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Welcome to your latest edition of The London Advocate and I hope you will enjoy reading the range of articles brought together by contributors from across the profession.

We kick off with a call from our President Jason Lartey for more co-operation between all those working in the criminal justice system with a stark warning that only through meaningful cohesion can the very real challenges we face be overcome.

Next, Peter Doyle KC shines a spotlight on the unusual—but at the moment highly topical—offence of misconduct in public office.

The recovery of costs in private prosecutions has become an increasingly expensive business, says Brian O'Neill KC as he cites three significant cases in recent months.

In his article The Dust of Conflict, Mark Gatley KC discusses the controversial Courts and Tribunals Bill and the dangers of implementing judge-only trials.

From the junior solicitor point of view Katerina Pai asks: How many defendants does it take to become lessons in advocacy?

Last but not least, Greg Foxsmith reviews the latest edition of Ed Cape's seminal book "Defending Suspects at Police Stations".

Finally, a word about this year's sell-out Summer Party, one of the highlights of the Association's calendar.

Sponsored by 23ES and 2BR it takes place at the Rotunda Bar & Restaurant in Kings Cross on Friday, July 3, from 6 pm to 11.30 pm.

Members will have the opportunity to reconnect with colleagues and friends in the spectacular setting of this premier entertainment venue.

Piers Desser, Editor

The need for professional cohesion has never been greater than now

By Jason Lartey
LCCSA President

As we move through another demanding period for the criminal justice system, it is worth reflecting on both the pressures currently facing practitioners and the broader structural changes that continue to shape our work.

The criminal courts remain a vital public service, but one that is increasingly stretched by constrained resources, evolving procedural reforms, and sustained demand.

Against this backdrop, cohesion between all those working within the system - solicitors, barristers, the judiciary, the Crown Prosecution Service, HMCTS staff, probation services and others - has never been more essential.

Over recent months, several themes have dominated discussion among our members. Court backlogs remain a persistent concern.

While there has been some progress in reducing the most acute delays experienced in the aftermath of the pandemic, many Crown Court listings continue to be affected by fixture slippage, late vacated trials and a shortage of judicial sitting days.

For practitioners and defendants alike, delay is not an abstract inconvenience; it affects preparation, welfare, case strategy and, critically, public confidence in the administration of justice.

Linked to this is the continuing strain on legal aid provision. Recruitment and retention in criminal defence practice remain fragile. The workload pressures on duty solicitors and advocates, particularly those operating in police stations and magistrates' courts, are considerable.

Without meaningful and sustained investment in remuneration and working conditions, we risk further erosion of the very workforce upon which the system depends. This is not a sectional concern; it is a systemic

one. A criminal justice system cannot function effectively if any one of its pillars is weakened.

The increasing digitisation of court processes is another area of ongoing development. While digital case management systems and remote hearings can offer efficiency in appropriate cases, they also bring challenges.

The uneven quality of technological infrastructure across court centres and the variable experience of participants, can create inconsistency.

Care must be taken to ensure that efficiency gains do not come at the expense of fairness, participation, or the ability of defendants to engage meaningfully in proceedings.

In this context, the proposals in the Courts and Tribunals Bill warrant the utmost scrutiny. Of particular concern are the provisions contemplating the removal of jury trial for certain categories of offence.

The jury trial is not merely a procedural mechanism; it is a foundational safeguard within our criminal justice system. It embodies the principle that individuals are to be judged by their peers, not solely by the state, and it provides a vital check on authority through community participation.

Any proposal to curtail the right to jury trial must therefore be justified by compelling evidence and considered with exceptional caution. While arguments relating to efficiency, backlog reduction, and cost savings are often advanced, these must be weighed against the broader constitutional and societal value of jury trial. Expediency alone is not a sufficient basis for such a fundamental shift.

There is also a practical concern. Reducing jury trials may offer short-term administrative relief, but it risks longer-term consequences for legitimacy and public confidence.

The perception of fairness is as important as fairness itself. The involvement of citizens in the adjudication process reinforces transparency and trust in outcomes. Removing or limiting that role risks weakening the public's connection to the justice system at precisely the moment when confidence must be strengthened.

What is required instead is a holistic approach that addresses the root causes of delay and inefficiency without undermining core principles.

Investment in court infrastructure, proper resourcing of the legal aid sector, improved listing practices, and enhanced inter-agency coordination are all essential components of meaningful reform.

Piecemeal structural changes that diminish fundamental rights should not be mistaken for genuine solutions.

It is in this spirit that the LCCSA continues to advocate for constructive engagement across all parts of the criminal justice system. Cohesion is not a slogan, it is a necessity.

The effective administration of justice depends upon mutual respect between professions, open channels of communication and a shared commitment to fairness and efficiency in equal measure. When any part of the system is isolated or undervalued, the integrity of the whole is weakened.

As practitioners, we must continue to speak with clarity and purpose about the realities faced in courts every day. At the same time, we must remain open to reform that is evidence-based and principled. The challenge ahead is not simply to make the system faster or cheaper, but to ensure that it remains just, accessible, and trusted.

The LCCSA will continue to play its part in that endeavour, working collaboratively while maintaining a clear and principled voice on behalf of those who defend in our criminal courts.

Misconduct in public office: a case study

The arrest of Peter Mandelson on suspicion of misconduct in public office has focused a spotlight on this unusual offence. Here, Peter Doyle KC of 25 Bedford Row discusses the case of *Rex-v-Pearce (2025) EWCR* 12 heard at Southwark Crown Court before The Hon. Recorder of Westminster HHJ Baumgartner in November 2025.

The prosecution alleged that the defendant, while acting as a public officer, namely a member of the civilian staff of the Metropolitan Police Service (MPS), used his mobile phone to take images of human remains inside a car recovered from the scene of a triple fatality road traffic collision and shared the images with an MPS sub-contractor as well as a member of the public.

He faced a two count indictment; each count al-

leging misconduct in public office contrary to common law.

The Pre-Trial Application to the Court

Made pursuant to s.40 Criminal Procedure and Investigations Act 1996, a ruling of law was sought as to whether the defendant was a "public officer".

The existence or otherwise of a public office is one of law for the court and not a jury. (*R v Cosford(2013) EWCA Crim*).

It is of importance to note that no publication of such a ruling is permitted until the case is concluded. In the present case the ruling resulted in the prosecution offering no evidence and not guilty verdicts being entered by the court. The ruling can therefore be reported (s.41(6) CPIA 1996.

Misconduct in Public Office

No statute actually defines the offence. The requirements (see Attorney-General's Reference (No.3 of 2003) (2005) QB 73) are that the defendant:

a) was a pubic officer acting as such
b) that in that office wilfully neglected to perform his or her duty and/or to wilfully misconducted him or herself
c) to a degree amounting to an abuse of the public's trust in the office
d) and did so without reasonable excuse or justification

The "Interpretation" Headache

As the authors of the Law Commission's Issue Paper observed (The Current Law, 20 January 2016), the term "public office" lacks clear definition yet is a critical element of the offence.

The types of duty that may qualify someone to be a public office holder are poorly defined and the ambiguity generates significant difficulties in interpreting and applying the offence.

Precedent

Over a century earlier Lawrence J in the case of *Whitaker (1914) 3 KB 1283* and giving judgment for the Court of Appeal said: "A public officer is an officer who discharges any duty in the discharge of which the pubic are interested."

The Attorney General's Reference (No.3 of 2003) was a case where it was agreed that the defendant held a public office; he was a policeman.

However, the court recognised the potential unfairness, if those holding a public office were to be liable to sanction not applicable to those in private employment doing similar work.

The potential for unfairness added weight to the court's conclusion that the offence **should be strictly confined**.

The decided cases assist in identifying who holds a "public office".

Included are executive or ministerial officers, police officers (whether suspended or not), employees of the police service such as community support officers and those in charge of police computer systems, prison officers, magistrates, coroners, district judges, Church of England clergy, local councillors, local authority employees, army officers, immigration officers and DVLA employees.

The Principles to be Applied

R v Mitchell (2014) EWCA Crim 318 identified the questions to ask when determining whether an individual was the holder of a public office.

1. What was the position held
2. What was the nature of the duties undertaken by the employee or officer in that position, and
3. Did the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public had a significant interest in the discharge of that duty which was additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty. Unless such an interest was proved the defendant could not be said to be acting as a public officer

If the answer to 3 is "Yes" then the defendant is a holder of a public office. If it is "No" then he is not.

Having considered the relevant authorities the learned Recorder found that the following principles applied:

a) A public office is primarily defined by its functions and not its status.
b) It does not need to be an "office" in any technical sense or be a permanent position.
c) The position held does not need to be subject to specific rules of appointment, one of employment, a contractual position or remunerated.
d) It does not need to be directly linked, by way of appointment, employment or contract, in terms of status, to either the Government or the "state".
e) It must involve the individual in the performance of a duty associated with a public function, and

f) The duty must be one in which the public will have a significant interest in being performed (an interest beyond the interest of those who might be directly affected by a serious failure in the performance of those functions).

Did the Defendant Qualify?

It was agreed that the defendant was employed as a civilian member of staff by the MPS and the nature of his role was also agreed. He was a Pound Assistant (Band F) at Perivale Vehicle Pound. The advertisement for the position and thus its job description is annexed to the learned Recorder's judgment.

What His Job Required

The evidence of the defendant's Line Manager identified his roles and responsibilities. They were:-

a) supervising the loading and unloading of recovery vehicles.
b) processing vehicles upon their arrival at the Car Pound including confirming the vehicle's identity, the accurate completion of vehicle removal forms and inspecting the vehicle for damage.
c) conducting vehicle inspections on their arrival and safely and securely handling items that may be found including property, cash, drugs and weapons.
d) using specialist vehicle movement equipment to move vehicles around the Car Pound that could not be driven.
e) restoring vehicles to members of the public that have been processed at the Front Counter directly to the claimant or a third-party recovery operator.
f) restoring property to members of the public that have been processed at the Front Counter. This includes assessing the vehicle and obtaining any specific property that they have asked for.
g) limited administrative tasks such as updating Vehicle Movement Searches onto a computer system (also done by non-employees working for a third party recovery contractor.) and
h) contact with members of the public.

Encountering the Unexpected

Evidence was before the court that it was neither common nor to be expected that human remains were left in a vehicle recovered to the Car Pound.

His Line Manager spoke of a dismissive attitude by MPS staff involved in the recovery of the vehicle that the vehicle vehicle contained body parts. When she contacted the Forensic Collision Investigations Unit their view was that "*there definitely shouldn't be*" human remains.

The court found as a fact that the Defendant, as he had been in the course of his work as a Pound Assistant, should not have been exposed to or expected to handle human remains.

Having heard detailed submissions from the parties the learned Recorder found that the defendant was and remained a low-level civilian employee. He worked with third-party contractors who performed similar functions. He did not perform any front line duty; rather his role was to support such duties.

He inspected and secured recovered vehicles. He had no evidence- gathering role. His role did not include searching a vehicle involved in crime or a fatality. Nor was he involved in the investigation of offences. He had no access to sensitive police intelligence stored on the PNC. He was not in a position of trust in connection with such material. He had no control of public funds.

The fact that he was vetted and trained did not promote the defendant nor increase his contractual duties. The fact that he wore a police issued uniform and wore protective equipment was irrelevant.

The learned Recorder found that the defendant's duties did not represent the fulfilment of one of the responsibilities of government. His duties were not wider than identified.

Nor did the public have a significant interest in the discharge of the defendant's duties additional to or beyond the interest in anyone who might be directly affected by a serious failure in the performance of his duty.

The wider public interest is to be contrasted with the narrower one of a member of the public who for example recovers his vehicle only to find it has been damaged while at the Pound.

The learned Recorder declined to permit the prosecution to impose on the defendant an ex post facto duty requiring the proper or dignified handling of human remains.

He said that "such an approach suggests a retrospective application of the law to facts, rather than the proper approach, which is the reverse."

The author gratefully acknowledges that this case was first referenced by his colleague Kerrie Ann Rowan, who was instructed for the defence, in her article to be found on 25 Bedford Row's website.

Private prosecutions-an increasingly costly business

By Brian O'Neill KC

The past 12 months have seen the publication of three significant judgments regarding the recovery of costs in private prosecutions.

In *R (Antony Bates) v Highbury Corner Magistrates' Court* [2025] EWHC 2532 (Admin), ['*Bates*'], the High Court ruled that a long line of authority restricting the recovery of costs had been wrongly decided.

In *Rex v BDI & Ors* [2025] EWCA Crim 1289, ['*BDI*'] the Court of Appeal decided that the private prosecutor's costs from central funds should be capped at CPS rates. And in *Taktouk v Benherst Finance Ltd & Anor, R (On the Application Of)* [2025] EWCA Crim 1473 ['*Taktouk'*] the private prosecutor's costs from central funds were ordered to be allowed at the reasonably sufficient sum, but reduced by 50% because of a number of failings by the private prosecutor.

Bates

The issue in *Bates* was whether the High Court had power to make an order for costs between the parties in a criminal cause. In *Murphy v Media Protection Services* [2012] EWHC 529, ['*Murphy*'], a private prosecution regarding the streaming of Premier League football matches, the issue was whether the parties' costs should be determined under the civil or criminal costs regimes.

In his judgment Stanley Burnton LJ stated: *"Clearly, save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime."*

It was contended on behalf of Mr Bates that *Murphy* and the long line of cases which had followed it had been wrongly decided. Counsel for the Attorney-General, appearing at the invitation of the court, submitted that *Murphy* was and remained good law.

Giving judgment the court stated (paragraph 55*): "Murphy has given rise to a line of authority which severely curtails the availability of inter partes costs in judicial review proceedings in which the underlying subject matter is criminal.*

"However, the principle emerged without any real argument, without citation of any relevant authorities and without any detailed reasoning such as might be expected if a significant curtailment of the High Court's general discretion to award costs was intended.

"Subsequent cases have further narrowed the scope of the residual discretion under section 51 where a judicial review claim relates to a criminal cause to a very narrow category of exceptional cases."

The court added that:

- *Murphy* was not to be followed (paragraph 57).
- Applications for costs under section 51 should be decided on principle (paragraph 57).
- Such applications were "*acutely fact sensitive*" (paragraph 83).

The High Court can order that the defendant pays the prosecutor's costs or vice – versa (paragraph 85).

BDI

In *BDI* the Court of Appeal, following a lengthy review of a long line of authorities, stated (paragraph 82) that a private prosecutor seeking to recover costs from central funds pursuant to s.17 of the Prosecution of Offences Act 1985 was entitled to recover "*such sum as the court considers reasonably sufficient to compensate the private prosecutor for the expenses he has properly incurred in the proceedings*"; adding that*: "the reasonably sufficient sum may be less than the sum claimed* [and]*... in an appropriate case, s17(2A) enables the court to award less than the full amount of the reasonably sufficient sum."*

Adopting the observations of Lord Thomas CJ in *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823 https://www.bailii.org/ew/cases/EWCA/Crim/2014/52.html the court posed rhetorically (paragraph 79) that "*If the appropriate state authority was able and willing to undertake a particular prosecution or would have been...an obvious question arises as to whether the cost to the public purse should be increased by a private prosecutor choosing to pursue his own course.*"

Adding (paragraph 80) that if the private prosecutor did not take steps "*to involve the state prosecuting authorities and to test the market for appropriate legal representation...he puts himself at risk that the application will be refused, or that any award will be reduced"* to CPS rates.

Addressing the issue of choice of representation the court observed that (paragraph 85) "*the reasonableness of the choice of legal representatives does involve consideration of their charges".*

Before adding (paragraph 88) "*in some of the cases cited to us, the view was taken that only a very limited number of solicitors and counsel would be competent to conduct the private prosecution,... clear evidence will be needed before a court would decide that the choice was limited in that way, ...in fraud cases there are a significant number of expert counsel with experience of prosecuting; there are a significant number of large solicitors' firms whose expertise in defending such cases could be deployed on the prosecution side.*"

Having reviewed the history of the case (with the assistance of counsel for the Lord Chancellor as an Interested Party) the court found (paragraph 98) that the private prosecutor had failed to show that:

- The police and the CPS could not or would not have undertaken the investigation and prosecution of the crimes alleged.
- They had acted reasonably in incurring expenses in excess of those which would have been incurred by the CPS.

Accordingly, the court ordered (paragraph 100) that the sum to be awarded should not "*exceed the expenses which would have been incurred if the prosecution had been undertaken by the CPS*".

Taktouk

In *Taktouk* the private prosecutor was seeking their costs of resisting an appeal pursuant to s.17. Four previous costs orders had been assessed and paid in the sum of more than £3.8 million.

The court began by acknowledging the decision in BDI and indicating that it would follow it having previously invited further submissions by the private prosecutor and the Lord Chancellor, intervening at the invitation of the court.

In its decision (paragraph 48 onwards) the court stated that the serious failure to present the claim in compliance with CrimPR 45.4 meant that it was open to the court to decline to make any costs order and that in future that may well be the outcome.

The court's "*more generous*" order (which it hoped would "*explain to the profession how the courts will approach these issues*") that costs be allowed at the reasonably sufficient sum, reduced by 50%, was made for the following reasons (paragraph 52):

- The failure to lodge an adequate claim for costs in compliance with CrimPR 45.4(6)(c). This failure was a constant criticism of the court in its judgment.
- The failure to communicate with the state prosecuting authorities at any stage in the proceedings including post conviction when confiscation proceedings were being considered.
- The failure to test the market at any time: (at paragraph 44)"*those who instruct lawyers and then seek to recover their fees from public funds should show that they took reasonable steps to secure the best deal they could.*"
- Failings in disclosure until the appeal: which was (at paragraph 34) "*the kind of thing which will result in a costs penalty to ensure that better practice prevails in the future.*"

Clause 12

In addition, coming down the track is Clause 12 of the Victims and Courts Bill https://bills.parliament.uk/bills/3968 which received Royal Assent in April.

Private prosecutions: regulations about costs payable out of central funds

(1) The Prosecution of Offences Act 1985 is amended as follows.

(2) In section 17 (prosecution costs)—

(a)...

(ii) for the words after paragraph (b) substitute "make an order in favour of the prosecutor for a payment to be made out of central funds in respect of the prosecutor's expenses.";

(b) after subsection (2) insert—

"(2ZA) An order under this section is, subject to the following provisions of this section, to be for the payment out of central funds to the prosecutor of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by them in the proceedings."

And, as one can see from the Explanatory Notes to the Bill, the government plainly has in mind achieving parity between a private prosecutor's costs order and that which the defence can recover, namely legal aid rates. The relevant paragraph states:

"With increasing SCCO rates, the disparity between the amounts which may be paid to private prosecutors and legally aided defence lawyers in the same cases is more pronounced.

"There is no indication that the caseload undertaken by private prosecutions is more complex than that typically conducted by public prosecuting authorities.

"This measure seeks to address this inequality ***to reduce the disparity between the amounts which may be paid to private prosecutors and legally aided defence lawyers in the same case****, and to provide clarity on what is considered to be "reasonably sufficient to compensate the prosecutor," as required under Section 17 of the POA (1985).* (Emphasis added*).*

"This measure is an enabling power for the Lord Chancellor to set rates in Regulations. The Government would then need to consult on the levels of hourly rates and lay secondary legislation to bring them into force."

So where does that leave the party seeking to recover costs from central funds?

More and more out of pocket would appear to be the answer as a statutory framework capping such costs at publicly funded rates draws ever closer.

Instead the route for full recovery of costs will be between the parties, with every prospect of it being argued that inter partes costs orders should be subject to the same principled scrutiny as applications for costs from central funds.

A costly business indeed.

Now in his seventeenth year in Silk, Brian O'Neill of 2 Hare Court Chambers, specialises in private prosecutions, business crime, serious crime, regulatory crime and sports law. His expert skills can be applied to any complex situation whether defending or prosecuting across various jurisdictions.

The dust of conflict

By Mark Gatley KC

A judge who "*descends into the arena is liable to have his vision clouded by the dust of conflict*" Lord Greene MR[1].

Following the passing of the second reading of the Courts and Tribunals Bill we are facing changes that risk emboldening judges to enter the ring.

Indeed, HH Geoffrey Rivlin KC, the former Resident Judge at Southwark Crown Court and Honorary Recorder of Westminster, has argued[2] that this is precisely what Lord Leveson had in mind when proposing judge-alone trials.

In his 2015 Review, in the context of serious fraud, Sir Brian wrote "*Trials can be much shorter because the Judge is able to provide feedback to the parties both on the evidence and the arguments that appear persuasive and those that have only marginal, if any, relevance.*"

To this Geoffrey Rivlin KC says: "*But this is crime, and we might find it surprising that anyone with his experience should think this could be appropriate in a criminal trial – with a defendant in a high state of anxiety, at risk of imprisonment, and sensitive to any indication from the Bench as to which way the wind is blowing.*

"Does it not ignore that under our expectations of a fair trial 'feedback', interruption and interference of this kind would be inexcusable, and appealable?"

So what is the current law in relation to excessive judicial intervention?

In the recent case of *R v Andre Mathurin*[3] a conviction was quashed because the recorder had impermissibly entered into the arena, testing, not clarifying the appellant's account and giving the jury the impression that he was sceptical of the appellant's defence.

The conviction was held to be unsafe, notwithstanding the strength of the evidence and the implausibility of the defendant's evidence.

In the judgment, the Court identified principles from the case of *R v Inns*[4]:

- The jury is the tribunal of fact.
- In our adversarial system, the judge's role is to be a neutral umpire and must not enter the arena.
- A judge may seek clarification but it is inappropriate for the judge to cross-examine the defendant, especially during their evidence-in-chief.
- The defence must have the opportunity to present its version of events in the way they intend. Interruptions risk preventing the defendant from giving a full and complete account.
- These rules apply even if the defence's account seems fanciful.

Whilst it was 'unfortunate' that the recorder had asked 197 questions in the course of the examination-in-chief, the appeal was dismissed in *Inns*.

The case of *R v Perren*[5] was not cited in *Inns.* There, the damage from hostile cross-examination during the appellant's evidence-in-chief by the judge was not curable by a summing-up which reminded the jury that the facts were for them: the process of forming their opinion as to where the truth of the facts lay would have begun as they listened to the evidence unfold.

The Court held that the interventions which give rise to a quashing of a conviction are really three-fold:

- Those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury
- Where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and
- Cases where the interventions have had the effect of preventing the defendant from doing justice and telling the story in their own way

The Court added: "*The potential for injustice is that if the jury, at the very time when they are listening to the witness giving his narrative account of events, do so to the accompaniment of questions from the Bench indicating to anybody with common sense that the judge does not believe a word of it, this may affect the mind of the jury as they listen to the account.*"

Defenders of Leveson might point out that many of the problems identified in these authorities have occurred just because of the involvement of juries: without juries, fewer problems will arise.

Inns and *Perren* provide principles which would be applicable to judge-only trials, but the answer also comes from cases such as *R v Alves*[6], where in the absence of the jury the judge expressed skepticism about the defence and invited counsel to give the defendant "certain advice" during the defence case.

The Court held that the defendant "*may have formed the view that the judge had taken an unreasonable and excessively adverse view of his case, and may have thought that, because the judge had formed the view that he had indicated, he was not going to get a fair trial.*

"*That carries with it the same danger as interruption of his evidence and handicap to the fair giving of his evidence and raises a serious doubt about the conviction that was recorded against him.*"

Civil cases such as *Yuill v Yuill (ibid)* are also highly relevant. These authorities were recently reviewed in *Timothy Raggatt v Bar Standards Board*[7]. It is clear that broader principles apply, such as the law of bias.

Moreover "*in contradistinction to the law of bias, the risk of unfairness through judicial interventions does not depend on appearances or on what an objective observer of the process might think of it.*

"*Rather, the risk is that the judge's descent into the arena 'may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may for that reason render the trial unfair.'*"

If our collective opposition to the Bill fails, these principles will become all the more crucial.

All the more reason to continue the fight.

Footnotes:

[1] *Yuill v Yuill* [1945] 1 All E.R. 183

[2] https://redlionchambers.substack.com/p/juries-and-judges-the-right-to-choose

[3] [2025] EWCA Crim 1254

[4] (2019) 1 Cr App R 5

[5] [2009] EWCA Crim 348

[6] [1997] 1 Cr App R 78; followed in *Myers* [2018] EWCA Crim 2191

[7] [2023] EWHC 1198 (Admin)

Mark Gatley KC is Head of Crime at Garden Court Chambers specialising in serious and organised crime and regularly acting for private clients. He also has a 25-year track record of winning in the Court of Appeal and regularly accepts instructions under the Public Access Scheme.

How many defendants become lessons in advocacy?

By Katerina Pai

Every advocate has a first trial. No advocate, however skilled or experienced they later become, begins their career fully formed. Advocacy is ultimately learned through practice, exposure, and experience in real cases involving real people and real consequences.

In criminal law especially, there is no simulation capable of reproducing the pressure, unpredictability, and responsibility of standing before a court where a person's liberty, reputation, or future is at stake.

Yet this unavoidable reality gives rise to an uncomfortable ethical question: to what extent are advocates learning on the backs of their clients?

As a junior solicitor myself, I am particularly concerned about the position of junior solicitors entering advocacy. Whilst all advocates must begin somewhere, I

do not believe sufficient attention is given to whether solicitor advocates are being adequately trained, supervised, and prepared before conducting contested hearings and trials.

This is not an argument that junior solicitors should never undertake advocacy. On the contrary, the profession depends on new advocates gaining practical experience. However, there is a difference between developing through experience and being insufficiently prepared for the responsibilities placed upon you.

I still remember my first trial. It was a case where the evidence against the defendant was, objectively speaking, fairly strong. However, my client had a defence properly capable of being advanced and argued before the court.

He was ultimately convicted. To this day, I still carry the lingering thought of whether the outcome may have been different had I been a more experienced advocate.

That is not to say the verdict was necessarily wrong, nor that a more senior advocate would inevitably have secured an acquittal. However, every junior advocate who genuinely reflects on their early cases likely understands the feeling of wondering whether they could have done more, asked different questions, or presented the case more persuasively.

That moral burden is rarely discussed openly within the profession.

The issue, in my view, is not necessarily a lack of experienced advocates within criminal practice. Rather, it is the speed at which newly qualified solicitors can find themselves undertaking advocacy with surprisingly limited formal advocacy training behind them.

During my own LPC studies, the advocacy training largely consisted of relatively basic exercises such as bail applications and mitigation submissions. Whilst useful, they scarcely resembled the reality of conducting a trial. I do not see the current SQE route as materially different in this respect.

This contrasts significantly with the training traditionally received by barristers. Even junior barristers entering practice have generally received substantially more focused advocacy training and are far more accustomed to courtroom technique, witness handling, structure, and oral persuasion.

They are trained not simply to speak in court, but to think as advocates from the outset. As a result, although they may still be inexperienced in practical terms, they are often considerably more prepared for the realities of contested advocacy.

Solicitors, by comparison, are frequently left behind when it comes to advocacy training. Historically, perhaps this reflected the traditional division between solicitors and barristers. Solicitors were not necessarily expected to conduct substantial advocacy themselves.

However, modern criminal practice no longer reflects that reality. Criminal solicitors — particularly duty solicitors and those working within legal aid practice — regularly undertake advocacy extending well beyond simple bail applications or sentencing hearings. Many conduct trials, contested hearings, and appeals throughout their careers.

Despite this, the training provided to solicitors often remains superficial.

When I refer to advocacy training, I do not simply mean being told that open questions should be used in examination-in-chief and closed questions in cross-examination. Those are basic principles that any advocate can quickly memorise.

Proper advocacy training should go much deeper. It should involve understanding how to approach different types of witnesses, how to identify weaknesses in evidence, how to structure a persuasive cross-examination, when not to ask a question, how to adapt to unexpected answers, and how to deliver persuasive and coherent closing speeches.

These are not skills that can be developed adequately through a handful of classroom exercises. As a result, many junior solicitor advocates effectively learn these skills publicly and under pressure in live cases.

This creates a genuine ethical tension. On one hand, every advocate requires opportunities to develop. Confidence and competence cannot be gained solely through observation or theory. There comes a point where someone must stand up and conduct their first trial. Overprotecting junior advocates would ultimately prevent the profession from developing future practitioners.

On the other hand, criminal defendants are entitled to competent representation. Clients rarely know how experienced their advocate actually is, particularly within legally aided practice where choices may be limited.

A defendant entering a trial is unlikely to appreciate whether the advocate representing them is conducting their first contested hearing or their hundredth. They place trust in the profession and assume the person representing them is fully capable of handling the case before the court.

This tension becomes even more difficult when junior solicitors themselves may feel unable to refuse work or express concerns about their readiness. Criminal practice can foster a culture where confidence is expected and uncertainty is quietly suppressed.

There can be an unspoken pressure to simply "get on with it" and gain experience through doing. Whilst resilience is undoubtedly important in criminal practice, there is a danger that a "sink or swim" culture normalises situations in which junior practitioners undertake cases without adequate preparation or support.

The emotional impact this can have on junior advo-

cates should also not be underestimated. Convictions, particularly in early cases, can stay with advocates for years. Many junior practitioners privately question whether different decisions, different questions, or greater experience may have altered the outcome.

Even where such concerns are ultimately impossible to answer, the sense of responsibility can be considerable. Advocacy is not merely technical; it carries moral weight.

None of this is intended as criticism of individual firms or supervisors. The realities of criminal legal aid practice mean that workloads are heavy, resources are stretched, and opportunities for intensive supervision are often limited.

However, the profession should still be willing to acknowledge that the current system leaves many junior solicitor advocates learning through trial and error in circumstances where the stakes are exceptionally high.

If criminal solicitors are increasingly expected to undertake substantial advocacy throughout their careers, then greater investment in advocacy training is essential. We need more meaningful training opportunities specifically designed for solicitors.

That should include advanced advocacy workshops, structured mentoring, practical exercises based on realistic criminal scenarios, supervised advocacy opportunities, and greater emphasis on courtroom strategy and persuasion rather than simply procedural formality.

The profession cannot realistically expect confident and competent solicitor advocates to emerge without providing them with the tools necessary to develop those skills properly.

Every advocate must begin somewhere.

Experience can only truly be gained through practice. However, there is an important difference between learning through supported professional development and learning through avoidable inadequacy.

Criminal defendants should not bear unnecessary consequences arising from insufficient training structures, and junior solicitors should not be placed in positions where they are expected to develop critical advocacy skills largely through experience alone.

If the role of solicitor advocates within criminal practice continues to expand, then the profession must en-

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Book review: Ed Cape's Defending Suspects at Police Stations

By Greg Foxsmith

It is always a joy when a new addition of "Defending Suspects at Police Stations" (Cape, Hardcastle and Paul) arrives, albeit it with a sense of trepidation- how much bigger/heavier will it be than the last?

This, the ninth edition, now runs to a hefty 650 pages, and that is despite the removal of PACE and the relevant sections of CJPOA 1994 which were included previously.

Now, you will just have to look those up online - probably for the best considering the constant tinkering with the Act (fun fact: there are now 42 sections of PACE between sections 63 and 65!)

I am one of the LCCSA members old enough to remember the first edition some 30 years ago, before which was a period known as BC or "before Cape".

I agreed to undertake this review of the new edition for the LCCSA, and should immediately acknowledge that two of the three authors are known to me as professional colleagues, although you would not know me well if you think that would influence me to write a soft review.

The last edition was back in 2020 (remember Covid? Yes, that long ago)

The current version updates throughout where needed, including dealing with the new Code I. One speculates how many editions before there is a Code Z.

Entering the police station arena requires both knowledge of the law, and the ability to use it – and this is the book that reminds us of our key role in Chapter 1 "defending the client", before going on to the key provisions of PACE and the Codes.

There is a good summary of how to gather important information from the police with a checklist, but sadly it doesn't have any advice on getting the police to actually answer the telephone, or getting an OIC to call back, and neither does it have an answer to the problem of getting into custody – or sometimes even into the police station – on arrival.

Those issues are of course symptomatic of the currently underfunded and dysfunctional justice system – a point that the authors punchily make in the preface.

To introduce this book to a new generation of police

station advisors – those for whom this is their first edition rather than the ninth – I have run a "book club" where we have read -and then discussed - some of the key chapters.

I once did the same with an earlier edition a quarter century ago for a then trainee, now one of the authors- so it must have some value.

The new readers on my invitation added the following short reviews:

"The use of practical examples, clear commentary, and relevant case law adds real colour to the statutory provisions and legal principles, making them easier to understand and apply in practice" (ZB)

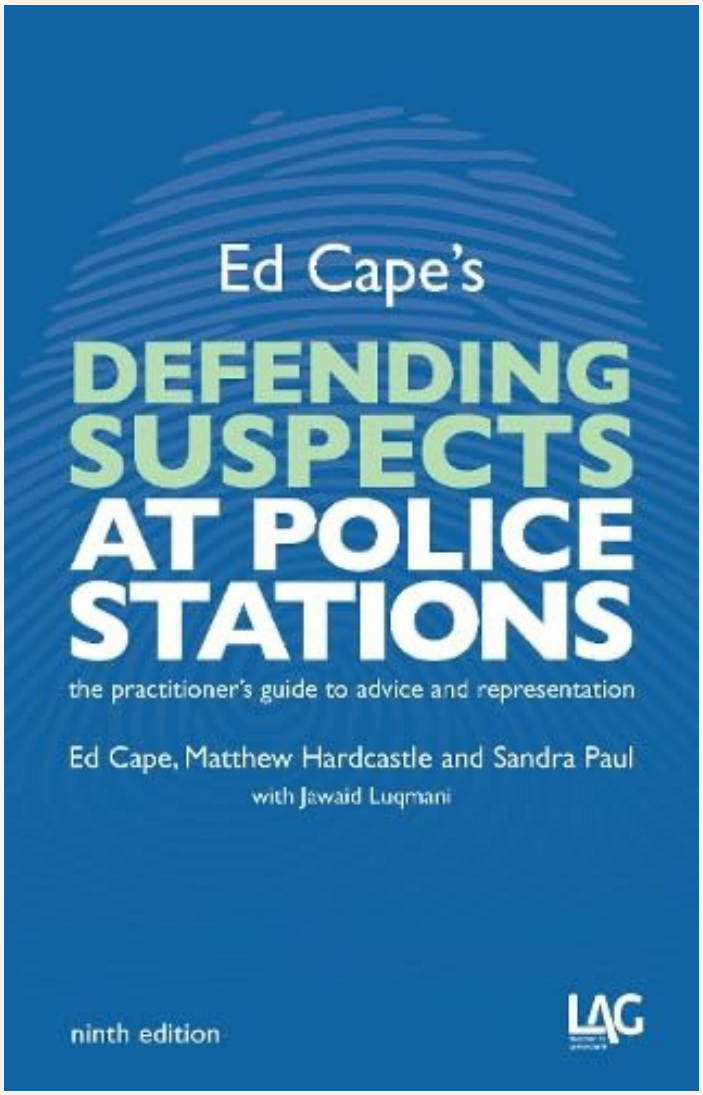
"...an invaluable book for any criminal practitioner. I never attend the police station without it. The chapters are well structured and the checklists are a useful aide memoire" (TS)

One change of note relates to suspects under the age of 18, and I applaud the authors for having chosen to use the word "child" throughout the text, using the definition from the UN Convention on the rights of the child and a reminder to us to remind the police what they often forget- someone under the age of 18 is a child legislation.

One odd omission perhaps is that the book does not include the wording of the caution. Perhaps the authors assume that everyone has this memorised, but my recent "put people on the spot" survey showed an alarming failure to get that right!

I would also have liked to have seen some guidance on LPP privilege, for example when police have seized material from the client or on a search on which we may wish to assert privilege.

Those minor quibbles aside, this book remains an essential guide, and with its added heft a book that makes a reassuring "thud" when ostentatiously dropped on



the table in the interview room, reminding the police that that in the adversarial contest whilst they have some advantages – disclosure, timetable, territory – we trump them with two: knowledge of the law, and CAPE.

If you think you know it all, you actually know nothing. Buy this book- and don't go to the police station without it.

Greg Foxsmith is Legal Director in the criminal team at Kingsley Napley LLP.