WESTGATE CHAMBERS

NEWSLETTER

The latest cases, updates, and announcements

September 2021
Issue 3

IN THIS EDITION:

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NEWS FROM CHAMBERS

Westgate Chambers' Tea Time Training continues

Westgate Chambers' Tea Time Training programme continued this month with Sarah Taite leading a discussion on the importance of compliance with ABE guidance and the potential pitfalls concerning this type of evidence. The event was well attended by people involved in various roles within the family justice system and, as such, benefited from contributions for a variety of viewpoints and experiences.

To make sure you don't miss out on our next Tea Time Training event, please contact family@westgate-chambers.co.uk.

Quickfire News and Links

- **List of courts using Common Platform**
  Available here
- **About Common Platform Guidance**
  Available here
- **What is Common Platform?**
  Available here
- **How to use Common Platform (Defence)**
  Available here
- **How to use Common Platform Defence Webinar**
  Available here
- **New Magistrates' Court PET Form – June 2021**
  Available here
- **Criminal Procedure Rules – Update 2 (2021)**
  Available here
- **Updated Crown Court Compendium (August 2021)**
  Available here
- **The Court of Appeal Division Guide to Commencing Proceedings**
  Available here
- **Sentencing Council: Annual report**
  Available here
- **Sentencing Council: Reports into the Council's impact**
  Available here
- **CrimeLine publishes SFR guidance (subscription required)**
  Available here

CRIMINAL LAW

Assault on emergency workers: when are police officers acting in the exercise of their functions?

The recently published High Court case of *Tonique Campbell -v- CPS* [2020] EWHC 3686 (Admin), available here, provides timely guidance on the law regarding assaults on emergency workers. The appeal, which was made by way of case stated, considered whether, for the purposes of s.1 of the Assaults on Emergency Workers (Offences) Act 2018, emergency workers must be acting lawfully to be considered as 'acting in the exercise of functions as such a worker'.

The Applicant had been arrested for drunk and disorderly conduct before proceeding to assault emergency workers on three occasions; once whilst being handcuffed, once upon arrival to the police station, and once whilst being moved within the station. The Applicant stated that the arresting officer had laid hands on her without intending to arrest her earlier in the incident, and that this was therefore an unlawful application of force which rendered the subsequent actions of the officers unlawful. At first instance, the Justices held that a constable could be exercising the functions of their role, even when not acting in the execution of their duties. This distinguishes assaults on emergency workers from assault on a constable, pursuant to s.89 of the Police Act 1996, where an unlawful act by a constable could render their subsequent actions as not being 'in the execution of his duty'.

Lord Justice Popplewell found that *'it is clear that the expression "in the execution of his functions" in s.1 of the 2018 Act is not to be construed in the same way as the expression "in the execution of his duty" in s.89(1) of the 1996 Act, and imports no requirement that the emergency worker be acting lawfully.'* Popplewell LJ referred to the following factors:

(1) The 2018 Act omits any reference to duty or lawfulness.
(2) The contrasting meanings of duty (responsibility or obligation) and function (activity and a role in which the activity is undertaken).
(3) Parliament had not repealed the older offence, indicating they intended the two offences to apply to slightly different circumstances.
(4) The law must be applied to all emergency workers consistently, many of whom will exercise their functions without doing so in execution of a duty.
(5) Emergency workers may exercise the functions of such a worker even after hours – a time when they are not required to act in the execution of a duty.

Further, Popplewell LJ agreed with the submission that the point of law would not have affected the outcome of this case. There had been a lawful reason for the arrest (being drunk and disorderly) and thus the officers would still have been acting within their duty at the respective time, regardless of any unlawful actions that preceded it.

- **Updated CPS Guidance: Immigration: Organised Facilitation – Vehicles and Boats**
  Available here

- **Criminal Bar Association: Response to Extended Operating Hours**
  Available here

- **Criminal Bar Association: Response to Rape Review**
  Available here

- **Child arrests fall 74% in last decade**
  Available here

- **22 September 2021 deadline to register firearms previously defined as antiques**
  Available here

- **HM Inspectorate of Probation: Drug using offenders need more support**
  Available here

- **Male victims of coercive control say they aren't believed**
  Available here

- **New offence to be created: pet abduction**
  Available here

- **Pet Theft Taskforce publish report**
  Available here

- **Parliamentary Briefing: Regulating e-scooters**
  Available here

- **Law Commission publish report recommending communications offences reform**
  Available here

Knife Crime Prevention Order pilot scheme

The Knife Crime Prevention Order (KCPO) pilot scheme came into force on 05 July 2021 for a 14-month period. It covers the 'metropolitan police district', an area encompassing Greater London but excluding the City of London, Inner Temple, and Middle Temple. The legislative scheme for KCPOs is to be found within Part 2 of the Offensive Weapons Act 2019. Criminal practitioners will need to be aware of the power to impose a KCPO following conviction, that it triggers notification requirements, and there are offences related to both breaches of KCPOs and failing to comply with the aforementioned notification requirements.

A KCPO can be made on application or following conviction, subject to various conditions (s.14 and s.19), against any person aged 12 or over, and lasts for a fixed period between 6 months and 2 years. Freestanding applications can only be made by the police. Prosecutors may apply for an order following conviction for any offence involving violence/threats of violence, or where a bladed article was used by any person in the offence, or any offender had a bladed article in their possession at the time of the offence. The order will only be granted where it is necessary to protect the public, or any particular members of the public, from the risk of harm involving a bladed article, or to prevent the Defendant from committing an offence involving a bladed article. Where an offender is under 18 when the application is made, the local Youth Offending Team must be consulted (s.20). Such orders may feature a wide range of prohibitions and/or requirements as deemed necessary to achieve the aims of a KCPO (s.21 and 22). Where a Defendant is remanded in custody, subjected to a custodial sentence, or on licence, a KCPO will not take effect until the Defendant's release from custody, they cease to be the subject of a custodial sentence, or they cease to be on licence.

The notification requirements are set out in s.24. This section gives Defendants 3 days to provide police with the relevant information. It is an offence, pursuant to s.25, to fail, without reasonable excuse, to comply with these requirements or to knowingly give false information. These are continuing offences, but a person may only be prosecuted for it once. These are either-way offences with a maximum sentence of 2 years imprisonment.

Pursuant to s.29, a person who, without reasonable excuse, breaches either a KCPO or interim KCPO, is guilty of an offence. These offences are also either-way and carry a maximum 2-year sentence. Further, s.29(4) prohibits a sentencing court from ordering a conditional discharge for the offence.

Practitioners should also note that there are provisions for reviewing (s.26), varying, renewing, or discharging (s.27), and appealing (s.28) KCPOs.

The Regulation bringing the pilot scheme into force may be found here, Part 2 of the Offensive Weapons Act 2019 here, and the press release on the pilot scheme here.

- **New Sentencing Guidelines for Trade Mark offences (individuals)**
  Available here
- **New Sentencing Guidelines for Trade Mark offences (companies)**
  Available here
- **Sentencing Council launches consultation on miscellaneous amendments**
  Available here

Jury Directions – How to Deliberate

Dale Sullivan reports that, for the first time in his experience, in a recent multi-handed case in Sussex, a trial Judge gave a jury separate written directions to assist them in their task of deliberating.

Chapter 29 – Appendix VIII of the Crown Court Compendium Part 1 sets out the directions that can (subject to the Judge's absolute discretion) be given to a jury. These topics include:

- General guidelines for deliberating
- Getting started
- Selecting the foreman/woman
- Getting organised
- Discussing the evidence and the law
- Voting
- Getting assistance from the court
- Finishing deliberations for the day
- The verdict
- Thank you

Most of the directions are posited in a 'FAQ' style format. The guidance makes clear that what is contained within it is not intended to take the place of any instructions given to the jury by the Judge.

These further written directions completed the trilogy of written directions given in the case: (i) directions on law, (ii) route to verdict, and (iii) guide to deliberations.

The CC Compendium states that the guidance has been presented to the CPRC and received 'unanimous acclamation' as having the potential to assist jurors, but it remains only a suggestion as to what may be said and, ultimately, has not yet been the subject of consideration by the Court of Appeal Criminal Division.

The CC Compendium cites empirical research into the jury system that found 82% of jurors who had just returned a verdict said they would have liked more guidance on how to conduct deliberations.

In Mr Sullivan's case, it is notable that the jury managed to return verdicts in both directions having sent a note during deliberations that indicated a majority verdict was unlikely against some defendants. Of course, the participants in that trial will never know whether the third instalment of directions actually assisted the jury reach their decision; however, it seems entirely possible that this third instalment of written directions may become an increasing common phenomenon in the future.

New Sentencing Guidelines for Modern Slavery offences

On 12 August 2021, the Sentencing Council published new guidelines for offenders convicted of offences under the Modern Slavery Act 2015, which will come into effect on 01 October 2021. There are three sets of guidelines:

(1) Slavery, servitude and forced or compulsory labour/human trafficking (s.1 and 2), available here.
(2) Committing an offence with intent to commit a human trafficking offence (s.4), available here.
(3) Breach of a Slavery and Trafficking Prevention Order/Breach of a Slavery and Trafficking Risk Order (s.30), available here.

The first is the most comprehensive and will be relevant to sentencing offences that fall under the other two guidelines. Despite section 1 and 2 offences carrying a maximum sentence of life imprisonment, the guidelines suggest a sentencing range that goes up to 18 years' custody.

Significantly, the guidelines allow the courts to recognise where offenders are coerced or intimidated into committing, or are themselves victims of, such offences, and to therefore impose comparatively lower sentences where appropriate.

Animal welfare offences reform

The Animal Welfare (Sentencing) Act 2021 has introduced an amendment to s.32 of the Animal Welfare Act 2006 which greatly increases the punishment available for the following offences under the 2006 Act:

(1) S.4 – Causing a protected animal unnecessary suffering.
(2) S.5 – Mutilation of a protected animal.
(3) S.6(1) and (2) – Docking of dogs' tails.
(4) S.7 – Administration of poisons, etc., to protected animals.
(5) S.8 – Animal fighting offences.

Originally, under the 2006 Act, these offences were summary only and punishable by up to 6 months' imprisonment. Pursuant to the amendment, the offences are triable either-way and punishable by up to 5 years imprisonment, if committed on or after 29 June 2021.

The current Animal Cruelty guidelines cover some of the above offences, but only their summary versions. The Sentencing Guidelines Council has published interim guidance, available here, on the approach to be taken until the aforementioned guidelines are revised.

Applications to transfer legal aid – A call for greater scrutiny

The Recorder of Bradford, His Honour Judge Richard Mansell QC, recently considered an application for the transfer of a legal aid representation order and within his determination delivered a warning about such applications generally. Whilst the decision does not set any binding precedent and is clearly concerned with practices in the judge's local area, it does serve as a reminder that such applications ought to be properly prepared by solicitors and scrutinised by the courts.

In his ruling, HHJ Mansell QC opined that his court receive far more applications each week than he conceives to be credible and sets out his suspicions that many applications are not being driven by defendants but by the solicitors who stand to gain from the transfer. He notes that there are two particular scenarios of concern. The first involves defendants who are 'tapped up' or 'poached', given various reassurances or promises, and, sometimes, a financial or other inducement to support the application. In the second, the application will not be objected to as the firms have effectively engaged in 'commodity trading' of briefs and sees the firms conspire to create a fiction in which there is a good reason for the transfer. HHJ Mansell QC notes that under the revised Litigators Fee Scheme such a transfer can result in the two firms being paid up to 160% of what would otherwise have been recoverable.

HHJ Mansell QC also noted a troubling trend for applications to discharge or revoke a representation order on the understanding the action is to become privately funded, despite there being no credible source of funds. In those circumstances, the judge was critical of the often-minimal money laundering checks undertaken by solicitors and suggested greater scrutiny will also be needed for such applications moving forwards.

A transcript of the judgment is available here (CrimeLine subscription required).

Quickfire News and Links

- **Bill to raise minimum age of marriage to 18 has second reading on 19 November 2021**
  Available here
- **Regional and local support for LiPs underway in England and Wales**
  Available here
- **Professionals say remote hearings in the family court still need improvements to ensure fairness**
  Available here
- **Domestic Abuse Act 2021: six more factsheets published**
  Available here
- **New report reveals a quarter wished for mediation or arbitration as answer to divorce**
  Available here
- **Latest View from the President's Chambers**
  Available here
- **Law Commission recommends reforms to protect victims of online abuse**
  Available here
- **Eight in 10 councils forced to overspend on children's social care budgets**
  Available here
- **Child maintenance: consultation launched on modernising and improving the service**
  Available here
- **Legal aid expended on private family law increases by 21 per cent**
  Available here

FAMILY LAW

Sussex Family Justice Board's annual training day

On Saturday, 13 November 2021, the Sussex Family Justice Board will host their annual training event day at The Grand Hotel in Brighton.

Every year the event provides invaluable updates and insight to the key issues affecting those involved with the Family Justice System. This year promises to be no different. The event will be co-chaired by HHJ Bedford (DfJ for Sussex) and HHJ Lusty and feature presentations by:

- Mr Justice Williams – Experts
- Mr Justice Keehan – The Public law working group; Remote working; recent decisions
- Professor Jo Delahunty – Coercive Control
- Natasha Gamble – A Whole Family Approach to Domestic Abuse; learning from Domestic Homicide Reviews
- Jahnine Davies – Adultification & Implications for Anti-racist Practice
- Rachel Gilmore – Clean coaching for wellbeing
- Update on Sussex wellbeing protocol

Registration will be at 9.30am and the event will run until 4pm at The Grand Hotel Brighton, 97-99 King's Road, Brighton, BN1 2FW.

Tickets cost £65 and the price includes lunch and refreshments.

The venue operates a full "covid-safe" protocol.

Those who wish to attend or find out more information can do so here.

Sussex protocol for disclosure of police material for public law proceedings

The new(ish) Protocol for Disclosure of Police Material for Public Law Proceedings ("the Protocol") is now in full operation and ought to be used in all public law proceedings. So, for your assistance and convenience, we set out the key takeaways of the Protocol below.

It should be noted the Protocol document runs to some 10 pages. It is not desirable or possible to reproduce the entire document within this newsletter, but it is a must-read for lawyers whose practice includes public law cases. The Protocol is available in full here.

The Protocol sets out the procedures and expectations which should be followed when police and/or local authority information is required in the following circumstances:

a. Disclosure of Police material to a local authority prior to the issue of care proceedings,
b. Disclosure of police material to a local authority within proceedings, and
c. Disclosure of material from a local authority to the police.

Below we summarise the key points from the first 2 circumstances.

- **Transparency Project: What does AA v BB tell us about the treatment of DA since Re H-N?** *Available here*
- **Family Law Week: The resolutions approach: misunderstood and under-used** *Available here*
- **Family Law Week: Rebalancing the Family Justice System** *Available here*

Disclosure pre-proceedings:

In circumstances when a local authority is contemplating public law proceedings in which police disclosure is relevant, it shall make a request to the police using a "SERF Form" requesting one or more of the following:

i) An Initial Report: this is a report provided by Sussex Police with a list of occurrence information available on their systems;
ii) Primary Disclosure: where the request is specific and there are known incidents upon which the local authority rely, and which are clearly relevant to the matters at issue;
iii) Secondary Disclosure: as per primary disclosure but the local authority knows what information is held by the police.

The standard provision of primary and secondary disclosure shall be limited to up to 2 years preceding the date of the SERF form. In exceptional circumstances, specific information older than 2 years may be requested. Such a request must include details of why it is relevant, necessary, and proportionate.

The police shall provide the requested disclosure to the local authority within 20 working days of receipt of the SERF form.

Disclosure within proceedings:

In circumstances where there has not been a request for disclosure pre-proceedings, the local authority shall request an initial report before the CMH using the SERF form.

The Initial Report will be provided by the police within 10 working days of the request detailing the actual volume of available information and the length of time required to provide it, if all of the available information is requested. The information within the initial report shall be disclosed to the parties and the court.

At the CMH, the court will make its determination as to what disclosure is necessary and proportionate in the usual way, but it should select information from the Initial Report within the last 2 years. In exceptional circumstances, where the court considers disclosure of information older than 2 years is necessary, the court order must specify the additional information required (referencing the Initial Report) and set out why it is necessary.

The direction for disclosure shall be made on a standalone order (Annex H) and give a date for compliance at least 14 days from the date of service of the approved court order. The order for disclosure should set out the following information:

i) The issues in the case and the court timetable, including confirmation of the date for compliance with the direction and the date of any court hearing for which the disclosure is required;
ii) Full name(s), dates of birth and address(es) of the person(s) in respect of whom disclosure is sought;
iii) The incident/occurrence number and/or date and to what it relates;
iv) Details of the documents sought e.g., statement, summary of ABE interview.

A direction for the disclosure of 'all information' which is not specific or proportionate is likely to cause delay to information being provided.

The local authority shall serve the disclosed documents on the parties as soon as practicable after receipt.

If there are any difficulties complying with the court order within the timescale given or for any other reason, the police shall make the local authority aware within 7 days of receiving the order to enable the local authority to raise such issues with the parties and/or the court.

Where further incidents similar in nature to information already provided under the original court order occur during the course of the proceedings and/or further information/documents become available during the course of the proceedings in relation to the original incident(s), the local authority may request disclosure of this information from the police under the remit of the original court order.

Supreme Court upholds the use of the inherent jurisdiction to authorise the deprivation of liberty of 15-year-old

The appeal in the case of *T (A child)* [2021] UKSC 35 concerned the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty. The judgment can be found in full here.

The proceedings centred around a shortage of regulated placements for children who require limitations on their liberty. In the present case, this shortage forced the local authority (Caerphilly County Borough Council ("CCBC")) to seek orders from the High Court under its inherent jurisdiction authorising placement of the 15-year-old child, T, elsewhere than in an approved secure children's home.

CCBC applied to the High Court for an order under the inherent jurisdiction authorising it to accommodate T in a placement which was not a registered children's home or approved for use as secure accommodation, in circumstances which involved depriving T of her liberty. The order was granted. After this initial placement broke down, the court authorised CCBC to deprive T of her liberty in a registered children's home which was not approved for use as secure accommodation.

T appealed to the Supreme Court on 2 grounds:

First, T argued that such a use of the inherent jurisdiction is barred by the Children Act 1989 and contrary to article 5 of the European Convention on Human Rights. The question for the court was: is it a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of his or her liberty in this category of case?

However, the court, in unanimously dismissing the appeal, held that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present is permissible, but expressed grave concern about its use to fill a gap in the childcare system caused by inadequate resources.

The court recognised that local authorities have statutory duties to protect and support children, including a specific duty to provide any child in care with accommodation. Section 25 of the CA 1989 provides the basis for providing accommodation for the purpose of restricting liberty ("secure accommodation"): [30]-[44]. Regulations provide that a children's home must only be used as secure accommodation if it has been approved for that purpose by the Secretary of State for Education. Any person who carries on or manages a children's home without being registered commits an offence: [45]-[62].

Nevertheless, the court considered it unthinkable that the High Court should have no means to keep children safe from extreme harm. If the local authority cannot apply for an order under section 25 because there is no secure accommodation available, the inherent jurisdiction can be used to fill that gap. Where there is absolutely no alternative and where the child, or someone else, is likely to come to grave harm if the court does not act, the inherent jurisdiction may be used to authorise a local authority to deprive a child of his or her liberty, notwithstanding that the placement will be in an unregistered children's home in relation to which a criminal offence would be being committed: [122]-[145].

While Section 100 of the CA 1989 prohibits the use of the inherent jurisdiction to confer, in particular, power to determine any question in connection with any aspect of parental responsibility for a child on a local authority, it does not prevent recourse to the inherent jurisdiction in a case such as this, where the local authority already had parental responsibility by virtue of a care order: [106]-[121].

The use of the inherent jurisdiction in these circumstances does not fall foul of article 5 ECHR, given the safeguards which the courts have devised, in particular by mirroring the procedural protections applicable in a section 25 application: [150]-[155].

Lord Stephens notes this is a temporary solution developed to deal with an extremely difficult situation caused by a scandalous lack of provision. The appropriate permanent solution is the provision of appropriate accommodation: [178].

T's second ground of appeal argued that her consent was highly relevant, and that as she consented to the placements, it was contrary to her best interests for the High Court to have made the orders.

Lady Black, who gave the lead judgment of the court, noted an apparently balanced and free decision made by a child may be quickly revised. That was illustrated by the facts of this case, where T's behaviour in the first placement confirmed the judge's view that her consent was not genuinely expressed. Lady Black acknowledged, however, that any consent on the part of the child will form part of the circumstances that the court must evaluate in considering an application for an order authorising a local authority to restrict a child's liberty: [156]-[161].

Commons Justice Committee: Legal aid needs urgent reform to secure fairness of the justice system

Legal aid is in urgent need of reform to protect the fairness of the justice and to ensure that the most vulnerable can have access to justice, a report by the House of Commons Justice Committee has found.

The report warned that a rigid system of fixed fees and low pay is leaving firms specialising in legal aid struggling.

The report emphasised the sustainability of legal aid providers is critical to ensure that those eligible for legal aid are able to be supported through what can be a complex and daunting system. It notes early legal advice can help to make the courts operate more effectively.

The weight of evidence, according to the Committee, suggests that inaction on the rising number of litigants in person is not an option. Inaction would result in increasing the resources of the courts or other agencies involved in the system.

The Committee recommended a two-pronged approach. Firstly, that the Government takes a more flexible approach to legal aid funding, so that providers can be given support to help the most vulnerable. This may include legal aid providers giving advice early in the legal process to lay litigants. Secondly, the Committee thought the current legal aid means test may be a barrier to justice for some of the most vulnerable in society and impacting the fairness of the justice system. The Government should consider changing the eligibility thresholds and regularly increase them in line with inflation.

The Committee welcomed the introduction of the Family Mediation Voucher Scheme which it described as a positive step but also recognised more needs to be done to help separating parents. The Committee thought that if early legal advice was available alongside mediation, it would result in an increase in the numbers using mediation successfully.

The summary is available here.