropped behind comparable roles, when pressed as to how much Karen Kneller said 'probably a good quarter or a third. We are talking a substantial uplift, in my view.' Case review manager Miles Trent was asked about whether he felt overly-constrained by the CCRCs 'real possibility test' – the group can only send a case back to the Appeal judges if they are satisfied there is a 'real possibility' that the court will over turn it. The Westminster commission has called for that test to be reviewed over long standing concerns it was making the commission too deferential. 'That is the easiest question I have been asked all day,' Trent replied. 'I and all the other case review managers would answer the same. We are not sitting around saying, "If it was not for this pesky real possibility test, I would have this case referred." Case reviewers do not feel the wording inhibits us.'

Submissions to the Home Secretary to Lift the LTTE terrorism Ban in the UK

Bindmans Solicitors: TGTE (Transnational Government of Tamil Ealam) members have presented the Home Secretary with legal arguments and evidence in support of their application to have the Liberation Tigers of Tamil Eelam (the LTTE) removed from the list of organisations proscribed under the Terrorism Act in the UK. The TGTE is seeking to have the ban on the LTTE lifted on the basis that the LTTE is not 'concerned in terrorism', and that the ban interferes with the rights of the Tamil community to engage in public debate about the position of Tamils in Sri Lanka. Their representations include expert evidence from political scientist Professor Mampilly of City University of New York, and Peter Schalk, a retired expert in the history of religions at

the University of Uppsala, Sweden. The representations also include powerful evidence from a number of Tamil activists whose political campaigning has been adversely affected by the LTTE's proscription. The Home Secretary now has 90 days to consider the arguments advanced on behalf of the TGTE and to make a decision as to whether or not the LTTE will continue to be proscribed. The decision is expected no later than 31 August 2021.

The opportunity to make these arguments arose following the TGTE members' successful appeal to the Proscribed Organisations Appeal Commission (POAC) against the Home Secretary's previous refusal to de-proscribe the LTTE. In its judgment, handed down on 21 October 2020, the POAC found that the information presented to the Home Secretary when he (at the time) made his decision to maintain the LTTE on the list of proscribed organisations 'materially misstated' the conclusions reached by the Proscription Review Group (the expert body whose role it is to assess the threat posed by groups who are considered for proscription under the Terrorism Act 2011). The POAC also found that the submission inaccurately summarised the views of JTAC (Joint Terrorism Analysis Centre). The POAC therefore concluded that the decision to retain the LTTE on the list of proscribed organisations was unlawful.

Following the judgment, on 18 February 2021, the POAC accepted an undertaking by the Home Secretary to reconsider the TGTE's application to de-proscribe the LTTE, taking into account further representations by members of the TGTE. The TGTE is represented by Maya Lester QC and Malcolm Birdling of Brick Court Chambers along with Jamie Potter and Caroline Robinson of Bindmans LLP.

Protestors Ziegler & Others Victory in the Supreme Court

Rights to freedom of expression and freedom of peaceful assembly guaranteed by articles 10 and 11 of the European Convention of Human Rights (the "ECHR"). In September 2017, the Defence and Security International arms fair was held at the Excel Centre in East London. The appellants Ziegler & Others are strongly opposed to the arms trade. They took action to protest the fair and disrupt deliveries to the Excel Centre. The action consisted of lying down in the middle of one side of an approach road leading to the Excel Centre, and locking themselves to lock boxes, which are hollow boxes containing bars to which the appellants attached their arms. The police were present at the scene in anticipation of demonstrations. Officers tried to persuade the appellants to remove themselves from the road. When this failed, the appellants were arrested. It took roughly 90 minutes to remove them from the road, however, as the lock boxes were constructed in a way which made them hard to disassemble.

The appellants were charged with wilful obstruction of a highway without lawful authority or excuse, contrary to section 137(1) of the Highways Act 1980 (the "1980 Act"). They were acquitted following a trial at Stratford Magistrates' Court. The district judge had regard to the appellants' article 10 and 11 ECHR rights, and concluded that the prosecution had not proved that the appellants' obstruction of the highway, which it found to be limited, targeted, and peaceful, was unreasonable. The appellants therefore had a defence of lawful excuse for the purposes of section 137. The respondent appealed by way of case stated to the Divisional Court, which allowed the appeal and directed that convictions be entered. The Divisional Court considered that the assessment of the proportionality of the interference with the appellants' ECHR rights was wrong, essentially because the district judge failed to strike a fair balance between the interests of the protestors and those of other members of the public.

The parties agreed that the issues in the appeal, as certified by the Divisional Court as

points of law of general public importance, are as follows: What is the test to be applied by an appellate court to an assessment of the trial court in respect of a statutory defence of lawful excuse when Convention rights are engaged in a criminal matter? Is deliberate physically obstructive conduct capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis (i.e. minimal), and prevents them, or is capable of preventing them, from passing along the highway?

Judgment: The Supreme Court allows the appeal by a majority. The order directing convictions is set aside. The dismissal of the charges against the appellants is restored. The Appellate Test: Section 137(1) of the 1980 Act must be read compatibly with the ECHR. In this context, that involves considering whether the public authority's interference with the protestors' rights was proportionate. If it was not proportionate, such that the interference was unlawful, the protestor will have a statutory defence of lawful excuse. [10]-[16]. The appellate test conventionally applied by the Divisional Court in appeals by way of case stated in criminal proceedings, including in cases involving issues of proportionality, is whether the court's conclusion was one which was reasonably open to it – i.e., it is not Wednesbury irrational or perverse (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) [29]. This strict test of irrationality or perversity reflects the fact that an appeal by way of case stated is an appeal from a tribunal of fact which is only permissible on a question of law [36] and the general approach to such appeals set out in the House of Lords decision in Edwards v Bairstow [1956] AC 14. On this approach, a conclusion of fact will only be open to challenge if it is one which no reasonable court, properly directed as to the law, could have reached on the facts found or there was no evidence to support it. An appeal will also be allowed where there is an error of law on the face of the case stated [39]-[40].

The Divisional Court held that a different test applied in appeals, such as this, which involve an assessment of proportionality. Under that test, following the Supreme Court's decision in In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, an appeal will be allowed where the decision of the lower court was "wrong", whether in law or in fact. The majority consider that this was not the correct test. In re B was a family law case involving the appellate test under the Civil Procedure Rules (which do not apply in criminal proceedings such as these). It would be unsatisfactory for the appellate test in appeals by way of case stated to fluctuate depending on whether the case turns on an assessment of proportionality [42]-[45]. However, the test in In re B, as subsequently refined, may be very relevant to appeals by way of case stated which turn on an assessment of proportionality. If there is an error or flaw in the judge's reasoning which undermines the cogency of the conclusion on proportionality, that is likely to be apparent on the case stated, and therefore an error of law on the face of the case, such that the decision will be open to challenge on the correct appellate test. Any challenge, as Lady Arden observes at [104]-[107], would have to be made on the basis of the trial judge's primary and secondary findings, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached: the review is of the judgment and its findings, not the evidence on which the judge relied [49]-[54]. The minority would uphold the decision of the Divisional Court. They consider that the same appellate test in relation to an assessment of proportionality should be applied regardless of the procedural route by which the appeal happens to proceed. Is deliberately obstructive conduct capable of constituting a lawful excuse for the purposes of section 137?

A review of the case law of the European Court of Human Rights shows that the protection of articles 10 and 11 ECHR extends to a protest which takes the form of intentional disrup-

tion obstructing others. However, the extent of the disruption and whether it is intentional are relevant factors in the assessment of proportionality [62]-[70]. The factors relevant to this assessment [71]-[78], include in particular, and so far as relevant here, that the appellants' action was, and was intended to be, a peaceful gathering, which gave rise to no form of disorder, did not involve the commission of any offence other than the alleged section 137 offence, was carefully targeted at vehicles heading to the fair, involved no complete obstruction of the highway, and, insofar as the obstruction lasted 90-100 minutes, was of limited duration. The district judge was entitled to take these factors into account in determining the issue of proportionality in favour of the appellants. There was no error or flaw in his reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality [80]-[87]. The minority agreed with the Divisional Court that the district judge's assessment of proportionality was flawed, but considered that the limited facts set out in the case stated did not allow the Divisional Court to conclude that the police action was proportionate. The Divisional Court's own assessment of proportionality was also flawed. The minority would therefore have ordered remittal to the magistrates' court for further examination of the facts [140]-[153].

Forgotten People? Prisoners on Remand in the Pandemic

Transform Justice: Soon after the pandemic started, the Lord Chief Justice gave a judgment which suggested that all judges should take into account the (worse than usual) conditions in prison when sentencing or remanding defendants. When I observed magistrates' courts in April and May last year the Manning judgment was seldom referred to, and remand decisions seemed unaffected by the pandemic. Which is a pity, because the conditions in prison really were terrible and the pandemic offered a golden opportunity to reduce unnecessary remand. This would have helped reduce the court backlog, since cases involving remanded prisoners need more hearings and require courts with docks and cells, which are in short supply due to social distancing guidance.

Before the pandemic our report – '*Presumed Innocent But Behind Bars'* – pointed out that the majority of those remanded and tried in England and Wales magistrates' courts do not get sentenced to immediate custody. This is an indicator that there are unnecessary remands. Judges and lawyers are quick to point out that the criteria for remand are different to those for sentence, and that those remanded might have got a short custodial sentence had they been given bail pending trial. I accept this, but still feel that the figures indicate an overuse of remand when combined with other evidence. And if a short prison sentence is ineffective, "a short sharp shock" of pre-trial detention must be even more so.

Recent data from the MoJ indicates that the courts' use of remand during the pandemic was very similar to previous. Magistrates and district judges remanded 48,745 defendants in 2020, only 4% less than in 2019. And the conversion to immediate custody (63% of those remanded and tried in magistrates' courts were acquitted or got a non-custodial sentence) was exactly the same as in previous years. So the pandemic seems not to have inspired judges to take more risks.

A new report from Fair Trials shows the impact of such decisions. *'Locked up in Lockdown*' is based on letters from prisoners on remand during the pandemic. The cost is both to prisoners' mental health and to justice itself. The prisoners relate huge barriers to communicating with their lawyers. Prisons locked down and refused to let lawyers visit in person. So prisoners had to communicate via video link, or phone. Access to video links and time for each call was insufficient, the quality was often very poor and it was impossible to see the prosecution evidence.

"The matter of getting legal consultations has been a nightmare, had one [remote] legal

visit, couldn't hear most of it, can't talk and see evidence as you need to, I feel very unprepared for the case and I have to take the word of brief [lawyer] saying it's in hand on the phone when they are not demanding things critical to my case i.e camera evidence, the full police interview… [I] still have no clue as to when it [trial] will be and if solicitors are prepared the way I want them to be prepared." (Stuart)

Justice is at risk due to the court backlog. Prisoners' trials have been delayed months, if not years. They are locked up for most of the day and family visits have been stopped or severely curtailed. So some have done the pragmatic thing and changed their plea to guilty, or been sorely tempted. "I was totally innocent but due to the conditions, time locked up and not being able to get appropriate legal conferences I was willing to plead guilty to get out of there. I was well over my custody limit as well. I am aware of at least 4 other people who pleaded guilty just so they didn't have to stay in HMP Preston potentially until 2022 just to have a trial. It is totally wrong and unjust." (Alex). Next week marks the end of the pandemic extension to custody time limits (the maximum time on remand before a formal review). Unfortunately this is unlikely to make any difference to the length of time prisoners spend on remand. Before and during the pandemic, judges hardly ever refused requests to extend time on remand.

Even more unfortunately a pandemic scheme for probation to provide bail information in court for all those at risk of remand has not stemmed the flow. Transform Justice and our colleagues – the Criminal Justice Alliance – are not convinced it ever properly got off the ground. We were told this bail information would be available in all magistrates' courts, but no defence lawyer came across it. And the government can't provide any data as to how it worked.

That so many remanded prisoners were acquitted or received a non custodial sentence (16,622 people in 2020) even in a pandemic year shows the need for system change – for much better information, for more challenge to the prosecution request for refusal of bail and for more understanding of the privations of pandemic imprisonment. In 2020 1,893 prisoners who had been on remand received either a conditional/absolute discharge or a fine as their sentence. Is that pandemic justice?

John Bowden - Fightback Against Oppressive Policing

The Police, Crime, Sentencing and Courts Bill represents a fundamental change in the nature of policing in Britain, and a radical shift in the balance of power between the state and an increasingly disempowered population. The British criminal justice system was forged in its repression of the most marginalised and disadvantaged groups in society, whose experience of the police was almost as an occupying paramilitary force, especially in communities and districts largely populated by ethnic minorities. Policing by consent was usually a privilege afforded to compliant white working class and middle class communities, whilst poorer socially and racially marginalised communities were policed in an almost colonial way, evidenced by the high rates of death in police custody in those communities and the disproportionate use of stop and search powers to harass and intimidate. A huge proportion of the British prison population is composed of young men of ethnic minority origin, who were targeted and criminalised by the police at a young age and imprisoned; their lives are evidence of an institutionally racist criminal justice system and police force that, under the guise of 'law and order', inflicted violence, death and repression for the purpose of social control.

So-called criminal justice legislation before the current Police Bill was always focused primarily on a criminalised underclass – the other – and both Labour and Tory governments zealously

empowered the state to create an apparatus of punishment and repression in an atmosphere of populist 'law and order' and the replacement of the welfare state with a carceral state in dealing with increasing numbers of poor and marginalised people and groups. Significantly, the Bill extends beyond criminalising the usual scapegoated groups and now further empowers the police to criminalise political protest and dissent, and employ an apparatus of state repression against political behaviour once considered a basic human and civil right in an apparently democratic society. In an increasing atmosphere of political repression and police authoritarianism, so-called policing by consent is now increasingly replaced by the form of brutal colonial type policing long experienced and suffered by the dispossessed and voiceless. More than ever, solidarity and identification with the struggle of that group is vital for the freedom and liberation of us all.

Ultraviolence—Giving Voice to Victims of Killer Cops

Ken Fero Talks to SWP: When director Ken Fero's landmark documentary film Injustice was released in cinemas 20 years ago, the police went on a legal rampage. Their lawyers chased down cinemas that planned to show the film and threatened them until they withdrew. Even small, ticket-only, showings at the well-known haunts of the left were cancelled by venues out of fear. Nevertheless, the depiction of state violence, directed primarily at black people, struck a chord with so many people that Injustice was shown at all sorts of impromptu events. The film's audience grew organically, despite the crackdown. Now, Fero is back with a new film, Ultraviolence, and once again police killings are the main focus. Using interviews with the victim's families, sometimes intercut with actual CCTV footage of their loved ones dying in police custody, the film is tough to watch. "We want people to be disturbed," Fero told Socialist Worker. "The decision to put this footage in was agreed with the families—and it cannot be as distressing for anyone in the audience as it is for them. We can see with the George Floyd case how it impacted people, and people are traumatised.

"But the question is what to do about the situation. It's not about the films. It's not about filmmaking. What's important are the demands for justice." Part of Fero's objective is to spread the word of cases highlighted by Ultraviolence to a new generation. He takes heart and inspiration from the Black Lives Matter movement, but he also thinks there are things to be learned from past struggles. "I think history is important in any struggle," says Fero. "The importance of knowing about these cases is, if you don't know your history, you don't know where to go in the future. The other important thing is that the way the state and the mainstream media handle this issue is to always move on from the death. They're always drawing a line. The lines can be heavy, like a public inquiry. It could be a light line, but it's a line. "But the families don't recognise those lines. They don't respect statutes of limitation. So the film is really to say to [new activists], some people did fight before, and there were victories, and it is possible to win."

Fero also has warnings for campaigners today. "We need to look at fundamental things, such as language," he says. "'The UK is not innocent' is a slogan that's going around. That's quite a liberal slogan, because the slogan that I use is, 'The UK is guilty'. There's a difference. "Look, for instance, at Malcolm X. Every time he was on television he had the ability to completely turn around [an interviewer's] loaded question that was based on attacking him and the Black Power movement. So for example, he would be asked, 'Do you condone the violence of the movement?', and he would reply, 'No, I don't condone the violence of the police.'

"This terminology of 'deaths in police custody' is very soft, and was brought in by the liberal organisations that negotiate with the state but never get anywhere. We should be using the term 'police killings' instead. But there are lots for people like me to learn from the new movement. I'm not the kind of person that berates people for not knowing history if that history is not taught in schools. They don't know because they haven't been taught, and they haven't been taught for a reason. That's a specific reason in terms of ideology, and in terms of control."

A key narrative in Ultraviolence is told as though it were a letter from one generation of anti-racists to the next. "The film is, in a way, a kind of apology," says Fero. "Not for the people who are fighting, but an apology to our children for the people that didn't fight. That puts a kind of responsibility on older people. The film is aimed towards younger people, sure. But it also asks people, if your kids are on the street and campaigning for racial justice and other issues, why are you not with them? We have to accept responsibility as a generation."

One of the striking features of Ultraviolence is the way it makes a link between domestic state violence and imperialist violence on a global scale. Fero says this is a vital point that isn't made often enough. He adds, "Of course, it's a very different case when a soldier is killed in Amarah province in Iraq by the resistance to British imperialism, to a death in custody, but there are connections.". here's an organic part to it. Janet Alder's brother, Christopher, was a paratrooper. He was killed by the police —so there's a direct connection there. And, when Janet Alder campaigned for a seat in the general election, she campaigned on an anti-war and pro-justice platform. That's a real connection, not theory. There are also connections in the unity between families of soldiers who are betrayed by the state, families of Iraqis who are murdered by soldiers of the state, and families in the UK. At the moment, this may be a minority position. But it wasn't a minority position thirty or forty years ago. Positions change depending on what people do."

Ultraviolence is a film made for changing times, and Fero is hopeful for the future. "We can see within young people that they have had enough, they won't accept things anymore, and their demands are radical," he says. They're not interested in negotiating with the state. They're not interested in improving the system. They're talking about dismantling things. They want to dismantle systems and countries and everything else. And that is quite revolutionary when you think it's coming from people who were not born in a period of struggle. Ultraviolence is a film of its time. We're lucky, it takes years to edit, it just happens to be coming out right now."

Jersey to Legalise Assisted Dying

Last week, 78 per cent of a citizens' jury that was convened on the issue said that terminally ill islanders should be able to seek help to end their life. Jersey can legislate on assisted dying independently and the jury's recommendations will be followed by a report due to be published in September. The island's Council of Ministers will then lodge a proposition with the States Assembly seeking agreement on legalisation. "The people of Jersey have declared loud and clear that they want choice and control over their deaths alongside high-quality palliative care," said Sarah Wootton, chief executive of campaign group Dignity in Dying. Dr Nigel Minihane, chairman of the Jersey Primary Care Body, which represents family doctors, said: "Our current law denies terminally ill people the ultimate choice over how, when and where they die. "The evidence is overwhelmingly in favour of enabling this option for those who are in their final months ... Two hundred million people around the world live in jurisdictions with access to this option; it is time for Jersey to follow suit."

Serving Prisoners Supported by MOJUK: Derek Patterson, Walib Habid, Giovanni Di Stefano, Naweed Ali, Khobaib Hussain, Mohibur Rahman, Tahir Aziz, Roger Khan, Wang Yam, Andrew Malkinson, Michael Ross, Mark Alexander, Anis Sardar, 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, Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan & Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Robert Knapp, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Peter Hannigan.