Family Affairs

The Newsletter of the Family Law Bar Association

Issue 88 | Winter 2023

Family Affairs is published three times a year by The Family Law Bar Association. Copies can be obtained by non-members on payment of an annual fee of £20.

Printing by Paragon UK

Design by Cider Café

Cover Art by Twins Design Studio

Editorial

John Wilson KC | Editor in Chief

Welcome to the Winter issue of Family Affairs! I hope that you will find much of interest between its covers.

However, I must begin this column by bidding a sad farewell to our esteemed Chair, Hannah Markham KC as her term comes to an end at the end of this year. The two years that Hannah has been in charge seem to have whizzed past. It has been a great pleasure working with Hannah on Family Affairs and I had to keep reminding myself that this was only the tiniest part of her duties; her workload. Hannah has been a really excellent Chair and very few of us know just how hard she has worked for our membership during her term. She has also had to cope with many difficult issues away from the FLBA and yet through all of them she has retained her cool and got the job done. All of us owe Hannah a sizeable debt of gratitude. Hannah, very many thanks. We shall miss you.

As of January, James Roberts KC will be taking over as Chair and Leslie Samuels KC will be taking over as Vice-Chair. We wish them both well and we at Family Affairs look forward to working with them going forward.

There is much of interest in this issue of Family Affairs but I would like to single out in particular the article celebrating 40 years of Cumberland Lodge. In fact the FLBA first attended there in 1981 but we were delayed in reaching our anniversary by the two years we lost to the pandemic. We were very fortunate to receive memories and reminiscences from Baroness Elizabeth Butler Sloss, Sir James Munby and Sir Andrew McFarlane – two former Presidents of the Family Division and the current President – as well as from Lord Justice (Jonathan) Baker, Dame Lucy Theis, Dame Frances Judd and Anthony Kirk KC, a former Chair of the FLBA and Honorary Life Vice-President of the FLBA. We are very grateful to all of them. Their memories of their times at Cumberland Lodge and, in the case of both Lucy and Frances, those memories going back to when they were both very junior tenants, sparkle.

All of these reminiscences are full of happiness and perhaps the most often used word to describe a weekend at Cumberland Lodge is "fun". Also emphasised is the fact that we all meet there as equals so that is the ideal place for the most junior amongst us to chat with the President of the Family Division for example. We hope that those who have never yet ventured to join us for the annual stay there will be tempted by these memories, and by the photographs of our weekends there, to try out the experience.

There is also some sadness in the present issue. I am grateful to Martha Cover and Lady Wise of the Supreme Court in Scotland for their tribute to Alan Inglis who sadly died far too young in August of this year. Their tributes to him are heartfelt and bring us closer to the man Alan was.

In addition, we have another piece of true scholarship from Sir James Munby as he examines the remarkable life of Dionysius Lardner in a very entertaining article which brings together the subjects of railways and adultery as well as a great deal of original research. Please read it.

We also have a wealth of thought-provoking articles from, in particular, His Honour Michael Horowitz KC and Hannah Markham KC who discuss hearing children and money issues together and Louise Tickle and Hannah Summers who consider the fraught issue of domestic violence.. Michael also makes a leading appearance in this issue's *Glimpse into the Archive* which concentrates on the dinner to celebrate his retirement from the bench.

And there is the usual wealth of other interesting and thought-provoking articles.

On a darker note, I feel I must comment on the reports on 2nd December of a vicious attack on a senior family judge in a family court in Buckinghamshire when a litigant in person attacked him after he had granted a non molestation order against him. He is a well-liked, hard-working judge and it is appalling that such a thing could happen. It cannot assist the situation when the government has a tendency to demonise the judiciary when decisions go against it. We wish him a speedy recovery from this awful assault.

As always, I am very grateful to the whole of the editorial team and, in particular, to Philip. A few weeks ago he and I were able to go out for dinner together. During the course of our meal and in answering a question from our waitress we realised that we had known each other for forty years. For me a very long and important friendship!

We were able to use our dinner as an opportunity to celebrate the decision by the FLBA to give us an *Outstanding Contribution Award* for our work on *Family Affairs*. We were both surprised and delighted when Hannah announced this at the AGM in Bristol. We are extremely grateful to the FLBA for making this award to us. It also recognises the fact that I never tire of repeating that the production of is very much a team effort. I would like to think that we take this award on behalf of the whole editorial team and on behalf of Mike Waugaman in particular. His work on the presentation of the material which makes up each issue is outstanding in itself.

May all our readers have a peaceful and relaxing Christmas break. We must hope that the New Year will bring the opportunity for peace in Gaza and Ukraine.

In this issue...

Chair's Column

Hannah Markham KC | Chair of FLBA

When Cyrus called me, in the late summer of 2019, to talk about my standing for election as Vice Chair of the association, I truly had no idea what lay ahead. Who could have predicted the events of 2020 and the years which followed? None of us knew how lives would change and the way in which technology would alter the way we practise family law.

Equally I had little real comprehension of the work the Chair and Vice Chair undertook, and the importance of the association to so many: not only during the pandemic, but also in these years coming out of it.

I have learned that much needs attending to. The profession needs support, care, and it needs defending. Many members - especially those whose practice is paid through the legal aid agency - deserve the protection and support of us all, and in particular those in leadership roles. A review of publicly-funded payments is overdue, but underway. Many brilliant members of the association have already put themselves forward to commence the necessary research, so that we are informed and armed with information before turning to discussions. The survey many engaged in at Easter this year provided invaluable but troubling information about the pressing concerns and issues facing our members, and highlighted where support and work is needed.

Disappointingly, it is plain that post-pandemic reports of bullying behaviour, harassment and disrespectful interactions have increased: from the judiciary to the Bar but also, it seems, between us.

The FLBA's respectful working policy has been in place for over a year - alongside a list of members who have put themselves forward to listen, advise and guide members who experience any type of disrespectful behaviour during their working days. I emphasise this policy and remind all that support is here. Please use it.

Partnership between the FLBA and other arms of the profession has blossomed through the pandemic and beyond. The support provided from the Law Society, Resolution and the ALC has been significant and important. Together we can achieve more than acting in silos. I thank my colleagues from those associations and know the ongoing relationships will shape the next stages and the battles which likely lie ahead.

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Critical, in my view, to the furtherance of what is best about the Bar is the ongoing development of inclusivity, diversity and race awareness. Under the leadership of the formidable Sam King KC, the Equality and Diversity sub-committee have focused on policies addressing these vital matters, also on-the-ground actions such as partnership with Bridging The Bar and the Urban Schools projects put them into action through meaningful and concrete acts.

At the annual dinner held in Lincoln's Inn, we celebrated coming together again after a two-year hiatus. I was so proud to welcome everyone back, but I was equally proud to be able to congratulate the pupils and new tenants who sat with us. They are the future of our profession. They deserve and must have our support, guidance and protection. Changes made now must be with an eye to protecting their roles: ensuring they feel supported through proper pay regimes, wellbeing policies that are more than mere words and with ongoing projects to ensure we retain them and do not lose them to other jobs. Seeing Mrs Justice Henke take up her well-deserved seat in the High Court is a perfect example of the significance of the Bar, of the work we do and the way in which the wisdom of practice is translated to the bench. Our newest High Court Judge was a fierce supporter of the juniors and pupils. There is much one can and should take from her life and the Bar.

In the four years of my tenure, I have also had the privilege to be involved in the ongoing development of the Vulnerable Witness Training: however, at arm's length, as the real heroes of that scheme are Lorraine Cavanagh KC , Alison Moore and Sian Smith who have each dedicated so much of their non-working time to this training. If you see them, please thank them!

Other unsung heroes hide within the association. Matthew Maynard has been developing and working on the new FLBA website. It will be his tenacity which provides members with better access to online materials, a forum through

From top to bottom:

- Masked and anonymous Cyrus and Hannah;
- Travelling incognito Charlotte Hartley and James Roberts KC;
- James Roberts KC, Hannah Markham KC, Charlotte Hartley and Cyrus Larizadeh KC.

which local practice directions from around the region can be found, a new streamlined way for booking and paying for dinners and Cumberland Lodge. With it comes a new vibrant logo. Matthew: you are awesome!

Victoria Wilson holds the focus for wellbeing *and* arranged the Autumn Lecture series - brilliant seminars aimed at providing access to recent case law; focused lectures in a way that is accessible to all in the association.

At this year's AGM, the work of the editors of Family Affairs was recognised. I could fill an entire column writing about them both: John Wilson KC and Philip Cayford KC. Each dedicates their own time - for no financial reward - creating a journal that is so much more than the newsletters of old. The recent inclusion of articles from the likes of Baroness Kennedy, who willingly wrote for them, is a testament to how they are viewed and to the power of the journal itself. They rightly have their thanks from this association. It has been one of the biggest pleasures to write this column for them.

As this is my last time of writing, as Chair of the Association, please forgive me a wee personal moment. It's been a tough gig. There is so much to do. I feel I have led the association through a thin slice of change. More is needed. It has been a privilege, and my pride in speaking and advocating for the profession will never be topped. I have formed friendships that I know will stand. Cyrus, James, Charlotte, Khadija, Leslie, Sam, Joy and Greg: this year in particular has been personally hard. You have held me, stepped in for me, cared for and about me. Thank you.

Much luck to James as he takes over. James - like Holman J, who came before him - has the FLBA running through him like a stick of seaside rock. He will guide and navigate this association over the next two years. The ship is in steady hands. I will remain on board working with the fees team, but for now will exit stage left and watch from the wings.

Above: Greg Williams, Hannah Markham KC, Charlotte Hartley and James Roberts KC

Bottom: Cyrus, Hannah and James

Forty Years of Cumberland Lodge

Anthony Kirk KC, Hon. Life Vice-President

I was delighted to be asked by our chairman to write a few lines about my memories of this event.

They extend back a long way. Not all reading this piece will know me, or even remember me, and so I had best begin there.

I was called to the Bar in 1981 and was fortunate to become a tenant at 1KBW in 1983, my professional home for 40 years. I became a member of the FLBA committee in 1991 under the chairmanship of the late Peter Singer QC. I was appointed Secretary in 1999 and remained in post for 5 years, serving under Pamela Scriven QC and Andrew McFarlane QC.

In 2004 I became Vice-Chairman to Philip Moor QC. This was a relatively new position. I remained there for 2 years before becoming Chairman in 2006. I was followed in the role by Lucy Theis QC.

I became an Honorary Life Vice-President of the Association in 2008.

Early years at The Lodge

The first visit was organised by the then chairman, Joe Jackson QC, of "Rayden & Jackson" fame, in May 1981. The programme of lectures and list of delegates from these early years have been retained in our archives. I have studied them and kept copies.

Accommodation at The Lodge was limited and most just came for a day visit.

The format of the Friday evening has barely changed over the years, with the customary invitation to a new judge of the Division to speak after dinner.

Saturday, it seems, was a relatively leisurely day with the lunch break extended to a full 2 hours to permit members of the committee to hold a meeting in situ.

There were certainly no lectures on the Sunday morning, delegates being expected to attend Matins at The Royal Chapel, followed by lunch and an afternoon programme of lectures. The programme concluded at 4:00pm with afternoon tea being served.

It must have been a long weekend.

My first visit

This was in May 1983. I remember it.

Save for the great and the good, delegates were allocated dormitory-type accommodation with up to 4 sharing. There were no ensuite facilities in those days. Queues formed outside bathrooms at an early hour, patiently waiting their turns in slippers and candlewick dressing gowns. Hot water supplies from ancient oil-burners were limited and unreliable, and so we either persevered or abandoned the idea altogether.

Gentlemen were required to wear jackets, collars and ties for the whole weekend. Ladies would don floor-length gowns for dinner on Saturday. Lectures took place in the lovely drawing-room in the main house, the Mews Building still being

Counter clockwise from top: Jackson and Kirk at the piano; Kirk, Townend, Marshall, and Turner; Paul Coleridge QC

under construction.

We retired to bed early. There was no choice other than to do so. Last orders were served at the bar at 9:50pm and lights in the main house went off at 10:30pm. I like to think we slept the sleep of the righteous.

My time as Secretary

To begin with I had limited secretarial support. Bookings were kindly accepted by Lisa (later Lady) Coleridge. Invitations and forms were sent out in hard copy and places were allocated by lottery. Invariably the weekend was over-subscribed.

We introduced an arrangement whereby a certain quota of members in provincial sets might secure places. Booking forms, in those days, were sent by ordinary post and needed to be returned the same way.

I did my best to maximise attendance at the event.

The Lodge could only offer accommodation, as also dining facilities, to limited numbers. That was partly resolved by securing rooms at the Runnymede Hotel and organising a private dining-room on Saturday at the nearby Fox & Hounds for the overspill!

An enormous challenge was the allocation of rooms within The Lodge itself. Delegates were, of course, asked in advance about preferences in terms of room-sharing. But it was not uncommon for those booking to declare a preference, only for me to discover that the nominated roommate would not be attending or, if coming, had ruled out any such suggestion.

My bedding lists usually proved acceptable. But not all delegates remembered that The Lodge was not an hotel. Some expressed surprise about the lack of room-service, televisions in bedrooms and no supply of toiletries available at reception.

Thereafter, I always came equipped with a few new toothbrushes and a box of Elastoplast, just in case!

David Bodey QC as puritan

Secretarial support changed with the appointment of our first full-time administrator, Carol Harris, in (I think) 2000. She was supremely competent and quickly became a valued friend of the association. Many reading this will remember her.

Carol assisted with getting both conference material and conference guests to the Lodge. Lecture handouts all needed to be copied and sent there ahead of our arrival. This was a significant task in those days when material could not be passed on electronically to delegates. It was simply not possible to produce bound volumes of conference material in advance with late submission of lecture notes.

I am all in favour of paperless conferences, but the odd handout at the door seems to remain a welcome feature and, in those days, was an absolute necessity.

I have mentioned getting our guests and other attendees there. Many were members of the family judiciary sitting on the Friday in London. Carol and I would hire a "judicial people carrier" to transport them, with collection points at 1kbw, the West Green car park at the RCJ, as also that of the House of Lords for serious VIPS! We provided a similar return trip on the Sunday afternoon.

The association entertained many guests at the conference. The Presidents of the Division were always in attendance during terms of office and

for many years afterwards. It was ever a pleasure to greet those returning, to include Sir Stephen Brown and Lady Patricia Brown. As also Baroness Elizabeth Butler-Sloss (as she then became) together with her husband Joe. Others in attendance would always be Dame Joyanne Bracewell who always loved the occasion, together with her husband Roy Copeland.

At the reception desk, they insisted on writing their own name-badges and so, for the weekend, they had, quite simply, become Stephen, Elizabeth and Joyanne. It created an impression and reinforced the fact this was a family occasion. Their example has been followed by others in subsequent years. To this day you are invited to complete your own name-badge.

Entertainment - What to do of a Saturday evening?

I fear I had become rather weary of "balloon debates" and "burning issues" debates after supper.

I hired a piano to go into the new lecture space in the Mews Building for a programme of entertainment. The programme was barely organised before the day itself, but there was no shortage of volunteers to assist. It was, I like to think, fun and very popular in its day.

Can you recall Sir Stephen Brown gamely perched/pushed atop of a stepladder, bucket and mop in hand, as the Manchester contingent below sang George Formby's "When I'm cleaning winders" to banjolele accompaniment? I certainly can.

One of the first to reserve his small slot would be the former Lord Chief Justice of Northern Ireland, Lord Lowry, who sang (unaccompanied) quiet songs from his youth spent in the province.

Perhaps such entertainment might be revived one day, retaining the basement disco which, after all, was always there?

My time as chairman

2006 coincided with the 25th anniversary of our return to the Lodge. We had a special programme to include visits and speeches by the Lord Chancellor and the Chief Justice of Australia.

An especial memory for me was bringing together "The Three Presidents" for an afternoon question time, hosted by Sir Peter Singer. Stephen, Elizabeth and Mark (Potter) gladly engaged. We were treated by the Lodge to an enormous celebratory birthday cake later that day.

In the evening I played the piano alongside the remarkably talented Lord Justice Peter Jackson as he was to become.

Finally – The Lodge today

I have written up past remembrances as best as I can recall at this distance.

Time was when the place was so heavily overbooked that, as secretary, I was asked to find a larger venue within the Thames corridor. I searched long and hard and could find nowhere where we would have been happy. I produced a tentative report for the committee at the time. It was rejected. I was glad.

Cumberland Lodge is a special place to visit. I encourage all reading this to do so when the conference next comes around in 2024. It is a wonderful place to relax, to meet with friends (old and new) as also to receive some splendid education and hospitality.

The association could not function without the dedicated assistance of its committees and Executive Officers, but above all, our excellent administrator, Khadija Khan who merits a special mention in these memories and, alongside the secretary, Charlotte Hartley, plans meticulously for the occasion.

I was, sadly, unable to attend this year but will come, determined to do so, in 2024.

I hope to see you there.

Baroness Butler Sloss

For many years my husband, Joe, and I, often accompanied by successive dogs, Maggie and then Mollie, went to Cumberland Lodge.

Generally we went with the Family Bar but occasionally with the Inner Temple.

It was one of our favourite places to visit. It was always interesting with the other senior members and, particularly, meeting the students; the food was excellent; very comfortable and lovely walks. There were always most interesting and often challenging talks and discussions. I found it very useful when I was President.

On Saturday evening we had inhouse entertainment which was always very funny. Sometimes Anthony Kirk KC, a fine pianist, would play for us. I remember once being required to perform and all I could remember to recite was the Owl and the Pussycat.

Many years ago I took Gay Martin, then a student, with me and we went riding in the Great Park. We were accompanied from the stables and we walked the horses until we got between two white lines and then we went flat out – terrifying! Then we walked back.

Joe and I regularly went to church to the Chapel Royal on Sunday morning. Many non-Christian students went to the service, some, I think, to see the Queen and the Queen Mother. They were wonderful talking to the students. I remember the Queen calling out to the Queen Mother, ¬Come on Mummy, we are going to be late for lunch!

The Principal of Cumberland Lodge regularly went to Windsor Castle to tell the Queen who among the senior attendees would be at church. One year, the then Principal, Alistair Niven, told the Queen I had just lost my dog.

After church next morning, Joe and I were standing back from the students. The Queen came over and said to me how sorry she was that I had lost my dog.

Baroness Butler-Sloss and Joe Butler Sloss

The present Principal, the Rev Ed Newell, was a Canon at St Paul's Cathedral when I was chairman of the Advisory Council. I was Ed's referee. I was asked if he was very obviously a clergyman. I was able to say with absolute truth that, unless you knew, you might not realise!!! He has been a most successful Principal.

Tangentially to reflections on Cumberland Lodge was a discussion of which I was a member in St Paul's Cathedral on the book, "*Darkness over Germany*" by Amy Buller. She went to Germany in the 1930s many times and met a wide variety of Germans of many different views on Hitler and the state of Germany, lastly she went in 1938. She wrote of her experiences and the conversations she had had. A riveting book.

The Queen Mother's spiritual adviser suggested she read the book which she did and gave it to King George VI to read. They invited Amy Buller to tea and offered her Cumberland Lodge to live in and hold conferences, meetings etc to discuss issues which a wide variety of interested participants. She accepted and hence Cumberland Lodge.

Ed Newell invited Rowan Williams, a German professor (whose name I forget) and my self to discuss the book. About a 1000 people came to listen. It was one of the most interesting events in

which I had ever taken part.

Cumberland Lodge is a wonderful place. It does a great deal of good. Long may it flourish.

Sir James Munby

I first went to Cumberland Lodge over fifty years ago, as a student member of the Middle Temple, in 1968 or was it 1969. I mention this for two reasons. First, because those accustomed to its more recent comforts will be unaware of just how bleak and spartan the accommodation was in those days. Second, because I remember listening to a most illuminating talk on advocacy given by John Arnold QC, later Arnold J and in due course Arnold P. One piece of advice he gave stood me in good stead down the years: Do you need to ask the question; may the answer not in fact assist your opponent?

Due entirely to the generous kindness of the FLBA – I have never once been asked to pay for the privilege – I have been a regular attender at Cumberland Lodge for the best part of the last 25 years. My first visit was, I think, in 1999, when I was asked to speak. My talk was, as might be expected, lengthy and solemn. For those who are unaware of my personal odyssey I ought to explain that before my appointment to the Division in 2000 I was not really a family lawyer at all, dabbling in only a few esoteric corners of family law and mainly in appellate cases.

One of the highlights of Cumberland Lodge was, and still is, the Friday night ordeal when the new judge is expected to explain themself, ideally with self-deprecating humour, gentle self-mockery and the showing of mildly embarrassing photographs from an earlier life. Being cowardly and humourless I failed when my turn came, though the details are mercifully forgotten.

Common decency precludes reference to more recent occasions but no-one who was there will forget when Wood J, explaining why he was speaking in what should have been Ryder J's slot, brought the house down by saying it was "*way past Ernest's bedtime*" – for Ernest Ryder, as will be recalled, had been appointed at an uncommonly precocious age.

Nor will anyone there in those days forget the wonderful musical entertainments and cabaret which on Saturday nights year after year were put on for us by the Northern Circuit. A particular highlight was Charles Bloom got up as an Elvis impersonator playing, as I recall, a banjo.

And the senior judges from London (including the President) were expected to expose themselves to gentle mockery. Who will forget the Windsor Sinfonietta, when we were equipped with implements from the kitchen and expected to play a tune under the watchful eye of the conductor, Anthony Kirk QC? Or the Quiz in which, parodying some then popular TV show, "*Elizabeth [Butler-Sloss] from …*" and "*James [Munby] from …*" were put through their paces only for their appalling ignorance – on matters they should have known about – to be ruthlessly exposed to general merriment. Or, more recently, the memorable spectacle of McFarlane P sawing the future Judd J in half.

Thinking of those days inevitably brings back memories of those who are no longer with us, memories so wonderfully preserved for us by Phillip Cayford's splendidly evocative photographs. Most of all, I remember with much fond affection Peter Singer who for so many years was one of the most assiduous judicial participants. He tended to position himself – deliberately – at the very back of the room, from which position of advantage he would interrupt with irreverent abandon. So much so that on one memorable occasion a former President was seen to turn from the front and heard to say, with that firmness with which she was renowned, and which brooked no dissent, "*Do be quiet Peter.*"

There was also, of course, much serious business to be undertaken, some less obvious than the public sessions. I remember on one occasion, when I was the duty judge, stuck in a traffic jam en route to Cumberland Lodge in the judicial people carrier so kindly provided for us by the FLBA, when the officially supplied telephone – a rather basic Nokia – rang. The line was bad and constantly cut-off. This

had the advantage that during the interruptions I was able to discuss the problem with the three other judges who were my fellow passengers. So the litigants, though they never knew it, were, as it were, before the Divisional Court.

On one occasion – it is referred to in *Re SA* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 91 – I spent much of the weekend in communication with the Tipstaff, following an unusual collection order I had made in relation to a vulnerable adult, removed from her usual place of residence by her daughter and grand-daughter.

And then – this was in May 2017 – on a day of burning sun I sat in the beautiful gardens with Jo Miles, Edward Hess and Nicholas Mostyn planning what was to become the Financial Remedies Court. A truly consequential meeting.

But what is the essence of Cumberland Lodge, especially as seen from a judicial perspective?

I have always thought it important that the judges are there. We need to remember that some who are there will never before have met a High Court Judge to talk to. And we need to keep in touch; we need to find out (especially from the young) how things are going. One of the great strengths of Cumberland Lodge is that we are all there as equals. I just hope that we come over as sensible human beings.

And then of course it is a wonderful way of catching up with old friends – particularly, if I may be allowed to choose, those from the Northern Circuit who have so loyally attended in large numbers for so many years.

But above all Cumberland Lodge has always been FUN. Long may that continue.

From top to bottom:
- Lucy Theis QC in ermine;
- Gordon Murdoch QC, District Judge Angel and District Judge Davis;
- John Reddish and Donald Cryan sing
- Lunch time at Cumberland Lodge

Sir Andrew McFarlane

My abiding memory of the early days was of good weather with the lectures taking place, all day, in the garden around a very large and shady tree. It had a surreal quality with Mathew Thorpe explaining the process of assessment of need in money cases: '*Just send your client off to Harrods and tell them to draw up a list*'.

As a young barrister from Birmingham it was a shock, privilege and real pleasure to find oneself sitting at meals or elsewhere chatting to the '*greats*' of the day. I particularly recall with warmth time spent with Joe Jackson QC, who was truly the father of the FLBA.

Great fun was had and longstanding friendships were formed at Cumberland Lodge.

The cabaret by Bodey and Coleridge and Charles Bloom was of the highest quality and genuinely great comedy – Anthony will recall Stephen Brown P and the step ladder.

Cumberland Lodge weekend is an oasis in the middle of busy professional life. Its calmness, wonderful setting, good food and obliging staff all go to make for the perfect setting for the FLBA to gather – young or old, barrister, KC or judge, Londoner or out of Londoner.

Wonderful memories

Lord Justice (Jonathan) Baker

I have been attending the annual Cumberland Lodge weekend since the 1980s and have missed very few weekends in the past 30 years.

It has always been interesting and entertaining. At first, it was a little intimidating. It was full of big characters (Proper London Counsel) like Peter Singer, Paul Coleridge and James Holman. Although they were always welcoming and supportive, I found their easy confidence enviable but hard to emulate. In those days there was much more of a divide between the top chambers and the rest and, coming from what was then a relative backwater, it could feel daunting at times. Over the intervening years, the FLBA has been instrumental in erasing that divide, and Cumberland Lodge has been a major factor in that achievement.

Looking back, the most memorable talk I heard at Cumberland Lodge was Nicholas Mostyn's discussion of White v White – the funniest legal lecture I have ever heard. I also recall Coleridge and Bodey prancing around with cardboard boxes on their heads pretending to be computerised lawyers. In those days it seemed ridiculous but, in these days of digitised court processes and AI, it seems strangely prescient.

I continue to attend whenever I can. One can get a bit remote in the Court of Appeal and spending a weekend in the company of practitioners from all over the country enables me to keep in touch with what's happening. That is what I say to my colleagues in the East Block but (please don't tell them) the real reason is because it is so much fun.

Above: Paul Coleridge QC and David Bodey QC
Opposite page, top: Hershman & MacFarlane
Opposite page, bottom: Lifting the mask

Mrs Justice Theis

The annual FLBA weekend conference at Cumberland Lodge in Windsor Great Park in May is one of those special occasions where so many friendships are forged.

I attended my first FLBA conference there in the mid 1980's as a very junior practitioner. I had no idea who anyone was or what to expect, having only been there once before on a Gray's Inn student weekend. No one in my chambers had been before. My bright red Citroen 2CV (my pride and joy) looked rather out of place parked outside Cumberland Lodge with so many other much grander cars.

In the early days everyone shared rooms, frequently with someone you had not known before. The friendships from those chance encounters lasted many years.

The programme was very relaxed, until the mid 1990's there were no lectures on Sunday morning, only in the afternoon. There was always time for walks to the Savill Gardens, up to the Copper Horse and to watch the polo on Smiths Lawn. For many years I went riding on the Sunday morning with Mark Batchelor, a regular attender at the conference. The stables by the Bishops Gate entrance had a strict dress code for riding in the park – hair nets, riding jacket etc. Not what I was used to. The horses were magnificent and very fast. There was something quite magical about riding in the park in such elegant surroundings, often encountering members of the Royal Family doing the same.

The talks were first held in the yellow drawing room, to the left as you enter the Lodge. I can remember Edward Cazalet doing the Friday night slot there soon after he was appointed to the Family Division. If the weather was fine, everyone would decamp out on the lawn for the lectures in the shade of the trees. For me the most memorable was the talk given by Peter Singer in 1992 entitled 'Sexual Discrimination in Ancillary Relief' ([2001] Fam Law 115) which first made the case for equality in financial provision. I recall being so won round by what he said that I ran his arguments past a very grumpy District Judge sitting in Southend the following week….with absolutely no success. It took Mrs White and the House of Lords to take that step. What Peter Singer said at Cumberland Lodge was rightly referred to in the speech of Lord Nicholls.

For many years the homegrown Saturday night inhouse entertainment knew no limits – including the great comedy duos of David Bodey and Paul Coleridge and Charles Bloom and Martin Allweis; the brilliant humour of Lucy Stone; the FLBA musical talent led by the legendary virtuoso Anthony Kirk; the clerihews composed by the former President, Nicholas Wall, and the full scale

musical production to mark the 25th anniversary of the conference produced by Bernard Wallwork and others, starring most of the Northern Circuit! There was no shortage of talent at the family bar. In my letter that accompanied the 2009 lectures I noted as follows:

'I can't leave Cumberland Lodge without mention of the entertainment on Saturday night. There is always an element of surprise and this year was no exception….my curiosity was alerted when I saw a letter written by Anthony Kirk Q.C. to Sharon, the head waitress, asking whether she could supply the following from the kitchen: two saucepans, two wooden spoons and more…on further investigation I was informed that I may be conducting the re-formed 'Windsor Sinfonietta' and would need a baton….a multi coloured duster appeared – the perfect conducting baton'.

The letter goes on to record that the 'Windsor Sinfonietta' consisted of Sir Stephen Brown, Lady Butler-Sloss, Munby J, HHJ Roddy, Nicholas Longford, Caroline Little, Sunita Mason, Stephen Cobb QC and Philip Marshall. The instruments ranged from comb and paper to saucepan lids!

The evenings usually concluded with singing round the piano in the drawing room – on one occasion resulting in comment by a member of the Royal Family at the Church Service the following morning about how it sounded so good as they had walked past the Lodge late the previous evening that they wanted to come and join in.

When I became FLBA secretary I had the unenviable task, together with the FLBA administrator Lisa Coleridge and then Carol Harris, of organising the conference, including who shared rooms. A task that required some diplomatic skills…I also had the job of collecting all the papers given over the weekend, arranging for them to be bound and then sent to all who had attended the conference, as well as to all the Libraries in the Inns. This stopped in about 2011. When I was appointed to the Family Division in 2010 I took over Peter Singer's room in the RCJ and inherited his complete set of Cumberland Lodge lectures which set out the wide range of topics discussed over the years. In 1991 Nicholas Mostyn gave a talk about how a personal computer can improve your practice! During my term a Chair of the FLBA the FLBA website was launched at the Conference in 2009 by Philip Cayford QC and Charles Hale to what is recorded as 'rapturous applause'.

The strength of this conference is the way pomp and ceremony are left at the Lodge door.

Mr Justice Peter Singer's (nearly) complete set of Cumberland Lodge lectures

Its continued success is through the people who attend and what they contribute. Attend with your friends, which can be great fun, but do not be afraid of attending on your own. Either way you will always make new friends, learn something new and thoroughly enjoy the weekend.

Mrs Justice Judd

I first started to go to Cumberland Lodge as a very junior barrister. I usually went for the day, either on Saturday or Sunday. My first memories are of sitting in the garden enjoying the sunshine rather than listening to the lectures. We did not have any QCs in my chambers at the time, nor had anyone at Harcourt been appointed to the Family Division, so I was very much in awe of the silks and judges that I met then. It never crossed my mind that I might join their ranks.

As the years went on and I became involved with the FLBA I started to attend for the whole weekend. I always applied too late to get in the Lodge and so went to stay at the Runnymede, with dinner on Saturday night at the Fox and Hounds.

It is the funny things that I remember, such as the hilarious lecture by Nicholas Mostyn QC about his experiences in the Court of Appeal and House of Lords in White v White, the Friday night talks from Baker J, Francis J, Cohen J and others and singing around the piano on Saturday night. Much later, this was replaced by a quiz night, run by Margaret Heathcote, then Chair of Resolution. Last, but not least was the time when I was sawn in half by the PFD with a machine sourced by Cyrus Larizadeh from a magician contact. It was only when the saw was advancing towards me that it occurred to me that things could go very wrong…

I will always have very warm memories, whether they be of Elizabeth Butler-Sloss walking her dog, James Turner KC and Sir James Munby in a lively debate over lunch, an Australian judge who came every year even though I never worked out who he was, or of John Wilson smoking by the back door (usually surrounded by the brightest and best of Cumberland Lodge, and sometimes me!). I am sure there were serious lectures too, but I have forgotten them.

Clockwise from top right:

- Playing Snooker in the basement
- Her Honour Isobel Plumstead and William Longrigg
- Justin Gray, Ian (Griffo) Griffin and Lord Justice Baker
- Bench

An artist of the spoken word: Alan Inglis

Martha Cover

Alan Inglis, family law barrister, triathlete, raconteur and expert in Scottish/ English children's cases, died on the 10th August 2023 in his home city of Edinburgh, after living with cancer for two and a half years. He leaves behind many people in the legal worlds of both jurisdictions who regarded him with affection, admiration and respect.

Sir Andrew McFarlane, President, says:

" I knew Alan for over thirty years. Throughout that time, he effortlessly attracted my trust and respect as a fellow barrister and, later, as counsel, or as an expert before the court. A family lawyer through and through, Alan palpably cared about his cases and discharged his role with compassion, insight and skill. He was always a welcome companion, with an impish glint in his eye and often a nugget of weapons-grade gossip on his lips. Latterly, his status as the go-to expert on Scottish family law was well deserved and proved to be of real value in a range of cases. I shall really miss him."

Lady Wise, Justice of the Scottish Supreme Court, knew Alan for many years. She recalls:

"I have very happy memories of a proof that ran for 21 days in which Ruth Innes and I were for the husband and Alan was for the trust into which the husband had placed a significant asset. Alan kept us so entertained with his sotto voce remarks during the submissions that I had to plead with him to stop as I feared bursting into peals of laughter during an inappropriate moment. To me that epitomised Alan – he was industrious and professional but just didn't take himself too seriously.

She said by way of conclusion:

"While Alan loved a gossip he was never unkind and was the first to celebrate a friend's success. He was self-deprecating to the last. I have, slightly tearfully, been reading some of his old emails to me. In one sent in 2020, after he had started treatment he emailed me saying "Fancy a zoom blether?". And then, after we had indeed blethered by zoom he sent another saying "Hope I wasn't too gruff this morning. I must sound like Fenella Fielding". Which had me immediately googling to discover that Ms Fielding, an actress, had been famous for having a particularly husky voice. Such levity in the shadow of darkness is how I will remember Alan."

Lady Wise's appreciation is set out in full in the accompanying section.

Alan worked initially as a social worker in Islington, and then decided to qualify for the Bar. His pupil supervisor, HH Judith Hughes KC, recalls that Alan was different from most pupils because of his background in social work. He told her that he frankly thought from his court attendances that he could do well as some of the barristers and possibly better. Alan entertained Judith by regaling her with tales from his social work days, beginning a lifelong theme of his wry sense of humour and love of gossip and a good story. He was diligent, very

observant and good company.

Alan originally practiced from 1 Garden Court Family, even then a specialist family set. He was a very successful and gifted practitioner, who began to specialise in cases involving alternative families and same-sex parents.

He moved from 1 Garden Court to Coram Chambers in 2001 and was with us until he returned to Edinburgh in 2009. At Coram, he firmly established his reputation as an excellent lawyer, especially in cases involving modern families. He appeared in a line of cases, known then as "the lesbian custody cases", which reached the appellate courts. He was by now a recognised expert in this area.

Deirdre Fottrell KC was Alan's pupil in 2002. She recalls that "he was a uniquely gifted and quite brilliant advocate. His preparation was meticulous, and he perfected the art of saying no more than was needed in court. He took time to condense his legal argument and cross-examination. Alan had an elegant turn of phrase and was able to engage the interest of the judges in a way that was hugely effective. In the case of Steadman, Alan acted for Alfie Patten, a case which attracted huge media attention (Alfie was alleged by the tabloids to be the 'youngest father in Britain'). Alan presented careful and persuasive arguments about the interpretation of the ECHR in children's cases."

Alan loved to laugh and to gossip. He also had a razor-sharp wit, which he was not afraid to use in court.

Deirdre recalls that Alan "was a strong supporter of gay and lesbian colleagues and encouraged chambers to support LGBTQ rights. He was at the forefront of the case law addressing legal recognition of a range of family structures, notably the decision of Re B (2007) before Black J (as she then was). Alan took real pride in acting in cases where he used the law as a tool for social change for lesbian and gay parents. He had not forgotten that his own journey as a young gay man had been difficult, and he wanted to do what he could to make it life easier for others.

He was always a welcome companion, with an impish glint in his eye and often a nugget of weapons-grade gossip on his lips. Latterly, his status as the go-to expert on Scottish family law was well deserved and proved to be of real value in a range of cases. I shall really miss him.

Sir Andrew McFarlane, P

One evening we were all discussing how we might describe to non-lawyers what it was that we did in Court. Alan paused for a brief moment and then said " I am an artist of the spoken word."

I shared a room with Alan at Coram Chambers, from 2006 until he left London to live and practice in his home city of Edinburgh. I enjoyed every minute of it, and when we weren't working, we spent the whole time gossiping.

A quote from Logan Pearsall-Smith reminds me of Alan:

"A heart that is delicate and kind and a tongue that is neither – this is the finest company."

He was a bracing, amusing and clever friend, with a great love of legal gossip and the perfectly turned remark. He could be acerbic and frequently Anglo-Saxon in his use of language. He knew that brevity was the soul of wit, and hated people who were long winded. I remember his dismissal of a pious advocate, whose speech he'd been listening to for too long that morning – "Awful! A stained-glass window in every sentence!".

He took strong likes and dislikes to people. Classic Alan remarks coming back from court would be "I can't STAND that man!" or " Oh yes. He is VERY good!" Or - even better- "She is VERY good fun!" He loved gossip but was never cruel and was intensely loyal to his friends.

He had a great sense of fun and of occasion – these were the days before he gave up alcohol

completely. The slimmest excuse would do for a celebration- it's Friday, I've had a big cheque in, I finished that case, you finished your case, I'm going on holiday next week, it's Thursday- would find us at Chez Gerard's or Daly's, with Alan filling everyone's glass to the absolute brim and ordering more champagne.

In the time he did not devote to the law, partying, or running and cycling, he was a voracious reader. We would often discuss the latest novels. He told me last year that reading Shuggie Bain made him laugh and cry, sometimes at the same time. I said I had not read it yet, and a copy appeared in the post two days later.

He had faced and temporarily seen off cancer, and he had just had his book on permanency orders in Scotland published.

He was highly regarded by the bench in Scotland and was being sent abroad to interview children and families and report back to the court. He was a trustee of Scottish LGBTQ and children's charities and was very worried about transphobia and what he believed was increasing homophobia.

Alan's career and reputation in Scotland and England was going from strength to strength when he was suddenly cut down. His courage in facing cancer and the harsh treatments required for it was typical of him. As Susan Oswald, a Scottish solicitor and close says: "He was bonny, brave and braw."

Alan Inglis

A tribute from Lady Wise

I first met Alan Inglis shortly before he called to the Scottish Bar in 2009. He was undertaking a "mini devilling", an abbreviated from of pupillage those like Alan who are experience in another jurisdiction are asked to take. Alan bounced up to me in Parliament Hall and asked if he could come and watch me in court that day. It was a rhetorical question of course; the court was open to the public. But he took the opportunity to introduce himself as a fellow Family lawyer and told me a little about his background. From that day onward, Alan was omnipresent in my life and in the lives of many at the Scottish Bar.

First and foremost, I remember Alan as an accomplished advocate with an extensive knowledge of his specialist area of practice. His active practice in both Scotland and England led to him being uniquely well qualified to be at the forefront of the burgeoning area of cross border jurisdictional issues in child protection cases. He was often cited as being uniquely placed to help in that field and was a leading light trying to find a solution for them, something acknowledged by the judiciary in both jurisdictions. But while Alan was primarily a child law specialist, once here at the Scottish bar he had to dabble in a bit of financial provision as well. I have very happy memories of a proof that ran for 21 days in which Ruth Innes and I were for the husband and Alan was for the trust into which the husband had placed a significant asset. Alan kept us so entertained with his sotto voce remarks during the submissions that I had to plead with him to stop as I feared bursting into peals of laughter during an inappropriate moment. To me that epitomised Alan – he was industrious and professional but just didn't take himself too seriously.

Alan's unrivalled experience in child law matters mean that he was instructed in countless cases involving children in need of permanence or

adoption orders. While usually acting for the local authority, he was always fair to his opponents and keen to assist the bench. Many times he would offer up a decision that was against his interests but which his opponent had managed to omit; often with a shy smile, anticipating (correctly) that he would get a little plaudit from the bench for his probity.

Once I was on the bench Alan would greet me both when we met and by email as "Senator hen" and I would respond by calling him "Advocate loon". For the uninitiated I should explain that it was the incongruity of the combination that always made us laugh as "hen" is of course a West of Scotland term and "loon" a Doric one. It was the sort of harmless nonsense that I so enjoyed about my exchanges with Alan. As we were neighbours in the New Town, I would bump into him regularly on my way home from court. Once we moved on from our daft greetings, he was always one to comment on whatever case I had recently issued a judgment – never failing to tell me whether in his view I had got it right or wrong…it felt a bit like he was marking them out of 10! Funnily enough, what would have sounded downright impudent from some others was never so from Alan as his insight into any case he read was always very interesting and valuable. And while Alan loved a gossip he was never unkind and was the first to celebrate a friend's success. He was self-deprecating to the last. I have, slightly tearfully, been reading some of his old emails to me. In one sent in 2020, after he had started treatment he emailed me saying "Fancy a zoom blether?". And then, after we had indeed blethered by zoom he sent another saying "Hope I wasn't too gruff this morning. I must sound like Fenella Fielding". Which had me immediately googling to discover that Ms Fielding, an actress, had been famous for having a particularly husky voice. Such levity in the shadow of darkness is how I will remember Alan.

Alan kept us so entertained with his sotto voce remarks during the submissions that I had to plead with him to stop as I feared bursting into peals of laughter during an inappropriate moment. To me that epitomised Alan – he was industrious and professional but just didn't take himself too seriously.

Update for Judge Hafiz

In the summer of 2022, we published an interview with Judge Enayatullah Hafiz. Judge Hafiz had been, before the Taliban took over in Afghanistan, a Justice of the Supreme Court who had also worked as a spokesperson and Judicial Investigation Director for the Supreme Court of Afghanistan as well as being a Member of the High Commission for the Defence of Human Rights Activists. He was Chief Editor of Pakhtoonistan Weekly and Ghotai (magazines, an editorial board member of Qaza (Magazine) and a lecturer at Shaikh Zayed University and other private universities and had also worked with organisations such as the USIP, IDLO, JSSP and TLO. These checkpoints on Judge Hafiz's Curriculum Vitae seriously understated the measure of this man.

When the Taliban came to power it became imperative for him and his family to escape from Afghanistan. This they succeeded in doing and, when they were interviewed by Charanjit Batt and Janine McGuigan (both of QEB) awaiting a determination of whether or not they would be allowed to stay.

During the week ending 17th November we received an email from Sarah Magill, founder of the charity Azadi – now known as Free From Fear that Judge Hafiz had won his German Asylum appeal and has been granted three years residence in Germany.

This is truly excellent news for a very brave and principled man We wish him and his family well and we say a special thank you to Sarah Magill and her charity Free From Fear. We also wish Judge Hafiz and his family the very best of good fortune. May he and they one day be able to return to their home in Afghanistan and carry on the good work that he had been doing there.

Hybrid National Conference, October 2023, Bristol

Abigail Bond and Amy Beddis

Abigail Bond and Amy Beddis

On Saturday 14 October 2023 189 delegates were welcomed to St George's in Bristol for the FLBA annual national conference with a further 59 attending remotely. The programme included plenary sessions introduced by Mrs Justice Judd as well as smaller, separate sessions for children and money practitioners, introduced respectively by Mrs Justice Judd and HHJ Barlow. As usual the conference also hosted the FLBA's AGM, in which this year an Outstanding Contribution Award was presented to John Wilson KC and Philip Cayford KC in recognition of all their hard work over the years in editing and putting together this journal.

The President gave the keynote address, beginning with a fascinating account of the evolution of our family justice system, explaining by way of example how our increased insight into and understanding of different forms of child abuse has led to a more sophisticated response in place of the 'clunkier' framework of old. Practitioners should look out for the further changes in family justice to come, including the relaunch and tightening up of the MIAM process for private law and money cases; the ground-breaking Pathfinder Pilot (where a child impact assessment is produced by CAFCASS in advance of the first hearing, moving the focus from the forensic issues between the parents to the impact of the dispute on the child); proposals in public law for a national or regional body of recognised experts who would report as soon as an injury is identified so as to avoid reassessment and delay; an increased focus on post adoption contact; and the expansion of the FDAC system.

The next plenary session focused on Ethnic Diversity and the Family Justice System, in which we were addressed first by Dr Edney from the Family Justice Observatory who set out a detailed analysis of CAFCASS data on ethnicity from around 2015/2016 to the present. She told us amongst other things that in both public and private law proceedings, white and Asian individuals are under-represented compared to the general population, whilst black individuals are over-represented. Black and Asian children are on average 7 years old when care proceedings start, whereas those of white, mixed or multiple ethnic groups are on average aged 5. Black children are more likely to end proceedings under less interventionist orders than are children from other ethnic groups, although they form the highest proportion of those placed on secure accommodation or deprivation of liberty orders. Dr Edney stressed that important questions about why these inequalities exist and whether children's post-court experiences are affected by their ethnicity are the subject of ongoing work being undertaken by the unit. Sam King KC, the FLBA Diversity and Inclusion Officer, highlighted the importance of Dr Edney's work in understanding the client experience but challenged us to think more holistically about access, retention, progression and culture in trying to ensure that the composition of the Family Bar reflects the society we serve. Only then can we have a truly anti-racist practice.

The first of the parallel sessions then took place. The children lawyers heard from Professor Bilson and Dr Robinson on bruising in pre-mobile infants, chaired by Darren Howe KC. Professor Bilson told us about a culture in social work practice and local authority policy whereby bruising in a pre-mobile baby is said

to be a significant indicator of abuse and compared it to research suggesting that accidental bruising is more common than assumed. Dr Robinson set out the features of accidental and inflicted bruising and identified the need for an accurate forensic analysis at the time any bruise is seen. Both agreed that presumptions must be avoided.

Financial practitioners began with a session on business valuations, including Daniels v Walker applications – a hot topic given Peel J's reported judgment on 31 October in the case of GA and EL [2023] EWFC 187. The session was expertly chaired by the Designated Family Judge for Avon, North Somerset and Gloucestershire, HHJ Wildblood KC. Participants heard from Nick Allen KC and Thomas Rodwell, Managing Director at Rodwell Disputes Advisory. It was incredibly useful to hear from a Judge, a practitioner and expert to ascertain what we should be asking our experts, what is helpful to the court and key things to consider in practice. Methods of valuation, shadow experts and apportionment were some of the issues debated. The importance of a clear executive summary at the start of any expert report was deemed crucial.

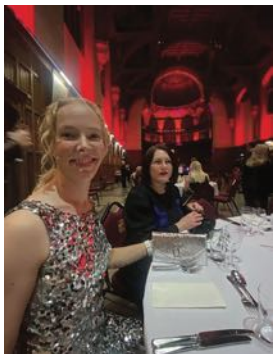
The parallel sessions resumed after lunch. For the children practitioners, Tina Cook KC interviewed Independent Social Worker Stephanie Snow in an engaging session on Resolutions-type assessment in denied child abuse. The lively question-and-answer session drew out the important point that, in an appropriate case, there was no reason why this type of assessment could not be undertaken on an either/or basis before any fact-finding hearing takes place. If positive, it might even obviate the need for a fact-finding hearing in a case where a 'pool finding' appears inevitable. In the next session, Beth Tarleton summarised the conclusions of the Nuffield Foundation Report on Substituted Parenting, setting out how the concept has been used to deprive learning disabled parents of sources of long-term support. Ms Tarleton closed by alerting all delegates to look out for a major report on learning disabled parents, written by Katie Birch and due to be published before the end of the year. Although she was not permitted to provide us with any further details pending publication, we were told that it would push the issue much further up the agenda.

Meanwhile, HHJ Hess, Deputy National Lead Judge of the Financial Remedies Court, who has contributed a huge amount to the financial remedies court and to the PAG reports, chaired the session on pensions. Joe Rainer, a PAG member and David Lockett, Senior Actuary, Actuaries for Lawyers, provided a practical, and interesting debate on key issues in pensions on divorce. David called for clear letters of instruction and only asking questions where you will know what to do with the answer. We eagerly await the release of PAG2.

The children stream concluded with a film of a hard-hitting domestic abuse drama performed by the Certain Curtain Theatre Company. Judging by the question-and-answer session which followed, it provoked reflection even for those seasoned and 'unshockable' practitioners in the audience. The final session for the financial practitioners was chaired by Mr Justice Peel and, with Sam Hillas KC and Elizabeth Darlington, covered hot topics such as conduct, pre-nups, costs and whether ADR should be mandatory. It provided an important opportunity for the family finance bar to engage in debate (even using polling technology). The session was highly entertaining as well as informing attendees of important issues affecting their own practices.

The day ended with a dinner at the Wills Memorial Building, which, appropriately, houses the University's Law School. A memorable after-dinner speech was given by the Lady Chief Justice of Northern Ireland before the evening gave way to the live band and dancing.

National Conference 2023



Clockwise from the top:

- Dinner
- Liam Gribbin, Sara Trumper, Abigail Bond, David Josty, HHJ Barlow and Peel J
- Zoe Saunders Judi Evans & Lucy Reed KC
- HHJ Barlow and Mark Whitehall
- Registration
- Hayley Griffiths and Ruth Armstrong
- Zoe Saunders and Lucy Reed KC
- Sir Andrew McFarlane & Mrs Justice Judd
- Sir Andrew McFarlane
- Bethany Scaarsbrook and Vivien Croly

Centre photo: Mrs Justice Judd

Regional News

Kent & Sussex

Young Persons' Day- A Private Law Initiative

Private law is broken. Cafcass is overwhelmed. Delays in the system result in huge damage to family relationships. This is the perception of many families and many of the practitioners working within private law at the moment. At the Family Bar we have all witnessed the devastated face of a parent who has not seen their child for many months when they learn that it will be another 6 months before the next hearing and any prospect of a resolution.

Fortunately a proactive and dedicated Judiciary, Cafcass and practitioners who work in children law are working together on practical ways to overcome the obstacles to speedy, fair resolution of disputes involving children.

One of the current schemes taking place in Sussex, having been very successfully piloted in Surrey, is the Young Person's Day. This involves a young person age 11 or over meeting with a highly experienced and skilled Cafcass Officer. They will explore with the young person their views of the past, current feelings, and suggestions for current and future arrangements for the time they spend with their parents. After this meeting, a hearing will take place attended by the Cafcass Guardian and the parents before a Judge. The young person's interview is the centrepiece of the hearing, and parents are encouraged to reach an agreement with the help of Cafcass and the Judge.

Young Person's Days have been taking place during 2023 in Sussex before the DFJ, HHJ Bedford, and the vast majority of cases settle with final orders being agreed on the day. Under the Surrey Pilot, very few cases (less than 20 percent) returned to court for any reason following the Day. This scheme therefore has huge potential to ease the delays in the system. The cases under the scheme have speedier outcomes which reduces the number of hearings required in the proceedings. This frees up time for other contested proceedings. It also reduces the pressure on Cafcass in respect of preparing full s.7 reports, a large factor in the time it takes for final decisions to be made in private law cases.

The cases suitable for Young Persons' Days should be identified early, at FHDRA or before by Cafcass. They are cases without safeguarding issues, where the young person is 11 or over and able to express their views and where both parents consent to the process. They will be asked if they are prepared to listen to the outcome of the Cafcass interview and participate willingly to try to reach an agreed solution. When the parents agree, the court will list a date and the young person will be taken to see Cafcass before the hearing. The Cafcass Officer will attend the hearing and be sworn in before verbally reporting to the Court. The parents can be represented or unrepresented at the hearing. Lawyers are allowed to attend and to file position statements but are present in an advisory and supportive capacity and to draft agreed terms of any order reached. It is not an adversarial process and not the forum for legal argument or submissions and some parents decide that they do not need their lawyers to attend this stage.

In the event agreement is reached, an order is approved by the Judge and proceedings can conclude, allowing the stressful and expensive process to come to an end and the family to move forward with their lives. That is the usual outcome.

If agreement cannot be

reached on the Day, the Judge may list the case for final hearing. In rare cases, if something emerges which requires further investigation, a s.7 report could be ordered.

In any event, the parents, but more importantly, their child, will have had the benefit of a lot of expertise and an early hearing where the issues have been aired and the voice of the young person is front and centre as it should be.

This initiative is one of many ways in which the Judiciary is tackling the inefficiencies and delays in the system which result in injustice and poor outcomes for children. There is a suggestion that directions may follow if cases are listed for final hearings in excess of a day, which include solicitors being ordered to disclose all inter-solicitors' correspondence. This will reveal whether parties have retained a child-focussed approach during the litigation. Children and families deserve better than the current system of private law can provide and in Sussex, we are committed to improving.

Addendum by Delia Minoprio

We are looking forward to the annual training meet-up of the Sussex Family Justice Board on 18th November at the Grand in Brighton. Programme includes: Darren Howe KC: Respectful Working and Ensuring all Feel Heard • Bev Barnett-Jones (Nuffield Family Justice): Deprivation of Liberty • Camilla Wells : Vicarious Trauma • Sarah Parsons (Cafcass Principle Social Worker) and Delia Minoprio: Parental Alienation.

The Work of the Quality Circle continues, having had a brilliant session on 30th October with Josh McAlister who presided over the independent review of children's social care. Convened by West Sussex County Council on Fresh thinking: reunification of families and permanence for children.

The poignancy of Josh's words and research helped remind all who work in public law not to lose sight of the end goal for children involved with proceedings. The guiding principle for all should be that for children to grow up successfully they must know that a 'tribe of people who love them' exists. A blog piece should be available for those who missed it. Please join remotely for the next meeting, you can join the mailing list on brighton.events@1cor.com and the teams link will be sent to you once the invitation is accepted.

We recently attended an online talk/seminar chaired by the Designated Family Judge for Sussex on the Young Person's Day initiative run in conjunction with Cafcass to assist private law family cases. Please see article by co-chair Laura Bayley above and before the addendum

Laura Bayley
Co-Chair Kent and Sussex
Crown Office Row Brighton
& Delia Minoprio
Co-Chair Kent and Sussex
Crown Office Row, Brighton

Manchester

Members of the FLBA continue to champion Equality, Diversity & Inclusion initiatives on the Northern Circuit.

Olivia Edwards of 18 St John Street Chambers is leading a school outreach programme, which will see family practitioners trading the courtroom for the classroom. The programme will prioritise schools in underprivileged areas of Greater Manchester and aims to break down barriers for young people who do not consider the Bar as a viable career choice. The students will hear first-hand from members of the FLBA in workshops that will de-mystify, encourage, and inform in equal measure.

The FLBA was well-represented at the FreeBar event hosted by 9 St John Street Chambers on 2 November 2023. The event successfully brought together LGBT+ members of the Bar, the judiciary, and their

allies, and successfully fostered inclusion and support for students, pupil barristers, and clerks. Future FreeBar events are already on the horizon on Circuit.

Education and training also continues to be promoted internally and externally with Advocacy and the Vulnerable training being offered on 21 October 2023 and court skills training scheduled for Greater Manchester local authorities and Cafcass in May 2024.

St John's Buildings in Manchester hosted the Advocacy and the Vulnerable training. 38 barristers were trained by Frances Heaton KC, Julia Cheetham KC, Kate Burnell KC, Martin Todd, Heather Popley and Ginny Whiteley. Feedback from the delegates has been universally positive.

Lorraine Cavanagh KC of St John's Buildings noted a very impressive turnout with Circuiteers demonstrating good grace and humour having put in a great deal of hard work. Anyone who has not yet completed the training is strongly encouraged to apply when FLBA notices are circulated.

A special mention must be given to HHJ Myles Watkins who tried valiantly to reach Manchester despite the storms causing the cancellation of his trains.

Toby Craddock
Deans Court Chambers

North East

On the 24th October 23, the whole family law legal community welcomes the President, Sir Andrew McFarlane to our region. By all accounts he crammed his time with meeting both in Middlesbrough and in Newcastle, but so far as court work was concerned, rumour has it that case after case mysteriously settled as soon as it went into his list….On the evening of 26th October 23, Sir Andrew was the very special guest of the family judges, solicitors and barristers on the north eastern corner of the north east circuit a the Vermont Hotel, Newcastle. Having been delighted with the extension for this publication so that photos of the night could be included, I got so carried away with enjoying myself, I forgot to take the photos until after the presidential pumpkin carriage had whistled our special guest away! The photos below are therefore absent of any featuring Sir Andrew.

As seems to be the way these days, rather than going out in a blaze of glory, our retiring members quietly hang up their wigs and tip toe away. This was especially surprising when the word went out that Tom Finch had finally stopped working. Tom, whose enthusiastic dedication to his clients, and to refusal to allow the judges an easy life will be missed in court. If there was an appeal – Tom would go for it, and this example to younger barristers, often put off by the arduous work that appeals involve, is a loss to the bar. Being against Tom was not always easy but it was always fun.

Elizabeth Lugg
Dere Street Barristers

West Midlands FLBA

It's been a busy few months for the West Midlands FLBA!

On 20th July, we held a summer party for our members and local family judiciary on the roof terrace at Eighteen, which is on the 18th floor of one of Birmingham's tallest buildings. It was our first summer party for many years and it was a great success.

We held our committee elections in September and Timothy Bowe KC (St Ives) has been elected as our new Chair. Carolyn Jones (St Philips) and Mark Cooper (St Ives) have been re-elected as Treasurer and Secretary respectively. The West Midlands FLBA would like to thank Elizabeth Isaacs KC for her service as Chair and her continued support of the association at a regional and national level.

Our training programme has continued to be well attended. Over the summer, James Snelus (No5) delivered two training sessions for members under 5 years call dealing with financial remedy cases. This term, Timothy Bowe KC (St Ives) has delivered training on surrogacy cases, and John Vater KC
















First row, left to right: *Elizabeth Lugg with her two most recent former pupils Lauren Hartley and Molly McNestry; HHJ Gill Matthews KC, Alistair Nixon and Eleanor Bamber; Lucy Mead, HHJ Carly Henley, Elle Iron and Georgina Hey*

Second Row: *Helen Gamble and Nick Stonor KC; HHJ Murray and Helen Robinson; Rachel Mangenie, Kate Dodds and Collette Price*

Third Row: *DJ Lindsay, Rafeesa Chourdhury, Julie Richardson and John Jackson; Holly McGahey, Amy Orange and Cassie Spencely; Paul Fleming and Heather Swan (pupil)*

Fourth Row: *Daniel Ruddick, HHJ Rachel Hudson, Amir Assadi, Kerrie Greenley and Clare Usher; Kate Wood and her pupil Thomas Bannister; Mia Coultas, Jenn Williamson, Karen Hart and Lucy Harland*

Fifth Row: *Charles McCain and Kossar Kitching; Lee Mason (pupil), Chris Woodrow; Anne-Marie Wilson, Rachael Fearson, Rhian McCable, Freda Bullock. Abby Russell and Lisa Vigilante-Harding*

Sixth Row: *Mairi Clancy, Lewis Sharp, Jack Cottrell and Henry Percy-Raine*

(Harcourt, St Philips) provided his 'tips and pitfalls' on infant head injury cases. Justine Lattimer (St Ives) will also be delivering an introduction to The Court of Protection.

On 13th October, we paid tribute to Her Honour Sally Dowding, who recently retired as the DFJ for Wolverhampton and Telford. A black-tie dinner was held at the Clayton Hotel in Birmingham, and Richard Hadley (No5) gave a speech on behalf of the bar. We wish Judge Dowding a long and happy retirement.

Mark Cooper
St Ives Chambers

Clockwise from top:

- *HHJ Sybil Thomas, Louise Higgins, HH Sally Dowding, Annabel Hamilton, Davinder Dhaliwal, Kirsty Gallacher, HHJ Evelyn Bugeja, Nandini Dutta, Julie Sparrow, Victoria Clifford, Dympna Howells, Richard Hadley, Heather Popley and Param Kaur Bains*
- *Julie Sparrow*
- *Danae Larham Laura Rowe June Williams*
- *Matthew Maynard*
- *Milly Webb*
- *Carolyn Jones Mark Cooper*
- *Timothy Bowe KC and George Smith*
- *HHJ Katherine Tucker and Elizabeth McGrath KC*

Railways, Steamships, Crim Con and Divorce

The Curious Life of Dr Dionysius Lardner

Sir James Munby

Dr Dionysius Lardner (1793 to 1859) was born in Dublin, the son of a Dublin solicitor. Educated at Trinity College Dublin, he graduated BA in 1817, MA in 1819, and LLB and LLD in 1827. Cambridge University awarded him an LLD in 1833. He became a Clerk in Holy Orders. He was a Fellow of the Royal Societies of London and Edinburgh, of the Royal Astronomical Society, of the Linnean Society and of the Zoological Society. In 1827 he moved to London, where he was professor of natural philosophy and astronomy at University College from 1828-1831. Thereafter, he lived on his wits. He was a member of the council of the British Association for the Advancement of Science from 1838–40.

Famous in his day as a polymath and savant, Lardner achieved an uncomfortable immortality for his ill-fated technological disputes with Isambard Kingdom Brunel. If that is what he is best remembered for today, there is another, much less well-known, side to his life which is of interest to family lawyers: for not merely was he the defendant in a scandalous case of *crim con* – criminal conversation, adultery – but he featured in two separate Parliamentary divorces. In the first, Lardner successfully obtained a divorce from his wife for her adultery; in the second, the outraged husband of the married woman with whom Lardner had eloped obtained a divorce from her for her adultery with Lardner.

The only full-length biography appeared as recently as 2015: A L Martin, *Villain of Steam: A Life of Dr Dionysius Lardner*. His biographer is generally sympathetic and does her best – sometimes, one feels, too much – to mitigate his failings. More balanced, if much briefer, is the account of his life in the ODNB.

Lardner was a man of many lives, which are best taken chronologically.

First, in a vast output of his own writings, public lectures and the writing and editing of multi-volume encyclopaedias – the *Cabinet Cyclopaedia* (134 volumes, 1830–1844), the Cabinet Library (12 volumes 1830–1832) and the *Museum of Science and Art* (12 volumes 1854–1856) – Lardner was a massively prolific and very successful populariser of an astonishing range of mathematical, scientific and technological learning. His *The Steam Engine Familiarly Explained and Illustrated* was an important and immensely successful book which went through many editions between 1828 and 1851. The much expanded Fifth Edition of 1836 (Preface by Lardner dated December 1835) included

an enlarged chapter on railways and a new chapter on steam navigation; both, as we shall see, are very revealing.

However, despite his enormous success as a populariser, Lardner was, as the 1911 Encyclopaedia Britannica put it, "lacking in originality or brilliancy." The verdict of the ODNB is, with one conspicuous exception (Lardner's writings on railway economics), judicious and fair:

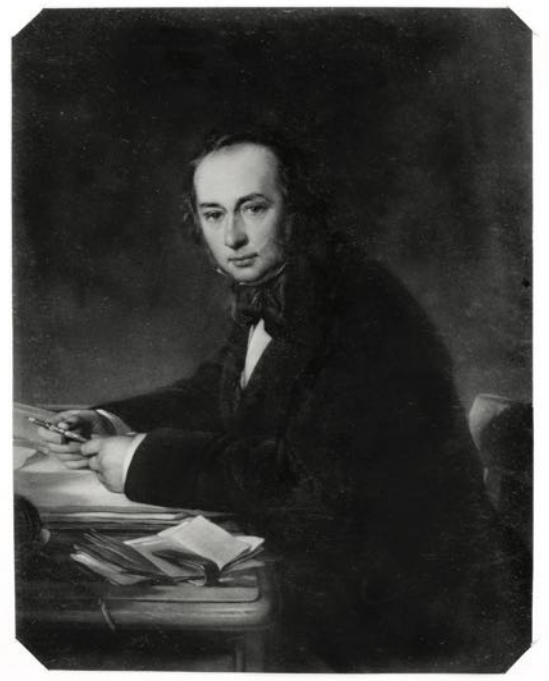
> *"His treatises did not progress beyond the level demanded by the autodidactic hopes that inspired mechanics' institutes, the Society for the Diffusion of Useful Knowledge, and the Cabinet Cyclopedia … As an important mediator of the culture of the new technologies of his time, his influence should not be underestimated, and his writings are a key source for understanding nineteenth-century popular ideas about progress and its relation to technological development."*

Secondly, and here he succeeded in destroying much of his scientific reputation, was Lardner's disastrous work as an expert witness. His folly was to cross swords with Isambard Kingdom Brunel, the greatest engineering genius of the 19th century and the creator of the Great Western Railway. Brunel inevitably had the better of him. There were three famous controversies, best recounted in E T MacDermot, *History of the Great Western Railway: Volume 1*, 1927 (revised 1964), and L T C Rolt, Isambard Kingdom Brunel, 1957, though much important additional information is provided by Lardner's biographer. As the ODNB engagingly puts it, "from those controversies [Lardner] emerged as a foolish theoretician, out of touch with the reality of engineering genius." A more recent writer, the scholarly cleric The Reverend Canon Brian Arman, calls him "the outrageous Professor Dionysius Lardner" (a footnote sardonically mentions his subsequent fate) and describes him in this context as "an early exponent of the art of scientific bafflement:" see *The Broad Gauge Engines of the Great Western Railway, Part 1: 1837-1840*, 2018, 12, 72, a fascinating work of massive scholarship.

The first controversy was in 1835, when the Bill authorising the GWR was going through Parliament. Brunel had planned what was then the longest railway tunnel in the world, 3,193 yards (about 1¾ miles) long. It was at Box on the approach to Bath, on a falling gradient from east to west of 1 : 100. Lardner's general approach to falling gradients (*The Steam Engine*, 223) was clear enough: they were "inconvenient" and, potentially, "attended with great danger." He added:

> *"considerable inclines are fatal to the profitable performance on a railway, end even small inclinations are attended with great inconvenience."*

Giving expert evidence before the House of Lords Committee he opined that if the brakes failed a westbound train would emerge from the tunnel at 120 mph, at which speed no passenger would be able to breathe. Brunel, pointing out that Lardner had failed to take account of friction and air resistance, calculated the relevant speed as being only 56 mph. For all that, on the falling gradient through the tunnel Brunel installed rails specially designed, as MacDermot put it, to "check



Isambard Kingdom Brunel

the speed of trains descending the incline" and utilising what J C Bourne in his *The History and Description of the Great Western Railway* (1846) described as an "arrangement … intended to oppose an increased resistance to the descending train." Millions, of course, have travelled through Brunel's masterpiece, as they continue to, in perfect safety, and the era of the High Speed Train has demonstrated that the human body is capable of surviving speeds well in excess of those that Lardner had postulated would be fatal.

The second controversy, in 1835-1836, related to Brunel's remarkable steamship *SS Great Western* and whether it could carry enough coal to make the transatlantic crossing. Lardner seems to have entered the fray at the meeting of the British Association for the Advancement of Science at Dublin in August 1835. Later in the year (Martin, 226) he was quoted as saying at Macclesfield of another scheme that:

> *"the project … of making the voyage directly from New York to Liverpool … was, he had no hesitation in saying, perfectly chimerical, and they might as well talk about making a voyage from New York or Liverpool to the moon."*

Next year he explained his position very clearly (The Steam Engine, 307, 317). Having calculated that the maximum distance a steamship could travel was, in theory, 2400 miles, he continued by saying that making appropriate allowances:

> *"we should have as an extreme limit of a steamship's practicable voyage, without receiving a relay of coals, a run of about 2000 miles."*

Referring to proposals for a steamship service from Valentia in the west of Ireland to St John's in Newfoundland, the nearest point in North America, some 1900 miles away, he commented:

> *"The distance from Valentia to St John's comes very near the point which we have already assigned as the probable present limit of steam navigation."*

Later that year, at the meeting of the British Association for the Advancement of Science at Bristol on 27 August 1836, he expressed the point in mathematical terms, arguing that a vessel of 1,600 tons if it was to cross to New York would require to carry 1,348 tons of coal in addition to the 400 tons of other baggage, which was more in total (1,748 tons) than the 1,600 tons of the vessel. The maximum distance the vessel could travel before needing to refuel, he opined, was 2,084 miles – the distance from Bristol to New York being in excess of 3,000 miles. Brunel was present and responded but there is no clear record of what he said.

Construction of *SS Great Western* had started at Bristol a month earlier, on 28 July 1836, but Brunel was not perturbed. Lardner was an adherent to the common belief that no steam ship could carry enough coal to cross the Atlantic, based on the fallacious argument that if the size of the ship was doubled, twice the power would be needed to drive it and therefore double the weight of coal would have to be carried. Brunel understood the true principle, that, as expressed by Rolt:

> *"whereas the carrying capacity of a hull increases as the cube of its dimensions, its resistance, or in other words the power required to drive it though the water, only increases as the square of those dimensions … the tonnage or capacity of a ship is a question of volume whereas its resistance is a matter of surface area."*

Thus, the need for fuel to overcome the resistance and drive the ship forward increases at a lower rate than the total capacity of the ship, so that as the ship is made larger the proportion of space devoted to fuel can be decreased. It was, as Rolt put it, "the elementary little fact of the difference between the cube and the square." It is obvious from his explanation of the calculations in *The Steam Engine* that Lardner did not understand this. So a steamship could be designed to carry enough coal for any given length of voyage. *SS Great Western* was launched on 19 July 1837, left on her maiden voyage on 8 April 1838, and reached New York on 23 April 1838 with nearly 200 tons of coal still in

her bunkers. The day of the steam-powered ocean liner had arrived. *SS Great Western* was followed by Brunel's revolutionary masterpiece, *SS Great Britain* (restored and preserved at Bristol in the dock in which she was constructed and from which she was launched in 1843), and then by his ill-fated *SS Great Eastern*, launched in 1858 and designed with a coal-carrying capacity enabling her to go from England to Australia without re-fuelling.

The inability of those who ought to know better to appreciate the practical implications of even simple mathematical principles – what for later generations was to become the province of 'operational research' – lasted far beyond Lardner's time and is with us still. Dare it be said that even lawyers are not immune from this failing. If Lardner was unable to grasp the implications of 'the rule of the cube', the Board of Admiralty, over a century later and at a time of crisis, was very slow to accept the implications of 'the rule of the square'. For in 1943, at the height of the Battle of the Atlantic, it took a long time to persuade the Admiralty of the advantages to be gained by the introduction of much larger convoys: P M S Blackett, *Studies of War*, 1962, 228-233, and Stephen Budiansky, *Blackett's War: The Men Who Defeated the Nazi U-Boats and Brought Science to the Art of Warfare*, 2013, 222-226.

Caricature of Lardner

In an earlier life Patrick Blackett (1897-1974) had fought at Jutland in 1916 as a Midshipman on *HMS Barham*; later he was to become an immensely distinguished scientist, winning the Nobel Prize in Physics in 1948 and ending up Lord Blackett OM CH FRS. He was famous for his comment in 1941 (*Studies*, 173), reflecting the limited intellectual horizons of the senior military, on the need "to avoid running the war by gusts of emotion."

To explain. The chances that a merchant ship in a convoy would be sunk depended on three factors: (a) the chance that the convoy would be sighted; (b) the chance that, having sighted the convoy, a U-boat would penetrate the screen of protective naval vessels; and (c) the chance that the U-boat, having penetrated the screen, would sink the merchant ship. Empirical research established that, whereas the size of a convoy made almost no difference to the chance that it would be sighted by a U-boat, and that if a U-boat penetrated the screen the number of ships sunk was the same for both large and small convoys, the chance of a U-boat penetrating the screen of protective naval escorts was a function of the length of the perimeter, depending on the number of escorts for each mile of the perimeter. But, while the length of the perimeter varies in proportion to the radius of a circle (the circumference of a circle is given by the formula $2\pi R$), the size of the convoy – the area of the circle (given by the formula πR^2) – varies in proportion to the square of the radius. So, the percentage of ships sunk was inversely proportional to the size of the convoy. Expressing the point in another way, take the example of a 78-ship convoy: it had a perimeter only one-sixth longer than a 40-ship convoy, so 7 escorts on the larger convoy provided the same level of protection as 6 escorts on the smaller

convoy. It followed that the most efficient use of the available escorts was to use them in the largest convoys practical.

Those who may wonder what relevance these mathematical and historical musings can possibly have for today's family lawyer might care to remember that we often have to evaluate overall risk where there are three factors in play (for examples see *Re A (Prohibited Steps Order)* [2013] EWCA Civ 1115, [2014] 1 FLR 643, para 25, *Re X (Children), Re Y (Children) (Emergency Protection) rders)* [2015] EWHC 2265 (Fam), para 46, and, most recently, *Re H (Children: Placement Orders)* [2023] EWCA Civ 1245, para 23).

More importantly, they might care also to ponder the implications of the problematic but extremely revealing use by an eminent family judge of the phrase "pseudo-mathematical" in In *re A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718, [2019] 2 FLR 101, para 59, following *Milton Keynes Borough Council v Nulty and Others, National Insurance and Guarantee Corpn Ltd v Nulty's Estate and Another* [2013] EWCA Civ 15, [2013] 1 WLR 1183. My reaction was caustic: see [2023] FRJ 77, 83, where I said "If they thought the mathematical/statistical approach was legally irrelevant, why not simply say so? What on earth did they mean by 'pseudo-mathematical'?" More recent, and much more significant, is what Lord Leggatt said in his keynote address to the At A Glance conference on 11 October 2023, *Some Questions of Proof and Probability*, in a courteous but stinging response:

> *"The Court of Appeal in these two cases made a striking claim. They claimed that it is "intrinsically unsound" to ascribe percentage probabilities to past events. This claim is easy to refute."*

Again, as earlier with Box Tunnel, Brunel had provided crushing practical dis-proof of Lardner's theories. Even his sympathetic biographer has to admit (Martin, 254) that "Overnight Lardner's name became a byword for the unreliability of scientific 'experts'." Already, at the meeting of the British Association for the Advancement of Science at Liverpool in 1837, Lardner was trying to draw back, asserting that he did not deny that a transatlantic voyage was possible, only that it would not be profitable. By the next meeting, in Newcastle in 1838, by which time the successful voyage of *SS Great Britain* had completely exploded his credibility, he could only pretend that he had never said it was impossible for a steamship to cross the Atlantic, merely that it was uneconomical to set up a service from Bristol. That was simply not true. It is abundantly clear from what he said in *The Steam Engine* that Lardner's analysis had nothing to do with economics: it was based entirely on a steamship's coal consumption and coal carrying capacity. He did not speak at the next meeting in Birmingham in 1839, and the following year he was expelled following a great public scandal.

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The third controversy, which was finally to destroy Lardner's reputation as an expert witness, was in the autumn of 1838 and related to the crucial question of whether the Great Western Railway was to continue to be built, as Brunel recommended, to the Broad Gauge of 7' 0¼" or to the narrower (now standard) gauge of 4' 8½" used by the Stephensons. Much of the debate focused on the very poor performance of the GWR's finest locomotive, *North Star* (a full-size replica can be seen in Swindon's Steam Museum). Lardner sought to establish by elaborate testing and mathematical calculations that the reason for *North Star*'s poor performance was the effect on its wide frontal area

of the air resistance which, in contrast to his earlier calculations in relation to Box Tunnel, he now suggested was critical. Frantic work on North Star by Brunel and his Chief Locomotive Assistant, the brilliant Daniel Gooch, established that the cause of the problem was because of faults in the design and positioning of the locomotive's blastpipe – and therefore nothing to do with air resistance. Once remedied there was such dramatic improvement in *North Star*'s performance that Lardner's theories went for nothing and on 9 January 1839 a Special General Meeting of the GWR voted in favour of Brunel and the Broad Gauge.

His biographer has to concede (Martin, 261) that "Lardner's career as an expert witness and public speaker in Britain was no longer supportable. The future looked bleak." In fact he was soon to be engulfed in public scandal.

On 14 June 1839 Lardner obtained a divorce from his wife, Cecilia Flood. They had married in Dublin on 19 December 1815. On 22 March 1840 the Age reported that he had eloped with a married woman, Mrs Mary Spicer Heaviside, wife of Captain Richard Heaviside of the 1st Dragoon Guards. To escape her vengeful husband they fled first to France and then to America, remaining there until 1845, Lardner in the meantime conducting an extensive and very remunerative lecture tour. In 1845 they returned to live in Paris, spending time in Naples, where Lardner died in 1859.

Whilst lecturing in America Lardner made another foolish sally into the world of the expert witness. He was paid by Norris Brothers, the well-known locomotive builders, to investigate a boiler explosion on a newly made locomotive. Lardner opined that the accident had been caused by lightning, though a committee of the Franklin Institute pointed out that there was no lightning present at that time and that there were defects in the design and manufacture of the locomotive. The Coroner's jury was nonetheless persuaded by Lardner that the accident was an 'act of God'.

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It was during this period that Lardner's produced truly innovative works on railway economics which remain of lasting importance. In October 1846 the Edinburgh Review published his long article *Railways at Home and Abroad* and in 1850 he followed this up with his masterpiece *Railway Economy: A Treatise on the New Art of Transport, its Management, Prospects, and Relations, Commercial, Financial and Social, with an Exposition of the Practical Results of the Railways in Operation in the United Kingdom, on the Continent, and in America*.

The importance of the 1846 article is explained by Andrew Odlyzko of the School of Mathematics, University of Minnesota, in his valuable paper, *Dionysius Lardner, the denigrated sage of early railways*, where he refers to "Lardner's striking insights into railway economics" and continues:

> *"'Railways at home and abroad' ... can be regarded as the seed from which Railway Economy sprouted. However, it also had special value for its time. It appeared at the height of the Railway Mania and contained convincing arguments demonstrating this manic period was bound to end in a financial debacle."*

The importance of Lardner's later *Railway Economy* had earlier been explained by G R Hawke in an illuminating Appendix, *The Reputation of Dr Lardner*, in his *Railways and Economic Growth in England and Wales 1840-1870*, 1970. It is sufficient for present purposes to note that *Railway Economy* was used both by Karl Marx and by the great 19th century economist W S Jevons and that it has been commended by such subsequent economic

commentators as Alfred Marshall, J H Clapham and J A Schumpeter.

Hawke quotes the great railwayman and railway historian Michael Robbins writing of Lardner in 1950:

> *"It was an original investigation of railway management, based on the limited statistical information then available … Almost all the statistical questions asked by railway managements today were recognised by Lardner and demonstrated to be fundamental to a correct understanding of railway economy."*

Coming from such a knowledgeable source, that is praise indeed.

A later, and equally knowledgeable railway historian, T R Gourvish, *Mark Huish and the London & North Western Railway a study of management*, 1972, 30, 151, is equally laudatory, explaining that until the publication of Lardner's "notable treatise" in 1850 there was "no really satisfactory exposition of financial and administrative practice to guide railways", though, as he is careful to point out, Lardner was much indebted to Huish for the release of a great deal of both published and unpublished material on the LNWR.

It is time to return to Lardner's personal life and his unfortunate matrimonial experiences.

Before examining them, however, we must remind ourselves of the state of the divorce law in the early Victorian era. Before the creation in 1858, in accordance with the Matrimonial Causes Act 1857, of the Court for Divorce and Matrimonial Causes (the predecessor of the later Probate, Divorce and Admiralty Division and the more recent Family Division) there was no judicial divorce in this country. Matrimonial causes were the preserve of the ecclesiastical courts, which had jurisdiction to grant a divorce a *menso et thoro* (what we would think of as a judicial separation) but no jurisdiction to grant what we would think of as a divorce (a *divorce a vinculo*). Such a divorce could be obtained only by Act of Parliament.

For those who want to know more about all this there are two key texts: John Macqueen, *A Practical Treatise on The Appellate Jurisdiction of the House of Lords and Privy Council, together with the Practice on Parliamentary Divorce, 1842* (available in a modern facsimile reprint), and the detailed, elegant and intriguing chapters VIII, IX and X of Lawrence Stone's magisterial Road to Divorce: England 1530-1987, 1990.

For present purposes it suffices to note that by the end of the 18th century, the process of obtaining a divorce involved three separate proceedings, famously described by Maule J in his celebrated sentencing of the bigamist Thomas Hall at Warwickshire Assizes on 1 April 1845: see (2021) 81 Family Affairs 73, 79. First, the husband had to bring a common law action of *crim con* – criminal conversation, a euphemism for adultery – in the Court of King's Bench and obtain a judgment and damages against his wife's paramour. Second, he had to obtain a final decree of divorce a *menso et thoro* from the ecclesiastical court, having established to the court's satisfaction that his wife had committed adultery. Third, he had to apply to Parliament for an Act granting him a decree of *divorce a vinculo*.

Like any other Bill, the divorce Bill had to pass both Houses; but the practice was long established that such Bills were introduced in the House of Lords, where all the relevant investigations took place, and that a Bill which had passed the House of Lords was then passed by the House of Commons without further investigation or argument. It should be noted that the Standing Orders of the House of Lords generally required the petitioner husband to establish *both* that he had obtained a *crim con* judgment and that he had obtained a final decree from the ecclesiastical court.

There is one further aspect of practice which needs to be understood. A wife sued for divorce by her husband in the ecclesiastical court could recriminate, that is, countercharge the

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petitioner with having also committed adultery. The importance of this was that a successful recrimination by the respondent was a bar to the petitioner obtaining a divorce: see Stone, 209-210, 405. Section 31 of the 1857 Act for the first time gave the court discretion to grant a decree in such a case, although the discretion was for a long time only rarely exercised. This was all explained in the judgment of McCardie J in *Pullen v Pulling and Holden* (1920) 36 TLR 506, where he denounced the law with characteristic brio:

> *"It may well be asked whether the sum total of public morality is increased by refusing a divorce against a wife who has committed adultery because the petitioning husband has himself committed the same sin … Adultery is presumed to render further married life impossible. But inasmuch as the husband himself has here committed adultery also, and married life is therefore doubly impossible, the decree must, in accordance with the existing law be refused."*

Against this background I return to Lardner.

There are two accessible accounts of Lardner's divorce from his first wife, Cecilia Flood. One is in the law report of his proceedings in 1839 for a Parliamentary divorce: In *re the Bill intituled "An Act to dissolve the Marriage of Dionysius Lardner, Clerk LLD, with Cecilia, his Wife," etc* (1839) 6 Cl & Fin 569. The other, much more detailed, is by his biographer (Martin, 33-36, 139-148, 247-249. Unhappily, there are significant discrepancies between them, even on such important matters as the date of their separation and the date when his wife gave birth to the child of her adulterous lover. For present purposes, however, these are not matters which require resolution, for the general outlines are sufficiently clear.

Lardner and his wife had married in 1815 and had three children, though one died in infancy. According to the law report, they separated in 1819 in consequence of "differences … arising, it was said, from the violence of the lady's temper." According to his biographer, they separated in September 1820, after she made an appalling scene during a dinner party and left him, never to return, the following day. By then, Lardner had begun a prolonged relationship with Anne Maria Darley Boursiquot (1795–1879), the wife of a Dublin wine merchant. He almost certainly fathered her son Dion Boucicault (1820–1890), the actor and dramatist, who was born on 20 December 1820. Cecilia for her part, having moved in as a lodger with a Mr and Mrs Murphy, began an adulterous affair with Murphy, a Dublin customs officer. Their daughter was born, according to the law report, in January 1821; according to Lardner's biographer, she became pregnant in June 1821 and gave birth in March 1822. Mrs Murphy having insisted that Mrs Lardner leave her house, she and her lover, according to the law report, had removed to lodgings hired by Murphy where they both lived under an assumed name, Mrs Lardner passing as Murphy's sister.

Somewhat surprisingly it might be thought, for professional middle class Dublin in the 1820s was surely not very large, and he did not move to London until 1827, Lardner remained unaware of his wife's adultery. He claimed first to have learned of it in 1830.

The law report recorded the relevant facts as follows:

> *"In the course of the year 1828, Mr. Murphy, then on his death-bed, as he and all his friends verily believed, called to his bedside his wife and his brother, a respectable solicitor in Dublin, and made to them a full declaration of his connexion with Mrs. Lardner, and of the birth of the child, the fruit of that connexion; and requested his brother to communicate the same to Mrs. Lardner's father, after his own death. He died in January 1829, and his brother shortly afterwards made the communication, as requested, to Mrs. Lardner's father, who immediately sent one of his sons to communicate the matter to Dr. Lardner's family. This gentleman went and told Dr. Lardner's mother and sister, in the presence of Mrs. Lardner, who was then residing with them, that he came from his father to desire her to tell the truth of all the circumstances relative to her adulterous intercourse with Mr. Murphy, and not to impose herself on her husband's family as an innocent woman. He then narrated the facts as communicated to and by his father, and Mrs. Lardner admitted that all that had been stated by Mr. Murphy was true; and she said she wouId go and take her child (then with Mr. Murphy's widow), and she accordingly did take the child. The mother and sister of Dr. Lardner kept this communication a secret from him, and it was not until the Autumn of 1830 that he was informed of it by his brother, who had come to reside in London in 1829."*

His biographer gives a rather different account (Martin, 139-143), though agreeing that it was not until the autumn of 1830 that Lardner first learned the truth.

His response was to sue for a divorce a *mensa et thoro* in the ecclesiastical court in Dublin.

According to the law report:

> *"In September 1830, Dr. Lardner gave instructions to sue for a divorce in the Ecclesiastical Court in Dublin; but, in consequence of a recriminatory suit instituted there by the wife, and of the difficulty of finding witnesses and providing for the costs, the definitive sentence of divorce a mensa et thoro was not delivered until 1832."*

His biographer gives a fuller and more colourful account (Martin, 143-147). She tells us that the proceedings began in February 1831 and concluded with a final decree on 21 September 1832. Lardner's case was based on Cecilia's adultery with Murphy. She recriminated, alleging that he had committed adultery with Anne Boursiquot and that he was the father of her son Dion Boucicault. The evidence was voluminous and scandalous. A maid gave evidence that, looking though the keyhole, she had seen Lardner being "intimate" in the locked parlour with Anne's cousin Maria D'Arley. Anne for her part denied that she had ever been Lardner's lover.

Eventually, Lardner succeeded and Cecilia failed, both in her denials and in her recriminatory suit, for Lardner succeeded in obtaining the decree of divorce he sought.

There was then further delay, as explained in the law report:

> *"The same want of funds prevented the petitioner from applying to Parliament for a divorce a vinculo, from 1832 to 1839."*

His biographer tells us (Martin, 147) that Lardner did not finish paying the costs and expenses until 1837.

Lardner's divorce bill came on for second reading in the House of Lords on 23 April 1839.

As will be appreciated, Lardner faced two potential problems: one deriving from the fact that he had never sued Murphy in *crim con*; the other deriving from all the delay. The same points had arisen in the House of Lords as recently as 19 March

> No sooner had Lardner escaped one marriage than he embarked upon further and even more scandalous matrimonial frolics.

1839 on the second reading of the divorce bill in the case of Lieutenant Coode. As the headnote to the report, In *re the Bill intituled "An Act to dissolve the Marriage of HENRY COODE, Esq. with JANE, his Wife," etc* (1839) 6 Cl & F 567, records:

> *"In suing out a divorce bill, the standing order (No. 141), requiring the Petitioner to produce a record of a judgment in an action far criminal conversation against the adulterer, will be dispensed with, where it is shown that such action was impracticable."*

Coode, a Lieutenant in the Royal Navy, married his wife at Barbadoes in 1823. They came to England in 1825. From October 1828 until October 1830, he was absent on naval service, chiefly in the Mediterranean, Mrs Coode remaining in England all that time. While her husband was away she gave birth to an illegitimate child. The report continues:

> *"Mr. Coode, having been made acquainted with his dishonour on his arrival in England, put the matter into a train of investigation, but was not able to discover the person with whom the adultery was committed.*
>
> *Upon the order of the day being read for hearing counsel and taking evidence in support of the second reading of the bill, Mr. Serjeant Merewether, counsel for the petitioner (Mr. Male appearing for the wife), opened the case, as above stated; and being asked whether he could refer to any cases, in which the record of a judgment in an action at law for criminal conversation was dispensed with in suing out an act for a divorce, he referred to the following cases: Farrer's case, in 1796; M'Gauley's case, in 1797; Twistleton's case, in 1798; Woodmason's case, in 1798; Bailey's case, in 1817; Stock's case, in 1829; Shakerley's case, in 1830; and Howel's case, in 1834. In the preamble to the bill in Stock's case it was stated, that "Your subject hath, by his agents, used every possible endeavour to discover the person who lived with his wife under an assumed name, but hath been unable to discover who he was, and who was the father of the child."*
>
> *The House being satisfied with the evidence advanced, and with the cases referred to, the bill was read a second time, and was ultimately passed."*

Returning to Dr Lardner, his explanation for not having sued in *crim con* was of course that he had not been aware of his wife's adultery until after the death of the adulterer. But what of the delay? The report records that "The attention of the House was called to the delay, first, to sue for the divorce in the Ecclesiastical Court in Ireland, and next, to proceed on the sentence of that Court in Parliament; but the circumstances proved being deemed to afford sufficient explanation of the delay, the Bill was read a second time, and was afterwards passed (eight divorce Acts were passed in this session)." Accordingly, Lardner's marriage to Cecilia was dissolved by statute on 14 June 1839.

The headnote to the law report summarised the legal basis of the decision to allow the Bill to pass:

> *"The production of the record of a judgment at law, for criminal conversation, was also dispensed with in this case, where, during a voluntary separation of the Petitioner and his wife, she committed adultery, of which he was not informed until after the death of the adulterer.*
>
> *HELD also, that a lapse of nine years from the admitted discovery, and of nineteen years from the fact, of the wife's adultery, was not a bar to the Petitioner's right to a divorce a vinculo, he having shown that he was not able, for want of funds, to apply to Parliament sooner."*

Cecilia had taken no part in the Parliamentary proceedings. She explained why, in a letter she subsequently wrote to Lord Brougham, the former Lord Chancellor (Martin, 248-249), adding:

> *"I have no wish to retain Dr Lardner as my husband but I am anxious that the separation should not take place upon the grounds specified by him, which are no less false in fact,*

than injurious to my character and besides it may be important that your Lordship and the public should not be misled so far in the case of so public an individual as Dr Lardner."

It seems to have done her no good.

No sooner had Lardner escaped one marriage than he embarked upon further and even more scandalous matrimonial frolics. He had obtained his divorce on 14 June 1839. In November 1839 he moved to Brighton, his biographer suggests (Martin, 266) "lurking around the Brighton ladies in the hopes of catching a young and wealthy bride who would bring with her the stable income and respectable domestic comforts that had eluded him for so many years." Be that as it may, he was soon embroiled in an adulterous relationship that caused immense scandal, for on Friday 13 March 1840 he eloped with Mary Heaviside, wife of Captain Richard Heaviside, and mother of three children.

He had first met Mary Heaviside as recently as December 1839, though it seems likely that his dealings with Captain Heaviside went back some years for, as Lardner's biographer points out (Martin, 263), both had been involved with the London and Brighton Railway (authorised by Act of Parliament on 15 July 1837 and later amalgamated with the London and Croydon Railway by Act of Parliament on 27 July 1846 as the London, Brighton and South Coast Railway). Captain Heaviside was one of the founding directors – he had been present at the original subscribers meeting on 12 December 1834 – and played an active role in the affairs of the London and Brighton: see J T Howard Turner, *The London, Brighton & South Coast Railway, Vol 1, Origins & Formation*, 1977. Lardner was called as an expert witness before the House of Lords.

The route of the new line was the subject of considerable controversy as the Bill made its way through Parliament, the argument focusing on the choice between a more direct but more heavily engineered line through Merstham and Horley proposed by Sir John Rennie – essentially the line which we are familiar with today – and a more circuitous but less arduous line through Dorking, Horsham and Shoreham proposed by Robert Stephenson and G P Bidder. Stephenson was represented by Serjeant Merewether, who as we have seen also practised in the House of Lords in matters of divorce. Bidder was represented by the Hon John Chetwynd Talbot, who the year before had vigorously cross-examined Lardner in relation to Box Tunnel. Lardner's biographer (Martin, 207) describes that cross-examination as having been "hostile and disrespectful." The Bill was first considered in committee by the House of Commons in 1836 and subsequently in committee by the House of Lords. Lardner gave evidence in support of Rennie's scheme before the House of Lords, where he was again vigorously cross-examined by Talbot, seemingly to some effect (Martin, 252-253). Pace his biographer, it was Rennie's scheme rather than the Stephenson/Bidder scheme which was eventually approved, so Lardner's evidence apparently did no real harm. The line opened in 1841.

The report in The Age on Sunday 22 March 1840 of Mrs Heaviside's elopement with Lardner merits extensive quotation:

"Great consternation was spread throughout the fashionable circles in Brighton, on its becoming known that a lady, the wife of a Magistrate, and who has hitherto lived in the estimation of a large circle of friends, had left her husband's residence in Brunswick Square on Friday night, and had eloped with a learned Doctor, who had for some months been residing there ... The Lady, we regret to add, is the mother of three young children, and as compared with the companion of her flight is as Hyperion to a satyr, being a woman of great personal charms, while the object of her misplaced affection, though he stands high in the school of science, is not remarkable for those personal qualifications which occasionally dazzle and win the favours of the gentler sex. The parties alluded to are Mrs HEAVISIDE, wife of Capt. Heaviside, late of the 1st Dragoon Guards; and our old ami, Dr DINNISH LARDNER. HEAVISIDE stands six feet seven in his stocking vamps, and his runway-rib is a monstrous fine woman, but a terrible fool, we guess. With HEAVISIDE,

she has the long of it; she'll find the short, we calculate, with DIDDEROO DINNISH."

As one can imagine, the press had a field day. None more so than *The Satirist; or, the Censor of the Times*, a weekly Sunday newspaper whose style and content more than lived up to its name. It pursued the story relentlessly week after week for many weeks, often publishing pieces on more than one page of each issue (modern tabloid practice has long antecedents). It started with this spectacular report in the issue of Sunday 22 March 1840:

"The elopement of Dr. Dionysius Lardner with the wife of Captain Heaviside, of Brunswick-square, Brighton, has excited considerable sensation there and elsewhere. The scientific old sinner! Who on earth would have thought it? Everybody believed the Doctor to be so industriously occupied about steam-engines and railways, as not even to dream of coveting his neighbour's wife. Little did the world imagine that he was occupied in "getting the steam up" for a far different purpose—that schemes of seduction were mixed up with the mysteries of science in the Doctor's brain. Some of the papers contemptuously allege that the lady, in comparison with her seducer, is as "Hyperion to a satyr," which is not very flattering to the Doctor at any rate. No matter; the "satyr" must have gained the favourable opinion of the lady, in whose eyes he doubtless appears a very different personage, and not a bit more "satyr"-ical than is agreeable. Perhaps a clue to the looseness of the Doctor's morals may be found in the fact that he has not been very happy in his own domestic relations, and it is not long since that somebody ran away with, or otherwise seduced his wife, Mrs. Dionysius Lardner. It may be that the Doctor, on the principle of retaliation, deems himself justified in running away with the wife of somebody else. As a wronged man, he thinks, perhaps, that he has a right to wrong others; from wearing horns himself he proceeds to planting them on the brows of others. The Times calls him "a very foolish person" In relation to this business. The phrase is not ill-chosen coming from the Times, seeing that the "foolishness" of being found out is clearly referred to. Barnes [Thomas Barnes, editor of the Times 1817-1841; he never married but from 1821 until his death in 1841 lived with Mrs Dinah Mary Mondet, née Dunn] knows better than to condemn it on any other ground; his practical experience of adultery would not permit him to be too severe on a brother sinner. The fugitives have, it is said, fled to Holland, on the hope perhaps of escaping in a Dutch fog. The injured husband is in full pursuit of his wife and the "scientific" Lothario, which seems rather singular, considering the uselessness of seeking to regain a woman who is lost to herself! If she have set her affections on the Doctor, as her conduct would show, she cannot be worthy the trouble of pursuit; and as for the Doctor himself, an opportunity may be found for horsewhipping him at a future period, or a ball lodged scientifically in his thorax may put a stop to his philandering for the future. Should the Captain prefer a more magnanimous course, and leave him to his awful reflections, it is to be hoped that conscience will whisper in the ear of Dionysius the enormity of his crime, and the duty of sincere and speedy repentance. Since the above was written, it has been communicated to us that Captain Heaviside, who was accompanied in the pursuit by Mr. J. N. Wigney, the late member for Brighton, traced the guilty couple to Bruges, but we have not heard that the gallant Captain inflicted the brand of personal chastisement on the seducer."

A week later, *The Satirist* returned to Dr Lardner in its issue of Sunday 29 March 1840. On page 2 the following story appeared:

"It sounds rather curiously that an Act was passed last Session, "to dissolve the marriage of Dionysius Lardner, clerk, doctor of civil law, with Cecilia Lardner, his wife, and to enable him to marry again, and for other purposes." The late elopement of Mrs. Heaviside has proved to what "other purposes" the worthy Doctor has devoted his leisure moments. The Doctor, it seems, is a clergyman, as well as a man of science, though we cannot learn that he has of late been "on Spiritual duty." He has devoted a vast deal more attention to railroads than to true religion, and there is consequently less reason for surprise that he should at length manifest a disposition to "go it" at a most immoral rate. Being divorced, he appears to have felt himself quite free and easy as to his conduct and principles, and at full liberty to play the elderly Lothario wherever he could. His clerical character, albeit he never sermonised that we are aware of, is unquestionably an aggravation of his delinquency, as he was bound to be doubly careful not to bring scandal on the "cloth." His "black coat" certainly gives a darker hue to his guilt. The sin of adultery assumes its most devilish complexion when committed by a

Much better had it been for him if he had availed himself of the permissive power granted by his Divorce Bill of marrying again, as in that case there would have been nothing sinful in the "*other purposes*" so pointedly alluded to. If a man is free to take a wife, it does not follow that he must take the wife of his neighbour.

> *"gentleman in black;" the Doctor, however, being only a kind of "lay parson," does not, perhaps, come within the full scope of our censure. He has enough to answer for as it is. Much better had it been for him if he had availed himself of the permissive power granted by his Divorce Bill of marrying again, as in that case there would have been nothing sinful in the "other purposes" so pointedly alluded to. If a man is free to take a wife, it does not follow that he must take the wife of his neighbour."*

Four further stories appeared on page 5. In one, *The Satirist* imagined the confrontation between Heaviside and Lardner (imagined, because Heaviside had not yet caught up with Lardner):

> *""Scoundrel!" quoth Heaviside, on coming up with Dr. Lardner, "I have been in pursuit of you for some days." "Well, sir," rejoined the Doctor, coolly, "one good turn deserves another. I have been in pursuit of your wife for some months.""*

And then, a little lower down:

> *"Mrs. Heaviside was generally considered, in the gay circles of Brighton, a very pretty wife. Hence the feeling entertained by Lardner, when he fixed his vampire eyes upon her, that she would make a beautiful mistress."*

The same page also contains this:

> *"Old Lady Cork says Mrs. Heaviside was a great fool to go to the Continent with Lardner, when she might have been incontinent with the Doctor at home. If all women acted so foolishly, half the husbands in high life would, in a very short time, be relieved of all matrimonial troubles!"*

Page 6 contained two further pieces.

In the next issue on Sunday 5 April 1840 *The Satirist* published these two witticisms:

> *"There is a whisper afloat in the circles of fashionable detraction, that, on the return home of an old friend of a nobleman—the son of a deceased law lord, he found his lady absent, and on inquiry, traced her to an inn a short distance from town, to which she had retired with the noble lord, in order to recruit after a long ride, or, as was more consistently argued, to read the account in the paper of the elopement of Dr. Lardner with Mrs. Heaviside."*

And, a little lower down:

> *"When Captain Heaviside presented himself to Dr. Lardner, the latter, it is said, was so astonished that he might have been knocked down with a feather. A white feather must here be alluded to, or the profligate Doctor would certainly have paid his respects to mother earth."*

On Sunday 12 April 1840 *The Satirist* wrote:

> *"Every person at all acquainted with the guilty parties, or knows Captain Heaviside, is astonished at the combined wickedness and folly of the female. It appears that Dr. Lardner had not been acquainted with the fallen woman for more than five weeks, had dined in her society only three times, and was not in the habit of seeing her but on occasions when her husband was present. "By drugs or witchcraft conjured to the effect" he must have possessed his victim's affections, and it is more than believed by the credulous – we, however, are not of the number – that he had recourse to animal magnetism, to effect the work of seduction … Mrs. Heaviside was, for we must speak of her as morally dead, the daughter of Colonel Spicer, a gallant old soldier. She is a woman of great personal beauty, and highly accomplished, being an excellent French, Italian, and English scholar. In her appearance she was inobtrusive and modest in the extreme; a woman apparently startled at anything bordering on levity of manner or mystery of expression, which makes it the more wonderful that she should have been won so*

soon and under circumstances altogether of so unaccountable a character."

It went on to report that "The guilty pair are in Paris." On another page it opined that:

"Dr. Lardner was induced by Mrs. Heaviside to select the French capital for their future residence, as being the best adapted for the "life of pleasure," which they hope to lead together. Paris is certainly the paradise of gay women."

On Sunday 19 April 1840 it reprised a previous joke:

"It is believed by some that the preference so discreditably evinced by Mrs. Heaviside for Dr. Lardner, in comparison with her lawful husband the Captain, arose from the high notion she had formed of the Doctor's capability, as a man of scientific attainments, of "getting the steam up!"

But by then the scandal had reached its denouement.

When Lardner and Mary Heaviside fled, first to London and then to Holland and France, Captain Heaviside pursued them, accompanied in the latter stages by Colonel Spicer, Mrs Heaviside's father. Heaviside caught up with the miscreants in Paris at the Hotel Trouchet (some reports give the spelling Tronchet) on Thursday 9 April 1840. Catching them in flagrante, the outraged Captain Heaviside subjected Lardner to a thrashing, which he feebly and unsuccessfully attempted to escape by crawling under a grand piano; his humiliation was complete when his wig came off as it became entangled in the pedals!

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The fullest accounts of all this are in the *London Morning Herald* of Friday 17 April and Monday 20 April 1840, the first derived from *The Times* of Monday 13 April and the second from the *Brighton Herald* of Saturday 18 April.

The *Morning Herald* of Friday 17 April 1840 recorded that:

"... that immediately on landing at Ostend Dr. Lardner and Mrs. Heaviside proceeded to Paris by Calais and St. Omer, and took lodgings in the rue Tronchet, where they lived as husband and wife. Captain Heaviside had followed them as far as St. Omer, but, there losing all trace of the fugitives, gave up the chase. The latter, nevertheless, took no measures to conceal themselves; indeed, so much the contrary, that Mrs. Heaviside opened a correspondence with her father, Colonel Spicer, who resides at Boulogne."

Describing Heaviside's attack on Lardner, the report continued:

"[Lardner] was felled by a blow of a heavy stick from Captain Heaviside, who continued to flog him as vigorously as deservedly. While this was proceeding, the desk of Dr. Lardner was opened by the invading party. All the papers it contained were seized by them and carried off, as well as Mrs. Heaviside, who endeavoured to induce a rescue by screaming loudly, and continued to do so until they reached the Hotel de l'Europe. There some sensation was created by the screams of the lady, but when the circumstances were stated to the persons about to interfere they desisted. The whole party left for Boulogne in the evening, with the exception of the captain, who remained in order to give Dr. Lardner an opportunity of calling him out, if he should so think proper. The captain left next day for Boulogne. Dr. Lardner is not yet declared entirely out of danger."

Concluding, the report commented:

"His just punishment will, probably, make him turn his attention in future from adultery to mechanics … I am assured that this matter will not come before the French tribunals."

The further report in the London Morning Herald of Monday 20 April 1840 is so remarkable as to merit even more extensive quotation:

"It will be seen, by accounts extracted from the London papers, that Dr. Dionysius Lardner has received that which he richly deserved from the hands of Captain Heaviside. Those accounts, we have the means of knowing, are generally correct; but we can add a few additional particulars, which may be interesting. After proceeding to Brussels from Ostend, without obtaining any clue of the parties, Captain Heaviside retraced his steps to Boulogne, where he received information which at once made him acquainted with the whereabout of the fugitives. In consequence of this information he proceeded directly to Paris, and on Thursday morning se'nnight [archaic: the space of seven nights and days, so here a week ago], accompanied by Colonel Spicer (Mrs. Heaviside's father), and attended by two servants, presented himself at the Hotel Trouchet, in the apartment where Dr. Lardner and Mrs. H. were just sitting down to breakfast. On the door being opened, Mrs. Heaviside recognised her father, who was the first of the party. Her ejaculations of terror and surprise alarmed the Doctor, who was sitting on the other side of the table, and whose position prevented him from seeing those who entered. With an instinctive dread of danger, however, and the fear natural to a guilty mind, he arose in alarm, and on seeing Captain Heaviside commenced exclaiming, "Oh Lord! oh Lord!" in a tone of the most abject supplication."

The report continues:

"As he rose from his chair, Captain Heaviside struck him a severe blow across his forehead, and then commenced a battery of well-directed blows on him. Uttering the most piteous cries the miserable wretch endeavoured to escape by a door at the end of the room, which however proved to be fastened. At the same end of the room a grand pianoforte was standing, and under this he next endeavoured to protect himself from the blows which now began to show their effect on his face and head. In crawling under the instrument he received the most terrible punishment on the upper part of his body, and in endeavouring to insinuate himself between the pedal and the wall lost his wig, which had been previously disarranged. The pianoforte, however, proved but small protection, for in his fright he crept to the lower part, and here turning on his back presented his bald pate as a full mark to his assailant. The punishment he received was dreadful, and we need scarcely say that he would have fallen a victim to the indignant fury of the person he has so deeply wronged had not those present interfered, fearful of the result. As it was, the poor wretch was dragged bleeding and senseless to another apartment, in the sight of his mistress, who had been a witness to the just punishment inflicted on her paramour. After the doctor had been removed, Captain Heaviside dragged his wig from under the pianoforte, and, seating himself in a chair, thrust it on the fire, and watched it gradually consume, at the same time hurraaing vigorously. The parties then left the hotel, Mrs. Heaviside being taken away in a coach by her father. The same day Captain Heaviside left Paris, and is now in London, whence we trust he will shortly return to Brighton."

The issue of *The Satirist* of Sunday 19 April 1840 contained two further reports of these events. One, on page 5, read as follows:

"Captain Heaviside having discovered, after much difficulty, the retreat of his wife and her paramour, proceeded to Paris, accompanied by the lady's father, Colonel Spicer. On arriving at the domicile of the guilty pair, the Captain and his companion, without the least ceremony, walked into the apartment where the culprits were at breakfast, and the Doctor in the very act of breaking an egg. The sight of the husband and father absolutely paralyzed the lady, who sat like a statue aghast and immoveable, while the Doctor was seized with a trembling fit, that rendered it doubtful whether he would need the hand of the angry husband to shake him to pieces. Captain Heaviside was not long in seizing his prey, but before inflicting on him the punishment which he so richly merited, he politely walked up to the Doctor and removed the spectacles from his nose. The Doctor made no kind of resistance to this preliminary step of aggression. This act of humanity performed, Heaviside began to lay about him, and in a very few minutes he had not only painted the face of

his opponent, so that the owner, had he looked in a glass, would not have been able to have traced his own features, but he belaboured him on sides and back so unmercifully, that he bellowed "murder" more lustily than coward and woman-seducing scoundrel ever did before. The Doctor's wig flew piecemeal in all directions, and Lardner, to screen himself from the blows of the angry Captain, crept under a piano, and at length piteously roared for mercy. After the Captain had bestowed upon him as severe a drubbing as he considered he had truly earned and was honestly entitled to, he paid on him the compliment of a few contemptuous epithets and departed."

It continued:

"During the time Heaviside was thrashing the Doctor, the father of the lady vi et armis carried his daughter to a carriage in waiting, and hurried her to his hotel. Paris was in an hour or two in a complete uproar, and a report speedily gained ground that one Englishman had beaten another to death, and for no other cause than the running away with his wife! The scene which ensued at the father's hotel may be more easily imagined than described. The dishonoured wife and mother hid her face from the gaze of father and husband. She offered nothing in extenuation of her offence, being but too sensible of her own impropriety. She felt that she had brought disgrace on herself and her family, that she had forfeited everything that rendered life endurable—the duty of children, the affection of parent and husband, the esteem of friends and the respect of the world. She ought, too, to feel that she was the victim of a scoundrel, who as much deserved the punishment of death as any culprit that ever graced the gibbet at the Old Bailey."

With a tone of satisfaction, the report concluded that:

"Conclusive evidence being now obtained of the guilt of the wife, proceedings for a divorce will be immediately commenced."

The other report, on page 7, was described as coming from its Paris correspondent. What relationship it had with reality, the reader must judge for themself. I quote it in full:

"Deeming it probable that you would like to have a full, true, and particular account of the denouement of this affair of Dr. Lardner and Mrs. Heaviside, reports of which, I perceive, are bruited about in the English journals, I shall pen for your especial use all the particulars I have been able to gather. When the Doctor, accompanied by the fair delinquent, left the Belgic territory, he directed his course to Paris, thinking that probably the spot of all places where folks engaged in "what men call gallantry—the gods, adultery," "most do congregate." So far, he was right, but the gallant Captain, by dint of following in close pursuit, got scent of his movements, and at length traced him to an hotel in the Rue Fronchet. Some of the papers state, but wrongly, that the parties were discovered in bed together; this is an error. They had been in bed, and were at breakfast when the worthy Captain, accompanied by the lady's father, rushed into the apartment. It were in vain to describe the consternation of the pair at the apparition of their visitors. The father directed his attention, and some bitter reproaches to boot, to the lady, while the Captain addressed himself to the Doctor. Hard words followed first, and harder blows afterwards. It is fair to state, however, that the Captain fairly called upon the "man of science" to defend himself previous to belabouring him in right earnest. The Doctor took his drubbing with Christian-like resignation; whether his pluck failed him, or whether, being, as they say, a clergyman, he felt himself under a vow not to fight, is doubtful; certain it is that he never attempted to return the blows—howling only a little louder than usual when the blows fell uncommonly thick. Servants, waiters, &c., all came to enjoy the fun, never once attempting to interfere when they learnt the Doctor's manifold sins. He was consequently thrashed to his heart's content, and more; in truth, my dear Sat, if all seducing Lotharios could be made certain of receiving so thorough a "welting," the sin of adultery would stand a chance of diminution, and you, my good fellow, would lack subjects of satire wherewith to fill your columns."

The report continued:

"The following is the dialogue that passed previous to the drubbing, as well as it could be collected amidst the din and hurley-burley of the conflict; — THE CAPTAIN (shaking his cane at Dionysius)—Doctor, you are a damned scoundrel. DOCTOR—Very likely,

Captain; sometimes I think I am myself. But, as a philosopher, let me ask what is the use of your coming here? You see (pointing to Mrs. Heaviside, who was struggling to get away from her father) that you are not wanted. CAPTAIN—I come to give you your deserts, villain, before I have done with you. DOCTOR—Much obliged to you, Captain; but I believe I have got more than my deserts already. I candidly admit I never deserved so fine a woman as Mrs. Heaviside. CAPTAIN—Insulting rascal! Why, you ugly old sinner, what could put it in your head to seduce my wife? What the devil (distractedly) could induce her "to leave this fair mountain (placing his hands to his heavy-sides) to batten on that moor?" DOCTOR (looking very black)—Because she liked me best, that's all. I suppose the lady found something about me that she could not in you, and consequently, thought she had a right to assert her sex's privilege of bestowing a preference. You may blame her, but 'pon my soul I can't. CAPTAIN—By G—d, Doctor, you are a more thorough rascal than I took you for. You shall either fight me, or have a god [sic] licking—choose which. DOCTOR—That is what I do not choose. (After a pause) I don't fight—so flog away. CAPTAIN—I will, so help me. We'll soon see, scoundrel, whether your hide is as hard and insensible as your conscience. You may rob me of my wife, d—d villain as you are, but you shall not rob me of the pleasure of breaking this cane across your shoulders. Here followed a heavy shower of blows, the Doctor jumping about with infinite agility, the lady shrieking murder with great power of voice—the smashing of crockery, the howls of the discomfited Doctor, the execrations of the enraged Captain, and the perpetual exhortations to "give it him" of Mrs. Heaviside's father—altogether forming a delicious scene of uproar and confusion, which only ended when the Captain's arm was wearied and the Doctor half dead. So endeth "fytte" the first of this lugubrious farce."

Given that the defence of crime passionnel was still available in France, Lardner was perhaps lucky to escape with life and limbs intact and to have received no more than a thrashing from the outraged Heaviside. Lawrence Stone (Stone, 240-241) gives us accounts of the "ferocious passion" sometimes aroused in the 18th century in men who had discovered their wife, or curiously more usually their mistress, *in flagrante*. In 1749, Sir Francis Blake Delaval on discovering her in bed with an Italian eunuch, horse-whipped his German mistress and then sodomised her lover. In 1751, a man in Newport who discovered his wife *in flagrante* in a barn with her lover castrated him. The same punishment was meted out in 1779 by Lord Clanwilliam when he discovered his "favourite mistress" in bed with a younger man; her lover died the next day of his injuries.

Notwithstanding the denouement in Paris, *The Satirist* pursued its campaign of mockery with unrelenting vigour. The issue of Sunday 26 April 1840 contained these two witticisms:

"It was an act of humanity that led Captain Heaviside to remove the spectacles from the nose of Dr. Lardner, before he commenced beating him. The Doctor, it is well known, has not good eyes, and in no transaction of his life has he appeared so short-sighted as in his recent disgraceful elopement with Mrs. Heaviside."

"Dr. Lardner is said to have won the heart of Mrs. Heaviside by no master stroke of finesse, but by the ability he displayed in his lectures on chemise-try!"

Also published were two love-letters from Lardner to his mistress, in the first of which he signed off "Believe me, ever adorable Mrs, H., Your devoted slave and lover, Dionysius."

The issue of Sunday 3 May 1840 reported, at Lardner's expense, a splendid example of Irish wit:

"Dr. Lardner's Christian name is properly Dennis, and it was while paying his addresses to Miss Cecilia Flood, the lady from whom he was last year divorced, that he changed it to Dionysius, and it was brought about by the lady complaining of its vulgarity, which the Doctor was but too sensible of, and accordingly effected an exchange without the concurrence of godfather or godmother. Lardner, in about three months after his union with his "beloved Cecily," began to display the authority of a husband, and chastise her with something more than the "valour of his tongue." The lady's father, who was in practice at the Irish Bar, being asked one day by a brother barrister

how long it was since Lardner first assumed the name of Dionysius, replied with much off-hand wit, "Ever since he has become the tyrant of Cecily.""

This classical allusion was to Dionysius I or Dionysius the Elder (c.432-367 BC), the Greek tyrant of Syracuse in Sicily.

And so it went on, week after week for the next five issues (10, 17, 24 and 31 May and 7 June 1840). Its interest in Lardner revived with the issue of *The Satirist* of Sunday 2 August 1840.

Being unable to induce Mary to return to him, Heaviside had turned to the law for relief, finally obtaining in 1845 a Parliamentary divorce: see the report, *In the Matter of HEAVISIDE'S DIVORCE BILL* (1845) 12 Cl & F 333.

Heaviside's first step was to sue Lardner in *crim con*. The case came on for trial at Lewes Assizes at 9am on Saturday 1 August 1840 before Gurney B and a jury. Heaviside was represented by Thesiger QC (later Lord Chelmsford LC), Platt QC (later Platt B: he succeeded Gurney B on the latter's retirement) and Petersdorff. Lardner, who prudently absented himself abroad, first in Paris and then in the United States, in order to make himself judgment-proof, was represented by Sergeant Channell (later Channell B) and Clarkson. It must be remembered that at that time Mrs Heaviside was not permitted to be a party, so the only parties were Heaviside and Lardner, neither of whom at that time was permitted to give evidence: see (2021) 81 Family Affairs 73, 80.

Shortly before 4pm the jury came back with a verdict, awarding Heaviside £8,000 (some £650,000 in today's money). He had sought £10,000 but the £8,000 as fixed by the jury was still very large and, indeed, towards the top end of the scale of contemporaneous jury awards (Stone, 430, Table 9.3).

As the report of the later Parliamentary proceedings records:

"Mr. Heaviside brought an action against him for criminal conversation, and obtained a verdict, at the next ensuing summer assizes, for £8000 damages, for which, and for the costs, judgment was duty entered up, but not executed in consequence of Dr. Lardner having left the country."

As may be imagined, there was enormous newspaper coverage of the trial, many of the reports being of very great length. The report in the *Morning Post* of Monday 3 August 1840 covered more than four columns of densely printed broadsheet. The very full report in the *Annual Register for 1840* extended over many pages (289-304).

The Satirist seems to have missed the bus. In its issue of Sunday 2 August 1840 it informed its readers that the trial, which of course had already taken place, was due to start on the Monday. It did

Lord Chelmsford LC

He obtained an introduction to the plaintiff, and, unhappily for him, was received as a visitor at his house. There was nothing in his conduct, his age, or his appearance, to induce the suspicion that he was a dangerous visitor—nothing that would lead the most sceptical to believe that when he entered the doors of peace and the dwelling of happiness he was the viper that would destroy everything that was valuable within, and turn the plaintiff's home into an abode of wretchedness and of desolation.

not report the trial, though it did keep up a desultory mockery of Lardner for the next few weeks.

The report in the *Morning Post* set the scene:

> *"This cause, which has created so much interest for several months past among the literary and fashionable circles, came on for trial before Mr. Baron Gurney and a special jury, composed of the resident gentry of the county of Sussex, at the Town Hall, Lewes, on Saturday. The most intense interest was taken in the proceedings, and long before nine o'clock, the hour at which the trial was appointed to take place, the doors of the County Hall were besieged with an anxious crowd, and as soon as the public were admitted every corner of the Nisi Prius Court was inconveniently filled. A number of ladies, and among them the distinguished persons who were called as witnesses for the plaintiff, sat upon the bench, in addition to several of the leading magistrates."*

After Petersdorff had opened the pleadings, Thesiger addressed the jury. His opening speech as reported by the *Morning Post* was a fine example of powerful contemporary advocacy:

> *"Mr. Thesiger then observed that he rose to discharge the very painful duty of detailing to them the circumstances under winch the plaintiff was compelled to seek, in a public Court of Justice that poor and miserable compensation which the laws of this country afforded in the shape of pecuniary damages. He could not enter into this case without being nearly overcome with strong feelings for the bitterness with which his unfortunate client already had and would have to endure throughout the remainder of his life. The defendant was a person who had arrived at that advanced period of life when the passions ordinarily became subservient to the judgment, and when the experience of the world pleaded anything but in mitigation of the aggravated conduct of which he had been guilty. The defendant possessed a scientific knowledge, and was endowed with superior literary attainments; and it would appear by the history of this painful cause that he had employed his combined talent to effect the seduction of this weak and confiding woman; he had rendered her an outcast from the society she was calculated to adorn, and he had induced her to quit a kind and generous husband, and a home which threw around her everything that conspired to her happiness. The plaintiff was compelled through the misconduct of the defendant to publish his dishonour to the world in a Court of Justice, and he was obliged to submit to the degradation asking for pecuniary damages for an injury which he had sustained, and which no amount in money could repair."*

Having sketched out the matrimonial history and painted a picture of devoted domestic harmony, Thesiger continued:

> *"If in this life they could expect to find happiness, the jury would imagine that it would be found in such a home as this; but in an evil hour the defendant made his appearance among them. He came to Brighton about some literary pursuit, and his reputation as a man of science was a passport into society. He obtained an introduction to the plaintiff, and, unhappily for him, was received as a visitor at his house. There was nothing in his conduct, his age, or his appearance, to induce the suspicion that he was a dangerous visitor—nothing that would lead the most sceptical to believe that when he entered the doors of peace and the dwelling of happiness he was the viper that would destroy everything that was valuable within, and turn the plaintiff's home into an abode of wretchedness and of desolation."*

He went on:

"They knew there were many approaches to the female heart. A woman who possessed no inordinate share of talent might be misled and decoyed from the path of virtue by a person of superior acquirements, who, for sinister purposes, paid deference to her in order that, when her vanity overcame her reason, he might, serpent-like, draw his meshes around his victim, and make her irretrievably lost. These were the dark and insidious arts that were practised by the defendant, and the jury would be able to trace every web that was designedly thrown around the plaintiff's wife until she was inextricably surrounded."

He then explained how Mrs Heaviside had left home on 13 March 1840 while her husband was away in London, how she and Lardner had shared a room that night at the Adelaide Hotel, at London-bridge, taking the steamship to Ostend the following morning, and how Heaviside had eventually caught up with them "living at the Rue Tronchet, at Paris, as man and wife." He went on:

"Stung with indignation and horror the plaintiff, in the first impulse of his disgust, inflicted a well-merited chastisement upon the defendant. He (Mr Thesiger) could not from his heart blame the plaintiff for the course he had taken, for they all knew there were times when, despite of everything, their own natural feelings would vindicate their own natural rights, and when they could not wait for the slow process of the law. He (Mr. Thesiger) did not, therefore, believe that this circumstance would have any effect upon their judgment, or that they would entertain it for one moment in the reduction to any material extent of the damages they would award to the plaintiff. If the defendant had brought an action for assault against this deeply-injured husband, he (Mr. Thesiger) would ask them what amount of damages the defendant would have recovered? and after having answered this question they might then deduct exactly so much from the damages which Captain Heaviside this day sought to recover."

Thesiger then explained how the drafts of two letters, one from Mrs Heaviside to her husband dated Sunday 10 March 1840 and the other to her father dated 4 April 1840, both amended in Lardner's hand, had been found in the desk at Paris. Thesiger suggested that:

"the jury … would be able to trace in every line the dictation of the defendant. They were not the outpourings of a person with a troubled mind, but they were evidently the calm, deliberate, and calculating reasonings of a mechanical philosopher."

The letters were then read out in full to the jury and can have left absolutely no doubt as to her and Lardner's guilt. They are far too long to quote here in full, but the letter to Heaviside included the following:

"What I have done I have done openly, and have not added the meanness of falsehood and deception to the sin of infidelity … by this formal confession I place in your hand. the power of releasing yourself from the tie which binds me to you, and of preserving the rights of our children from the possible consequences of my act … the person to whom l am now united … is Dr Lardner. Neither he nor myself desire to offer any extenuation, much less defence, of our conduct."

The letter to her father contained this extraordinary passage:

"You say that a special clause will be introduced into the Act of Divorce to prevent my marriage; you must, in common with every well-informed person, be aware that such a prohibition is not customary; and, if it were introduced in this case, it must be done on some special grounds, or through the exercise of some special influence. No special grounds exist for such a prohibition; and if any sinister influence should be exerted to deprive me of the means of rectifying my position, and receiving at the altar the vows of him for whose sake I have made so terrible a sacrifice, I have no refuge, except in the consolation arising from the reflection that the state in which he and I will be compelled to live is one which we should use every means in our power to avoid. We feel that we are already as strongly bound to each other by every tie for which we entertain respect as any marriage could make us, and we look forward to that ceremony hereafter. It is not for the sake of ourselves, but with a view to the opinion of the world, and to the interests of those to whom we may give birth. It is therefore with those feelings that I trust and hope you will yourself after more serious

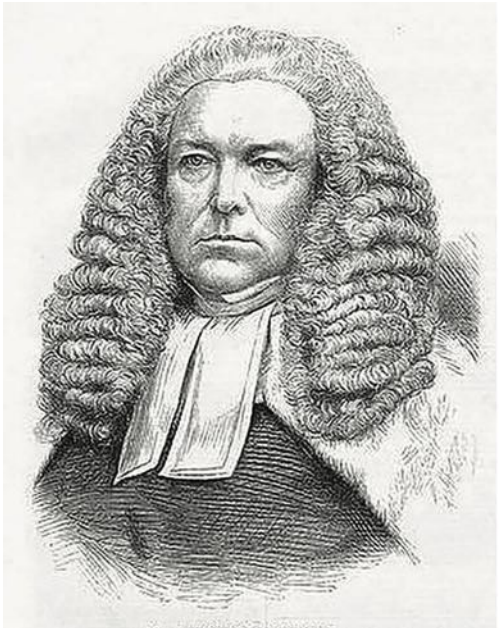
and deliberate consideration than you have been able to bestow on this painful subject, use your influence to prevent any such unusual and mischievous restriction as that to which you refer."

Thesiger was brutal in his next observation to the jury:

"They would observe that none of the letters threw any obstacle in the way of the plaintiff to prevent him from obtaining a divorce, and he Mr. (Thesiger) was entitled to say from this fact alone that the motives that influenced the defendant in pursuing the immoral course he had done was the desire to obtain at any cost, and under any circumstances, however reprehensible, base and filthy lucre. The plaintiff's wife, as he had stated, was entitled at the death of her father to 13,000£; but the defendant could not grasp the money unless the plaintiff obtained a divorce, and thereby enabled the defendant to marry her. This, to his (Mr. Thesiger's) mind, was evidence most clearly showing that the most corrupt, sordid, and mercenary motives influenced the defendant."

Continuing to his exordium, Thesiger said:

"It was unnecessary for him to make a single remark upon the conduct of the unhappy lady. If the grave had closed upon her, heavy indeed would that calamity have been: but the plaintiff would have borne it with resignation. Tears would have followed so heavy a loss, but he would have had the consolation of entertaining a hope that the object of his care and of his affection had passed into a better world, and he would with resignation have bowed to that rod by which they were at all times stricken by God, and would have cherished the fond hope that at some distant period they would have met in a happier place. But where, as in this case, their joys were nipped in the blossom by the withering acts of the adulterer—where their feelings were wounded in the most poignant manner, and those feelings of bitterness and of anguish remained — where every thought had a scorpion's sting, and every feeling was madness— where the pity of the world was turned into scorn, and the dishonour of the adulterer still remained and rankled in the breast, and no time could obliterate it — where, as in this case, all this ay, more than this, the plaintiff had sustained from the defendant, was it not a mockery to the feelings of insulted honour to be obliged to resort to the contemptible and paltry course of asking for pecuniary compensation?"



Channell B

After briefly addressing the jury as to the basis upon damages might be assessed, he concluded his opening speech with this:

"Captain Heaviside appeared before them wretched and heart-broken, with every joy shattered and annihilated. The plaintiff's children, at a time when they most required it, were deprived of the protection of a mother, and that tender care which a mother could alone afford. If ever there was a case in which exemplary damages ought to be given it was the present, and he implored the jury to give the plaintiff every farthing that he asked in his declaration."

The rest of the trial was something of an anti-climax. Various witnesses were called on behalf of Heaviside: two domestic servants, the chambermaid and the proprietor of the Adelaide Hotel, and various friends, including Colonel Spicer, who "deposed to the plaintiff and his wife having lived on the most kind and affectionate terms during their residence at Brighton."

Thesiger closed his case and Channell rose to

address the jury. He was, he said, fearful of the effect Thesiger's eloquence must have had upon the jury and "therefore … entreated them to consider the matter dispassionately, and to deal justly and mercifully between the parties". It was, he said, impossible to deny that the plaintiff's wife had eloped with the defendant and "admitted that to the fullest extent." The plaintiff was entitled to a verdict, the only question being the amount of damages.

> *"That the plaintiff was entitled to compensation in damages for the injury that had been done him he did not deny, but he did confidently state that the circumstances of the case were not such as to require the enormous amount of damages that had been demanded by his Learned Friend."*

He was ready to admit that Heaviside had treated his wife with kindness, "there could be no complaint against him on that score", but he begged the jury to recollect that this was not a case where long friendship had been abused – the elopement had evidently sprung from some sudden impulse – and it could not be said that there had been a long and systematic plan of seduction pursued by the defendant, this being the most serious portion of the charge that was made against him. He went on:

> *"When he considered the lady's age, the circumstances under which she was placed, and the fact that after an intercourse of only three months she had thought fit to elope from the house of her husband with the defendant, he could not help thinking that there was something more in the case than met the eye of the jury, and that there must have been some reason in her own breast for inducing her to quit the protection of her husband and throw herself into the arm of a comparative stranger."*

All idea of any deliberate plan of seduction was entirely negatived by the circumstances. Although Dr Lardner had eloped with Mrs. Heaviside, there was no proof that this result arose from any deliberate plan of seduction on his part.

> *"He must also submit to the jury that they could not believe, from the circumstances that that complete and perfect state of happiness existed between Mr. and Mrs. Heaviside that had been spoken to by the witnesses. If that state of happiness had really existed down to the moment of Dr. Lardner visiting the family could they believe that a lady of this age could so suddenly have forgotten that affection and the duty she owed to her husband, and to her family, by giving herself up to a stranger?"*

The jury ought to repudiate altogether the imputation that the defendant had made use of any arts or that any deliberate plan was executed by him to seduce the affections of the plaintiff's wife.

In relation to the letters, and the allegation that they had been concocted and dictated by the defendant, that ought not to weigh with the jury; "although under the peculiar circumstances of the case the defendant might perhaps have known of the letters being written, yet … they must be considered as exposing the genuine feelings of the heart of the unhappy lady." Repeating that there was not, therefore, the slightest ground for imputing to the defendant that he had made use of any arts and practices to seduce the wife of the plaintiff, he said that the jury were called upon to do justice to the parties, but he hoped that they would not allow their minds to be excited, and that they would not give an amount of damages that would tend to the utter ruin and destruction of the defendant, who had no other resource than the talents he possessed to provide a subsistence.

Having, as the report put it, proceeded at some length to argue these points, Channell concluded by expressing a hope that the jury would take into consideration all the circumstances of the ease, and that they would give "such damages as would vindicate the honour and character of the plaintiff without entailing utter ruin upon the defendant."

Gurney B, in the course of summing up,

> *"observed that one point that was argued in favour of the defendant was, that he was chastised by the plaintiff, and, if he had put the defendant's life in danger, it certainly would go in mitigation of damages; but, under*

the peculiar circumstances of this case, the conduct of the plaintiff in this respect he (the Learned Judge) should leave entirely for their consideration."

He went on to direct the jury:

"that the jury were not to estimate the damages according to the pecuniary resources of the defendant, but in reference to the injury the plaintiff had sustained. He had lost an affectionate wife, and his children were deprived of the instructions and example of a mother; and the plaintiff could not look his children in the face for the future without pain and anguish."

The jury then retired and, having returned to ask various questions about Mrs Heaviside's financial expectations, retired again and eventually brought in their verdict.

In its report of the trial, the *Morning Post* printed an important letter which had not been referred to during the proceedings. Dated 6 April 1840 – that is, *before* Heaviside had caught up with the fleeing couple – it was written to Lardner in Paris by his solicitor, Henry Karslake of Regent Street (he was the father of Sir John Karslake QC, the future Law Officer). Its significance for present purposes is that Karslake records having discussed matters with Heaviside's representative, Mr Beavan (I assume this was Charles Beavan, the barrister and noted law reporter), who told him that although he (Beavan) had not as yet received any instructions to issue a writ "he was preparing to proceed in the Ecclesiastical Court."

From the city of dreaming spires and the home of lost causes there appeared in the *Oxford University and City Herald* on Saturday 15 August 1840 this remarkable denunciation of the guilty pair and of "modern Liberalism", identified as the root of the matter:

"The trial at Lewes, in which Captain Heaviside was plaintiff and Doctor Lardner defendant, is too important to be passed over in silence. It furnishes us with a practical illustration of the doctrines of modern Liberalism, and of the effects which must certainly spring from those doctrines whenever they are called into active operation. Of the wretched woman we shall say nothing more than that her conduct supplies striking example of the inutility of all the forms of society, and of all the ties dearest to the human heart, to preserve virtue, or even decency of demeanour, when religious principle is wanting. Without this support, the best intentions are valueless, and the strongest resolutions feeble. They serve to delude with an idea of strength, till the hour of temptation and trial arrives, but then, conquered by stronger emotions, they desert the heart that trusted in them, and leave it defenceless to the passionate madness of guilt. But Ductor Lardner must not escape so lightly. His conduct was marked by every circumstance which could aggravate an action at all times sufficiently base and dishonourable – by deliberate treachery, calculating avarice, and the meanest duplicity. Introduced by a fond husband to the mother of his children, he took advantage of the respect which his reputation inspired to abuse that husband's confidence, and of his subtle eloquence to poison the mind of the wife, and render her familiar with the idea of vice. We are wholly at a loss to account for the absolute ascendancy so speedily acquired over her; the caprice of a weak-minded woman is proverbial, and she will often lavish her favours on the most worthless things in creation, for the mere sake of showing how little she is entitled to be regarded as a rational creature. The caution displayed by the Doctor was worthy of "a modern philosopher;" he took care that no suspicion should attach to him; gave the lady her instructions, which she exactly followed; and when the husband returned to his deserted home, it does not appear that he had the slightest suspicion of who the villain was who had blasted his domestic happiness."

Referring to the letters written by Mrs Heaviside, though "dictated by this contemptible coxcomb", the article continued:

"If anything could increase our abhorrence of his conduct, it would certainly be these letters. In them he induces his wretched victim to throw off the last restraints of decency, to glory in her shame, and to declare that she had no more respect for the ordinances of God than for the institution of man; and he gratifies his own miserable vanity by representing himself as a being whose fascinations it was impossible to resist."

Having quoted from these writings at some length, the article concluded:

> *"Such was the style in which this miserable hypocrite induced his yet more miserable victim to write to the husband whose peace she had destroyed, and to the father whose name she had stained, and whose years of declining life she had in all probability shortened. We see the mind of the "Liberal" in every line. The jury marked their abhorrence of the guilt of the criminal by casting him in 8,000£ damages. The whole of the circumstances connected with this revolting affair are now before the public. It Is unquestionably one of the most disgraceful exposures ever made in a court of justice. The age, station, and experience of the parties leave them wholly inexcusable; while their open defiance of the laws of God and man shows how low the human heart may be sunk in depravity when the restraining influences of religion are removed."*

It was indeed, to the laws of God that Heaviside now turned for, having obtained his judgment from the secular court, he immediately followed it up with proceedings in the London Consistory Court, where he obtained a definitive sentence of divorce a *mensa et thoro* on 3 March 1841. This time the newspapers said little. On 6 March 1841 the *Newcastle Journal* reported that:

> *"Sentence of separation and divorce was pronounced in the Consistory Court, London, on Wednesday, by Dr. Lushington, between Captain Heaviside, and Mary, his wife, who eloped with Dr. Lardner, and is now in America with that heartless vagabond."*

Typical of those that chose to mention it at all was this report in the *Leicester Journal* of 19 March 1841:

> *"On Wednesday week Captain Heaviside obtained a fiat of divorce against his wife, who recently eloped with Dr. Lardner; there was no opposition … The publishers of the "Cabinet Cyclopedia" have found it necessary to alter the title page of that work, in consequence of the unpopularity attached to the name of Dr. Lardner."*

Eventually, Heaviside petitioned Parliament.

"Sentence of separation and divorce was pronounced in the Consistory Court, London, on Wednesday, by Dr. Lushington, between Captain Heaviside, and Mary, his wife, who eloped with Dr. Lardner, and is now in America with that heartless vagabond."

The second reading of Heaviside's Divorce Bill was on 17 June 1845. The law report explains the delay:

> *"Mr. Heaviside also took immediate proceedings against his wife in the Ecclesiastical Court, and obtained a definitive sentence of divorce a mensa et thoro, but took no steps to sue for a divorce in Parliament until the present month (June, 1845).*
>
> *The reason given for this delay by the counsel was, that Mr. Heaviside, having heard that his wife and Dr. Lardner had gone to America in the beginning of the year 1841, and believing that they intended to reside there permanently, did not think it necessary to sue for a parliamentary divorce ; but now finding that they had arrived in France from America, and were within reach of process, and apprehending also that they might come to England, he was induced, for the protection of himself and his legitimate children against a spurious issue, to apply for the divorce.*
>
> *The reason given for the delay by one of the witnesses (uncle to the lady, and to Mr. Heaviside also) was, that "Mr. Heaviside's mind was so upset, he was so completely beaten down with his misfortunes, that he had not resolution to think of anything, or to do anything, for years; and it was not till the witness urged him to appeal to this House that he would hear of it at all, and then witness put it upon the footing of his children growing up and coming out in life, and that it would be a great misfortune to them to have a mother so situated, and that the better plan would be to obtain a divorce if he could."*
>
> *It was from this witness that Mr. Heaviside learned that his wife and Dr. Lardner had arrived from America at Havre, and thence went to Paris on the 7th of this instant month*

(June, 1845). She was then served with the order of the House, and with a copy of the bill."

The report continues:

"After a lengthened cross-examination of the witness by several Peers as to the cause of delay, and answers by him to the effect above stated, their Lordships were satisfied. The bill was read a second time, and afterwards passed."

It is not perhaps surprising that some may have found it difficult to believe that this gallant Captain of Dragoons, whose immediate responses to Lardner's misconduct had been to pursue him to Paris and flog him and then to sue him successfully through both the civil and the ecclesiastical courts, should then have found himself "so upset, … so completely beaten down with his misfortunes, that he had not resolution to think of anything, or to do anything, for years." It is noteworthy that, little more than a month after the *crim con* trial on 1 August 1840, we find Heaviside (Turner, 161) playing an active role at an important meeting of the London and Brighton company on 5 September 1840.

We are told that, amongst the authorities cited by Heaviside's junior counsel, Charles Beavan, in relation to the issue of delay was Lardner's own case from 1839.

The headnote to the law report explains the basis for the decision:

"A husband, immediately after his wife's elopement, brought an action and obtained a verdict for damages against the adulterer, and also proceeded against the wife in the Ecclesiastical Court, and obtained a divorce there, but did not for five years from the elopement apply for a divorce in Parliament.

The delay was held to be sufficiently accounted for by the absence of the wife in America, and by the inability of the husband, in consequence of his affliction, to attend to any business."

There was significant coverage of this in the newspapers, but their reports add nothing of substance to what appears in the law report.

Having obtained his divorce a *menso et thoro* on 3 March 1841, Heaviside's marriage was dissolved by statute on 31 July 1845. We are told by his biographer that Lardner and Mary Heaviside married, in Paris, on 2 August 1846; she also records that they had already married in Philadelphia by 1843 and that by 1845 had had two daughters. The couple seem to have lived happily, mainly in Paris, until Lardner's death, in Naples, in 1859. Mary died in 1891.

We are left to puzzle just why Mary Heaviside decided to leave her husband, against whom no bad word was ever said, to elope with a man whom she had known for only four months. Channell's submissions to the jury seem to have reflected a real and not a merely forensic puzzlement. Perhaps Thesiger came closest when he declaimed that Lardner had used his "superior literary attainments" and "superior acquirements" to overcome her reason by appealing to her vanity. And what of Lardner? By all accounts, Mary Heaviside was an extremely attractive woman, who moreover had access, potentially, to very considerable money. His biographer is probably right to suggest that it was such motives that took Lardner to Brighton in the first place. His terrible mistake was to find the solution to his needs in a woman who was already married to another man.

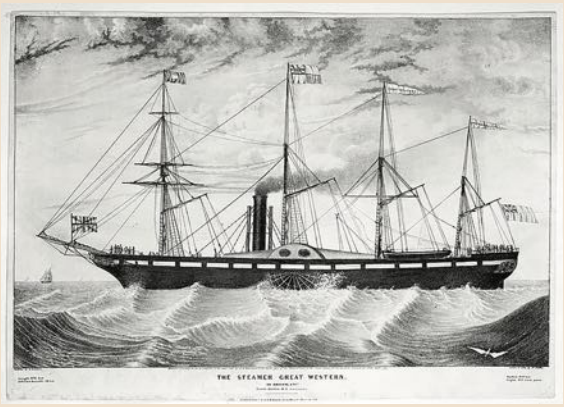
Box Tunnel West Portal

A coloured copy of the famous lithograph by J C Bourne published in his The History and Description of the Great Western Railway (1846) contrasting the timeless rural landscape above the tunnel – the farm labourers with their hay wagon in the field – with the modern technology below.

A Broad Gauge locomotive, probably of the Fire Fly class (a modern replica of Fire Fly runs at the Great Western Society's Didcot Railway Centre), bursts out of Box Tunnel, passing one of Brunel's 'disc and crossbar' signals with adjacent fish-tail caution board (examples and modern replicas can be seen at Swindon's Steam Museum and at Didcot): they are showing 'Caution: Slacken Speed' for a train entering the tunnel.

Note the railway policeman in top hat and tailcoat, standing by his hut, giving the 'All Right' hand signal to the driver. Railway policemen, the ancestors of the present-day British Transport Police, had been employed from the earliest days by the railway companies, including the Great Western Railway: the Liverpool and Manchester Railway, the world's first modern railway, had employed policemen ever since its opening in 1830. They were usually sworn in as special constables (from 1831 in accordance with the Special Constables Act 1831) and in the early days their responsibilities included acting as signalmen: hence Bobby as the long-lived railway slang for a signalman.

Note also the milepost marking the distance from Paddington; mileposts placed every quarter mile were a statutory requirement under section 94 of the Railways Clauses Consolidation Act 1845.



SS Great Western

Replica of GWR North Star

The Legend of the Box Tunnel

Sir James Munby

There is a long-lived legend that the rising sun shines through Box Tunnel on Brunel's birthday, 9 April, and that this is not chance but deliberate design. Even today, it seems, the matter has not been put finally to rest. The evidence is partly theoretical, partly based on actual observations, the latter made difficult by the poor weather which often obscures the sun at the critical moment and (at least in the days of steam) by the lingering presence of smoke in the tunnel.

There is also the astronomical problem, explained by Peter Maggs in his important 2016 article (Peter Maggs, Genealogists' Magazine, December 2016, 151, *Isambard's Gift*):

> *"Finally there is the problem of the Gregorian calendar and the leap-years. The azimuthal or compass bearing of the rising sun on any given date drifts south by around half a degree over a four year cycle to be reset by the leap-year, except that the reset slightly overcompensates, causing the average position to then drift north by a little more than half a degree over a period of 100 years. This drift is itself reset every 400 years as determined by the Gregorian cycle of century leap years (1800 was not a leap year, 1900 was not a leap year, 2000 was a leap year). Thus the rising sun, itself half a degree in diameter as seen from Earth, will vary in position on a particular date by as much as that diameter from year to year."*

There is no doubt that one can see though the tunnel from one end to the other: it is absolutely straight and falls on a constant gradient of 1:100. The question is whether the sun ever shines though it from one end to the other and, if so, when.

The tunnel opened on 30 June 1841. On 16 April 1842 the *Salisbury and Wiltshire Gazette* reproduced a story from the *Devizes Gazette*:

> *"The Box Tunnel on Saturday last [9 April] presented a most splendid, though singular experience, the sun shining directly through it, and giving the walls a brilliancy, 'as though the whole tunnel had been gilt ...'"*

On 4 May 1844, the *Western Times* quoted William Glennie, one of Brunel's assistants, who had been in overall charge of the construction of the Box Tunnel:

> *"Mr Glennie ... informs us that the sun shines through [Box] tunnel at rising, on April 9 and September 3."*

Writing in 1927, E T MacDermot, in his *History of the Great Western Railway*, 1927, Vol I Part I, 133, said:

> *"When it is clear of smoke one can see through from either end, and it is said that on or about the 21st June the sun is visible from the west end before it rises over Box Hill."*

Where MacDermot got this date from is not disclosed. Perhaps it was simply an error, for in the revised edition of 1964 (E T MacDermot (revised by C R Clinker), History of the Great Western Railway, 1964), Vol I, 67) the same passage appears but with the date given, without explanation for the change, as "on or about 9th April." Or did it perhaps reflect some other version of the legend, linking the phenomenon at Box, like the well-known phenomenon at Stonehenge, with the Summer Solstice?

In 1985 mathematical analyses of the problem were published both by Martin Barnes on 4 April in the *New Civil Engineer*, and by C P Atkins in October in the Journal of the *British Astronomical Association* (vol. 95, no. 6, 260, *Box Railway Tunnel and I. K. Brunei's Birthday: A Theoretical Investigation*). Both agreed that the phenomenon does occur, but two or three days earlier than Brunel's birthday, on 6 and 7 April.

Writing in 1991, Adrian Vaughan in his

Isambard Kingdom Brunel: Engineering Knight-Errant, 1991, 140-141, recorded an account by an unidentified observer who, having calculated that the phenomenon would occur on days varying between 15, 16, 17 and 18 April (because of the slight discrepancy between the calendar and the movement of the sun), saw the sun through the tunnel between 6.37 and 6.38 on 15 April 1968.

In 2002, Angus Buchanan in his *Brunel: The Life and Times of Isambard Kingdom Brunel*, 2002, 226, 269, reported calculations by a colleague that the alignment on 9 April would permit the sun to be seen through the tunnel soon after dawn on a fine day.

The 2016 article by Maggs is very important, not least because he sets out the relevant arguments very clearly and illustrates his conclusions with detailed computer-generated diagrams. So far as a layman can judge, his arguments are compelling. His conclusions are clear, and surprising.

His Figure 1 illustrates *Sunrise at Box Tunnel in the 1830s on Brunel's birthday*. He explains:

> *"The figure shows the far portal of Box Tunnel as it would have been observed by a person of Brunel's stature standing at the western entrance looking east shortly after sunrise on 9 April. The position of the sun close to the tunnel is shown for the years 1831-1834, superimposed on to the same chart. The dotted line shows the track of the rising sun during the year of 'closest approach', 1831, although during the years 1835, 1839, 1843 etc., the sun would have been in a similar position. The effect of the leap-year cycle is clearly visible."*

Maggs points out that the tunnel was constructed between 1836 and 1841; his choice of years reflects the period when Brunel was designing the tunnel. He continues:

> *"Since the positions of the sun and tunnel do not overlap, the disappointing conclusion is that the sun does not shine through the Box Tunnel on the morning of Isambard Kingdom Brunel's birthday. But the fact that it very nearly does, makes clear what gave rise to the legend … But this is not the end of the story."*

His Figure 2, prepared in the same way as Figure 1, illustrates the position of the sun for the years 1831-1834 on 6 April, the birthday of Brunel's elder sister, Emma Joan Brunel. It shows that the sun shone through the tunnel on April 6 in 1832, 1833 and 1834. Maggs concludes:

> *"It can now be stated with some confidence that on three years out of four in the leap-year cycle in the 1830s, the morning sunrise, weather permitting, on 6 April, the birthday of Emma Joan Brunel, shone right through the great Box Tunnel on the Great Western Railway. Whether Isambard intended this or it was just a happy accident will be subject to endless speculation … After all the press reports, claims and counter-claims, mathematical analyses, sightings … it turns out that it is the birthday of … Emma … the least exalted member of the Brunel clan, that is forever commemorated by the spectacular alignment of the sun with one of the most enduring symbols of nineteenth-century railway engineering."*

He adds this Note:

> *"Because of the slow drift in position due to the leap years, the years 2012 and 2013 show 100% penetration of the tunnel on Emma Joan Brunel's birthday, with partial illumination in 2014 and 2015. This pattern will be repeated every four years for a long time to come."*

On 10 April 2017 *The Guardian*, online, under the headline "Light at the end of the tunnel: sun shines for Brunel's birthday" and the strapline "Rail staff confirm legend that rising sun shines through Box tunnel in Bath on birthday of Isambard Kingdom Brunel," carried a report of observations taken the day before, Sunday 9 April 2017, by Great Western Railway and Network Rail. It published photographs taken from inside the tunnel, albeit near the eastern portal, clearly showing the sun visible through the portal and shining into the eastern end of the tunnel. It is a very great pity that apparently no photographs were taken from much further west inside the tunnel to show whether or not the sun was still visible there, through the eastern portal.

Unhappily the report did not substantiate what were plainly inaccurate exaggerations in the headline and strapline. For the report went on to concede that:

> *"At the western end, it was not quite as striking. Matthew Golton, commercial development director at GWR, said: "We could see the sun had risen but we weren't getting full-on sunshine through the tunnel.""*

Despite the headline and strapline, all the report demonstrates is that the sun is visible from inside the tunnel and shines into it for some distance, not that it shines through the length of the tunnel. Indeed, when *The Guardian* returned to the story on 5 April 2020 under the headline "New twist in mystery of Brunel's birthday sunrise" – the "new twist" being merely a reprise of Maggs's theory as published in 2016 – it said of what had happened in 2017:

> *"Disappointingly, they had to conclude that it did not quite beam all the way through."*

There the matter stands. Maggs's theory has not, so far as I am aware, been disproved either by further theoretical calculations or by subsequent ocular observation.

There is another aspect to the problem for which I am much indebted to my brother, Julian Munby FSA. Deriving from his experience working as an archaeologist with the engineers planning the route of HS1, and his discussions with them about possible minor deviations from the route in Kent and at St Pancras to avoid historic buildings and archaeological remains, he asks a pertinent question: How much 'wiggle room' was available for Brunel in designing the horizontal and vertical alignments of Box tunnel?

The line was designed to go from Chippenham, through Corsham and Box village (thus necessitating the construction of Box tunnel), and on to Bath. As can be seen from the modern Ordnance Survey map (Explorer 156), after a huge reverse S curve from Chippenham to Corsham and a minor 'wiggle' at Corsham, the line follows a long straight stretch of over 3 miles from Corsham, through the tunnel, and past Box village, before entering another reverse curve. Given the overall line of the route and various local topographical features, was there, he asks, actually much opportunity to alter the horizontal alignment of the tunnel?

And what of the vertical alignment? The gradient profile of the line shows that it reaches the local summit at Corsham, which is significantly higher than Box village, that there is a sharp descent from the summit through the tunnel (1 : 100 through the tunnel, easing to 1 : 120 and then to 1 : 330 after leaving the tunnel) until Box village, followed by a much gentler descent from Box village to Bath. Since the section of the line from the summit at Corsham to Box village is straight, and since the difference in level between those two points (and, indeed, between Box village and Bath) is a given, there was, surely, even less 'wiggle room' when it came to fixing the gradient through the tunnel.

It would be interesting to have the expert opinion of a surveyor.

I add a light-hearted coda. The Editor, John Wilson KC, told me (and I am most grateful to him for the information) that the Legend of Box Tunnel featured as the central plotline in an episode of the quirky Bath-based ITV detective series *McDonald and Dodds*, starring the wonderful Jason Watkins as local man DC Dodds. Broadcast on 7 March 2021 as the second episode in the second series, *We Need to Talk about Doreen* featured a murder where the body of the victim is found just inside the west portal of Box tunnel soon after sunrise on 9 April, Brunel's birthday – a date of whose significance Dodds is well aware. The murder is committed just as the sun is shining through the tunnel and the vital clue, Dodds realises, is that the light-sensitive spectacles worn by the murderer have been darkened by the glare of the sun.

An article in the online *RadioTimes.com* published on 17 June 2021, *Where is ITV detective drama McDonald and Dodds filmed?*, says this:

> *"As we hear in the episode, there is a story that the rising sun only fully shines through the whole length of the tunnel on Brunel's birthday, 9th April – although the question of whether this is actually true is a contested point. According to some sources, the full illumination actually occurs on 6th or 7th April depending on Leap years; but a test in 2017 showed that the sun did indeed shine through on Brunel's birthday."*

A hyperlink takes the reader to the article in *The Guardian* on 10 April 2017. The misleading headlines in *The Guardian* have at least this to be said for them: they have given us a cracking good television whodunnit.

Children and Money Cases

Hannah Markham KC | 36 Family and
His Honour Michael Horowitz KC

Hannah Markham KC is a leading practitioner in Family Law. She is Head of 36 Family, the 36 Group, Field Court Gray's Inn, where she specialises in children law pubic and private. Hannah is currently Chair of the Family Law Bar Association and Chair of the Centre for Child and Family Law Reform. She is a qualified Arbitrator and Mediator.

His Honour Michael Horowitz KC practised at the Family Bar for over 30 years. He was a Circuit Judge specialising in Family law from 2004 to 2013. He is a qualified arbitrator and mediator. He recently stepped down as Chair of the Centre for Child and Family Law Reform.

Why are they hardly ever heard together: A Proposal for Flexibility

The Centre for Child and Family Law Reform brings together practitioners, family law academics and retired judges to examine critically practice and procedure and propose changes. Under the chairmanship of Donald Cryan, the CCFLR was a prime mover in constructing the family law arbitration system and remains an active stakeholder in the Institute for Family Law Arbitration. Our most recent project just concluded examined the default assumption adopted by Courts and family lawyers alike that children and financial issues must be heard separately in what we came to call separate silos.

The Family Court exercises its powers in these two spheres under distinct statutes: chiefly, the CA 1989 and the MCA 1973 code as amended. But neither statute expressly or by any necessary implication precludes a coordinated application of the court's powers. Nor do the provisions of the FPR dictate or expressly contemplate separation. As we detail below, a culture of separation has become the status quo by default. We suggest that a more nuanced and flexible application of the courts' powers is overdue.

Is there a Juridical basis for separate hearings as a default?

Case law: the sole reported ancillary relief authority for the division practitioners take for granted is *LP v AE* [2020] EWHC (Fam) 1668 per Cohen J

At [18] Cohen J said:

Family lawyers are brought up from an early age not to mix money and children. Sometimes that advice need not be slavishly followed, and combined hearings can take place, particularly if a preliminary hearing, but to combine a hotly contested child arrangements hearing with a LSPO application should be avoided.

The utility or even desirability of combined or linked hearings has been accepted in principle in 3 reported children cases cited in *Annexe B. Re B (A Minor: Custody)* [1991] 2 FLR 405, *B v B (Minors) (Interviews and Listing Arrangements)* [1994] 2 FLR 489 and *Re W* [2008] EWCA Civ 538, but it is the pooled experience of the members of our Committee that despite the observations of Cohen

J and the dicta in the children cases cited, combined or linked hearings are more than rare: they do not happen.

Our Investigation

Summary

In the light of our extended investigation, the view of the Centre is that the current automatic practice lacks systemic justification. We recommend that a holistic and flexible openness to combined hearings at all or some stages of litigation can lead to speedier, more cost-effective resolution of family disputes. It would also answer directly to the expectation of the parties caught up in family litigation process who have to be introduced by their advisers to the functional separation family lawyers have developed.

The Case for the Status Quo

What lies behind a settled practice of embarking litigants to sail down these two distinct streams? We can identify a number of factors:-

a. Different procedural Rules – of the same FPR code - govern the two sets of applications, with different provisions for the filing of evidence, enforcement of disclosure et cetera. But do these differences reflect rather than nurture an essential difference?

b. Different Timescales - children's' issues must be given priority. By contrast, the process of disclosure and analysis of financial data in any but the simplest case requires purposeful delay to prepare a case for negotiation or litigation.

c. Many practitioners, particularly solicitors, offer their clients the full spectrum of family law advice and advocacy - including Schedule 1 applications for financial support of children outside marriage but many do not1. In a complex field sub-specialisation is inevitable.

d. Similarly, some judges at all levels specialise in money work with particular courses being completed to enable judges at all levels (DDJ to DHJC) to hear either (or indeed both) money and children. But specialisation feeds on itself.

> Our most recent project just concluded examined the default assumption adopted by Courts and family lawyers alike that children and financial issues must be heard separately in what we came to call separate silos.

e. But the main driver appears to be an assumption that justice and the parties alike are best served by separating issues that concern children and parental responsibility for them in which the stated statutory goal is to achieve the best interests of the child, an inherently objective target in theory at least, from the focused pursuit of their own advantage to pay or resist paying to meet a financial remedy claim.

f. It is clear that the functional separation is lawyer driven in origin deriving from the working preferences of the family law profession. Those preferences have become embedded in working practice without at any stage receiving analysis or explicit permission. That certainly was the view expressed to us by Lady Hale and Sir James Munby. As a working practice it now feeds on itself pressing some but by no means all family practitioners to shun either children or money work.

g. An interesting insight into the current assumption that these two subsets of matrimonial proceedings ought to be heard separately is the somewhat puzzling absence of any take up to date of the facility

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to resolve children money issues together now provided by the IFLA children and money schemes.

The Case for Reform

1) What are the disadvantages provided by our accrued current practice and what might be the advantages of better integrated or even simultaneous exercise of the court's powers?

a. The parties seek a resolution of all and any disputes between them. Their now broken relationship in respect of which they now seek advice will commonly involve children and money issues which will be inter-linked - housing suitable for contact, school fees and the costs of travel following relocation.

b. The essential task of the Family Court is to offer a holistic resolution. Segregation into silos imposed by practitioners and the court system fragments that objective. At its frequent worst, each segmented hearing or set of proceedings are un-coordinated with the other.

c. One parent may wish to relocate: property prices may vary in the two areas in which the parents will live and the cost of travel to maintain their relationships with their children may need to be factored in.

d. Decisions on schools will often involve an assessment of affordability and evidence relating to any linked financial remedy application is often required.

e. We found no empirical support for the proposition that separation of issues reduces bitterness between the parties and facilitates settlement. We doubt that it can safely be asserted that reduction of acrimony is how clients see the working of the family law system.

f. Functional separation means two sets of hearings and therefore two timetables. That may and frequently does extend time, expense and anxiety attending overall resolution. High costs are endemic in the present system. Repeatedly, Judges express withering criticism in particular cases but there is little attempt at systematic reform. An experienced Scottish family lawyer whose practice straddles the Scots and English system is professionally convinced duplication and thus higher costs are baked into the English system by comparison with Scotland. The English system, said Rachael Kelsey, was more prone to tactical game playing.

g. The current system which encourages niche specialisation arguably ferments complexity and, so inevitably, delay and its twin higher costs. That was the firmly held view of Sir James Munby, former President of the Family Division.

h. Thinking in a framework of one-stop decision-making may encourage both parties and enable the court to focus on realistic outcomes in a more compressed timeframe. We were struck by the stronger emphasis on negotiation by judge led settlement conferences a combined approach makes possible in other jurisdictions, eg Canada and some USA states.

i. The two silos approach may mean that each segment awaits resolution by the other. Too frequently the procedural weight of two paths separately pursued adds complexity, expense and delay to an

It is clear that the functional separation is lawyer driven in origin deriving from the working preferences of the family law profession. Those preferences have become embedded in working practice without at any stage receiving analysis or explicit permission.

overall resolution. Advocates at a financial hearing disown any knowledge of the state of progress in proceedings relating to the children. Advocates at a child hearing routinely disclaim knowledge of the issues in and progress of the money case. Money Advocates are frequently unable to provide information as to the progress of any children issue.

Our Research

Judicial input was received from the current and immediate past Presidents of the Family Division, Sir Andrew MacFarlane and Sir James Munby in Zoom discussion as well as Lady Hale, a former Law Commissioner who oversaw the drafting of the Children Act 1989, Justice James Williams of Ontario and Justice Michael Kent, retired Justice of the Family Court of Australia

Overall, we became persuaded that bifurcation into silos is inefficient, productive of delay and creates its own complexity. The inevitable result is a high-cost slow resolution family justice system.

Other systems – an overview

There is little empirical evidence to support the belief that division of litigation into two spheres diminishes acrimony. It was not a point raised in any discussion. We believe that it is equally plausible that it fortifies the taking of entrenched positions not least because diverts from taking an overview of the case.

Many other jurisdictions combined both issues at least at the initial stages within a framework of settlement conferences or dispute resolution hearings chaired by judge taking a more interventionist role than the English court.

Most jurisdictions in the USA start and often continue on a combined basis although New York seems an outlier with a complex structure of its own. Custody and finance are considered together in California at settlement and mediation conferences.

A similar approach is taken in Canada.. Combination is the default in Nova Scotia. But the trend is for tighter judicial case management. The court will keep all issues together as the default position.

Australia recently reformed family law with the formation of FCFCOA Federal Circuit and Family Court of Australia. The new procedure will enhance the current combined approach particularly at the initial stage of family dispute resolution conferences which will be compulsory.

The same approach obtains in the French system which will arrange early and provisional determination of children issues to be reviewed against the overall determination retaining judicial continuity throughout. The Netherlands Family Court will hear all issues together unless complexity or the time taken to gather financial information suggest otherwise.

Bringing Home our Research: cases suitable for a combined approach?

An obvious category is relocation, whether cross border or within the jurisdiction. Viability of the proposed relocating parent's plans involve evaluating affordability as well as the quality of the foreign school etc. The question of the affordability of extended travel arrangements is often as critical as practicality of proposed flight timetables. Detaching these issues from a financial re-ordering

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between the parties is common but frustrating and artificial. We recommend that combination should be regarded by parties and practitioners as the default setting in cross border relocation and relocation at any distance within England and Wales.

But we recommend that combination ought not simply be confined to relocation issues. The need for a new approach is wider. Examples include cases away from the high net worth families where resources to rehouse and pay for both are constrained and at risk of being put at risk by extended litigation costs, where a claim to school fees is plausibly resisted on financial grounds.

We do not confine an openness to these narrow categories. We are persuaded by our examination of other ways of conducting matrimonial litigation that combination should be an option when both parties wish it and should be available as a procedural argument at the first directions FHDRA stage available to either party.

It was suggested to us that combination was difficult to implement because of an inherent clash between the s1 paramount welfare principle in a children issue and the more general direction in s25 of the Matrimonial Causes Act 1973. We reject the suggestion that an experienced tribunal will not be able to direct itself to the proper standard appropriate to each issue.

How to reform?

We agree with Lady Hale who told us that reference to the Law Commission would take too long. We take a similar view of reform via a reference to the Family Justice Council and changes to the FPR code. We do not recommend seeking and waiting for statutory reform by Parliament.

We welcome the reforms to financial hearings pioneered at the Central Family Court. The changes we suggest neither obstruct nor frustrate the new system.

The remedy is in our professional hands. The jurisdiction already exists to combine – as Cohen J pointed out. We invite family lawyers to consider a more linked up approach from the initial applications to the Court onwards and throughout the litigation. The suite of Templates can be adapted easily to combine both sets of hearings at preliminary and final hearings by consent or on application by one party. Examples can be at the CCFLR Website: https://www.city.ac.uk/research/centres/child-family-law-reform.

When we first met

Eleanor Platt KC and Alison Ball KC

Alison Ball

Eleanor Platt and I met in the spring of 1990 but perhaps more interesting than the actual meeting was what happened in the years before and after it took place.

To set the scene Eleanor is ten years my senior and by the time we met she had taken silk some years earlier. In my youth I had been part of an alternative culture (1960s) and Eleanor was of a more respectable era (1950s) – or so I thought. That difference was something that slightly alarmed me initially but as I got to know Eleanor and worked with her it faded into insignificance.

We met at the hotel at Charing Cross station in the spring of 1990 and it was all rather secretive because in those days moving chambers was not done very often and was looked on with some suspicion. In fact, it was not Eleanor who contacted us initially but 2 of her colleagues who I think had decided to sound us out and who subsequently joined us together with Eleanor. The meeting went well, and Eleanor joined us in August 1990.

In January 1989 Peter Nathan (since HHJ at Guildford) and I and three other juniors had set up a specialist Family Law chambers at 1 Garden Court. I

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still have the Times advertisement from November 1988, now rather scruffy *. We were joined at that point and in the months that followed by about 15 other juniors (most of whom were women).

There were two guiding principles: firstly, that we would be specialist family law practitioners and not the poor relations in a mixed set and, secondly, that we would encourage women members. We also wanted some silks. Eleanor fitted the bill and seemed keen to be part of it.

The new Children Act had been in planning for some time prior to 1989 and we attended endless seminars and conferences about it and realised that at long last family law was about to change. Many practitioners now may not realise what a change it was, but this is not the place to discuss that. Simply put, the rights of children would come first, and they would no longer be tagged on to the squabbles and difficulties of their parents. Family law as a speciality would encompass not only divorce related matters but a much wider area of public law involving children and the family. We planned to be the first set of chambers to specialise in all of this and in nothing else.

My experience of being the first and only woman in the mixed common law set at 1 Garden Court when I joined as a pupil then tenant in 1972/3 had had an indelible effect on my attitude to the bar and its treatment of women practitioners and candidates for tenancies. Our then clerk referred to me as Alastair rather than admit to himself that there was now a woman member. I had been warned that he thought women unfitted for practice for a variety of reasons (periods, no separate lavatories, they may have children etc etc) and I found myself being sent to Chelmsford in the morning and Portsmouth in the afternoon (and other such disparate places) to test my stamina and resolve! Not only was he a misogynist but he extended his discriminatory behaviour to other groups, even insisting on someone changing his surname when he joined chambers as it sounded too 'foreign'. Fortunately, he had left before we set up the new chambers – we probably couldn't have done it if he had still been the senior clerk. To be fair there were a number of supportive members in chambers before we made the move and there was even a suggestion of my receiving a commemorative silver plate in recognition of being the first member of chambers ever to give birth, although I am not sure if that was a joke.

The idea of a silk such as Eleanor joining us was exciting and it meant that there would be two female heads and Peter stood down to let this happen.

Eleanor and I shared rooms for many of the subsequent years and managed to get on well and realise our plans to create a new type of set. In present day terms we might have been described as somewhat 'woke', and in the words of one senior practitioner at the time (who shall be nameless) we were 'a bunch of lesbians'. In fact, many sets of chambers began to change their outlook in the years that followed, and I think we were one of the forerunners of this.

Chambers grew and we took over the adjoining

building at 2 Garden Court; we appointed Chief Executives, later Chambers Managers; we never again employed a clerk like the one described above; we started a mediation service; we purloined some brilliant juniors from other sets and we produced a number of our own silks. Stephen Cobb (then QC) took over as joint head with me when Eleanor stepped down.

None of the above may sound very exciting but you can be assured that over the years it was amazing to see the prejudices and small-mindedness of those earlier years disintegrating, not only in our chambers but, as time went on, across the bar. We were also free to practice in the most important area of law – Family Law - without apology.

Eleanor Platt

I was approached by two members of my previous Chambers in late 1989 early 1990 as they, Ellen Solomons and Suzanne Shenton, were both intending to join Alison Ball in the Specialist Family Law Chambers she had set-up. They were asking me if I too would be prepared to move to One Garden Court with them.

I was uncertain to begin with as in those days moving chambers tended to mean that there was something wrong with YOU! We all had to be very secretive and met up in an hotel then a restaurant far from the Temple, to discuss all the important issues and of course meet the Senior Clerk! After careful consideration, I agreed.

I had been called in February 1960 and taken Silk in April 1982. The Cleveland Enquiry was over and I agreed to join on the basis of being Joint Head of Chambers with Alison. She had started the Chambers a year or so before and I would be the only silk at the time. It was a difficult time for me as we planned to give notice (3 months) on 1 May 1990 and move on 1 August. I was extremely embarrassed when in February that year my previous Chambers gave me a small celebration and a magnificent gift, which I still have, to celebrate my 30 years at the Bar and I was about to give in my notice!

Alison and I seemed to get on well together and I think throughout our almost 17 years of joint headship we rarely disagreed. We shared a room and our door was always open to any member who wished to chat or ask for our help.

Alison and I seemed to get on well together and I think throughout our almost 17 years of joint headship we rarely disagreed. We shared a room and our door was always open to any member who wished to chat or ask for our help. During the many years we saw a huge increase in numbers of members, additional silks, Alison taking Silk herself in 1995, and a few members leaving for different pastures.

We had changes in Senior Clerks, then Chief Executives and increased our accommodation but still remained in One and then also in Two Garden Court. We sometimes had to cope with problems with staff and also with members but throughout, both myself and I hope Alison, managed to keep smiling and stay focussed on the importance of having a happy and thriving set of Chambers. We were one of the first to have equality policies and detailed, (hopefully helpful), arrangements for maternity leave, then paternity leave.

I know that what Alison began and I helped to maintain and continue, now still continues in the excellent hands of our successors currently Nkumbe Ekaney KC and Andrew Norton KC.

Financial Remedies Update

Bethany Scarsbrook & Sophie Smith-Holland | St John's Chambers


Bethany Scarsbrook


Sophie Smith-Holland

The President has given the following update in respect of the Financial Remedies Court in his View dated 10 July 2023:

Two rule changes came into force in April 2023:

- FPR 2010, r 30.3(5A) was extended to enable a nominated FRC circuit judge to dismiss on paper an application for permission to appeal on a totally without merit basis. When such an order is made, the applicant loses the opportunity to renew the application at an oral hearing.

- FPR 2010, r 33.3(3) was amended to require an alleged debtor, in an application for the enforcement of an order for payment of money, to file a financial statement and documents.

The consultations undertaken by the FPRC and the MoJ in connection with Non Court Dispute Resolution (NCDR) have explored the strengthening of Mediation Information and Assessment Meetings (MIAMs), the possibility of making NCDR compulsory subject to appropriate safeguards, giving the financial remedies judge greater power to adjourn for NCDR, an addition to costs rules to include failure to attend NCDR as a factor to take into account when considering a costs order, and the Single Lawyer Model. The overall aim is to place greater emphasis on exploring NCDR in order to achieve a higher rate of settlement in financial cases at an earlier stage.

The recommendation in the working group report 'Transparency in the Financial Remedy Court' is that reporters (i.e. the media and accredited legal bloggers) should, as the default position, be permitted to report the contents of financial remedy proceedings, provided that the anonymity and confidentiality of the parties, and their main financial instruments, is maintained.

In ***Li v Simons*** **[2023] EWHC 1626 (Fam)** Moor J determined an appeal following an application to vary maintenance in one of the most regrettable pieces of litigation he had ever encountered. The Appellant and Respondent had one child, K who was 5 years old. He had been born via a surrogacy arrangement in the United States and in 2019 and the parties' marriage broke down months thereafter. K lived with R and there was a contact order in place for A to have contact on six out of every fourteen days. A had, however, since relocated to China and his new partner had given birth in February 2022.

The parties originally settled matters via consent order in July 2020. A was to pay R periodical payments at a rate of £2,900 per month until K finished Year 2 of primary school, then £2,400 per month until the commencement of Year 7, and thereafter £1,900 per month. Just a few months later A applied to vary the periodical payments order. This was on the basis that his income had fallen from £9,866pcm (as per the statement of information) to £6,030. By January 2021, A claimed to be only working part-time. By the time the application was heard by HHJ Gibbons in June 2021, R had cross-applied to enforce the order. HHJ Gibbons was highly critical of A, finding

that A had deliberately sought to mislead both R and the court as to his financial circumstances. She noted twenty-five inconsistencies within A's evidence. HHJ Gibbons did not accept that A was working part-time but that if he was, then he was not maximising his earning capacity. She ordered a slight downward reduction in maintenance due to a modest increase in R's income. Under HHJ Gibbon's final order dated December 2021, A's total monthly obligation (including arrears) was £3,685pcm. A did not seek permission to appeal this order at the time.

Just two months later, R applied to enforce maintenance arrears and A then applied to vary HHJ Gibbons' final order. At a directions hearing, A agreed a recital that the sole ground for variation being sought as the birth of his second child X. The substantive application was heard by Recorder Chandler KC in September 2022. The Recorder adopted the previous income figure of £9,866pcm and dismissed A's application, concluding that it amounted to an abuse of process and making such an application so swiftly was little short of vexatious. A's next action was to seek permission to appeal the order of Recorder Chandler KC and also to appeal the order of HHJ Gibbons out of time. It was on this basis that the matter came before Moor J to be determined in June 2023. The most difficult ground of appeal was the first, which argued that both previous orders were on the basis of £9,866 per month being the Appellant's true income, when all evidence demonstrated that it was in fact £4,300. As a consequence the order for A to pay £3,685 per month constituted 85% of his total monthly income. Moor J concluded that when directed correctly, the court had to conclude that A's income was £4,300 per month, and that he did not consider any adverse inferences drawn to the contrary to now be safe. The Recorder had not made any findings that the primary evidence regarding A's income was deliberately prepared to pervert the course of justice, and therefore Moor J had no choice but to allow the appeal ground. On considering whether the recital made by A that the only ground for variation was said to be the birth of X, from which he has later reneged, Moor J considered that by

> In *Li v Simons* [2023] EWHC 1626 (Fam) Moor J determined an appeal following an application to vary maintenance in one of the most regrettable pieces of litigation he had ever encountered.

the narrowest of margins this did not change his view. He further observed that under the Section 31 MCA 1973 exercise, where the court has a duty to consider all the circumstances of the case, he could not hold A to such a concession in any event.

However, Moor J went on to conclude that A should be maximising his earning capacity by working full time. A should also be renting out his property in Canada Wharf. The court therefore attributed an income of £7,500 per month to A. Whereas the previous maintenance order constituted 22.1% of £9,866, the appropriate maintenance figure to now be ordered was £1,650, to be reduced to £1,550 when K completed Year 2.

***DH v RH (LSPO and MPS Applications)* [2023] EWFC 111** was the latest in a trend of LSPO applications which sought an additional sum to pay formerly instructed solicitors who were no longer on the record. The distinguishing feature in this case was that the applicant wife's current solicitors had entered into an undertaking with her former solicitors. Burgess Mee had provided an undertaking to Withers to include the former's outstanding costs as part of any application for LSPO that they brought, and to discharge the firm's outstanding costs within 14 days of the funds being received, or alternatively from H in respect of W's costs. W therefore argued that it would not be possible for her to secure further representation from Burgess Mee until not only their own fees were settled, but the outstanding fees to Withers had also been paid. The court refused W's application for historic fees both in respect of her former solicitors *and* those currently instructed. For current solicitors, MacDonald J agreed with

MacDonald concluded that it was "difficult to see the terms of that undertaking as anything other than a rather transparent artifice to try to bring the wife's former solicitors within the circumstances that are understood by matrimonial lawyers to justify the inclusion of historic costs in an LSPO."

the approach taken by Holman J in *LKH v QA AL Z*. Specific sworn evidence of a solicitor intention to down tools unless historic costs are paid is preferred to relying on a general statement that firms should not carry credit. For historic fees to former solicitors, MacDonald concluded that it was "*difficult to see the terms of that undertaking as anything other than a rather transparent artifice to try to bring the wife's former solicitors within the circumstances that are understood by matrimonial lawyers to justify the inclusion of historic costs in an LSPO.*"

The flurry of interim applications for MPS and LSPO continued in ***HAT v LAT* [2023] EWFC 162**. The unusual facts of this case saw W bring a financial remedies claim some 25 years after Decree Absolute ended the parties' 9 year childless marriage. There was also a Deed of Separation dated almost 30 years previously, although W stated she had no recollection of having signed it. At the time of the application, W was 64 and H 72 years old. They had married in 1984 and separated in 1993, although later dates of alleged reconciliation were a contentious dispute between them. H was exceedingly wealthy and acknowledged that he had the means and liquidity to meet W's maximum claim, which she put at c.£5m on a needs basis.

Despite the Deed of Separation stating that H was to pay W just £702,000 and thereafter for there to be a clean break, H had continued to provide ongoing financial support to W far in excess of the deed stipulations. This included: (i) provided £2.145m towards the purchase of W's property (to be repayed without interest to H's children on W's death); (ii) a sum of £320,000 in 1998; (iii) a monthly allowance of £8,500pcm and payments for her private health care with BUPA. In March 2022, H informed W that he would cease all payments and her property would need to be sold. He reduced W's payments in July 2022 before stopping them completely in December.

Peel J concluded that neither the delay nor the separation deed was a bar to W's claim. If, however, a consent order was found that would be a different matter. As for the delay, *Rossi v. Rossi* [2007] 1 FLR 790 was correct that it was a factor capable of influencing the exercise of the statutory discretion. This was the correct approach to be taken in interim applications as well. The court ordered H to pay W the previous sum of £8,500pcm, which was backdated to the date of the application. W had sought a sum of £227,321 up to and including the FDR. This was reduced to £200,000 to be paid in equal monthly instalments.

Peel J was once again called upon to determine a LSPO application in ***Xanthopoulos v. Rakshina* [2023] EWFC 158**. Readers will remember that Cohen J's final order in the long running financial remedy proceedings between these parties was set out in the Summer 2023 edition of this publication. H failed to attend that final hearing at all in person and after his application for an adjournment was refused and his counsel and solicitors acting at that time withdrew and ceased to act. H sought permission to appeal Cohen J's order on several basis, including that the award made was too low and that his application for an adjournment should not have been refused. Moylan LJ gave permission to appeal in July, with the substantive appeal hearing listed for November 2023. H now applied for a LSPO for: (i) £39,789 regarding fees already incurred to his new solicitors; and (ii) £191,390 for additional costs anticipated to conclude the appeal.

Whilst previous authorities are clear that

courts should exercise extreme caution regarding LSPO applications for appellate proceedings, the difference in this instance was that Permission to Appeal had already been granted. Peel J gave particular consideration to Paragraph 13(iii) of *Rubin v. Rubin* [2014] EWHC 611, warning that the more a claim appears doubtful, the more cautious a court should be. He concluded that where Permission to Appeal has already been granted, the claim does not fall into the category of appearing "*doubtful*" for the purposes of determining a LSPO application.

Peel J did not accept W's argument that if awarded a LSPO, H carried no risk within the appeal litigation. This was because: (i) if H succeeded on Appeal, the sums received from the LSPO would likely be netted off against any subsequent costs order; or (ii) if H lost on appeal, he may have to repay the LSPO funds to W, as well as meeting any costs order regarding W's own legal fees in the appellate proceedings.

Litigation funding was similarly the focus of contentious and expensive litigation in ***Simon v. Simon & Integro Funding Ltd ('Level')*** **[2023] EWCA Civ 1048**. The parties had been engaged in long and extortionately expensive litigation for five years. W had secured a litigation loan of £1m from 'Level' to fund her within the proceedings. The procedural chronology in this matter is lengthy and the authors would suggest that it deserves to be read in full by financial remedy practitioners. The parties attended a private FDR on 12 February 2021. During the course of that FDR, W's legal team became conflicted and withdrew. W continued to act in person. The parties reached an agreement at this FDR. W was to receive a life interest in a residential property to be purchased with a sum of £1m. The £1m would be raised from H's trust who would thereafter own the property absolutely. As W would benefit from no free capital or income in settlement of her claims, her repayment to Level for the loan would fall away as she would not have the free funds to repay it. W informed Level shortly after the FDR that she would not therefore be repaying the loan. Upon learning of the proposed agreement Level applied to join the proceedings as a party. Level asked that no order be sealed regarding the matter until they had made a formal application to be joined and this had been considered. Newton J ordered that Level be joined as a party. Meanwhile unbeknownst to Level, a consent order in the terms agreed by the parties had been sent to the private FDR judge via his barristers' clerk by H's solicitors. This was accompanied by a D81 which did not contain H's Trust interest. Being unaware of the communications that had passed, or the actions taken by Level, the Private FDR judge approved the draft order and returned it to the court office for sealing. On 15 March 2021, H's solicitors informed Level that the matter had now concluded and that the agreement had been converted into a consent order. H applied for Level to be removed as a party. Holman J subsequently ordered a stay of the consent order as well as freezing orders over particular assets. Thereafter, Level then issued a civil claim, relying upon the consent order as a transaction for the purposes of 'transactions defrauding creditors' under s.423 Insolvency Act 1986. H did not concede that the consent order should be set aside until the first day of a three-day listing to determine the issue of set aside (21 March 2022). In March 2022, W wrote two brief emails stating that she did not want to be involved in any further litigation and wanted to play no further part in the proceedings.

When dealing with the matter, Deputy High Court Judge Cusworth KC made the following determinations and orders: that Level should remain as a party; that he was not prepared to now summarily approve the consent order; and made extensive directions for full financial remedy proceedings including exchange of Forms E and Questionnaires so as to progress the proceedings (W was ordered to attend a two-day directions hearing) and; transferred Level's civil claim to the Family Court.

H initially appealed on the following grounds:

i. That Level should not have been joined as a party (this was not ultimately pursued);

ii. If Level were to be a party, then following their submissions the consent order should have been approved or alternatively the court should have made no order;

iii. Level were being permitted to intrude on private proceedings beyond the scope of merely recovering their civil debt;

iv. It was wrong to find that litigation lenders fell into a special category and therefore should be treated any differently to secured creditors;

v. It was wrong for the judge to be influenced by the circumstances in which the consent order was made.

King LJ ultimately dismissed H's appeal on all but two grounds. In this difficult and unusual case the judge was correct in his approach save for two errors:

i. It was an error to order new full financial remedy proceedings with Level participating as a party. The correct approach was to order an inter partes hearing to hear submissions and determine whether an order should be made in the terms of the earlier consent order. W was clear that she did not wish to take an active part in proceedings, and H did not wish for them to continue. Parties could not be forced to litigate against their will. Further such a hearing would require only more limited disclosure and therefore alleviate concerns as to the extent of Level's involvement within proceedings;

ii. It was an error to order transfer of Level's civil claim into the Family Court. This was because, once the consent order had been set aside, it appeared that there was in fact no longer a 'transaction' pursuant to s.423 IA 1986.

The correct test to be applied to both parties' cross-applications was simply "is the evaluative exercise carried out upon the granting of decree nisi which led to the conclusion that it was unreasonable to expect the application to live with the respondent still valid in the light of subsequent events?" There is no second limb to this test.

In ***Cazalet v Abu-Zalaf*** **[2023] EWCA Civ 1065** the Court of Appeal allowed W's appeal against the first instance decision of Mostyn J. Decree Nisi had been pronounced between the parties in November 2013. W had applied for this to be rescinded. H had cross-applied for this to be made absolute. W appealed the first instance decision, challenging both the judge's formulation of the correct test to be applied and the application of that test to the facts of this case. The parties had two biological children, the youngest of whom was born after the DN. A further child was adopted by W under Russian Law after the DN. H admitted that this child was to be treated as a child of the family. Of the four original grounds of appeal, W was successful on Grounds 1 and 3. The Court of Appeal agreed that:

i. (i) the correct test to be applied is the test as set down in Savage v Savage (1983) 4 FLR 126. The correct test to be applied to both parties' cross-applications was simply "is the evaluative exercise carried out upon the granting of decree nisi which led to the conclusion that it was unreasonable to expect the application to live with the respondent still valid in the light of subsequent events?" There is no second limb to this test. The judge had been wrong to import a 'contrary to justice' limb to the above test.

ii. (ii) The judge's assessment of whether there

had been a reconciliation and therefore DN should be rescinded was undermined by his introduction of his own assessment as to the quality of the relationship and what constituted the essential components of a marriage. King LJ dismissed H's argument that to establish reconciliation W should need to show that the marriage had become "materially better" or "friendlier" than before. The court was clear that this fell into the trap of impermissible examination of the quality of the relationship before and after DN.

***J v A* [2023] EWFC 132** concerned H's application for a stay of English divorce proceedings. He asserted that the Nigerian court was the more convenient forum and challenged the jurisdiction of the English court. The decision was that the English court has jurisdiction, even though H issued his petition in Nigeria first. Both parties were habitually resident in England and had been since 2011. The case was substantially more connected to this jurisdiction than Nigeria. England was, by a significant margin, the more convenient forum for divorce. The judgment carefully reminded practitioners of the relevant legal tests and sets out carefully and methodically all factors relied upon by the judge in respect of his conclusions.

***AFW v RFH* [2023] EWFC 119** considered three applications brought by the wife after the conclusion of proceedings with a Final Order being made in January 2023. In the January 2023 Final Order, Recorder Moys had ordered that the family home should be sold forthwith. However at the time the hearing on 15 June 2023, the Family Home had not been marketed for sale and the appointed estate agent had not been allowed access to the property. H was continuing to reside in the property and paying the mortgage and outgoings whilst W resided in private rented accommodation. Contrary to the Final Order made, H did not wish to vacate the Family Home *at any point* prior to sale, including for viewings as part of the marketing process. H argued that leaving the property at any point when the agent or prospective purchasers are in the property would invalidate the buildings and content insurance. H further argued that health difficulties prevented him from leaving the property. W's primary application was to vary the original order for sale to bring forward the date by which H should vacate the property. In the alternative, W sought for the court to order H give W immediate possession of the property pursuant to FPR r.9.24(2). The court was clear in the need for finality of litigation, W's application was not an opportunity for H to relitigate matters which had already been determined. W's application was granted.

***RA v KS* [2023] EWFC 102** addressed the issue of interim orders for sale. W had applied for an interim order for sale of a property known as 'The Barn'. The issue was whether there was jurisdiction to order vacant possession when both H and W hold both legal and beneficial interest in the relevant property, meaning that s.33(3)(d) FLA 1996 is applicable rather than s.33(3)(e). The court reviewed the previous authorities, including the most recent decisions of *BR v VT* [2016] 2 FLR 519; *WS v HS* [2018] 2 FLR 528; and *SR v HR* [2018] 2 FLR 843. The court agreed with H's submissions that none of the words in s.33(3)(d) mean to permanently or irrevocably extinguish. It did not accept W's argument that there was no longer a need to disassociate the question of order for sale from that of vacant possession. Ultimately, Recorder Allen KC concluded that where an application is brought under s.17 MWPA 1882 for an interim order for sale and seeks for vacant possession to be ordered, the powers the court ultimately has are limited by s.33(3) FLA 1996. If the respondent holds a legal *and* beneficial interest in the relevant property, then under s.33(3)(d) the right to occupy may only be prohibited, suspended or restricted. It does not however in those circumstances have the power to permanently extinguish those rights. This scenario is distinct from that under s.33(3)(e), where rights come from home rights alone and may therefore then be terminated. For this reason, if a respondent to such an application has a legal and beneficial interest in the property, '*it would appear that there*

is no choice but for the applicant to have recourse to a TLATA 1996 application'.

***Baker v. Baker* [2023] EWFC 136** was an unusual case where neither legal principles nor their application was the primary contention between the parties. It was, in essence, a factual dispute which required adjudication. After legal costs, W held assets of £5.8m while H held £5.6m. However, W argued she should be entitled to a lump sum of £9.34m. This was because she argued that H had £27.4m ($35m) hidden away. W was emphatic – she was not saying H should be treated as if he had this money – her position was that H did in fact have the money. W's argument was rejected. However, H was ultimately ordered to pay W a lump sum of £1.64m, bringing an overall asset division of 65%/35% in W's favour.

***Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam)** saw Peel J dismiss H's appeal against a final order of Recorder Samuels KC (save in respect of two minor procedural drafting points). H brought five grounds of appeal against the judge's overall 62%:38% division of the assets, where he received the lesser sum and that percentage was less liquid by virtue of including business interests. The grounds were considered individually as well as in the round. Peel J observed that when looked at in the round, H had already had the benefit of hundreds of thousands of pounds he had unilaterally removed from his business, and this more than accounted for the unequal division of the assets now available.

Conduct was similarly at the forefront of the analysis is ***Tsvetkov v Khayrova* [2023] EWFC 130**. In this instance, the difference between the parties' open positions was just £5m. W proposed a 50%:50% division of the assets whereas H sought an overall departure of 60%:40% in his favour. Alarmingly, given the quantum in dispute, the parties' collective legal fees amounted to £3.1m. They had therefore already spent more than half of the disputed sum arguing about it. H sought a general departure from equality on the basis of six specific heads of conduct which had been pleaded against W (however one was not ultimately pursued). It is notable that H sought the overall departure *on top of* recognition by the court of those specific pleaded heads. Whilst H was successful in the main on the specific conduct heads pleaded, it was found on occasions that he had overstated the computational result he sought as a result in some parts. For instance, H sought to attribute a substantially higher value for the contentious jewellery than that of £6.6m attributed by the SJE valuer.

The decision is pertinent regarding conduct in two primary ways. Firstly, Peel J refused H's argument that W's conduct should be reflected holistically by way of a 60%:40% division on outcome *as well as* via adjudication on the specific points pleaded. The judge could see no justification in quantifying conduct in this broad-brush manner which would go beyond the loss occasioned on those six grounds. (He did however consider costs separately and a costs order was duly made against the wife, which was in large part due to her misconduct – see below).

Secondly, in paragraph 46 Peel J sets down the procedure to be followed in the normal course when conduct is alleged (for the avoidance of doubt this does not apply to litigation misconduct). As a specific s.25 factor conduct must always be pleaded. It is inappropriate to plead conduct if it does not meet the high threshold. A party advancing conduct must say so at the earliest opportunity, they should provide particularised allegations and state how these allegations meet the high threshold for a conduct claim. Usually, Box 4.4 of the Form E should be used to clearly set out the conduct allegations. The court and parties should be mindful of the court's duties under FPR r.1.1 and r.1.4. The court should determine at the First Appointment how the alleged conduct is to be case managed. The court should consider whether it is proportionate to permit the allegation to proceed, and even if proved, whether that conduct would be material to the ultimate outcome in the case. Wherever advanced, it must be clearly pleaded. Usually, narrative statements will be sufficient.

Costs were determined in ***Tsvetkov v Khayrova* [2023] EWFC 131**. W was ordered to pay 50% of H's costs with a deduction of 15% for a notional assessment on the indemnity basis. The sum to be paid was therefore £748,632.

***Gohil v Gohil and CPS* [2023] EWHC 1567 (Fam)** is a further decision in the case heard by the Supreme Court in 2015 ([2015] UKSC 51). H had been found guilty in the Crown Court of laundering £25m, corruptly obtained by a state governor in Nigeria. H pleaded guilty in respect of further offences and was imprisoned for 10 years in 2011. The CPS then commenced confiscation proceedings but they had not been concluded at the time of Mostyn J's decision. W's financial remedy claim was still to be determined.

Mostyn J's decision was about a discrete point namely the inexplicable differences that accompany a draft judgment handed down respectively in the Kings Bench Division (KBD), the Family Division (FD) and the Crown Court (CC). The CC sent two documents to H called "*findings following confiscation proceedings*" relating to him and the state governor. It was confirmed that these were draft judgments and were "complete" but subject to editorial correction of obvious errors. There was no rubric on the face of either draft judgment limiting who could be appraised of its contents. Nothing had been said by the judge that suggested that there was a prohibition on any party disseminating the contents of the draft judgments to anyone, although a prohibition could probably be inferred. If so, H had breached the prohibition and was possibly in contempt of court because he had included detail from the draft judgments in his position statement in the financial remedy proceedings.

Mostyn J compared the rules in the KBD and FD, concluding that the in the KBD there was a fierce warning that any breach of the non-disclosure warnings may be treated as a contempt of court. There is nothing in the FD rubric that says a breach

> She argued that H had £27.4m ($35m) hidden away. W was emphatic – she was not saying H should be treated *as if* he had this money – her position was that H *did* in fact have the money.

of the non-disclosure requirement is a contempt of court. He said "*it is obviously highly undesirable that something as important as contempt of court should or could be derived from such ambiguous language.*" The position in the CC was noted to be even worse: written rulings are routinely made and are habitually sent out in draft for typographical and other obvious errors to be corrected. Yet, there is no rule or practice direction which regulates the use of such draft embargoed judgments, and the judgments which are sent out in draft contain no warning rubric at all. Mostyn J finished with: "*This confusion is, in my judgment, completely unacceptable. It is unacceptable that someone would almost certainly be in contempt of court if she discloses a draft King's Bench Division judgment to a journalist; might well not be if she discloses a draft Family Division judgment; but in all likelihood would not be if she discloses a draft criminal judgment. This is an unacceptable example of arbitrariness.*" He directed that his judgment be sent to the three Rules Committees with a request that they seek to harmonise the rules on embargoed draft judgments.

***McClean v McClean & Ors* [2023] EWHC 1735 (Fam)** was an appeal brought by H and five companies of which he was the sole or majority shareholder, in respect of a final financial remedy order. Neither H nor the companies were represented at the final hearing. The companies had only been joined shortly beforehand. H did not attend for medical reasons but the Judge refused his adjournment requests, preferring medical evidence from a cardiologist that he was well enough to attend court.

The Judge had made findings against H in respect of litigation conduct. One issue was he had failed to engage with the instruction of an SJE to value his business interests. The upshot was the SJE had not been able to complete his work so there was no expert analysis available. Roberts J said that due to the lack of expert evidence, what was needed from the Judge was a "*penetrating enquiry into the evidence which underpinned W's counsel's submissions that the underlying corporate assets could, and should, be treated as assets which were held on trust for the exclusive benefit of H.*"

The Judge had reserved her decision. H then sent her information setting out that the assets available for division totalled £1,759,606. This was significantly different to the £6.5m suggested by W. H instructed solicitors who applied to reconstitute the hearing prior to the formal handing down of judgment. The Judge dismissed the application as being totally without merit. H then applied for permission to make written submissions in relation to computation prior to the formal handing down of the judgment. The Judge allowed limited submissions and precluded the filing of any new evidence not before the court at the final hearing. W was given the opportunity to reply.

H complained through counsel that W had tried to persuade the court that assets owned by third parties should be treated as his, that values given to other assets had no evidential basis, there was double counting of the value given to the classic car collection and an almost complete disregard of H's liabilities. Notwithstanding his absence from the final hearing, H had provided evidence to support a conclusion that there was, in reality, less than £2m available.

Roberts J had sympathy for the Judge who, having decided to proceed with the final hearing in the absence of H and the companies, then had H trying to make good the perceived deficiencies in the evidence that was to inform her decision. However, she placed reliance on documents/material produced by W after the final hearing so fairness dictated that, subject to relevance and any issues of authenticity, she needed at the least to consider what weight, if any, to attach to the documents from H and/or the companies. Evidence that was allowed on appeal showed that a finding the Judge had made that H had tampered with evidence could no longer stand.

Roberts J decided that the trial judge was entitled to proceed with the final hearing in H's absence, but considered that matters began to go wrong after closing submissions concluded. H had provided, crucially, updating company accounts which produced a very different picture to those that had been in the bundle. There was a distinction to be drawn between this case and *Moher* (upon which the judge had relied) because the challenge to the first instance decision concerned, first, the attempt by W to attribute to H beneficial ownership of assets which, on his case, belonged to the companies or third parties and, secondly, the valuation of those disclosed assets. That enquiry was conducted in the absence of H who, prior to the handing down of the final judgment, had provided the court with additional disclosure which challenged the assumptions as to value which the court had made. It was an enquiry which was conducted in the absence of the companies despite their formal joinder some months earlier.

The Judge had been wrong to reach the conclusions she did in respect of computation. She had accepted the figure of £6.5m without any adequate reflection in her judgment of the submissions made by H. There was no sufficient analysis of the information. The judge was also wrong to find, without more, that H was the owner of various corporate assets in his personal capacity.

In respect of the companies, Roberts J's view was that given their late joinder and the issues there had been with H's health, they were not in a position to prepare properly for the final hearing, at which the ownership of their assets was likely to be in dispute. W's evidence had not been rigorously scrutinised. She was not asked any questions on the

key issues concerning the companies.

***Backstrom v Wennberg* [2023] EWFC 79** related to a pre-marital agreement, the terms of which had been reaffirmed in a post-marital agreement. The agreement set out that the parties agreed the 'compensation' and 'sharing' principles would not apply and that the principle of 'reasonable needs' was satisfactorily covered in the agreement. Their disclosure at the time of the agreement showed that W had £50m and was likely to inherit several hundred millions of pounds. H had £225,000 and a small pension. H's gross income was c.£35,000 per year.

After the breakdown of the relationship, W made a notice to show cause application and H issued Form A. H did not attend the hearing and his adjournment request was refused. W's unchallenged evidence was that her assets totalled £250m, of which over £190m was held in liquid funds. H had filed no evidence in the proceedings. W's case was he was likely to hold assets of at least £2.5m.

There was no joint property and the agreement recorded that they shall each retain their separate property free from claim by the other. The agreement provided for W to provide for H and the children's reasonable housing needs until their last child reached the age of 18 or ceased full time education to first degree level. "Reasonable housing needs" included the costs of purchasing and 'kitting out' a suitable property.

The agreement did not include anything about the provision of child maintenance and W's counsel accepted that such provision falls outside of the pre-marital agreement. It set out, however, that there would not be any spousal maintenance. The court considered the law applicable: to marital agreements (and set out 12 principles applicable to the case at [49]), non-disclosure (*Moher*) and child maintenance (*Collardeau-Fuchs v Fuchs*). The Judge concluded that H assets were worth c.£2m and that he was earning £50k gross, and that this would increase significantly over time. As for the agreements, H did not evidence any vitiating factors in respect of either. The agreements were in conventional terms, H had received legal advice, the agreements were drawn up on the express anticipation that the parties planned to have children and provided for the financial provision that should follow (save the issue of child maintenance) and it was not a long marriage (married 6 years and cohabited for 7). The judge concluded that the agreements must carry full weight and were largely decisive as to the outcome.

W had offered £6.5m for H's housing needs, which included a "kitting it out" fund. The judge held however that this obligation should be ongoing rather than a one-off given the proposal was that the house would remain H's home with their son for 15 years. As to the question of how H was to be housed once his son's needs were no longer relevant, The Judge held that this was 15 years away and H should, by that time, have the resources available to enable him to rehouse at a reasonable level. He will not therefore be in a predicament of real need.

As for H's income needs, W had been voluntarily paying £20,000 per month. The Judge considered that H should be able to develop his career and achieve financial independence within 6 years and the broad figure required to enable him to develop his career to a sufficient extent to be able to adjust without undue hardship was just over £60,000 per year over a 6-year period. This was capitalised at £350,000. He also awarded child maintenance.

At the centre of the case of ***AB v CD* [2023] EWFC 103** was the parties' daughter, XFR, aged 20. She was born severely disabled and would remain dependent on others for the rest of her life. The case raised two issues: i) what is the quantum and duration of the periodical payments H should pay for her? ii) should the nominal joint lives periodical payments order made in favour of W be discharged?

An order was made in 2008 that H pay global PPs of £1,100pcm: £400 to W on a joint lives' basis

and £400 for the benefit of XFR until she reached the age of 17 or secondary education. On appeal in 2006, the figure was increased to £1,600pcm. In 2012, the order was varied: quantum remained £1,600pcm but £1,500 was for XFR and £100 was for W. In 2017 a settlement was reached for £275,000 to be placed in trust to assist in the purchase of a more suitable home in which XFR could live with W, and adaptations could be made. PPs were varied to continue at £1 pa after her 19th birthday. In 2020, H applied for a downward variation to £1,250pcm. In 2021, there was a further downward variation to £1,000pcm. It was varied upwards then to £1,150pcm and then, after a 2-day hearing in 2022, increased to £1,400pcm. This was only an interim order due to uncertainties over W's income position after XFR started college. This judgment sets out the decision at final hearing in 2023.

H's net income was in the region of £5,500pcm. The Judge had previously found that his income needs were around £5,500pcm excluding what he should pay for W and XFR. This figure would have increased by £200-£300pcm due to the cost-of-living crisis. The Judge's view was that H was living in a house that was beyond his means. Benefits payable to W and XFR was more complicated after XFR had started college and the amounts W received varied monthly. In January 2023, W got £1,845 and this figure was used as a guide. With the PPs from H, her monthly income was £3,245pcm. In July 2022 it was found that her income needs were c.£2,800pcm. It was accepted that this would also need to be revised upwards slightly by £200-£300pcm. The Judge found that given W's own health and caring responsibilities for XFR, she was not able to work.

H's position was he should pay £400pcm for XFR and W's joint lives order should be discharged. W sought global PPs of £1,500, being £1,499 for XFR and £1 for W. The Judge's view was that H had recklessly taken on responsibilities he could not afford and encouraged H to urgently re-order his affairs in a way that he is able to meet his responsibilities to W and XFR as well as his second family (for example, downsizing his home). The order made was £1,200pcm, being £1,199 for XFR and £1 to W, as a final order. The Judge was not satisfied that at this point W could adjust without undue hardship to the discharge of the joint lives order.

> Mostyn J therefore departed from *CB v KB* and set out the new Adjusted Formula Methodology (AFM) which is set out in full at the end of the judgment. It is a must-read for financial remedy practitioners and should be considered in full.

***James v Seymour* [2023] EWHC 844** was a decision of Mostyn J in respect of the calculation of child periodical payments. At first instance before HHJ Vincent, M submitted that the "the Mostyn formula" found in *CB v KB* [2019] EWFC 78 should apply to the calculation of child maintenance, so she should receive £2,184 per child per month, a substantial increase of the existing order of £833. H offered to pay £1,100. HHJ Vincent found that the children's needs had not substantially changed since the previous orders were made, so adopted H's position. M appealed, on the basis it was said that the Judge had failed to follow the approach set down in leading authorities that the 'starting point' for child maintenance calculations should be the figure given by the CMS up to incomes of £650,000.

On appeal, Mostyn J went through the authorities in respect of the 'starting point' –he said that the formula would provide useful guidance and in *Collardeau-Fuchs v Fuchs* at [120]-[121] he qualified his view to make clear that the formula would be irrelevant where the claim was for the type of CMS award which he described as a Household Expenditure Child Support Award or HECSA. Mostyn J accepted Moor J's criticism in *CMX v EJX* of his guidance and set out that using it, someone earning £650,000 would pay £60,000 for one child, £40,000 each for two children and

£33,000 each for three children – but a single child does not cost that much more than a child in a sibling group.

He set out an adjusted formula for incomes between £156,001- £650,000 called an Adjusted Formula Methodology (AFM) to give a Child Support Starting Point (CSSP). Under this formula, the calculations per child changed to £27,100, £25,000 and £23,200 respectively. Mostyn J therefore departed from *CB v KB* and set out the new AFM which is set out in full at the end of the judgment. It is a must-read for financial remedy practitioners and should be considered in full.

***De Renee v Galbraith-Marten* [2023] EWFC 141** quickly followed *James v Seymour*. It was a decision of Cobb J in respect of F's application to set aside terms of a consent order in respect of periodical payments for the benefit of the child, A. Those terms had been varied before, upwards from £1,350 per month to £2,684 and would thereafter be calculated after disclosure of his tax return, using the formula in Part 1 of Schedule 1, but it was to apply to gross annual income up to £650,000 in substitution for the figure of £156,000 and the varied figure would take effect from 6 April of the year immediately following the tax year to which the return relates.

F said he agreed to the formula because it had been expressly promoted by Mostyn J as the proper approach to the computation of maintenance above the CMS level. However, Mostyn J then promoted a different methodology in *James v Seymour* and F applied for the periodical payments provision to be varied to follow that approach. He argued it would now be unfair for him to be held to a formula that Mostyn J had previously endorsed when he now recognised the potential inequity it causes when applied. He said that he falls squarely in the 'anomalous' position described by Mostyn J in *James v Seymour* in that his most recent tax return shows a gross annual income of £640,187. Applying the CMS formula to all sums up to £650,000 produces a figure of c.£60,000.

Cobb J considered the 'traditional' set aside grounds in PD9A para 13.5 and decided that F's case fell into the "subsequent event" *Barder* territory. He considered Mostyn J's comments in *CB v EB* where he declined to expand upon or relax the "subsequent event" ground. Cobb J commented that F's case was effectively that the judgment in *James v Seymour* is a 'subsequent event'.

Cobb J considered that the 'guideline' earlier promoted by Mostyn J had materially influenced F to consent to an order which adopted that guideline, but that this guideline had effectively been abandoned by Mostyn J less than 4 months after the consent order, in *James v Seymour*.

Cobb J considered that there were two important points that emerged from the cases he considered:

1. The value of applying a 'formula' in a Schedule 1 case is perhaps more limited than earlier authorities had indicated; and

2. If the 'starting point' formula in *James v Seymour* was applied in this case, F would be obliged to pay a significantly lower figure in maintenance than he had agreed to.

He concluded that the development of *James v Seymour* had "invalidated" the "fundamental assumption" on which the consent order was made. If, however, his decision had stretched the 'traditional grounds' beyond comfort, then he relied on the language of para 13.5 that it was a matter for decision by Judges. Therefore, the child maintenance terms in the consent order were set aside.

***Augousti v Matharu (Rev 1)* [2023] EWHC 1900** was an application for permission to appeal, given in a formal judgment as Mostyn J gave permission for the judgment to be cited as an authority. H had advanced 21 grounds of appeal. Mostyn J observed that grounds of appeal must be few, short and clear. A ground of appeal need do no more than

The test should be the same whenever an application is made to adduce fresh evidence from after the completion of the evidence-giving phase, up to on appeal. That test should be as set out in *Ladd v Marshall*. The test should be applied with progressively increasing rigour relative to the point in time when the application was made i.e. it should be applied more fiercely on appeal than if the application was made at trial after the completion of the evidence but before final submissions.

to identify succinctly why it is said that in a given respect the Judge was wrong. The appeal raised the following issues: 1) what test should be applied on an application to adduce further evidence after the case has concluded and judgment been reserved? 2) what is the scope and extent of the court's discretion when exercising the needs principle? 3) what is the test on an application to adduce fresh evidence in an appeal? and 4) what degree of likelihood is needed to satisfy the criterion of "a real prospect of success" of a proposed appeal? How improbable does the success of an appeal have to be to satisfy the criterion that "the proposed appeal is totally without merit"?

Mostyn J's guidance on these issues was as follows:

Issues 1) and 3): It is incumbent on the parties to strain every sinew to ensure that the case is concluded within the time estimate (which includes allowing time for the writing of the judgment). Going part-heard is a bane with a number of potentially damaging consequences, including that sometimes parties think the delay opens the door to adduce new evidence to seek to reverse the direction in which the judicial wind is blowing. The test should be the same whenever an application is made to adduce fresh evidence from after the completion of the evidence-giving phase, up to on appeal. That test should be as set out in *Ladd v Marshall*. The test should be applied with progressively increasing rigour relative to the point in time when the application was made i.e. it should be applied more fiercely on appeal than if the application was made at trial after the completion of the evidence but before final submissions.

Issue 2): He noted that the problem with the "needs" principle is that it is not easy to identify the ethical, moral or logical basis for huge awards. He explored some of the case law where the needs principle is explained, closing with: "*Why does someone have to enter into a formal agreement to be confined to the logical limit of a needs award? These are questions that are going to have to be answered definitively. I suspect it will need legislation to provide a definitive answer which is not going to be subverted by the exercise of an "unbounded" judicial discretion.*"

Issue 4): In respect of the "the real prospect of success" test, he considered that a degree of likelihood of at least 25% would be required. If the appeal court is pretty sure that that the appeal will fail, then it can order, when refusing permission to appeal, that the applicant cannot request reconsideration at a hearing.

Mostyn J also gave his very last judicial word on the issue of anonymisation [68]-[93].

***RL v NL* [2023] EWFC 75** concerned H's application to set aside a financial remedy order made in 1995. H had been ordered to transfer his interest in the FMH to W. The transfer never took place, it seems because there was an issue in respect of the mortgage. W said that the mortgage lender no longer exists, and she had not been able to trace the current holder of the debt. The limited court papers indicated that in c.2007 W applied for implementation directions and for a Judge to sign

the TR1. Her statement set out the difficulties she was having in executing the transfer due to the lack of engagement from the mortgage lender. It was unclear what the result of that application was, as the property remained in H's sole name. Since 1995 W had been living in the property and meeting the outgoings.

The Judge raised the issue of whether H's application should be struck out under r. 4.4 FPR 2010, focusing on the coherence of the facts pleaded and on whether or not those facts could be fitted into a recognisable legal framework. H's position was that the order should be set aside for reasons including: he did not consent to the order, W did not enforce it, the order was "statute barred" under the Limitation Act 1980 and he was the registered owner of the property. The Judge held that parts of H's pleaded case had no foundation in law. H's oral case was based on an allegation of fraud, something that had not been mentioned in his statement. The Judge's requests of H's counsel for help understanding the legal basis of H's application fell on deaf ears.

The Judge concluded that H's application disclosed no reasonable grounds for bringing the claim, and it was struck out. H's case was factually incoherent and inconsistent. The legal basis for the application was unclear and the way in which the case had been presented made the court's task of applying the law to facts impossible.

***AP v BP* [2023] EWFC 170** was a decision of HHJ Vincent on H's application to set aside transactions pursuant to s37 MCA 1973. The parties had two companies. Company A's income was collected by Company B. H discovered W had sold shareholdings in Company B to the intervenors. She sold 51 shares for £51 when the SJE valuation was they were either worth £90,000 or £301,000 (depending upon whether H stayed involved with the business or not). She had also obtained a further 30 shares in Company B and split them between her and the intervenors. H said these transfers were done with the intention of depleting the assets of the marriage.

H had previously made an application for disclosure of the agreement in respect of the first transfer. This was opposed by W and the intervenors on the grounds that it was a privileged document, prepared for the dominant purpose of proceedings in relation to H's separation of Company A from Company B. DJ Lynch determined that the document was privileged and should not be disclosed. HHJ Vincent allowed the appeal in ***AP v BP and others (appeal – disclosure – privilege)* [2023] EWFC 169**. HHJ Vincent determined the appeal and held that the dominant purpose of the agreement was "*the implementation of the steps identified to bring about changes in the parties' legal relationships, which shifted the tactical positions so far as the ongoing and future litigation was concerned" and the "litigation provided a context for the agreement, but having regard to the contents of the document itself and the evidence of from the witness statements, it does not attract legal privilege.*"

In respect of the set aside application, HHJ Vincent was satisfied that:

- each of the transactions was (i) a disposition that took place less than three years before the date of the application; and (ii) would have the consequence of defeating the claim for financial relief (within the meaning of s37(1) MCA 1973), giving rise to the presumption (s37(5)) that W disposed of the shares with the intention of defeating H's claim for financial relief;

- W had not rebutted the presumption with respect to her intentions in effecting the two separate dispositions of shares. Her motivation was to undermine H's position by removing him as a director of the company, replace him and another shareholder with the intervenors and work together with them to further her own interests, and to undermine H's position in the business and in the family proceedings;

- the intention to defeat the claim for financial

relief was part and parcel of the intention to undermine H's position within the business, if 'subsidiary', she was satisfied that it met the test of being a 'material motive';

- None of the three limbs of the defence under s37(4) were made out by the intervenors.

***GA v EL* [2023] EWFC 187** required determination of W's Daniels v Walker application. The final hearing was less than three weeks away at the time of adjudicating this application. The parties had separated in 2019 after a c.12 year marriage with two children. The primary asset was a software company initially founded by H and a business partner. During the marriage H had transferred 30% of his shareholding in the company to W. The company was sold in early 2022. The parties received a gross total of £35m. This was made up of cash, loan notes and shares in the purchasing company. W issued her Form A in late 2022. The sale proceeds of the business asset made up the majority of the assets in this case, making the issue(s) before the court: (i) did the value of the business increase post-separation? (ii) was any increase caused by H's post-separation endeavour? (iii) Do the answers to the above justify a departure from equality when performing the s.25 exercise?

An SJE had been instructed to undertake a historic valuation of the company as at November 2019 using the "present day approach". The report produced a figure of £14.1m. However, in replies to Part 25 questions, the value on a "hindsight approach" was given to be £18.9m. W issued her Daniels v Walker application 2½ months after receipt of the SJE report (albeit supported by a single expect report dated the previous day). This report ascribed a "hindsight approach" value of £20.5m to the company as at November 2019.

Peel J observed that the starting point for such applications is FPR r.25.4, which requires "necessity" in order to adduce expert evidence. He formed the view that such a *Daniels v Walker* application is by its nature also an application to adduce expert evidence, therefore he concluded that it too must meet the necessity threshold despite a SJE report having already been ordered. He noted that there appears to be no direct authority on this point. Peel J proceeded to analyse the law referable to *Daniels v Walker* applications, and emphasised the '*overall justice to the parties in the context of the litigation*' (as enunciated in *Cosgrove & Anor v Pattison*) as a phrase neatly encapsulating the court's task in this context.

More generally the court also warned against the use of historic valuations. Whilst there may be some cases in which such an exercise can assist the court and be conducted simply, there should be a clear justification for this approach before the court gives permission for it to be adopted. It should be considered very much the exception rather than the norm. On this occasion, W's application was refused. This was because: (i) the historic factor is just one relevant factor amongst many that the court needs to consider. Whilst relevant it is not necessarily determinative of the post-separation accrual argument; (ii) The difference between the SJE "hindsight approach" and W's own report valuation was limited (c.£1.6m) and therefore unlikely to have a material impact on the proceedings. Furthermore, H's own proposal was not based on a strictly mathematical approach referrable to the SJE report in any event.

In ***BF v LE* [2023] EWHC 2009 (Fam)** Lieven J reminds us that a lack of special measures, or indeed their consideration, does not lead to an automatic breach of natural justice and/or set aside. The court approach when there has been a failure to comply with the provisions for special measures/participation directions is a two-stage process. First, consideration must be given to whether there has been a serious procedural or other irregularity, and secondly, whether the decision was therefore unjust as a result. The decision also provides an aide memoir as to the limited appropriate use of set aside, as opposed to the traditional appeal route.

Private Children Law Update

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Family Court Statistics

In September 2023 the Ministry of Justice published its Family Court Statistics Quarterly for the period January to March 2023. There were 13,936 new private law applications made, similar to the equivalent quarter in 2022, with 20,575 individual children involved in these applications. The number of private law disposals in January to March 2023 was 42,084, a slight increase of 0.6% compared to the same quarter in 2022. The number of private law cases disposed (11,976) reached the highest in its series and increased by 8% compared to the same quarter in 2022. In January to March 2023, it took on average 47 weeks for private law cases to reach a final order, i.e. case closure, up almost 4 weeks from the same period in 2022. For the same period, the proportion of disposals where neither the applicant nor respondent had legal representation was 40%. https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2023/family-court-statistics-quarterly-january-to-march-2023

Cafcass

Between 1 April 2023 and 31 August 2023, Cafcass received 16,613 new private law children's cases, involving 24,941 children and had 19,298 open private law children's cases at the end of August 2023, involving 29,127 children. This is -923 children's cases (-4.5%) and –1,937 children (-6.2%) compared to the same month last year. Although there has been an overall reduction in new applications following the Covid-19 pandemic that started in March 2020, the long-term trend over the last five years has been for an increase in the number of children and young people Cafcass work with each year with the biggest increases in private law proceedings. Cafcass worked with 97,098 children in private law proceedings in 2022/23 compared with 82,818 in 2017/18, an increase of

17.2%

https://www.cafcass.gov.uk/about-us/our-data

Nuffield research on family court users

In September 2023, the Nuffield FJO published research on the adults in private law family proceedings. The research demonstrates that the majority of families in private law cases live in the most deprived areas of England and Wales. While the majority of adults in private law proceedings are white, there is an over-representation of adults from some other ethnicities. Many families going through court have experienced health issues https://www.nuffieldfjo.org.uk/wp-content/uploads/2023/09/Private_Law_spotlight.pdf

CASE LAW

***A v B (Appeal: Domestic Abuse)* [2023] EWHC 1499 (Fam)**

This was an appeal against determinations of fact made within private law Children Act proceedings. The mother made allegations that during her marriage to the father, he abused her sexually, physically, psychologically, and emotionally, including by controlling and coercive conduct, and that he was physically abusive to the

child. The trial judge found none of the allegations proved. Mr Justice Poole dismissed the appeal on the basis that the judge had made findings based on the whole of the evidence, applying the correct legal principles, and made no errors of law or fact that undermined or contaminated his conclusions. However, he did express concerns as to parts of the trial judge's reasoning. In particular and in respect of the judge's assumption that the mother's allegations of persistent sexual abuse were inherently improbable, Poole J considered the judge "*applied a generalisation which tends to suggest that it is unlikely that anybody would repeatedly submit to sexual intercourse without protest or resistance for such an extended period. Not only is that assumption inapt generally, it is particularly inapt to this case*". Additionally and in finding improbable the mother's evidence that she did not feel she could speak to anyone about it, Poole J reminded that "*there are many reasons why someone might submit to an abusive relationship without insight into what they are suffering until after the relationship has ended, or perhaps long after that. It is very unfortunate that the Judge referred to "inherent probability" in this context*". However, "*...the fact that some victims of sexual abuse may not realise they are being abused, or may not speak out, does not preclude a finding that had the alleged abuse occurred to a particular person, that person would have known, and would have spoken to someone else about it...A court should be cautious for the reasons set out in guidance about rape myths and stereotypes as well as in a number of reported judgments, but it is not precluded from making a finding that a complainant would have realised that the alleged conduct was abusive or would have spoken to someone about what was happening*".

Poole J considered the judge "*applied a generalisation which tends to suggest that it is unlikely that anybody would repeatedly submit to sexual intercourse without protest or resistance for such an extended period. Not only is that assumption inapt generally, it is particularly inapt to this case*"

***H (A Child : Recusal)* [2023] EWCA Civ 860**

In this case, the Court of Appeal was considering a second appeal brought in private law family proceedings concerning a boy ('H'). The appeal was brought by H's mother against the decision of a High Court judge to allow an appeal by the father against the refusal by the circuit judge allocated to the case to recuse himself from the proceedings. The appeal was allowed. Lord Justice Baker stated that 'bias' is to be considered as per Porter v Magill [2022] 2 AC 357 "*on the more general level of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the father would not receive a fair trial. A party may argue that a particular decision during proceedings was unfair. If so, his remedy is to seek to appeal against that decision. Alternatively, he may argue that the judge's treatment of his case was unfair over the course of the proceedings and that he should therefore recuse himself. In those circumstances, however, it is necessary to consider the whole of the proceedings to determine whether the judge's approach to the aggrieved party has been unfair*".

As to complaints about case management decisions, Baker LJ took the opportunity to remind that "*judges in family cases are encouraged to make case management decisions that ensure that the proceedings are conducted with a focus on the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved. Case management decisions will be upheld on appeal save in clearly defined and narrow circumstances*".

***Tickle v Father & Ors* [2023] EWHC 2446 (Fam)**

This was an appeal against the decision of a trial judge to adjourn an application by a journalist, Ms Tickle, to be allowed to report the proceedings. Ms Tickle attended the second day of a four-day final hearing of private family law proceedings and the judge heard her application for the relaxation

In determining whether a reporter can report on what they see and hear in a Family Court, the Judge will have to apply a balance between Article 8 and Article 10 with an "*intense focus*" on the "*comparative importance of the specific rights being claimed in the individual case …*"

of reporting restrictions to permit reporting of the hearing; this application was adjourned. The scope of the application related to "*the entirety of the hearing*" and not the underlying substantive welfare application. The Guardian opposed the application to report and proposed an adjournment of the application "*pending the final hearing*". The Guardian was reported to be "*concerned about how this may impact on the child and also these proceedings given that they have been adjourned and not finalised yet*". The Father adopted the Guardian's submission; the mother supported Ms Tickle's application. In allowing the appeal, Mrs Justice Lieven set out the relevant principles when approaching an application for reporting of a Family Court hearing. Firstly, although Family Court proceedings are normally held in private the press and legal bloggers are entitled to attend under FPR27.11(2)(f). Such a person can be excluded, but only where it is "*necessary*" in the interests of the child, the safety or protection of parties or others, or the orderly conduct of proceedings, FPR27.11(3). and "*in approaching the test of "necessity", what was said in Re H-L (a child), albeit in a different legal context, is a useful guide*". Mrs Justice Lieven held that "*it will rarely, but not never, be appropriate for the Court to inquire as to why the journalist is seeking to report, or how s/he became aware of the hearing. In general… this will be a matter for the journalist who would not be expected to reveal a "source". However, if the Judge becomes concerned that one party is seeking to use reporting as a litigation strategy, particularly in the context of issues around coercive control, the Judge may wish to inquire into the background to the application to report. This can only be considered on a case specific basis*". In determining whether a reporter can report on what they see and hear in a Family Court, the Judge will have to apply a balance between Article 8 and Article 10 with an "*intense focus*" on the "*comparative importance of the specific rights being claimed in the individual case …*", see Griffiths [37] and Lord Steyn in the House of Lords in Re S at [17]. The child's best interests will be critical, although they will still have to be balanced against the other rights asserted, "*In practice, in most cases in the Family Court, it will be of great importance to preserve the anonymity of the child, so far as is reasonably practicable*". Mrs Justice Lieven emphasises that "*there is a public interest in the reporting of cases in the Family Courts. … it is relevant that because most Family Court cases are held in private and with no reporting, there is less knowledge or understanding of the challenges facing the Family Justice System than those facing the Criminal Justice System. There is a very real public interest in there being greater understanding of the work done by the Family Courts*".

Whilst there may be cases where it is appropriate to adjourn a decision about whether a case can be reported on until the final hearing that must be considered on the facts of the individual case: "*Adjourning the decision is itself an interference with the reporter's Article 10 rights, and as such is different from a more normal case management decision. The Court must bear in mind that the resources of media outlets and reporters are finite, and a reporter may not be able to return on a future occasion*". In deciding whether to allow reporting, the views of the parties, including the child, are of great significance. However, they are not determinative, so no party holds a veto against reporting. A decision on reporting is "*rather different from most case management decisions because it interferes with an Article 10 right and in practice may prevent that journalist from reporting at all. It therefore appears to me that the full rigour of the principles in Re TG do not fully apply*". As to the judge's justification for adjourning the application based on a concern that reporting might jeopardise the fairness of the substantive hearing and therefore impact on the parties', article 6 rights, "*it is of the greatest importance*

> *" it is of the greatest importance to understand that it is not for the Court to consider the quality or fairness of the reporting. The Court is not an arbiter of the editorial content of reporting"*

to understand that it is not for the Court to consider the quality or fairness of the reporting. The Court is not an arbiter of the editorial content of reporting".

***Re D (A Child) (Abduction: Child's Objections: Representation of Child Party)* [2023] EWCA Civ 1047**

This case came before the Court of Appeal as part of a conjoined appeal concerned with the role of a solicitor guardian in applications under the 1980 Child Abduction Convention ("the 1980 Convention"). In particular, are there constraints on the scope of the evidence they can give, for example as to their assessment of the strength or source of a child's views, either legally or, if not legally, as a matter of practice? In this case, D, the subject child, appealed from a return order made (against his wishes). The challenge advanced by D was as to the trial judge's treatment of the solicitor guardian's evidence in that the judge attached no or negligible weight to it, including the evidence given at the hearing by the solicitor guardian. On the facts of this case, the appeal was allowed. In giving some wider guidance, Lord Justice Moylan emphasised that "*as stated in paragraph 3.6 of the Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings, issued by Sir Andrew McFarlane P on 1 March 2023, "In only a very few cases will party status [for a child] be necessary". The child's voice is heard sufficiently through a report from a Cafcass Officer. This was referred to by Lady Hale in In re D (A Child) (Abduction: Rights of Custody) [2007] 1 AC 619, at [60], when she said that "Only in a few cases will full scale legal representation be necessary", and the position has not changed since then*"".

Rule 16.6(1) FPR provides that "a child may *conduct proceedings without a children's guardian*" when the court so permits or when a solicitor, instructed by the child, considers that the "*the child is able, having regard to the child's understanding, to give instructions in relation to the proceedings*". This provision, however, does *not* apply to proceedings under the 1980 Convention although it does apply to most other private law proceedings including proceedings under the inherent jurisdiction. This anomaly has never been resolved and whilst the effect of the present structure has been that the "pragmatic approach" has become the conventional response with the appointment of the child's solicitor as guardian, Lord Justice Moylan held that this "*raises significant questions as to whether the appointment of a guardian should be required by the FPR 2010 as well as the proper role of a solicitor-guardian in proceedings under the 1980 Convention*".

As to the admissibility of opinion evidence given by a solicitor-guardian, Section 3 of the Civil Evidence Act 1972 provides for the admissibility of expert opinion and certain expressions of non-expert opinion. Lord Justice Moylan referenced Phipson, at [33-112] for the proposition that there is no blanket rule that a factual witness may not include opinion evidence in his witness statement in civil cases. At time of writing, further guidance is awaited in the linked appeal.

***SP v DM* [2023] EWHC 2089 (Fam)**

This was an appeal against a child arrangements order which had been made following a fact finding hearing. Just prior to that hearing the mother advised that she was pregnant, had suffered

> There will be cases where the court has a duty to override the desire of a litigant to continue with the case. In such a case, it is likely to be clear that the party is unable to do themselves justice or is physically or psychologically not well enough for the case to continue.

The court acknowledged the parties would need to work together in future but held that *"a far greater feeling of injustice would rightly be felt by the father if he was left having to bear all his own costs in opposing an unmeritorious appeal by the mother."*

complications and that she needed to manage her stress, seeking special measures at the hearing. Participation directions were made, to be further considered at the start of the hearing. No further request was made by the mother. When the mother was giving evidence she took a break and checked her blood pressure, when it reduced she continued her evidence having indicated she was ready to do so. On the third day of the hearing, she asked for a break which was facilitated. On the fourth day the mother stated she felt unwell and left court to observe the rest of the evidence by a link. The appeal considered the principle as to whether, where a party is heavily pregnant, the court has an independent duty to consider an adjournment of the claim, or that evidence should be given by her otherwise than orally under cross-examination, irrespective of whether her counsel has accepted that that course should be followed. In dismissing the appeal, Sir Jonathan Cohen held that "*It is also important to look at the equal treatment book with care. It is correct that it advises that a woman in the last month of pregnancy should not be expected to attend a court or tribunal unless she feels able to do so. It is important to underline the words "unless she feels able to do so". This mother was keen to do so, and Dr Proudman is wrong to assert on her behalf that her attendance at court was contrary to judicial guidance. It was in accordance with her wish. It would be patronising for the court to ignore that fact*". The mother's wish that the case should continue was not conclusive of whether it continues but was "*an important relevant factor*". There will be cases where the court has a duty to override the desire of a litigant to continue with the case. In such a case, it is likely to be clear that the party is unable to do themselves justice or is physically or psychologically not well enough for the case to continue. The court does have "an independent inquisitorial protective duty" but, on the facts, carried out that duty by establishing participation directions and keeping them under constant review.

The court also considered whether the court could go beyond saying a finding was proved or unproved to determine, regardless of whether that was a finding that was specifically sought by the respondent, that a finding sought was false or untrue . Sir Jonathan Cohen held "*if the judge is satisfied that the allegation is wrong and has no foundation in fact, the judge must have the capacity to say that the allegation is untrue. It would be wrong if a judge was straitjacketed into only saying that an allegation was proved or unproved. That would permit the person making the allegation to say that they only failed because the judge was not satisfied on the balance of probabilities when in fact, a judge had found that the allegation was completely false. The judge must be able to make the finding that he/she thinks is appropriate on the evidence seen and heard. It is important, also, for the child that clear findings are made when the evidence permits*".

In a related judgment **[2023] EWHC 2089 (Fam) [No.2]**, the judge ordered that the mother pay 62.5% of the father's costs of the appeal, noting that the fact of the grant of permission to appeal was not conclusive of the issue as to costs. The mother "*chose to continue her appeal despite the judge's warning of the low prospects of success … She should have taken the warning into account*". The court acknowledged the parties would need to work together in future but held that "*a far greater feeling of injustice would rightly be felt by the father if he was left having to bear all his own costs in opposing an unmeritorious appeal by the mother.*"

Public Law Update

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The Adoption Sub-Group of the Public Law Working Group has published its interim report: *Recommendations for Best Practice in Respect of Adoption*, and has encouraged anyone who has experience of, or views on, this area to respond to the consultation. The report covers the fields of adoption and contact with birth families, access to records, practice and procedure in placement and adoption applications, adoptions with an international element, and adoption by consent. It is a draft report in its current form, but notably includes:

- Consideration of the potential advantages to adopted children of maintaining some sort of face-to-face contact with the birth family, referring to The House of Lords Children and Families Act 2014 Committee, which reported in December 2022 that the current system of letterbox contact was outdated. The group suggests a change in social work practice and training for all involved in the process to give more focus to contact and the benefits that it can bring for many (although not all) adopted children.
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- Consideration as to whether there should be any changes to the law as to the rights of both parents to apply for leave to oppose the making of an adoption order, noting the issues that applications can cause for children and prospective adopters. At this stage, the group suggests no change to the law on the basis that the new legal aid regulations that provide for birth parents to be able to obtain legal representation for applications within adoption or stand-alone placement order applications, may be sufficient to limit the number of applications in cases where there is no realistic prospect of success.

The President has said that it is hoped the report will be published in its final form, with an implementation plan, in the early part of 2024.

In relation to Deprivation of Liberty Cases, a Revised National Listing Protocol for such applications was issued by the President on 11 October 2023. Following the conclusion of the initial pilot scheme in July, the National DoL Court will no longer operate under that title. In future, all initial applications will be dealt with as part of the National DoL List which will continue to be overseen as part of the work of the Family Division. The revised protocol includes provision that every effort must be made to avoid issuing urgent applications on a Friday, and where there are, or will be, parallel public law proceedings concerning the same child, or where there has been prior judicial involvement at a local level, the case will be sent back to the local court for further reviews after the first hearing. That is to seek to ensure a much greater level of judicial continuity than is achieved presently. Local authorities are obliged to liaise with the local court regarding ensuring that the matter is listed before a s.9 judge.

At the same time, the President also issued revised Practice Guidance on the Courts' approach to unregistered placements, replacing the previous 2019 Practice Guidance: *Placements in unregistered*

The President has said that it is hoped the report Recommendations for Best Practice in Respect of Adoption will be published in its final form, with an implementation plan, in the early part of 2024.

children's homes in England or unregistered care home services in Wales, and the 2020 Addendum. The previous guidance set out the steps that judges were encouraged to take in respect of establishing whether a placement was registered, and if not, in the process towards registration. That has placed very considerable burdens on the court system, and the President has noted that "it is not for the Court to become a regulatory body or the overseer of the regulatory process". The court should therefore restrict its considerations and orders to its own functions, namely to exercise its inherent jurisdiction to ensure that any deprivation of liberty is not itself unlawful, and the court's role should not go beyond those powers.

A cross-government group of experts has been set up to tackle the recent sharp rise in the use of deprivation of liberty (DoL) orders amid concerns that they fail to provide the support vulnerable children need. The 'task and finish' group has been established by the Department for Education and NHS England in response to a report published by the Nuffield Family Justice Observatory which called for a complete overhaul of the support system for children subject to DoL orders. The group was set up in response to the National DoL Court figures which suggested the number of applications in the year to June 2023 had more than doubled.

The past few months appear to have seen a plethora of reported public law cases. The following are but a very brief selection.

Jurisdiction

In ***Re London Borough of Hackney v P and Others (Jurisdiction: 1996 Hague Child Protection Convention)*** **[2023] EWCA Civ 1213** the Court of Appeal was concerned with the date by reference to which the court determines whether it has jurisdiction based on a child's habitual residence, pursuant to the provisions of Article 5 of the 1996 Hague Convention, and the extent of the court's jurisdiction to make orders under Part IV CA 1989, if a child is present, but not habitually resident, in England and Wales nor any other Contracting State to the 1996 Convention. The Court of Appeal noted that whether the relevant date for jurisdictional purposes was the date of the hearing, or the date on which the proceedings were issued, had divided the judges of the Family Division.

As to the facts, the child, H, was born in France in 2009, and lived there until 2017 when she moved to live with her paternal grandmother in Tunisia, pursuant to an order of the French court, following her mother's death. H left Tunisia in June 2021, to stay with her paternal uncle in England. Almost immediately, he contacted the police, complaining that the child had been sent to England to "ruin his life". The child reported having been hit in the face by her uncle. She was taken into police protection and placed in foster care. In the section 47 investigation that followed, the uncle made allegations that the child had suffered and was at risk of suffering harm in Tunisia. The child was returned to his care for a few days, before again being placed in foster care as a result of further allegations made by the uncle.

The local authority commenced care proceedings in August 2021. The paternal grandmother, who had been joined as a party, resisted the application for a care order and sought the summary return of the child to Tunisia. She submitted that the court did not have jurisdiction based on presence, saying that the child was habitually resident in Tunisia. MacDonald J determined at first instance that the court had jurisdiction to make orders under s31 Children Act 1989 on the basis that H was habitually resident here at the date of the hearing. The grandmother appealed that decision. There was no appeal against the refusal of the summary return application or the decision that welfare issues were best resolved in the Family Court in

England and Wales.

On appeal, Moylan LJ set out at some length his analysis of the interplay of the 1996 Hague Convention and its Explanatory Report, and the domestic case law. He said that the 1996 Convention applies to public law cases, noting that the primary ground of jurisdiction is habitual residence pursuant to Article 5, where a child is habitually resident in a Contracting State. Under Articles 11 and 12, necessary measures of protection can also be taken by the authorities of any Contracting State in whose territory the child is present, but not habitually resident. That applies, regardless of whether the rival jurisdiction is another Contracting State, or a non-Contracting state, and those alternative grounds of jurisdiction are intended to be subordinate to or exceptions from the substantive ground of habitual residence.

Article 5 does not apply if the child is not habitually resident in any Contracting State at the relevant date, though Articles 11 and 12 could still apply because of the child's presence in England and Wales. The court's jurisdiction in those circumstances is not however founded solely on the provisions contained in Articles 11 and 12, since the Explanatory Note provides that, "nothing prevents these authorities from finding themselves to have jurisdiction, outside of the Convention, on the basis of the rules of private international law of the State to which they belong". Instead, the substantive jurisdiction is derived under national law, with which Articles 11 and 12 do not conflict. The jurisdiction based on habitual residence is lost and acquired simultaneously with the change of the child's habitual residence.

The Explanatory Report to the Convention makes clear that if a child's habitual residence changes during the course of any proceedings, the jurisdiction of the court first seised would be lost at that point in time. That does not however terminate any measures already taken, and they would remain in force until, if necessary, other appropriate measures are taken by the authorities of the Contracting State of the child's new habitual residence.

> In Re London Borough of Hackney v P and Others (Jurisdiction: 1996 Hague Child Protection Convention) [2023] EWCA Civ 1213 the Court of Appeal was concerned with the date by reference to which the court determines whether it has jurisdiction based on a child's habitual residence

Moylan LJ referred to the Family Law Act 1986, noting that it only deals with private law proceedings. However, he said its relevance is the fact that it gives the court alternative grounds of jurisdiction in the event that the 1996 Convention does not apply, and the alternative grounds include the child's presence in England and Wales. He noted that the relevant date for the purposes of determining jurisdiction under s.7 of the FLA 1986 is the date of the application, or if no application has been made, the date on which the court is making an order. Moylan LJ said that he agreed that "the 1996 Convention should be interpreted and applied purposively in a manner which supports the protection of children and their welfare interests". The court must determine whether it has jurisdiction on the basis of its jurisdiction at the outset of proceedings, as made clear inter alia by the provisions of the PLO. He agreed with Lieven J and Peel J that unless the issue of jurisdiction is determined expeditiously, a party might seek to delay proceedings or seek to take advantage of delay to procure a jurisdiction advantage. The 1996 Convention he said "is the "first port of call" including when the rival jurisdiction is not a Contracting State", and the starting point is therefore an enquiry into the child's habitual residence. Whichever contracting state the child is habitually resident in, has jurisdiction. However, if the child is habitually resident in a non-contracting state, but present in England and Wales, Article 5 has no application and the court may have jurisdiction under Article 11.

Moylan LJ said, "jurisdiction can be established

on the basis of presence under our domestic rules", though they "cannot be relied on in a manner that would conflict with the provisions of the 1996 Convention". Moylan LJ held that in this particular case the court undoubtedly had jurisdiction to make an interim care order. He agreed with McDonald J that "a residual common law jurisdiction with respect to public proceedings based on presence where the child is not habitually resident in a Contracting State for the purposes of Art 5 is not incompatible with that object and, indeed, is consistent with it."

Thus, if the 1996 Convention does not provide substantive jurisdiction, the court can turn to our domestic law as an alternative source of jurisdiction. Moylan LJ said that because this case involved a non-contracting state, it did not engage comity because there is no "international legal framework". Orders made in each of the jurisdictions would not have automatic entitlement to recognition or enforcement in the other. Thus he said, "depriving England and Wales of substantive jurisdiction based on presence would create a gap in the State's ability properly to protect a child present in its jurisdiction and to make "the best interests of the child … a primary consideration" as set out in the 1996 Convention".

As to the relevant date for the determination of habitual residence, this should initially be determined by reference to the date on which proceedings were commenced, since that is the date on which the court's jurisdiction was invoked. It also provides a benchmark against which any future changes can be measured in particular whether the child's habitual residence has changed. In the vast majority of cases that would not cause any difficulties. However, if a child ceases to be habitually resident in England and Wales during the course of proceedings, and becomes habitually resident in another contracting state, the courts of England and Wales would lose jurisdiction. If the move were to a non-contracting state, England and Wales could nonetheless retain jurisdiction by reference to domestic law. As to what happens if a child becomes habitually resident in England and Wales during the course of proceedings, then the English court will have acquired substantive jurisdiction under Article 5. In this case, however, the English court had substantive jurisdiction from the outset because of the child's presence here, and Tunisia not being a party to the 1996 Convention.

Joinder of a Father without PR

In ***S (A Child)* [2023] EWCA 706**, the Court of Appeal was concerned with an appeal brought by a biological father without parental responsibility against the judge's refusal of his application to be joined as a party to care proceedings in relation to his son ('S'). S, aged 11, had been born as a consequence of a consanguineous relationship between the mother and the father, as whilst the father was S's biological father, he was also the paternal uncle of the mother. The father was not named on S's birth certificate and did not have parental responsibility. As far as S was concerned, he believed the father only to be his uncle. The mother had conceived S when 17, and living with the father who had assumed a parental role following the death of her own father. The mother had more recently made allegations against the father of rape including that S had been conceived following a rape. Concerns of the local authority unrelated to the father had led to the local authority issuing care proceedings, and the father was given notice of the proceedings. He had made an application to be joined as a party as soon as practicable thereafter.

King LJ set out the relevant law as to joinder. As a father without parental responsibility, his application was made under r.12.3(3)(a) FPR 2010, which provides that the court 'may at any time direct that any person or body be made a party to proceedings.' Whilst there is no guidance in the FPR 2010 or the Children Act 1989 as to the factors that the court should consider when exercising its discretion under r.12.3(3)(a) FPR 2010, the court must, however, apply the overriding objective in r.1.1 FPR 2010. King LJ went on to set out what she said were the guiding principles as follows:

- The child's welfare is important but not paramount:

- Where a father without parental

responsibility applies to be joined as a party to care proceedings concerning the child, there is a presumption in favour of granting the application unless there is a 'justifiable reason' for refusing it.

- There is no requirement for a father without parental responsibility to show 'an arguable case' or even to have a specific application to make.

- What amounts to a 'justifiable reason' to rebut the presumption in favour of a father being joined as a party is a matter for the discretion of the judge having considered and put into the balance all relevant matters.

- There is no requirement to consider the factors in s.10(9) Children Act 1989 which relates to the joinder of persons in relation to section 8 Children Act 1989 private law proceedings.

- The court must consider the parties' Article 6 and 8 rights, including those matters set out in Re CD (Notice of care proceedings to father without parental responsibility) [2017] EWFC 34 at [29].

- The presumption in favour of a father being joined to the proceedings should not be displaced if the concerns of the other parties (often the mother) can be properly mitigated by the court making use of the extensive tool kit now available to it in the form of its general case management powers and its powers in relation to vulnerable parties.

In allowing the appeal, King LJ said, "Even without parental responsibility, the father is treated under the Children Act 1989 as a legal parent and is entitled as of right to apply for any orders in respect of his child. Further, if his child is in care, the father is entitled under s.34(1) Children Act 1989 to reasonable contact with his child subject to a court giving the local authority permission to refuse it." Given that, she added it is "unsurprising that the starting and often finishing point when considering whether a father without parental responsibility should be joined as a party is the presumption in favour of his being granted party status regardless of whether he has or has not a good arguable case". Whilst the court can make orders to restrict the disclosure of documents when 'strictly necessary', the use of such a power would undoubtedly be 'strictly necessary' if the alternative was to deprive a natural father of the opportunity to be a party to the care proceedings in relation to his child. Those type of case management powers would in most cases ameliorate any perceived harm. King LJ held that the judge had failed to assess the necessity and proportionality of excluding the father or to consider whether steps could be taken to mitigate the potential impact of joinder on the mother and S, when considering the application and whether there was any 'justifiable reason' to refuse the application. The judge had also wrongly imported an 'arguable case' test, and wrongly considered that concerns about the father's capacity and/or cognitive difficulties effectively precluded him from putting forward a position and participating in the proceedings, despite there being no proper assessment of his ability to do so.

Local Authority Exercise of PR

In ***Re WSP (A Child) (Vaccination: religious objection)* [2023] EWHC 2622 (Fam)**, the court was concerned with an application made by a mother, for the court to exercise its inherent jurisdiction to issue an injunction that would prevent the Local Authority from exercising its parental responsibility under s.33(3) CA 1989 to arrange for the subject child to undergo "routine" vaccinations. The mother suffered with poor mental health, and had been admitted to hospital for treatment under s.3 of the Mental Health Act 1983 where she remained until after the child's birth. Following the child's birth, the local authority had obtained an interim care order, with an interim care plan that the child initially remained in the mother's care. Following successive placement breakdowns, the mother and child were separated. In September 2023, the local authority informed the mother of their intention to arrange for the child to be vaccinated without her

consent using its powers under s.33(3)(b).

The mother made an application to injunct the local authority from vaccinating the child. She said that she considered vaccinations to be contrary to her Muslim faith, and such vaccinations were considered to be 'haram'. She maintained that vaccinating the child without her consent would violate her rights under Article 9 ECHR both alone and when taken together with Article 14. She was concerned as to the emotional or psychological harm that would be done to the child as a result. In refusing the mother's application, Paul Bowen KC, sitting as a Deputy Judge of the High court, referred to the Court of Appeal's judgment of In *Re H (A Child)* [2013] Fam 133 ('*Re H*'), and in particular the judgment of King LJ, who had said, "an application to invoke the inherent jurisdiction or to seek an injunction with a view to preventing the vaccination of a child in care is unlikely to succeed unless there is put before the Court in support of that application cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations". He noted that the feature of this case that differentiated it from *Re H* was that the mother objected based on religious grounds, and reviewed the relevant European legislation, as interpreted in domestic law.

Paul Bowen KC noted that Article 9 protects two rights. First, the right to hold (and change) any religious belief, which is absolute and unconditional, and secondly, the right to *manifest* one's religious freedom in 'worship, teaching, practice and observance', which is a qualified right because its exercise may have an impact on others. He said, "the protected rights under Article 9 may be overridden by a state body, provided there is a sufficiently pressing need to do so for one of the purposes in Article 9 (2), and the means used are both lawful … and proportionate, applying the four stage proportionality test in *Bank Mellat v Her Majesty's Treasury (No 2) (SC(E))* [2014] AC 700, [20] and allowing the state body an appropriate discretionary area of judgment". In his view, the upbringing of a child is clearly a 'manifestation' of religious belief, and thus he said "although '*the law will tolerate things that society as a whole may find undesirable*', some aspects of the upbringing of children that are done in the name of religion are not protected by Article 9 and the state may lawfully prevent them". In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration.

> King LJ held that the judge had failed to assess the necessity and proportionality of excluding the father or to consider whether steps could be taken to mitigate the potential impact of joinder on the mother and S, when considering the application and whether there was any 'justifiable reason' to refuse the application

Thus, he concluded, "a parent's decision to consent or refuse to have their child vaccinated on religious grounds is another 'manifestation' of religious belief that may be regulated by the state and its Courts without breaching Article 9". The mother had not produced cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations. In the absence of that, the mother's objections on religious grounds did not otherwise outweigh the child's welfare interests in receiving vaccinations. Paul Bowen KC also rejected the mother's argument that she had been discriminated against unlawfully in the enjoyment of her Convention rights contrary to Article 14. Whilst the mother had undoubtedly been treated differently, as a mother with a child in care, he was satisfied that the difference in treatment had an objective and reasonable justification for the reasons given by King LJ in Re H when explaining the differences between the 'public sphere' and 'private sphere'.

Court of Protection Update

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It is now 16 years since the MCA came into force and the jurisdiction of the Court of Protection continues to mature and develop to meet the needs of the cases presented by modern demographics and values. Our update this month reflects developments and understanding in a number of diverse areas: in eligibility to deprive someone of their liberty, how the court assesses mental capacity when a person holds delusional beliefs about proposed medical treatment, a case where the court declined to exercise its inherent jurisdiction, the approach to a termination of pregnancy and a further capacity assessment in relation to sexual relations where one feature was that the person might impulsively sexually assault others.

We begin with the decision of Theis J in ***Manchester University Hospital NHS Foundation Trust v JS & Others (Schedule 1A MCA 2005)*** **[2023] EWCOP 33**. This was an appeal from the decision of HHJ Burrows which was addressed to the tricky (some would say 'brain melting') question as to when a person's mental health status might render them ineligible to be deprived of their liberty under the MCA because the proper pathway for any detention should be the MHA 1983, the legislative code for detaining persons with qualifying mental disorders. Theis J upheld both the first instance judgment and the test set by Charles J in *GJ v The Foundation Trust & Anor* [2009] EWHC 2972 (Fam) to be applied by decision-makers to determine whether a person could be detained under the MHA.

Theis J agreed that a useful structure for practitioners and judges was to pose and answer –the 'key questions' of: (1) Is the person a 'mental health patient'? (2) Is the person an 'objecting' mental health patient'? (3) Could the person be detained under section 3 MHA 1983?. Theis J was

clear that Charles J's analysis of the meaning of 'could' was correct, namely that the decision-maker should ask themselves whether, in their view, the criteria set by, or the grounds in, s. 2 or s.3 MHA 1983 are met (and if an application was made under them a hospital would detain P). The court rejected the alternative advanced by the Trust of requiring the MCA 2005 decision-maker to defer to the MHA 1983 decision-maker unless their decision is not logical or rational because it "*would probably lead to more uncertainty and risk undermining the purpose of the legislation.*"

Theis J identified that a practical step that could be taken in cases where Schedule 1A Case E issues are likely to arise "*is for evidence to be provided to address that issue, utilising the GJ framework. That would not only assist the court and the parties, but also focus the minds on what needs to be addressed both in terms of any decisions to date under the MHA 1983, the basis of the application in the Court of Protection and addressing the key questions outlined above*".

Theis J also endorsed suggestions put forward by the Secretary of State for Health and Social Care to address stalemate situations, as follows: (1) The MHA and MCA decision-makers should arrange for discussions between the relevant professionals.

In *An NHS Trust v ST & Anor* [2023] EWCOP 40 Roberts J was presented with a difficult decision in relation to the mental capacity of a young adult to make decisions in relation to end of life care.

They should be undertaken in '*the spirit of cooperation and appropriate urgency*'. This will ensure the relevant professionals have reviewed and considered relevant evidence and if required further inquiries can be made. (2) If these discussions do not result in a detention being authorised under the MCA the hospital has a number of choices: (i) It can seek the person's admission under the MHA 1983 to authorise the deprivation of liberty, including on a short term basis while it seeks to advance the person's discharge; (ii) It can seek the person to be detained in an alternative setting, such as a care home, in which Case E has no application with consideration being given to what can be put in place to support the person in the community under s 117 MHA 1983 and/or Care Act 2014 duties. (iii) It can stop depriving the person of their liberty if it considers the person should not be detained under MHA 1983, even with the knowledge that the person will not be detained under the MCA 2005. (3) If the hospital does not consider that an application for assessment or treatment under MHA 1983 is warranted but does consider it is in the person's best interests to be detained in hospital for treatment of a mental disorder, it should consider carefully its reasons for drawing this distinction. The hospital could apply to the Court of Protection for a determination of whether the person is eligible for detention under the MCA 2005.

Specifically in relation to those aged 16 or 17, to whom Schedule A1 does not apply (but to whom Schedule 1A does apply in determining whether or not the Court of Protection can make an order depriving them of their liberty), Theis J indicated that the following may provide a guide: (1) In any application seeking authorisation to deprive the liberty of a 16 or 17 year old the applicant should carefully consider whether the application should be made in the Court of Protection and, if not, why not. (2) If a Schedule 1A Case E issue is likely to arise any evidence filed in support of an application should address that issue, so the relevant evidence is available for the court, thereby reducing any delay. (3) In the event that the Court of Protection determines that P is ineligible the professionals should urgently liaise in the way outlined above.

In *An NHS Trust v ST & Anor* **[2023] EWCOP 40** Roberts J was presented with a difficult decision in relation to the mental capacity of a young adult to make decisions in relation to end of life care. ST was 19, and had spent the past year as a patient in an intensive care unit. She had a rare mitochondrial disorder, a progressively degenerative disease and there was no cure which might have enabled ST to resume her life outside the clinical setting of the intensive care unit. She was mechanically ventilated through a tracheostomy. Her disease had resulted in a number of related health problems including impaired sight and hearing loss, chronic muscle weakness, bone disease and chronic damage to her kidneys and lungs. The collective view of her treating team was that ST was in, or was fast approaching, the final stage of her life and the plan was to move to a treatment plan of palliative care. That path would involve a much less invasive regime for ST. Dialysis would end and there would be no further attempts to resuscitate her in the event of a further major respiratory arrest such as had already occurred twice. The treating team sought to involve ST in their formulation of the plan however, as Roberts J pointed out, "*in preserving respect for her personal autonomy to make these choices, they have met with a fundamental obstacle which, on the case advanced by the Trust, is her apparent refusal or inability to accept that her disease will result in her early, if not imminent, death. It is that inability, or "delusion", which the Trust relies on as rendering her incapacitous to make decisions for herself*".

> Theis J indicated that the following may provide a guide: (1) In any application seeking authorisation to deprive the liberty of a 16 or 17 year old the applicant should carefully consider whether the application should be made in the Court of Protection and, if not, why not. (2) If a Schedule 1A Case E issue is likely to arise any evidence filed in support of an application should address that issue, so the relevant evidence is available for the court…

The questions before the court were (1) whether that was the case, and (2) whether ST had capacity to conduct the proceedings in view of her beliefs that a form of an experimental nucleoside treatment outside the United Kingdom might offer her hope of an improved quality of life, albeit a life which is likely to end prematurely in terms of a normal life expectancy. Furthermore, what prominence in that exercise to give to her view that "*this is my wish. I want to die trying to live. We have to try everything*". The Trust sought to advance the case that ST lacked capacity in the material domains notwithstanding evidence from two psychiatrists involved in her care that they considered that she retained the requisite capacity. Roberts J held that ST lacked the requisite mental capacity. The starting point was the decision that ST had to make, and the information relevant to that decision being, (i) the nature of her disease and the fact that her disease is responsible for the deterioration in her respiratory condition; (ii) the assessment of her medical team as to prognosis; (iii) the available options in terms of active treatment including the likelihood of that treatment being available and its chances of success; (iv) the fact that a small insult arising in the course of her care or management or the further development of her disease (such as another respiratory arrest) may cause potentially fatal clinical instability.

Having reviewed the case law, the judge expressed the view that: "*Whilst it is clear that the strict terms of the MCA 2005 omitted a 'belief' requirement from the wording of ss. 2 and 3, it is clear from Local Authority X v MM that the approach taken by Munby J subsumes the requirement for belief within the statutory limbs of understanding, using and weighing as part of the decision-making process. In this context, and in terms of a patient centred approach, it is important in my judgment for the court to consider the extent to which the information provided to a person is capable of being established objectively as a "fact" or a "truth". The less certain the fact or truth, the more careful the court must be when determining whether the presumption of capacity is rebutted*". Applying this to the facts of ST's case, Roberts J continued: "*What ST fails to understand, or acknowledge, is the precariousness of her current prognosis. She does not believe that her doctors are giving her true or reliable information when they tell her that she may have only days or weeks to live. She refuses to contemplate that this information may be true or a reliable prognosis because she has confounded their expectations in the past despite two acute life-threatening episodes in July this year and because she has an overwhelming desire to survive, whatever that may take*" . She went on:

"*Because she clings to hope that her doctors are wrong, she has approached decisions in relation to her future medical treatment on the basis that any available form of treatment is a better option than palliative care which is likely to result in an early death as active treatment is withdrawn. In my judgment she has not been able to weigh these alternatives on an informed basis because (a) she does not believe what her doctors are telling her about the trajectory of her disease and her likely life expectancy, and (b) she does not fully comprehend or understand what may be involved in pursuing the alternative option of experimental nucleoside treatment.*"

In the circumstances, Roberts J found that "*ST is unable to make a decision for herself in relation to her future medical treatment, including the proposed move to palliative care, because she does not believe the information she has been given by her doctors. Absent*

that belief, she cannot use or weigh that information as part of the process of making the decision. This is a very different position from the act of making an unwise, but otherwise capacitous, decision. An unwise decision involves the juxtaposition of both an objective overview of the wisdom of a decision to act one way or another and the subjective reasons informing that person's decision to elect to take a particular course. However unwise, the decision must nevertheless involve that essential understanding of the information and the use, weighing and balancing of the information in order to reach a decision. In ST's case, an essential element of the process of decision-making is missing because she is unable to use or weigh information which has been shown to be both reliable and true". She went on to find that, *"in my judgment, and based upon the evidence which is now before the court, I find on the balance of probabilities that ST's complete inability to accept the medical reality of her position, or to contemplate the possibility that her doctors may be giving her accurate information, is likely to be the result of an impairment of, or a disturbance in the functioning of, her mind or brain".*

In ***Re RK (Capacity; Contact; Inherent Jurisdiction)* [2023] EWCOP 37** Cobb J was concerned with R, a 30 year old woman with Down's Syndrome, a moderate to severe learning disability, who was partially sighted. She had a full-scale IQ of 60, and had some expressive and receptive communication difficulties. She was also an accomplished swimmer, having competed in national and European championships and an actor. R lived in supported living accommodation called 'Castle Hill,' her care needs being provided by a provider contracted by the relevant local authority, XCC. Cobb J had previously made determinations that R lacked capacity to litigate, and to manage her property and affairs, but that she had capacity to engage in sexual relations, to make the decision to remain at Castle Hill, and to make decisions about what support she needs on a day-to-day basis. He was now asked by R's family to declare inter alia that she lacked capacity to make decisions about contact, that she was susceptible to undue influence, and measures need to be put into

Cobb J … conducted a detailed review of the authorities, *"to demonstrate that while the inherent jurisdiction is available in the right case, it is not 'all-encompassing' and there are clear limits to its applicability".*

place to protect her from this. In the alternative, if he found that R had capacity to make decisions about contact, he was asked to make an order under the inherent jurisdiction in relation to supporting contact between her and her family. R's family, in essence, wanted to have implemented a supportive framework to encourage R to repair and maintain her relationship with her immediate and wider family and friends.

Having carefully reviewed the factual and expert evidence, the judge concluded that she possessed mental capacity to make decisions about contact and had not been subjected to the undue influence of others including staff at her accommodation. Cobb J then went on to consider whether to make orders under the inherent jurisdiction. He conducted a detailed review of the authorities, *"to demonstrate that while the inherent jurisdiction is available in the right case, it is not 'all-encompassing' and there are clear limits to its applicability".* Having reviewed the material before him Cobb J reached the following conclusions: *"….. in Re SA, Munby J declined to define the categories of person for whom the inherent jurisdiction may be invoked, but it is nonetheless clear from his judgment (and from DL which followed) that those for whom it would apply are those who are under constraint, subject to coercion or undue influence or otherwise (for some other reason) deprived of the capacity to make a relevant decision, or disabled from making a free choice (see above). In my judgment, this has not been R's experience in her placement."* Accordingly, there was no basis upon which the court could make orders imposing arrangements on R contrary to her expressed wishes.

Re H (An Adult; Termination) **[2023] EWCOP** John McKendrick KC was invited to consider whether the woman, Ms H, had capacity to make the decision to consent to terminate her pregnancy, if she lacked that capacity, whether a termination was in her best interests; and, if a termination were to be in her best interests, whether this should be carried out by a medical procedure (i.e. the administration of drugs) or a surgical procedure. Ms H was detained under the MHA 1983 and, with one exception, had been consistent in her wish to terminate her pregnancy. It was common ground that the test under s.1(a) of the Abortion Act 1966 had been met in that two registered medical practitioners had formed the opinion that the termination was less than 24 weeks, and that continuing the pregnancy involved greater risk to her mental health than if the pregnancy were terminated. No one before the court contended that Ms H had capacity to make the decision whether to terminate her pregnancy, and, endorsing and applying the approach set down by HHJ Hilder in *S v Birmingham Women's and Children's NHS Trust And Another* [2022] EWCOP 104 to the relevant information, John McKendrick KC agreed that Ms H lacked the material decision making capacity. No one before the court contended that a termination was anything other than in Ms H's best interests.

In circumstances where there was in the view of the court, a "*sustained negative view of her pregnancy and a sustained wish for a termination*", the Deputy Judge held that *"considering the terms of section 4 ..... and the case law....., in the context of this personal and profound decision for Ms H, I attach significant weight to her wishes and feelings. The fact that her wishes and feelings are supported by the two applicants, their professional witnesses and the Official Solicitor on her behalf, adds significant weight within my assessment of the section 4 2005 Act factors*".

A furthermore difficult decision however, was what form the termination should take – medical or surgical. Ultimately, and agreeing with the approach set out by the Official Solicitor, the court found that "*Ms H's very strong wish for a termination and her stronger wish not to have a surgical termination have a powerful role in the section 4 best interests analysis. ..... She has a visceral desire to be free from her pregnancy and she has elaborated consistently and clearly her firm desire for a medical termination and opposition to a surgical termination. This perspective is not one the court is unable to give effect to. On the contrary, it is supported by two NHS Trusts. It is also, on balance, supported by the Official Solicitor. Notwithstanding my concerns in respect of Ms H's noncompliance with a medical termination and the risks of her being deeply anguished during the 24-48 hour period, I consider this less psychologically harmful to her than being conveyed and possibly restrained en route to Newcastle [where a surgical termination could take place], where she would then be faced with being in hospital against her will for around 24 hours and would quite likely require chemical or physical restraint, given her opposition to a surgical termination*".

> Poole J applied the test for capacity as set out by the Supreme Court in A Local Authority v JB [2021] UKSC 52, [2022] 3 All ER 697, and considered other cases ... where the court had applied a test for sexual capacity which was tailored to the individual circumstances of the person.

Finally, in ***PN (Capacity: Sexual Relations and Disclosure)*** **[2023] EWCOP 44** PN was a 34-year-old man who had diagnoses of a mild learning disability and ASD. There was no dispute as to PN's diagnoses or his lack of capacity in a number of domains. The issue before the court was whether PN had capacity in relation to three issues: (1) to make decisions about engaging in sexual relations; (2) disclosing information about the risk of sexual harm he posed to others; and (3) about allowing the local authority to disclose information about the risk of sexual harm he posed to others. By the conclusion of the hearing having heard expert evidence, all three

The unpalatable truth is that some capacitous individuals commit sexual assault, even rape, but also have consensual sexual relations. An individual with learning disability, ASD, or other impairment, may act in the same way, but it is only if they lack capacity to make decisions about engaging in sexual relations that the Court of Protection may interfere.

parties in the matter agreed that PN had capacity to take decisions in the three domains above for himself. PN had a history of sexual offending, and the judgment states that it had been given "*a very long list of incidents of concern stretching back to 2001 which includes multiple examples of sexual assault by unconsented-to touching*". PN had a full-scale IQ of 69. The evidence appeared to be that PN did understand what sexual assault and consent were, and what conduct was illegal. The primary issue was that PN continued to behave impulsively when he was in proximity to women. The court heard evidence that he was capable of controlling his impulses but that on occasions he chose not to.

Poole J applied the test for capacity as set out by the Supreme Court in *A Local Authority v JB* [2021] UKSC 52, [2022] 3 All ER 697, and considered other cases (in particular the judgment in *Hull City Council v KF* [2022] EWCOP 33, in which he previously adopted a person specific approach) where the court had applied a test for sexual capacity which was tailored to the individual circumstances of the person. Poole J considered that in JB: "*Lord Stephens' judgment appears to me to recognise that the relevant information may differ from case to case. He expressly held that in certain cases the approach should be person specific and that the "reasonably foreseeable consequences of deciding one way or another may be different". He gave the example that the risk of a sexually transmitted infection may not be part of the relevant information that has to be understood, retained, weighed or used if the circumstances of the case render that irrelevant. Hence, Lord Stephens' judgment establishes that there is no requirement that all of Baker LJ's relevant information must apply in every case. The relevant information will depend on P's circumstances, their sexual orientation, sexual practices and preferences, whether there is an identifiable person or persons with whom they are likely to have sexual relations, and what the characteristics are of that person or those persons*".

In holding that PN had the requisite capacity he observed that: "*The unpalatable truth is that some capacitous individuals commit sexual assault, even rape, but also have consensual sexual relations. An individual with learning disability, ASD, or other impairment, may act in the same way, but it is only if they lack capacity to make decisions about engaging in sexual relations that the Court of Protection may interfere. If P would otherwise have capacity, then the court should not allow its understandable desire to protect others to drive it to a finding that P lacks capacity, thereby depriving P of the right they would otherwise have to a sexual life. The Court of Protection should not assume the role or responsibilities of the criminal justice system. One of the core principles of the MCA 2005 is that "a person is not to be treated as unable to make a decision merely because he makes an unwise decision" – s1(4). Deciding to act in a way that might be a criminal offence would be an "unwise" decision. Such decisions might contribute to a determination of a lack of capacity, but P is not to be treated as unable to make a decision merely because they may make a decision to act in a way that might amount to a criminal offence*".

Cohabitation Update

Greg Williams | Coram Chambers

Quite a few interesting cases to report on in this Edition, though none of them can be classified as pure 'cohabitation' cases. Perhaps the time will come where it will be necessary to revisit the title of this column, but for now, sit back and enjoy this seasonal round up of equitable stocking fillers.

First, to the Court of Appeal in ***Gill v Thind and others*** **[2023] EWCA Civ 1276**, for a family business dispute about the ownership of company shares. The Claimant was the father of the First Defendant. The Second Defendant was the First Defendant's husband. There were three family companies and the Claimant claimed to be the absolute owner of two of them and a one-third owner of the third. The Defendants had pleaded that the Claimant had received the shares in all three companies on trust for their children (the Claimant's grandchildren). The judge below found in favour of the Defendants, holding that the Claimant's shares were held on trust for the grandchildren. On appeal, the Claimant did not challenge the judge's decision below in respect of the first two companies, but he argued that the judge had been wrong about the ownership of the third company and his alleged one-third interest in that company, Jeeves Estates Limited ('JEL'). One interesting aspect of the JEL claim was that the Claimant had himself contributed one third of the cost of the purchase of properties held in the name of JEL, which the Defendants had alleged were merely interest free loans and on which point the judge had found in their favour. The Appellant Claimant submitted that, as a matter of law, there had to be clear evidence of an intention to create a trust, and he said the facts relied on by the judge in finding that there was an express declaration of trust did not individually or collectively represent clear evidence of an intention to create such a trust, as other facts found by the judge provided evidence to the contrary. Arnold LJ, giving the leading judgment for a strong Court of Appeal including Peter Jackson LJ, set out that "*it is well established that an express trust will only arise where the "three certainties" essential for the creation of a trust are satisfied. First, there must be certainty of intention to create a trust. Secondly, there must be certainty as to the subject-matter of the trust. Thirdly, there must be certainty as to the beneficiaries of the trust.*" [48] His Lordship noted that the Appellant's Ground 1 concerned the first requirement. Discussing whether it had been easy or not for the trial judge to pin-point a specific moment of declaration (where the evidence had been of a number of discussions over a number of occasions) Arnold LJ held that the judge below had been right to find that there had been an express declaration of trust. However, the argument of this issue (and the resolution of it) is well worth a closer reading. Counsel for the Appellant had argued that: (i) on a proper construction of the well-known case of *Paul v Constance* [1977] 1 WLR 527, as a matter of law there must be clear evidence of an intention to create a trust; (ii) the facts relied upon by the judge in finding an express declaration of trust did not individually or collectively represent clear

evidence of that intention; (iii) furthermore, other facts were to the contrary; and (iv) the judge had also failed to take into account the difficulty of ascertaining the terms of the trust. Counsel for the Respondents submitted, this argument conflates two different questions: what must be proved, and the standard of proof required to prove it.

In response, Arnold LJ said this: [55] "*What must be proved is an intention to create a trust. If A asserts that a declaration of trust has been made by B in a document, the claim might be analysed in two stages. First, A would have to prove, on the balance of probabilities, that B had signed the document. Secondly, A would have to persuade the court that the document, properly interpreted, constituted a declaration of trust. In principle, a similar two-stage analysis applies if A asserts an oral declaration of trust by B. First, A has to prove, on the balance of probabilities, what B said. Secondly, A has to persuade the court that this demonstrated an intention to declare a trust.*"

His Lordship continued: [56] "*The principal difference between these scenarios is that, in the case of a documentary declaration, the first stage of the analysis involves a question of fact whereas the second stage is a question of law, and evidence as to B's subjective intentions and subsequent conduct is not admissible at that stage; whereas, in the case of an oral declaration, the questions of what was said and what was intended by it are both questions of fact, and evidence as to B's subjective intentions and subsequent conduct are admissible: compare the position concerning oral agreements (and agreements made partly in writing, partly orally and partly by conduct) as explained by Lord Hoffmann in Carmichael v National Power plc [1999] 1 WLR 2042 at 2049A-D and 2050H–2051C.*"

Turning to the relevant standard of proof, Arnold LJ held that the standard of proof in civil cases is *always* the balance of probabilities: *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 AC 11 [58]. In the present case, the burden of proof had been on the Defendants to prove that the Claimant had been the trustee and the judge below

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found they had discharged that burden. The judge had reached that conclusion as a finding of fact and such a finding could only be disturbed on appeal if the finding had not been open to him [60].

The other Grounds of Appeal also failed. Ground 2 was also an appeal against a finding of fact, which was swiftly dismissed because it came nowhere near demonstrating that the judge's finding was rationally insupportable. Ground 3 argued that the decision that the Appellant was trustee for his grandchildren was an '*evaluative decision*' which could be disturbed on appeal in accordance with the principles discussed in *Re Sprintroom Ltd* [2019] EWCA Civ 932 at [72]-[78]. Arnold LJ disagreed with this, stating that the judge's decision was another finding of fact rather than an evaluative decision. However, he added that it made no difference which standard of appellate review should be applied, however, since counsel for the Appellant's submissions again came nowhere near demonstrating that the judge's finding was wrong. Ground 4 did not arise and was also therefore dismissed.

Next to an aptly named case for this Edition: ***Winter and Winter v Winter* [2023] EWHC 2393 (Ch)**, a case concerning proprietary estoppel. The claim was heard in July in the High Court sitting in Bristol and tried by Zacaroli J, who gave judgment on 29 September 2023. The parties were all brothers.

Zacaroli J concluded on the evidence that, whether or not their mother or father had used the words "*all this will be yours one day*" (which was the Claimants' contention in their evidence), that suggestion was the reasonable inference from what they had said, and that this was what the sons reasonably understood them to have meant

The Claimants, Richard and Adrian, brought a claim against their brother Philip arising from an inheritance dispute following the death of their parents. The parties, together with their mother and father had run a market garden business, through a partnership called Team Green Growers. They had been in the lettuce business and later went into strawberries. The principal land from which the business operated was a farm owned by the mother and father called Bower Farm in Somerset, which was subject to a declaration of trust in favour of the partnership. The partnership went on to purchase other properties as well. In 2001, the parties' mother, Brenda, died. Her share in the partnership vested under her will to all three brothers equally. The residue of her estate vested in her husband. In 2004, the business side was incorporated but the partnership continued to own the land on which it operated. In 2017, the father, Albert, died. Apart from a relatively small legacy, he left the residue of his estate, including his interests in the partnership and the company to Philip (only). The Claimants' first pleaded case was that their parents had made mutual wills such that their father's will was subject to a constructive trust, but that claim in the end took secondary importance to their concurrent proprietary estoppel claim and indeed the mutual wills point was never proven on the evidence. A third, free standing, claim for a constructive trust was also pleaded, but was later abandoned in closing as it added nothing substantive to the main focus of the case, which was the proprietary estoppel claim. The parties' evidence contained a lot of common factual ground. The Claimants did indeed devote their lives to working in the family business, apart from an occasion when each of them had briefly pursued other opportunities only to respectively return to the business later on. The business was a successful one, and the Partnership was also able to purchase and/or build other farm premises on which the sons and their wives lived. Unfortunately, however, after Brenda's death, the family relationship gradually broke down between Richard and Adrian on the one side, and Philip and Albert on the other. Matters were so bad that Richard and Adrian did not see their father in the immediate years before his death and they did not attend his funeral. Following Albert's death, the Company and the Partnership ceased trading. As a result of the parties not having drawn large amounts of money out of the business over many years, Richard and Adrian had interests in the partnership and the company of approximately £2m each, being partly their own original interests and partly as a result of their earlier inheritance of their part of their mother's former share. The issue, therefore, was what was to have happened to their father's share – was it to pass to Philip alone, as he had desired in his latter years and as set out in his last will, or was it to be split equally between all three sons as the Claimants contended had been understood by them all along.

In a helpful summary of the law, Zacaroli J cited the now well-known passage from Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463, at para 38 (quoting, amongst other cases, *Thorner v Major* and *Gillett v Holt)*. As to remedy, Zacaroli J naturally quoted from Lord Briggs' recent speech in *Guest v Guest* [2022] UKSC 27 at [74] to [80] (see Family Affairs Issue 85; Winter 2022).

Turning to his findings, Zacaroli J concluded on the evidence that, whether or not their mother or father had used the words "*all this will be yours one day*" (which was the Claimants' contention in their evidence), that suggestion was the reasonable inference from what they had said, and that this

was what the sons reasonably understood them to have meant [93]. Specifically, he found, that Albert and Brenda (their mother) did make assurances to Richard, Philip and Adrian which were understood by them to mean that if they committed to working in the family business, the business and its assets would ultimately be divided equally among them. Each son, he therefore held, had an expectation, reasonably induced by their parents' assurances, that they could expect to receive a one-third share in the business and its assets in due course.

Turning to remedy, one of the lively points for discussion was whether, given that Richard and Adrian already had substantial interests in the partnership and the company, if they had been induced by their parents' assurances to remain working in the business (as the judge found them to be), then, as Philip's counsel argued, they suffered 'no detriment' because they had already derived substantial benefits as a result of that commitment, and those benefits outweighed any detriment suffered by them. The judge did not agree with this point. He reasoned that the underlying question was whether it was unconscionable for Albert to renege, in 2015, on the assurances made by him and Brenda over many years. In the Court's judgment it would have been [136], because of the continuing commitment by Richard and Adrian for many years even after they had already acquired their interest in the Partnership and their shares in the Company. Had it been made clear throughout that they could not rely on ultimately receiving an equal one-third share in the overall business, and that their parents were free to transfer their (combined) 40% share to outsiders or to Philip alone, then the judge found that Richard and Adrian would have had other options open to them, among which would have been the option of taking their existing share in the Partnership and developing it in some other way. Accordingly, as to remedy, and adopting the starting point suggested by Lord Briggs in *Guest*, the appropriate remedy in a case where assurances were made, and acted on, over a period of some 40 years, was to give full effect to the assurances. The result was therefore that each son was entitled to a one third share overall of the business and its assets. The judge held that it should not make a difference, at the remedy stage, that they were already each in possession of a 26% share (or thereabouts) in the business. The claim therefore succeeded.

Accordingly, as to remedy, and adopting the starting point suggested by Lord Briggs in Guest, the appropriate remedy in a case where assurances were made, and acted on, over a period of some 40 years, was to give full effect to the assurances.

We travel next from Somerset to East London. In ***Mohammed and others v Daji and others* [2023] EWHC 2761 (Ch)**, the Chancery Division was concerned with claims and counterclaims regarding the beneficial ownership of land in Canning Town, London, upon which the Abbey Mills Mosque is located. The legal title to the land was held by the First and Second Claimants pursuant to a transfer in 1996, made contemporaneously with a written declaration of trust establishing trusts of a religious, educational and charitable nature. The Claimants sought declaratory relief to confirm the terms of that trust, following a dispute with the 24 Defendants that an earlier declaration of trust, dating to 1975, should be preferred instead. The Defendants counterclaimed claiming to hold the land subject to the earlier 1975 trust. The Claimants also brought an ancillary claim that the Fourteenth Defendant was replaced by the Third Claimant as a trustee pursuant to a resolution made in 2018, together with an order that the said Fourteenth Defendant must now join in transferring the title to the Claimants as the rightful present trustees. The Claimants also claimed in the alternative for a declaration that a cy-près occasion has arisen under section 62 (1) (e) (iii) Charities Act 2011, were their property claim to fail.

All of the parties were associated with the Tablighi Jamaat movement of Sunni Islam (apart

The trial took 9 days and the Court heard from 23 witnesses orally as well as reading a further 118 witness statements which were admitted as hearsay evidence on both sides.

from the Attorney General, who for completeness had been joined as a defendant to the proceedings since the case concerned charity proceedings, but who had played no active role). In 1975, a trust had been set up which the judge found was for general Islamic charitable purposes, and which expressly contemplated that land would come to be held upon those trusts. The trust instrument appended a constitution providing for the creation of a Committee who would manage and control the mosque and its affairs. The Judge found that although the early trust was intended to be centred on Dewsbury, it was perfectly possible for the society it created to expend its membership or move its location as convenient.

The trial took 9 days and the Court heard from 23 witnesses orally as well as reading a further 118 witness statements which were admitted as hearsay evidence on both sides. The judge gave himself a *Gestmin* direction, also citing with approval Mostyn J's comments on witness demeanour in *Lauchaux* [2017] EWHC 385 (Fam), at [35] onwards. In a lengthy judgment, the judge concluded that the land had been purchased in 1996 to build a mosque to serve the local London community. The purchase monies had been funded by the London community and it was the intention of the donors that the £1.4m that had been raised was for the purpose of the Claimants (and the Fourteenth Defendant) to acquire the land and fund the building of a mosque and community centre for the benefit of the Tablighi Jamaat community in the London region. The judge rejected the contention that the land was held for the purposes set out in the 1975 declaration, or the registered charity which had drawn up that 1975 deed. Incidentally, another issue which the judge had to decide was whether or not the 1996 declaration had been executed contemporaneously with the 1996 purchase or not, and on that point the judge held that the 1996 declaration did not come into existence at that time, more probably coming into existence between late 1996 and early 1998, when the property purchase was registered (after planning permission had been granted). The judge however did not find that the new trust did not date back to 1996, holding that the said trust would have been executory at that stage rather than executed. The Claimants therefore succeeded in their property claim and the Court did not need to determine their alternative claim of cy-près.

Finally, in this Edition, another proprietary estoppel case involving a farm. In the case of ***Spencer v Estate of John Mitchell Spencer (Deceased)* [2023] EWHC 2050 (Ch)**, a son, Michael, brought a claim against the estate of his late father, John, which was being administered by his two sisters. The father had owned a substantial farm in Stainby, Colsterworth, which is south of Grantham. He was described by the witness evidence as a proud, strong willed and old-fashioned farmer. His relationship with his son was not always a happy one. The evidence was that they clashed regularly and, in the words of one of the witnesses, "*there was always a war going on between the two of them.*" John had been a sole trader initially, later creating a partnership involving all his children until later on his two daughters left the partnership. From that time forward, in 1996, John and Michael

The evidence was gripping. According to Michael, John would say "*You work hard, it is yours at the end of the day*" among his many other assurances. As the judge recounted, Michael clearly regarded those statements as an inducement, describing them as "*a bribe*" and "*a carrot in front of a donkey*".

The judge founds that it was *"no less detriment that he did so willingly rather than reluctantly"*.

farmed as a partnership with only 5% of the profit shares to John as the father and 95% to Michael as son. However the freehold farmland was never a partnership asset, and much of the capital was retained within the business. Through a great deal of hard work, significant capital accumulated in the partnership account, although that was rarely deployed to meet a satisfactory lifestyle for Michael, such was John's apparent iron discipline. Although John had originally drawn up a will leaving all his share of the minority partnership and crucially his land to Michael, he wrote a new will in 2017 overriding those terms, instead leaving his land to a discretionary trust for the initial benefit of all his children, but then ultimately to his grandchildren once they reached 30 years old. It was agreed at a relatively early stage, and following a *Larke* v *Nugus* letter, that there were no good grounds for challenging this last will.

There was no dispute about the relevant law, and the trial judge, Rajah J, had regard amongst other authorities to the *Guest* decision and to *Gladstone and another v White and others* [2023] EWHC 329 (Ch) (see Family Affairs Issue 87; Summer 2023).

The evidence was gripping. According to Michael, John would say "*You work hard, it is yours at the end of the day*" among his many other assurances. As the judge recounted, Michael clearly regarded those statements as an inducement, describing them as "*a bribe*" and "*a carrot in front of a donkey*". While the judge accepted there may have been other good reasons for staying at the Farm and working hard and accepting his father's control of aspects of his life, the assurances were found to be an important reason. In exchange, Michael did as he was asked. As the judge held, he devoted himself to the farm and worked extremely hard. Michael described the 19-20 hour days he worked at the time of the initial purchase of the main part of the farm plus the long hours and 365 day a year nature of the job. He described spending no more than two days with his family on holiday before returning to the farm. Although it was submitted by counsel that this was the norm for a farmer, the judge found it to be more than that. Michael, he found, not only committed himself to working with his father, but subjected himself to his control, despite their difficult relationship. Michael and his wife had lived in a farm cottage which was cold and damp for six years because John would not allow Michael to take money out of his capital account to buy a house nearby. Michael's wages were lower than that of a normal farm hand, and lower than that of his sister when she had worked in the business. The judge found that he endured his father's will because he believed the farm would one day be his. The judge founds that it was "*no less detriment that he did so willingly rather than reluctantly*". Having found the proprietary estoppel claim made out, the judge applied *Guest* as to expectation and ruled that Michael should be granted a transfer of the farm land, save for a smaller plot of land which had already been partitioned off and for which planning permission was granted after John's death and which otherwise would have represented a windfall to Michael. The judge ruled that Michael should have the agricultural value of that land instead so that he could replace those fields if he could. From small seeds etc… Happy Christmas.

The Family Court Does Not Understand Domestic Abuse

Louise Tickle and Hannah Summers

Louise Tickle and Hannah Summers

Last week a tweet was posted by an American woman whose abuser sued her for defamation as part of a campaign of post-separation abuse. She won. But she remains furious about what he stole from her through his campaign of abuse, and so she wrote this:

Beyond the physical & emotional inflicted pain of abuse...is grief. Almost unrelenting grief. Things you can lose when you love & trust an abuser:

Self worth
Health
Dreams
Hope
Trust
Faith
Steady ground
Relationships
Children
Family
In laws
Friends
Your self

Please add.

Responses to her tweet included:

Career
Reputation
Credit rating
Hair (from stress)
Dignity
Credibility
Past (all a lie)
Future
Health
Time..... they steal time

Another woman posted: *"All those as well as the ability to trust my gut. Always second guessing everything, always."*

If we think about our lives, and what we value in it, the list above comprises pretty much everything we think it's worth living for. And of course, a female victim of domestic abuse by a man also knows, viscerally and – given the consistent data showing the high incidence of intimate partner femicide – justifiably, that a male perpetrator can very easily take her life too.

So that's literally everything. An abuser can take everything a person is. And their victims know it.

Women who ask for the family court's protection for their children arrive in front of a judge knowing the risks posed by their abuser in precise detail – because they have lived the reality. And yet, repeatedly, both in court and in published judgments, what we see is a system that – given overwhelming evidence of male violence against women – refuses to engage with the reality of women's trauma, their risk, and their terror for their children.

We see a system which operates on the basis that a period when abuse has lessened (or *seems* to have lessened, or can't be proved) means an abuser is by definition less risky. We see a system that readily discounts risk based on the outdated and erroneous assumption that separation means an abuser has stopped – when in fact it is well

If we think about our lives, and what we value in it, the list above comprises pretty much everything we think it's worth living for. And of course, a female victim of domestic abuse by a man also knows, viscerally and – given the consistent data showing the high incidence of intimate partner femicide – justifiably, that a male perpetrator can very easily take her life too.

documented that the point at which a woman leaves an abusive relationship is when she is most at risk of being killed. It follows that the same type of abusive personality who wishes to punish and control a woman in this way would use the family courts as a convenient tool in which the court process becomes an extension of the abuse. In a long-running case we heard of recently, the father was awarded a transfer of residence, but pulled out at the last minute. It had never been about the children. He didn't want them. It was about control.

In conversations with the public, at talks we give about our journalism on the family justice system, or speaking with friends and family, it has become evident that people – entirely mistakenly – believe that in cases about access to children, family courts are bound to keep a parent safe from their abuser. Unsurprisingly, victims think this too. People are shocked when we explain that an adult abuse victim – even a mother whom a court has found to have been raped, assaulted, coercively controlled, her life dismantled and her psyche pulverised, often seems to be of no interest in her own right to a family court in a children case . When we explain that the court is solely concerned with the welfare of children, and despite the requirements of PD12J, has, in cases we have attended and read about, only been interested in a mother's wellbeing insofar as she can carry out her parental role, they are aghast. And so are we.

Even on the basis that a woman is only of value and considered in a court's calculation insofar as she can perform her parental function, what level of risk is acceptable to expect her to live with? What level of trauma must she have suffered for it to be bad enough for a court to say, "*stop*"? How much fear does a woman have to live in for a court to take that into account in deciding an abuser's access to children?

The answer from some of the judgments we have read and some of the cases we have attended, is a very great deal.

Take the case described in the recent judgment of HHJ Vincent. This follows on from two previous judgments by the same judge, both published in 2020. The earliest judgment details extremely serious abuse proven against a father. Litigation had taken 20 months, partly because he asked for permission to appeal, which was refused. At the end of the case, the children's Guardian invited the court to make a barring order. Noting that this was the father's first application for contact, HHJ Vincent refused. The mother killed herself.

Louise looked into this case when the second judgment was published, shortly after the mother's death. She visited the couple who were friends of the dead woman, and who were now caring for her bereaved children. They were warm and concerned people to whom this mother had fled to escape her husband's abuse. The couple told Louise their friend had hanged herself in their home, showed her where they found her, the desperate attempts to save her, and talked through what they knew of her state of mind in the lead up to her suicide. Reporting guidelines make it clear that it is not advisable to attribute a single cause to suicide, but this couple told Louise unequivocally that, in their view, it was hearing that the barring order had been refused that tipped their friend into utter despair. Already fragile thanks to the serious abuse inflicted on her, they explained how her trauma had been compounded by nearly two years of litigation; in their view, this mother could simply not cope with the prospect of being taken back to court again by

Louise has reported on a case where a woman had to go to court 37 times, dragged back over and over again by her abusive husband whom she had discovered, years after they had children, was a convicted paedophile. At that point, she left him. It cost her a quarter of a million pounds – she had to remortgage her house – and eight years of continuous litigation while he attempted to increase his contact with the children before a judge finally agreed to make a barring order. Even then, it only lasted three years.

her abuser.

Their friend had been raped and horribly abused. The children had been exposed to that abuse, and one had been directly physically harmed; the deputy circuit judge who made the findings found that, "*on numerous occasions and in front of the children the father forcibly dragged the mother out of the room, hurting her in the process and leaving the children behind with 'at least' [one of the children] crying*." The judge was also satisfied that the father's abuse had continued beyond the end of the relationship, with him using "*secret CCTV recordings in the house… installing a hidden tracking device in her car, publishing details of the mother's whereabouts on Facebook, sending harassing text messages, and making persistent 'silent' phone calls, to both the mother and her friends*."

This reality, proven at huge cost to the mother via an inevitably re-traumatising fact finding and many gruelling months in court, demands that the family justice system answers a question: why is even this not enough?

Not enough to protect a woman from the constant, gnawing fear of more abuse via the family court process being visited upon her once again by her abuser seeking to extend contact. More resultant trauma. More financial hardship from being forced into litigation yet again to protect her children? We make it clear that in conversations with lawyers, and in our own reading of her judgments over the years, we have seen nothing but positive regard for HHJ Vincent. But if a request has been made by a proven victim of very serious abuse – or indeed, in this case, made by the court-appointed Guardian directly on behalf of the children – the decision not to make that order means a judge has chosen to value the rights of a dangerous abuser above those of a victim and her children. This man had only made one application so far, the judge noted. So… that's all right then? No matter the harm he's inflicted, he gets to have another crack?

The thing is, it's entirely predictable that abusers do go on to try their luck, often again and again. We know this. Courts see it regularly, but in our view, do not take the impact on victims seriously enough. Louise has reported on a case where a woman had to go to court 37 times, dragged back over and over again by her abusive husband whom she had discovered, years after they had children, was a convicted paedophile. At that point, she left him. It cost her a quarter of a million pounds – she had to remortgage her house – and eight years of continuous litigation while he attempted to increase his contact with the children before a judge finally agreed to make a barring order. Even then, it only lasted three years.

Proven rape, physical assaults, being screamed at (men please note: when a man shouts at a woman, what she hears deep inside is a threat she knows could quickly be fatal)… and an entirely reasonable terror of what may yet be inflicted on her or her children… and *still* a judge thinks this is not enough to give a victim even a period of respite from the kind of litigation that abusers regularly weaponise to continue their control over their victim's life?

It makes us wonder, if this level of abuse is not enough for a Section 91 order, then how much is

a woman required to stand? Because once you've proved rape, there's not much left to show the court but a woman's dead body. And suicide and murder do both happen in relation to family court proceedings. Louise interviewed the sister of Christine Chambers, shot along with her two-year-old daughter Shania the night before a family court hearing about custody after years of abuse and calling police for help numerous times. Ms Chambers' older daughter escaped, and has had to grow up without her mother and sister. Being killed is a prospect many victims of domestic abuse reasonably fear, given their knowledge of their abuser; they live every day with that risk.

Another victim who was subjected to further abuse by the family justice system is Kate Kniveton MP (formerly Griffiths), who proved rape, physical assault and coercive control against her ex husband, the former MP Andrew Griffiths. HHJ Williscroft found the abuse proved in what appeared to be an excellent judgment. Shortly afterwards, the same judge decided it was right that Ms Kniveton, a rape victim, should share the costs of supervised contact with her rapist – contact that only needed to be supervised because of the risk of harm Andrew Griffiths posed. When people hear that a senior, experienced family judge, and a woman to boot, made this order in the face of protests from Ms Kniveton, they are at first unbelieving, and then they are appalled.

It should be noted that in his judgment, HHJ Baker acknowledged parents called the police so often it was easy to become "*inured*" to such events and went on to say he did not doubt the mother's evidence that she found it "*frightening*". However, in the same way HHJ Baker acknowledges it's easy to become "*inured*" to police call outs, it perhaps follows that some judges, more broadly speaking, could find themselves "*inured*" to abuse that is "*not of the highest*".

It took Ms Kniveton an appeal that Louise attended – inevitably involving more anxiety, more thousands of pounds, and as always, a costs risk – for the order to be set aside. The welfare hearings are still going on, and this victim is still having to cope with the possibility that she will have to facilitate their child's contact with her violent, coercively controlling rapist for the next decade and a half.

And remember the young mother who was effectively told by HHJ Tolson that rape wasn't rape if she didn't fight back, who successfully appealed, and then won findings on all but one minor allegation in a re-hearing Louise attended, presided over by Mrs Justice Judd? Her rapist has been back to court asking for increased contact, and has got it. The mother is, understandably, stressed and worried. Their child is very young. Is this to be her life for the next decade and a half? Or will she get a barring order? It doesn't look very likely given that the woman who killed herself didn't.

It's not the only time HHJ Tolson's decisions have been called into question when it comes to his approach to allegations of rape. Two of his decisions were among four rulings challenged during a three-day conjoined appeal Hannah was in court to report on in January 2021.

Each of the four appeals featured allegations of marital or partner rape and coercive and controlling behaviour.

Three of the four were allowed including one of the Tolson cases after the appellant mother's barrister told appeal judges HHJ Tolson had ignored an important admission by the father that he had used physical violence - and that he [the judge] had wrongfully placed emphasis on the fact alleged non-consensual sex preceded "*many other occasions of consensual sex*". HHJ Tolson's approach to the evidence was "*seriously flawed*", appeal judges

found.

During the same conjoined appeal, Judge Scarratt came under fire for "*wholly inappropriate*" remarks that made a vulnerable mother and alleged rape victim "*fearful*" according to her advocate, Amanda Weston KC. Three senior judges who allowed the mother's appeal described the comments as "*ill-judged*" after they heard a recording in which HHJ Scarratt berated the sobbing woman, telling her if her case kept "*going on and on*" her child could be taken away and adopted. Barbara Mills QC, who made submissions on behalf of a group of women's organisations, went further in describing the remarks as "*very squarely abuse*".

Yet it was against this backdrop the mother, no doubt now terrified of losing her child, just had to plough on, hoping against the odds that this judge might still consider her serious allegations in the context of the child welfare arrangements. Instead, at a further hearing, a consent order was agreed between the parties. But - as the appeal judges acknowledged - it is hard to see how the mother, given the circumstances, could have retained any real negotiating boundaries about contact. She felt she had little option but to settle and therefore the order - to move to unsupervised contact for the father - was obtained without her true consent.

Both of us have observed the case law that arose from the conjoined appeal *H-N and Others* referenced in cases involving allegations of domestic abuse. Many judges are undoubtedly mindful of the resulting judgment which highlighted that cases must be heard with an increased focus on controlling and coercive behaviour and an acknowledgment that abuse does not always end with a relationship and that subtle forms of abuse can persist post-separation.

But we do find ourselves left wondering to what extent this guidance has truly filtered down to judges on a broader scale when we consider

> If you really take the time to listen to victims of abuse, as journalists do, often in interviews that take many hours, it is clear that even years later, abuse that a court could easily dismiss as "not of the highest" or "low level" frequently continues its destructive influence over so much of what that person valued about their life.

that so many still appear to struggle to recognise the true seriousness and danger posed by coercive control, despite using the words in their judgments.

"Not of the highest"

This phrase was used in a hearing Louise once attended, to indicate that while domestic abuse was proved, it wasn't the very worst sort. We have also heard judges use the phrase "*all abuse is serious, but…*" and we also repeatedly hear the phrase "*low level abuse*". There is simply no such thing. Coercively controlling behaviour that does not leave cuts and broken bones is, according to forensic criminologist Professor Jane Monckton-Smith, who researches domestic homicide, the framework within which all types of abuse – physical, sexual, economic – takes place. A perpetrator who seeks to control their victim is potentially extremely dangerous, no matter that a woman cannot come to court with bruises or hospital admissions to "*prove*" the risk she is at. It is clear to us that some victims are disadvantaged by judges becoming desensitised.

In the Carlisle case Hannah recently reported on, where a mother was seeking findings of rape and domestic abuse following a successful appeal, she told the court that her son had been traumatised by a police call out. It was put to the court that the mother, accused of 'alienating' her son from his father had kept this incident 'alive' for the child - rather than the boy being able to recall the incident due to his young age.

Costs in Anticipation	Costs as a Consequence				Costs in Response				Total
	Physical and emotional harm	Lost Output	Health Service	Victim Services	Police Costs	Criminal Legal	Civil Legal	Other	
£6m	£47,287m	£14,098m	£2,333m	£724m	£1,257m	£336m	£140m	£11m	£66,192m

HHJ Baker's view expressed in court was that police are called out all the time to domestic incidents, the inference being that this was not a big deal. Hannah's sense was that this mother's concern for her child was seen as an overreaction.

However, the overall frequency of police call outs to domestic incidents does not make such an occurrence any less traumatic for a child for whom this is a unique experience and as witnessed and testified to by his mother, who was present at the time.

The fact that HHJ Baker's sensitive, thoughtful and detailed judgment found in the woman's favour does not change the courtroom experience of an abuse victim who hears her legitimate worries for her child downplayed when they come to be considered in the context of the wider patterns observed in the family courts. It should be noted that in his judgment, HHJ Baker acknowledged parents called the police so often it was easy to become "inured" to such events and went on to say he did not doubt the mother's evidence that she found it "frightening". However, in the same way HHJ Baker acknowledges it's easy to become "inured" to police call outs, it perhaps follows that some judges, more broadly speaking, could find themselves "inured" to abuse that is "not of the highest".

If you really take the time to listen to victims of abuse, as journalists do, often in interviews that take many hours, it is clear that even years later, abuse that a court could easily dismiss as "not of the highest" or "low level" frequently continues its destructive influence over so much of what that person valued about their life.

One example: a school friend of Louise's , 25 years on, describes the loss of career prospects in her mid 20s when she was flying high, thanks to her abuser systematically undermining her confidence. He slapped her around a bit too – nothing a family court would think much of – but mostly, he told her she was incompetent, useless and worthless. She fled back to her family in another country, giving up her job in a highly competitive field, and it took her years to psychologically rebuild. She lost her career and never realised her professional potential. No children were involved, but had they been, she might well have been trapped in the UK with her abuser, forced into regular contact with the man who harmed her.

Another example from Louise; her own mother was broken psychologically and financially as a result of a short but intense period of emotional and economic abuse, which continued after she left the man (not her father) who manipulated and exploited her love for him. He stole her financial security – the equity in her house – and destroyed her trust that anyone would ever care for her. Though her mental health recovered to some degree after a voluntary hospitalisation, her physical health deteriorated fast via two auto-immune diseases linked to stress. In her mid-40s she had to give up her job as a nurse, and was poor and frightened until her death .

A third example: the young adult children of women who have been through the family court have told both of us of the harms they suffered by being forced to have contact with fathers they feared; not, usually, by being physically hurt (though intimidation and the threat of assault were often present), but in knowing they could not escape a man they had told the court they were frightened of, and who they knew had bullied and terrorised their mothers. Their mothers' warnings, and their own fears, were repeatedly minimised and smoothed over by Guardians and judges.

Research undertaken over the last decade and more by the Femicide Census shows that on average two women are killed every week in England and Wales through male violence. Even if we accept that almost all domestic abusers do not go on to kill, the level of harm they cause can be extensive and long-lasting – the overall social, health and economic cost of domestic abuse was valued in 2017 at £66bn a year in research published by the Home Office.

In two cases we know well, the fathers were extremely wealthy and deployed the court system to get their own way, instructing barristers to run their cases against their much poorer and unrepresented former wives. In a separate case, a boy in his mid-teens recently told MPs in Parliament that he was transferred to live with his father after reporting sexual abuse and despite making disclosures to various professionals. This child sees no point in reporting the abuse to anyone now; his mother tried to explain the risk his father posed but was not believed. And so this child is now trapped with his abuser by order of a court, while his mother exists in a living hell, unable to protect him, and with barely any contact.

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As a society, we accept on the criminal side of matters that domestic abuse is rife and life-threatening, and we know from research that only a tiny percentage of rape allegations are false. By contrast, in family courts very frequent assertions are made by fathers that mothers are liars who make false complaints of rape and domestic abuse to punish men when a relationship has broken down. It's not a view confined to fathers. We have heard lawyers shake their head sorrowfully at all those damnable scheming women who are gaming the legal aid system with exaggerated, if not fabricated, accounts of abusive behaviour. But… domestic abuse is widespread throughout society, with enormous social and economic consequences. The disjoint between what we know about the scale of male violence against women, and a reflexive scepticism that seems to abound in the family justice system regarding women's accounts of their own life experience is shocking to us.

In court hearings and in judgments, this is the reality we frequently observe:

Given that the dynamic is, generally, a father pushing for more time with children, and a mother who either alleges or has proved domestic abuse (to whatever level) who is arguing for less on the basis of the risk she says he poses, the woman seems to us to be typically viewed through a lens of 'obstruction' to a reasonable, or at least understandable, paternal demand.

In our experience, mothers are also frequently unfairly pathologised in the family court arena in a way men are not. Our observations are necessarily anecdotal but it seems on the face of it to be a trend. Men are rarely described as overly emotional or having anxiety, or painted as hysterical or unstable. Women often are.

And we have noticed a tendency – even when a judge is not giving a father what he wants, as that is found not to be in the child's interest – to hear considerable judicial sympathy expressed with his "frustration" at not having the full relationship with

his children that he tells the court he's desperate for. We are aware there are cases where good dads may be struggling to see their children. But it seems to take a lot of applications by a man who has been proven to have abused his ex partner, who is seeking increased contact before – very rarely – a judge will reach a point of saying "why is this father constantly rocking the boat, endlessly reissuing, dragging everyone back to court, pushing for more contact when everything has already been sorted out." Of course, these multiple applications cost vast amounts of court time (an expense borne by the public purse), along with the huge – at times intolerable – stress, and in some cases financial ruin, inflicted on the respondent mother.

Inextricably linked to this toxic dynamic is what we would characterise as judicial antipathy towards mothers who are unable to accept court decisions. The idea that a woman may understand the risk she and her children face better than a judge – even if she is unable to prove it – is apparently unable to be entertained. An unattractive and tellingly pervasive tone of tetchiness is frequently expressed towards mothers who challenge court decisions. This irritation at women's temerity in challenging the court, has led, in cases we have attended and read judgments about, to actual punishment of women for daring to pursue an appeal. In family courts, we observe how it can become part of the case against women that, "look, they couldn't accept the result." But, how reasonable is it to be hit with costs as a result of pursuing an appeal you have been granted permission to make, in a jurisdiction which does not impose costs except where someone has behaved unreasonably or reprehensibly? Mothers who truly believe their partners pose a risk to their children feel they are left with no other option. They are stuck between a rock and a hard place.

And oh… that word "reasonable" as used in the family court is a minefield that threatens to blow you up at any moment. Being seen to be on "reasonable" ground is vital. The difficulty then is that unless your barrister – if you can afford one – or you as a litigant in person, actively addresses that issue, what a judge perceives as reasonable even in the circumstances of abuse is, in our observation, very different to what a general member of the public views as a proportionate response to an existential threat.

In the wider world outside a family court, it is not controversial to take the view that a proven rapist or domestic abuser whose victim regards him as a risk to herself and their children and seeks to limit contact should not get to spend time with either her or them. However when we tell people that in family courts, unless the perpetrator backs down, this is a question that is typically entertained, requiring months of court hearings, Guardian assessments, and expensive expert psychological reports on the victim, they find it - in the literal sense of the word - incredible. When they ask if these perpetrators get contact, and we tell them it's extremely rare for an abusive father not to get some level of in-person access to their children, they are horrified.

Yet women found to have alienated their children – because they have made allegations of abuse – can find themselves cut off from them altogether for months on end, or indeed much longer. Hannah was recently given permission to report on a case where a mother who was found to have alienated her children had not seen them for nearly two years. It seems the punishment for

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alleged, perceived or proven false allegations of abuse is worse than the punishment for those who have been found to be abusive and who, in some cases, continue to pose a risk of harm.

This leads back to the point that family courts simply do not seem to grasp, nor appear willing to grapple with, the accumulated and lifelong damage caused even by domestic abuse that is "not of the highest". And to convince a judge to see the case through the prism of that long-term and dire impact on a victim – which is the point at which what's seen as "reasonable" might shift – is likely to demand skills of argument and persuasion that few victims of domestic abuse who end up representing themselves in court will possess. As LiPs are now in a majority, this does not bode well for their safety, or that of their children.

And it is also why there is real danger in advice from lawyers not to pursue allegations of domestic abuse, which numerous women have told us is the advice they have received. A person's view of what is "reasonable" is – perfectly reasonably – profoundly impacted by experiencing domestic abuse. That individual is going to know better than any judge what their abuser is capable of. But how can a victim ever find solid ground to engage with how a judge analyses their case if their experiences are, potentially very significantly, out of kilter with the risk assessment the judge is working to?

The same problem applies to fact findings that wrongly don't find any facts, and fact findings that are sought but not permitted…but those scenarios are such a nightmare that they are beyond the scope of this piece.

Let's finish up by going back to the HHJ Vincent case. We noted earlier that a third judgment had just been published. We read it, wearily unsurprised to find that the father – described in one judgment as "relentless" – who had made just the one application when his ex-wife took her own life, has since hauled everyone back to court. Twice.

No matter that the children are now settled after losing their mother. No matter that their special guardians don't think it's in the children's interests to see him – or that they themselves are overwhelmed by the demands of the litigation they've been thrust into. No matter that, perhaps most importantly, the children definitely don't want to see their father either. Certainly, he's put himself through various courses for domestic abusers, but, put shortly, the feedback is that he does not believe he is one.

The level of anxiety and stress that these special guardians have had to cope with as a result of the father's ongoing demands is set out in the judgment. It is worth remembering that this couple were friends of the dead woman, not relations, but they have nevertheless stepped up and are caring for two bereaved children who are not their own. Kinship care can be a very hard road, and its demands are often not properly financially recognised or socially supported by the state. It is a huge act of love.

So is there to be a barring order, this time? Yes, there is. Finally. But only for the next four years until the older child is 16 (the younger child benefits from the same order until their 16th birthday)

Will this "relentless" father drag everyone back to court again the moment it expires? Nobody knows for sure. These special guardians will just have to hope he doesn't, because in truth, they have nothing else to rely on. Louise spoke last week to the woman of the couple now caring for the children; she said she was "happy" that the judge had "very thoughtfully" made the barring order.

But she also said the proceedings have been "draining, shattering, very stressful" to the point that by the end, she could not even cope with the pressure of writing a witness statement. She said she could hardly imagine what the children's mother had been put through. To everyone else, she said, their friend's suicide in the wake of domestic abuse and punishing family court litigation may have happened years ago, but to them, "the pain is like it was yesterday." And two children will pay the price their whole lives.

Westminster Watch

Charles Hale KC | 4 Paper Buildings

The King's Speech

November is proving to be a busy month in Westminster. A significant cabinet reshuffle, the Supreme Court ruling that the plan to send asylum seekers to Rwanda is unlawful and the state opening of the final session of Parliament before the next general election. But what changes can we as family lawyers expect from the last year of this Government?

One is certainly Home Secretaries. According to the new, sorry latest Home Secretary, James Cleverly, if you show him two lawyers, he'll give you three opinions.[1] He was responding to Lord Sumption's concerns of constitutional damage if the government seek to "re-write" the "facts" that led to the Supreme Court unanimously ruling. Pretty rich you *might* think from a politician who said he'd need to be dragged out of the Foreign Office, nails scraping down the parquet flooring days before he skipped to a domestic job to make way for Lord Dave but hey ho…Home Secs these days, like yesterday's chip paper, come and go.

King Charles III's speech delivered on 7 November set out the 21 laws that ministers are intending to pass in their final session of Parliament. Key themes included the need to toughen up on crime, and wholesale reform to property laws for renters and leaseholders. While some of the Bills represent fresh ideas and new thinking, around a third of the proposals have been carried over from the previous session, or previously published in draft.

Victims and Prisoners Bill

Of those carried over, the Victims and Prisoners Bill will perhaps be of the most interest to family lawyers. Its proposals will not be unfamiliar and include the implementation of 'Jade's Law' following the death of Jade Ward in 2021, who was murdered by her former partner. The rule will create an automatic suspension of parental responsibility where a person is convicted of the murder or voluntary manslaughter of the other person with whom they share parental responsibility. There are exceptions to the rule - for example in the case of a victim of domestic abuse killing their abuser - and each decision will be subject to review by a judge to ensure the child's best interests are preserved in each case. The change is aimed at removing the possibility of the offending parent retaining any control over the child's opportunities to receive therapeutic support. The plan is to remove the hurdle for the bereaved child of having to apply through the Family Court to restrict the offending parent's parental responsibility. The Government's emphasis on child protection will be welcomed by the family law community but as ever the devil will be in the detail.

Other measures aimed at protecting victims of domestic abuse include introducing an obligation on the Secretary of State to issue statutory guidance on Independent Domestic Violence Advisors and Independent Sexual Violence Advisors, to increase awareness of these roles and their functions, and to promote greater consistency across the sector. All going to plan, family lawyers can expect guidance

1 Today Progamme interview 16 November 2023.

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and clarification on these roles to be issued in the coming year.

On the theme of encouraging consistency, the Bill will introduce a joint statutory duty on health and local authorities and the Police and Crime Commissioners to work together when commissioning support services for victims of sexual and domestic abuse and other serious violence, aimed at joining up and strengthening the provision of victim support services. Again, a promise of positive change for domestic abuse victims which will be well received by family lawyers, if execution goes to plan.

Another set of proposals that may be familiar to the family lawyer is the 'prisoner marriage measures', restricting prisoners who are serving whole life orders from forming a marriage or civil partnership while serving their custodial sentence. The proposal is aimed at reducing distress to victims and upholding public confidence in the Criminal Justice System by ensuring that the most serious offenders are dealt with in an appropriate way. There are, as predicted, exceptions to the rule and those serving whole life orders will in limited circumstances be able to apply for an exemption on compassionate grounds.

Criminal Justice Bill

All of the above goes hand in hand with the newly proposed Criminal Justice Bill, aimed at putting victims at the front and centre of the Criminal Justice System. Key proposals to note include the introduction of a mandatory duty on those working with children to report concerns relating to child sexual abuse. Such proposal is subject to consultation, but shows the Government's commitment to doing more to expose what can typically be a hidden crime.

In addition to Jade's Law (see above), is the introduction of a statutory aggravating factor at sentencing for offenders who have murdered their partner at the end of their relationship. Also proposed is an expansion of the offence of encouraging or assisting serious self-harm, the criminalisation of the sharing of intimate images, and more powers to probation officers to increase the multi-agency management requirements on offenders convicted of coercive or controlling behaviour. All important changes to note which will, one hopes, have a positive impact on how victims of domestic abuse experience the Criminal Justice System and public perceptions of how the System treats the most serious offenders.

Sentencing Bill

The final Bill aimed at criminal justice reform which will be of interest to family lawyers is the newly proposed Sentencing Bill. Sticking with the emphasis on violence against women and girls, the Bill proposes introducing a mandate on courts to impose a whole life order in cases of murder with sexual or sadistic conduct (unless, of course, there

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Most the above sounds promising, almost all of it sounds familiar. The clear emphasis is on toughening up on the UK's worst criminal offenders, with parental and marriage rights falling away as part of the plan. Is there an election coming?

are exceptional circumstances) and provisions aimed to ensure that convicted rapists and those convicted of the most serious sexual offences who have received a determinate sentence will serve each day of their custodial term behind bars. A promise of tough measures ahead for the country's worst offenders.

Arbitration Bill

Last of all, but by no means least, was the introduction of the Government's plan to modernise and clarify the law on arbitration. The Arbitration Bill is likely to implement all of the Law Commission's recommendations to bring the Arbitration Act of 1996 up to date. New measures are aimed at bolstering England, Wales and Northern Ireland's leading arbitration sector both for individuals and businesses.

Recommendations for family lawyers to note include, the introduction of a statutory duty on arbitrators to disclose circumstances giving rise to justifiable doubts about their impartiality - bringing English law into line with international best practice promoting trust in arbitration. Other proposals include empowering expedited decisions on issues that are without real prospect of success (much like summary judgment in court proceedings), clarification of the law governing arbitration agreements and simplification of the procedure for challenging arbitration awards. Subtle but important changes ahead which one hopes, will help reaffirm the UK's status as a world-leader in arbitration.

Christmas Future

Most the above sounds promising, almost all of it sounds familiar. The clear emphasis is on toughening up on the UK's worst criminal offenders, with parental and marriage rights falling away as part of the plan. Is there an election coming? Arbitration is set to be modernised and we will see how that affects family arbitration. Just how many of the 21 proposed Bills will be enacted in the last year of this Conservative Government is yet to be seen. Perhaps the more positive note is that one thing is certain, this will be the last year of this Government…

Book Review
Between the Lies

Caroline Willbourne

I came to this book, knowing a little of Ms Tickle's previous work, although I was of course aware of her formidable reputation for trying to bring about greater transparency in the family court.

The star of this story is Cherry, a journalist with an agenda, who has a particular interest in cases where the mother is the victim and the father is the perpetrator, and domestic violence simmers away under the surface. She already has a commission to write this case up, so things are looking rosy for her.

The mother is Kathie and the father is Ed. They have two children, a boy and a girl, who are the subject of the court proceedings. This appears to be a perfectly ordinary family. We meet all the relevant players in the drama, although curiously not a Cafcass Officer, but perhaps it is too early in the proceedings for that.

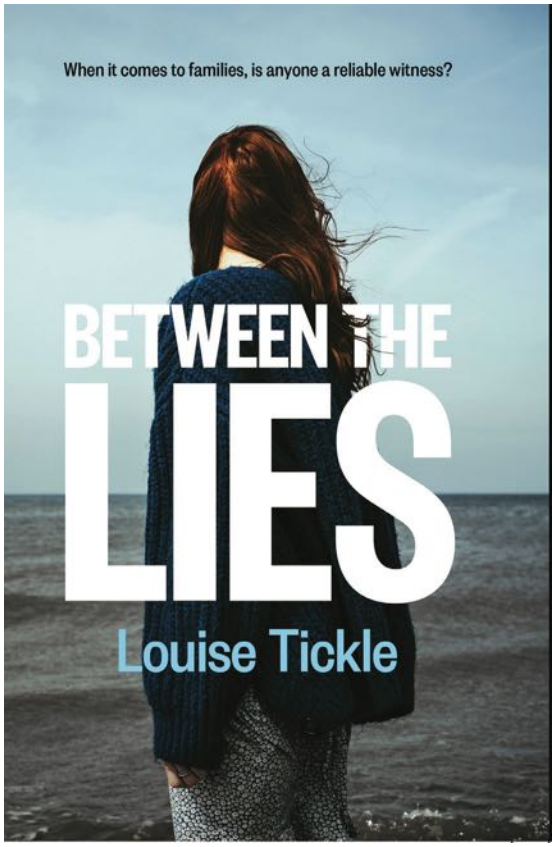
At one level, the story is wearily familiar to the practising family law barrister. Ed is seeking unsupervised contact with the children. Kathie is a victim of domestic violence at his hands, which the children have witnessed. They too have suffered to a lesser extent (and will continue to do so), or so Kathie fears. The children are ambivalent about their father, but their son has expressed a wish to see him. The legal issue, as always in these cases, is whether the mother's evidence will satisfy the burden of proof , so as to enable the court to make the necessary findings of fact.

Cherry is determined to observe these proceedings and she knows that will be easier if neither party objects to her doing so. We can see that the judge is already being difficult and can

imagine she would not hesitate to exclude her if she were given a reason to do so. Cherry no doubt fears that will happen if Ed objects to her presence, so she has to keep him onside. Her editor stipulates that she must interview Ed, in the interests of even-handedness Cherry is very aware that she has to be unbiased, despite her instinctive sympathy for Kathie.

Consequently, Cherry embarks upon trying to gain Ed's agreement to being interviewed. Ed does not make this easy, because he insists on Cherry being tested, in a way worthy of a Herculean task. By coincidence, both Ed and Cherry are experienced climbers and have met before in that context. Cherry knows that Ed excels at this so when he tells her that she will have to do a climbing wall exercise with him, before he will agree to her interviewing him: she knows she has do it and place her complete trust in him. She does, the climb is successful, despite some challenging moments, and Ed rewards her by finally agreeing to be interviewed for the piece Cherry is writing. We can see that, in doing so, he is already managing Cherry's involvement.

Cherry has her own traumatic upbringing, as we have discovered in the opening passages, although it is a while before we realise the full effect of her childhood experiences on her own



mental health. It dawns on us only gradually that Cherry is a victim, just like Kathie, and the reader must question her objectivity when she is so clearly in the mother's camp, but at the same time allows the father into her own home, supposedly in the interests of even-handedness. Ed subjects Cherry to some violent behaviour, once he is allowed into her house, although not of course witnessed by any third party, nor reported to any external agency. How can Cherry use Ed's violence against her to help Kathie? Of course, we know she can't, but it would have been vital corroborative evidence of Ed's tendency to violence. Cherry cannot enter the arena as a witness because her role must remain one of neutrality. The need for corroboration of domestic violence allegations is such a familiar evidential problem for lawyers, but the author does not offer us any escape from this conundrum.

Cherry can see that Kathie is in dire need of a good barrister, and so she introduces her to Eliza, an experienced counsel in this field. Eliza agrees to take the case on pro bono basis, but from then things go from bad to worse. In court Ed is represented by a pompous young man, who knows he is going to win the case, because Ed presents well in evidence and portrays himself as genuinely concerned for the welfare of the children. He tells the court that Kathie's objections to his seeing them are unfounded, not based on any evidence, and he openly calls into question her mental health. The reader can see that he is actually gaslighting her, but it is difficult to convey this to the judge.

The locus of this case is the Bristol family court, although one has to hope that the judge charged with hearing the case is a parody, rather than a representation of a real judge. However, most family barristers will have encountered some of the judicial hostility she exhibits towards Kathie's case, although the biting remarks attributed to her are maybe a step too far. Eliza clashes with the judge and inevitably the judge finds the burden of proof has not been discharged and so she grants Ed's application, dismissing Kathie's case that the children are at risk from him. Striking are the supposed extracts from judgments handed down by the judge at various points in the case. I hope they are fictionalised. The judge makes no secret of the fact that she considers the mother's objections to Ed seeing the children are fanciful, irrational and cannot be substantiated.

Kathie is so appalled that her concerns have been rejected by the court that she puts the children in the car and drives away. There is an awful inevitability to this outcome: we all hold our breath, like the Greek chorus, when we find out what she has done, knowing that that this is the worst course of action she could take. Also inevitable is Kathie's transition from apprehensive mother to runaway respondent. By her actions, she has thwarted the court order and is in contempt. This would almost certainly lead to an application by Ed for a change in the residence arrangements, but before we reach that stage, the story takes yet another turn. Here I pause, in order not to give too much away.

The whole saga is reminiscent of a Greek

tragedy. All the players are flawed to a greater or lesser degree: for example, Cherry is meant to be supportive of Kathie, so why does she run such risks in her dealings with Ed? Why is Kathie unable to get her reasons accepted by the court, especially when Eliza is so obviously competent? Why do those who try so hard for Kathie fail to get the message across to the judge? Why does Cherry allow herself to become embroiled in Kathie's abduction of the children? How are the children at the centre of all this to be protected?

This book is totally gripping. I read it in four hours over two days, despite the fact that my hard copy had failed to arrive, and I was reading it on a laptop screen, with the rain pouring down outside. The twists and turns are dramatic. But I will not reveal the dénouement, so you must beg, borrow or buy the book and read it for yourself.

'Between the Lies' is a powerful analysis of why domestic violence cases sometimes lead to unfair and unsatisfactory outcomes. It is also a worthy polemic in support of more transparency in first-instance family court proceedings, of which Ms Tickle can be justly proud.

Book Review

Marking Time: My Familiy and I

Rebecca Bailey-Harris | 1 Hare Court

Sir Mathew Thorpe, Henmarsh Farm Editions, 2023

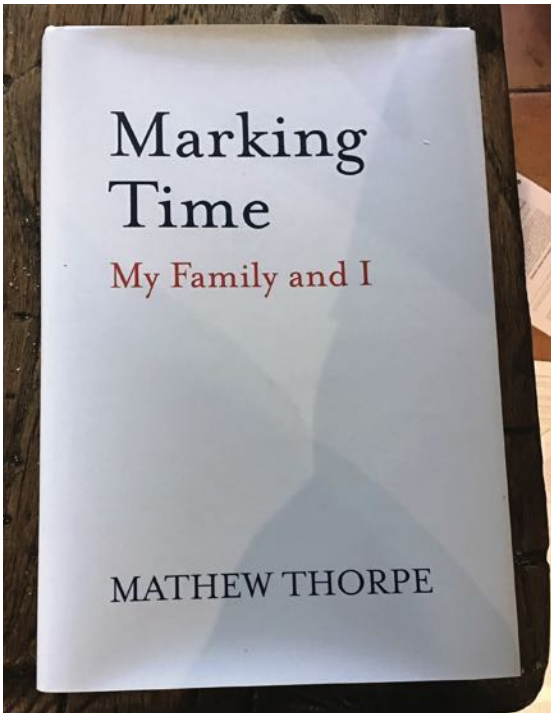
Sir Mathew Thorpe's latest book is divided into two parts, at first glance seemingly distinct. The first is a record of his ancestors, the families of his four grandparents. The second part is Mathew's autobiography – a long and colourful life, of considerable distinction. A close reading of this book reveals the subtle connections between its component parts. The legacy of his ancestors has coloured aspects of Mathew's own interests and achievements.

The first part is the history of four families. Mathew presents the reader with an extensive dramatis personae which paints a vivid picture of life and society in England and far beyond from the early 18th century. The following highlights can only give a flavour of what is to be enjoyed by the reader. Of the Thorpe family, Mathew's

grandfather Captain John Somerled Thorpe fought in the Boer and First World wars and was killed in 1916. Mathew was particularly fond of his great uncle Gervase, a colourful character who spent many years in India and whose book recording the shooting of game there is as vivid as it is shocking to the modern reader. The Meade family hailed originally from Ireland and then Ulster. John Meade the First Earl married one of the greatest Irish

heiresses, but the fortune was squandered. Richard the Second Earl died at the age of 39, but his short life was significant for the time spent in Vienna, where he married Countess Maria Carolina Thun. She died in childbirth in 1800. Her mother was a patroness of Mozart who often performed music in her house. The Third Earl, another Richard, was described by Chateaubriand as 'at the head of the London dandies'. In the diplomatic service he attended the Congress of Vienna and was described by a contemporary as being 'as handsome at seventy as when Lawrence painted him forty years before'. Members of the Lambert family sought fortunes in India and were successful in business enterprises there and in London. William (1836 – 1907) was engaged in the suppression of the Indian mutiny and in the Kaffir and Zulu wars in South Africa. Mathew's grandfather Colonel Arthur Lambert served in the Dardanelles, writing letters in which he described one of the most dramatic theatres of the Great War. He was killed by a Turkish bullet and lies in the Gaza war cemetery, a particular poignancy in current times, Of the Donaldson family, Mathew characterises Sir George as 'a prodigy'. 'Good looking, vain, self-important', he nevertheless had 'great flair' as a cultured man fluent in French and Italian. Sir George made his mark as a renowned collector and dealer, his special fields of interest being musical instruments, paintings and furniture and decoration. His public spirit led to honours in Saxe-Coburg and Gotha, France and England. Sir George's collection of musical instruments was unequalled in Europe. The collection was gifted to the Royal College of Music and the State Opening of the Museum took place on 2 May 1894. Sir George gifted to the College the manuscript of Mozart's Piano Concerto No 24 K491 – 'arguably the most important music manuscript in the UK'. As to art, he gifted to the National Gallery Goya's outstanding portrait of Dr Peral and sold to the Gallery at cost price Titian's portrait of the poet Ariosto.

What themes can be traced from this rich ancestry into Mathew's own life? I discern the following: love of shooting, attachment to Vienna and Austria, interest in India and more generally



a marked internationalism. The reader may find others on perusing the second part of the book.

Mathew was born in 1938, when the 'state of the nation was febrile as the threat of war with Hitler overhung': the bombing of Petworth in September 1942 was a well -publicised disaster. Mathew gives a vivid account of stays in his childhood with Granny Thorpe at the beautiful Coombelands Estate. Mathew went as a boarder to Stowe in 1952: the house was dilapidated and the magnificent grounds were in varying states of decay. Mathew was drawn to the study of history but 'Classics was the only proper study for clever boys'. He sat the entrance examination for Balliol College, Oxford and was offered a place. The admissions tutor was as impressed by Mathew's history paper as by his Latin. However, 'for practical reasons' he chose to read law, 'a subject in which Balliol excelled'.

Mathew's account of his legal education at Oxford from 1957 is sparse, because he was not attracted to the study of law as an academic discipline. The chapter on Oxford focuses instead on outings to Ascot and Goodwood, dinners at

the Bell at Aston Clinton, parties given by 'all the faster young ones, shooting and poaching 'under the wide Otmoor skies' and the decadence of the Annandale dining club. Mathew's 'Waterloo' was the Honours School of Jurisprudence in 1960, receiving a third class degree. Following Oxford, Mathew and his friend Robert Douglas- Miller spent an interlude in India, using their connections with the 'princely class' (including maharajas) to embark on game hunting and hopefully to bring back antique European weapons. They found 'a sporting tradition on the point of extinction', but Mathew was left with an affection for India and Indians. A less fortunate legacy was tuberculosis which slowly incubated for four years and required Mathew's hospitalisation for nine months.

Mathew's self-awareness is telling: 'Only when I moved from the study of law to the practice of advocacy did I become engaged and inspired'. After pupillage at 1 Mitre Court he was taken on in 1962, initially earning paltry fees. This chambers 'married ' Joseph Jackson's set from Paper Buildings in 1969, a development of significance. In 1967 Mathew married Vina and in due course Gervase, Al and Marcus were born (to whom this book is dedicated). Life at Seend Green House was rich and varied: a major achievement was the restoration of the walled garden. Mathew continued his passion for horse racing and betting in partnership with David Oldrey and they owned racehorses from 1963. Breeding followed: the Seend Stud operated for 16 golden years until a long and painful process of liquidation set in.

Family law practice changed greatly with the Matrimonial Causes Act 1973. Mathew recounts that 'A rejuvenated Family Division burgeoned on what was labelled ancillary relief litigation and I was perfectly placed to feature in the front rank'. He took silk in 1980 and thereafter was 'at the zenith as an advocate'. The following eight years were 'the exciting years of my prime, one high profile case following another'. These included Jagger, Guiness, Lady Radnor and the Contesse de Dampierre. Particularly engaging is Mathew's account of a case in Hong Kong in which his client dispensed with his services and acted in person, it having been discovered that she had a Chinese cohabitant whom she subsequently murdered, dismembered and buried in the garden. Mathew's greatest public responsibility in silk was as counsel to the Cleveland Enquiry into Child Sexual Abuse from 1987.

Mattew's appointment to the Family Division in 1988 marked a great change, not only in profession but in personal life. His marriage with Vina ended, Beech House was purchased and he married Carola. 'Suddenly, I took on responsibility to the State'. Perceptively Mathew observes that as a judge 'I needed profounder understanding of human behaviour and psychology'. But he did not confine himself to the judicial function. Judicial activism in striving to improve the quality of justice was a radical departure from tradition. Mathew's contributions of longstanding significance were to the Dartington conferences, the Ancillary Relief Working Party and above all to international family justice. The Court of Appeal followed from 1995 to 2013. In due course as presider 'my court became the principal vehicle for the carriage of family business'. But wider horizons beckoned. Mathew became the first Head of International Family Justice in 2005. He rightly regards his rich and varied experience 'in creating a new field of judicial practice and in advancing British interests and standards across the world'.

The final chapter of Mathew's autobiography is tinged with sadness: disappointment at not been given after retirement from the bench the work in ADR which his talent merited. But the final page of his autobiography is joyful. Mathew announces his engagement to Aleksandra, whom readers of A Divided Heart will know. We readers wish them every happiness for the future.

Available from the Author at thorpe@1hc.com at £25 p&p included or at £20 collected from 1 Hare Court or QEB or Devizes.

Section 25—a busted flush?

Duxbury

Readers of this august publication, and of the excellent Financial Remedies Journal¸ will know that the Law Commission is to embark next year on a review of the whole area of financial provision on divorce, with a view to remodelling the legislation. Reform is thought to be necessary because, bluntly, our judiciary has lost the plot. 50 years have passed since MCA 1973, without their being able to enunciate a clear set of principles that the public can follow and save themselves a ton on legal costs. Don't blame it all on the judges, though: it was our Law Commission who in 1969 devised section 25 in more or less its present form. As we shall see, the Scottish Law Commission did a much better job in 1985, north of the border.

The case for reform

Part II MCA 1973, and s 25 in particular, is characterised by:

- unbridled discretion
- unseemly expense, and
- capricious results.

Discretion: section 25(1) opens by telling the court have regard to '*all the circumstances of the case*', including a list of enumerated factors. Here, dear Reader, is the fons et origo of all that's wrong with the statute. If the law merely casts the net, you have no idea what kind of fish it will bring in. As the Law Commissioners unblushingly put it in 2012:

'*The situation facing family judges has therefore been likened to that of … a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination.*'

Expense. The cost of running even a moderate financial claim is notorious. In a simple case, it is commonplace for the parties to spend £16k apiece before first appointment. In a big money case, make that £160k; in mega money £1.6m. Questionnaires, replies and schedules of deficiency then follow in what must be one of the most inefficient exercises in due diligence known to man, carried on at partners' hourly charging rates instead of doing the obvious, viz. appointing a single forensic accountant to wrap up everything at a fraction of the cost. That's before you even get to FDR, where judges terrorise the parties by telling them that costs will double to trial; which prediction is duly fulfilled, like some Eumenidean curse. Further, and as previously noted in this column, there is no jumping-off point for the respondent, who may well be funding the

litigation anyway via LSPOs.

Caprice. You may get £62m for 'needs' (including a lifetime Duxbury) if you happen to be the 13-year wife of a Saudi national (*Juffali*, 2016). Alternatively, if you were married to a Russian oligarch, and are backed by a hedge fund, you may get £453m as a sharing award, of which half is classed as a 'needs' award for international enforcement purposes (*Akhmedov*, 2018). (Seriously? Can anyone get through £224m in a lifetime?). Again, if you marry a man who brings a thriving business into the marriage, you will strike gold if he happens to find a buyer afterwards (*XW v XH*, 2019: £297m to W). On the other hand, if you inflict financial losses on H running into 'tens of millions', you may not only be immune from recovery, but could even pocket a needs-based award of £750k to boot (*VV v VV*, 2022).

The impetus for reform at this time emanates chiefly from the sustained efforts, in the House of Peers, of Baroness Ruth Deech, former Chair of the BSB, assisted by her second-in-command Baroness Fiona Shackleton, partner in Payne Hicks Beach. Presenting her Divorce (Financial Provision) Bill [HL] on 11 May 2018, the noble Lady remarked:

'*I have set out the relevant uncertainty, unpredictability and inaccessibility of the law, largely judge-made, despite the existence of a statute of 40 years ago intended to clarify matters. But the rule of law requires that the law be accessible, intelligible, clear and predictable. Issues should be resolved by application of the law and not by discretion. Means must be provided for resolving disputes without prohibitive cost or undue delay. The procedures should be fair. The current law, based on Section 25 of the Matrimonial Causes Act and as embroidered by judges for over 40 years, fails all those tests.*'

Before proceeding, it is pertinent to observe that MCA 1973 was enacted against the background of a widespread popular belief that marriage was for life, or in the language of the common law, represented '*the voluntary union for life of one man and one woman, to the exclusion of all others*'. Whereas, as Sir James Munby pointed out in a speech in 2018, the intervening decades have seen huge sociological change, resulting in the waning popularity of marriage as an institution, and the rise of other family forms. Let us call the one '*traditional marriage*' and the other '*secular unions*'. The distinguishing features of secular unions are that (1) there is no assumption the relationship will last; (2) they are gender-neutral; (3) they result in a variety of family structures; and (4) they are critically dependent on mutual consent; such that if consent lapses for any reason, the law will come to the aid of the one exiting the relationship, and resist any attempt by the other to dig in.

In a word, the 50 years since 1973 have turned the concept of marriage from a lifelong bond into a cohabitation contract terminable at will. Nowhere is this seen more clearly than in no-fault divorce (effective 5 April 2022), whereby the demise of a marriage is effected by the simple expedient of filing an online form with the family court at Bury St Edmunds.

Now that no-fault divorce has become a way of life, the whole infrastructure of marriage has changed; and accordingly, it is necessary to redefine our approach to financial remedies. For a start, beyond providing for any children, there is no warrant for considering the '*needs, obligations and responsibilities*' of the parties towards each other (s 25(2)(b)). Am I my brother's keeper? You have elected to put me away; why should I look after you?

Similarly, the standard of living enjoyed before the breakdown (s 25(2)(c)) is irrelevant. If you want a certain lifestyle, stay married: otherwise, put the past behind you and start again. Nor is the duration of the marriage (s 25(2)(d)) a material factor: you don't get brownie points for staying longer in a marriage. Lastly, unless it can be shown that you have made some long-term commitment to my wellbeing that outlasts the marriage, any physical or mental disabilities that I possess (s 25(2)(e)) are not

your concern.

The only proper candidate for retention in any new scheme of things is s 25(2)(f) (contributions). For it is incontestable that people should get back, pro rata, what they put into a marriage. Joint efforts are rewarded by a sharing of the fruits. To this extent (but no further), the analogy of marriage as a partnership holds good.

The Scottish system

The Family Law (Scotland) Act 1985 is a very different kettle of fish. It was the brainchild of Prof. Eric Clive, former Scottish Law Commissioner, and is vastly superior to its English counterpart, both in concept and execution. Principal features are as follows:

- A narrow set of principles, with few variations from the mean.
- A clear distinction between matrimonial property (as defined) and everything else. Only the former is divisible between the parties; although there is a limited power to make inroads into other wealth, where necessary to redress a balance of advantage or disadvantage flowing from the relationship, or to provide for short-term needs (or both), generally over a maximum of 3 years. In other words, the Scottish system makes for a speedy transition to independence. Duxbury awards, and other large scale reallocations to meet alleged needs, are unknown.
- The value of matrimonial property is taken at the 'relevant date', viz. the date of separation of the couple. This cuts out the need for regular updating and revaluations, and scotches any arguments about the divisibility of post-separation accrual (pun not intended).
- Clean breaks are the norm. If there is any residual claim for re-balancing or short-term support, it is usually addressed in capital terms.
- People can reach their own agreements without the need for court approval.
- Divorces are withheld until the finances are settled.

'Matrimonial property' is defined in s 10(4) as '*All the property belonging to the parties or either of them at the relevant date* [ie separation] *which was acquired by them or him (otherwise than by way of gift or succession from a third party)—(a) before the marriage for use by them as a family home or as furniture or plenishings for such a home, or (b) during the marriage but before the relevant date*'.

While he has not tested this proposition with colleagues at the Edinburgh Bar, Duxbury is of the opinion that s 10(4), as drafted, does not permit Scottish judges to follow the English predilection for treating pre-marital assets as '*matrimonialised*', in whole or part, once they are brought into a marriage (see eg *N v F (Financial Orders: Pre-Acquired Wealth* [2011] EWHC 584 (Fam), Mostyn J). Consequently the need for careful weighing of business '*springboards*', à la *Jones v Jones*, should not arise. But if he is wrong about this, Duxbury points out that by s 10(6), the court can take into account '*the source of funds or assets used to acquire any of the matrimonial property … where those funds or assets were not derived from the income or efforts of the persons during the marriage*'.

Not everyone south of the border would agree that matrimonial property should be valued as of the date of separation. But it has the great merit, in Duxbury's view, of removing any incentive for people to 'game' the court, by engaging in tactical delays in the hope of a bigger award.

Astonishingly, and thanks to the careful work of the Scottish Law Commission, the Family Law (Scotland) Act 1985 has cured in advance nearly all the flaws of the English system, and that 40 years ago. Apart from a whingeing criticism by Lord Hope in *White v White*, it has operated to great acclaim and to almost universal satisfaction among court users ever since. It is plainly the way English law should go, with the odd tweak here and there.

The Divorce (Financial Provision) Bill [HL]

Baroness Deech builds on the Scottish precedent but adds one or two glosses. For example, clause 2

('Orders limited to matrimonial property') reads as follows:

> *(1) In this Act "matrimonial property" means all property and interests in property, including any pension rights, which could be the subject of a pension sharing order or a pension compensation sharing order, belonging to the parties or either of them at the date of the relevant financial order which—*
>
> *(a) was acquired—*
> *(i) during the marriage; and*
> *(ii) otherwise than by gift, inheritance or succession from a third party; and*
>
> *(b) does not directly or indirectly represent property acquired by them or either of them before the marriage.*
>
> *(2) For the purposes of subsection (1)(b)—*
>
> *(a) any premises and household goods acquired before the marriage for use by them as or in their home shall be treated as acquired during the marriage;*
>
> *(b) if any property that would otherwise fall within subsection (1)(b) is used and applied so as to increase the value of any matrimonial property, the property so used or applied shall be treated as matrimonial property;*
>
> *(c) if any matrimonial property belonging to one party is used or applied so as to increase the value of an asset which belongs to the other party, and is not matrimonial property, a proportionate share (by value) of that asset shall be treated as matrimonial property; and*
>
> *(d) paragraph (c) shall also apply if by exceptional personal skill or effort a party to the marriage increases the value of an asset.*

It will be noted that subs (2)(d) reintroduces the idea that special contribution can enhance a party's share of the spoils in certain circumstances. This may be controversial, but to Duxbury's mind it is wholly in keeping with the modern notion that rewards belong to those who do the heavy lifting.

Your correspondent would however take issue with subs (2)(b), whereby non-marital property can become 'matrimonialised' if mingled with marital property. Their Ladyships no doubt included this sub-clause as a gesture to English case law, but Duxbury regards it as unprincipled and capable of producing grotesque results, as in *XW* v *XH* above. Better per Arden LJ, who in *Jones* v *Jones* opined: '*The correct analysis in my judgment … is that, where a spouse has a non-matrimonial asset of the present kind, he is entitled to that element of the [business] at the end of the day which can fairly be taken to represent the fruits of the non-matrimonial assets that accrue during the marriage, even if the fruits are the product of activity by him or on his behalf.*'

Lifetime marriage – an opt-in?

Despite all he has said above, and the practical wisdom he has brought to bear, Duxbury is still a romantic at heart, finding himself inspired by Shakespeare's poetry: "*… Love alters not with his brief hours and weeks/ But bears it out even to the edge of doom./ If this be error upon me proved/ I never writ, nor no man ever loved.*"

So what shall we say to people who wish to stay with the Biblical norm of one-man-one-woman for life, and are prepared to swear an oath to "*love, comfort, honour and keep*" one another, "*in sickness and in health, and forsaking all other, to keep [themselves] only to [each other], as long as they both shall live*"? Should they be allowed to contract out of no-fault divorce, and to accept continuing financial obligations to one another, not to mention the sharing of all worldly goods? Duxbury can see a powerful argument in favour. Then s 25-style remedies would come into play only on the separation (without divorce) of the parties, and while they remained faithful to their vows. But that is an argument for another day.

Duxbury

Flawyer

Dear Family Affairs

I write to you all on the last day of Pro Bono Week … on the eve of Remembrance Day …in the dark shadow of 7th October and the visceral horror of what happened on that day and in all the days that have followed.

As I often do, I had half written this entry, for our beloved editor, John-Magnificent-Wilson-KC-The-Brave, in my head (thank you! Ed). I do the same with packing my suitcase to go away. Mr Flawyer will ask me, "have you packed?" and I reply, "yes… in my head" (and he does his little sad face that speaks to what it is, as a very punctual person, to be partnered with a last-minute merchant).

The piece, half written in my head, wittered on about how I had decided to stake the future of my career on the outcome of one car-crash of a case. "If I can't win this case, this emblem of justice, I should pack up my out-of-date Red Book and leave it to the proper barristers." I then lost said case, badly. Waaaaaaaaah. But I didn't keep my promise to myself to exit stage left because, without really realising it, various lawyers around me, including my Head of Chambers, came to my rescue with their time, thoughts and humour… and the rather bigger matter of an offer to help dig the case out of its hole on a pro bono basis. So, there ended that little story. Newsflash: the good people of this bonkers profession can keep you going come rain, shine or (judicial shit)snow (geddit? The Ed. didn't so we should probably have canned that attempt at humour… oh well, too late). I'd hazard that being called to the Bar alone delivers the best shoulders to cry on. Like the words "blah-dee-blah utter barrister" have a magical effect on the recipients' scapulas… #NotAllBarristers. The spell doesn't work on everyone… you know who I mean. Those rare types for whom the spell goes haywire, and they just end up as common or garden d*cks.

But that little story seemed like such bollocks to rabbit on about in the context of all the devastation and trauma and grief. I am as unqualified as anyone to opine on the events that began on 7 October and continue now. I cannot offer anything of my own, and no one would need it if I did. But equally I would be a giant prat to say nothing and ignore the abject agony and the reverberations. I've turned to others, betters, for thoughts on how to think and step forward without indulging in cowardly silence. I've turned to Noah Yuval Harari. Such calm intellect in the most turbulent times. And Gibran Khalil Gibran. And Warsan Shire. And Ruth Bader Ginsburg. Even Marcus Aurelius. Poets and philosophers gently remind us that we have been here before, we do know these events, we've inherited experiences of them.

It is the desire to cleave to a 'side' in the moral sense that I am trying to resist. It's so easily done. Too easy. It comes from empathy, in a way. But if we have some intellect, we should probably dust it off and use it in these times. Question our own blind spots and inclinations. As much as it might be painful to imagine for a moment how someone else could not be moved in the same way as we are by barbarity of one type. Or another. The question that bubbles in me when I hear proponents of war on one side and of ceasefire on the other is, and then what?

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It is the desire to cleave to a 'side' in the moral sense that I am trying to resist. It's so easily done. Too easy. It comes from empathy, in a way. But if we have some intellect, we should probably dust it off and use it in these times.

Humanity has been here before. What do we know? Are murderers and terrorists to be reasoned with? How does that usually work out? Are murderers and terrorists more often born or made? How often does violence beget peace? Isn't the most intelligent response – while chaos and horror still rages, while there is no hindsight – simply, 'I don't know'? Why do we have to decide where our sympathies lie? How about simply with the innocent whose lives have been lost or shattered? Who does the rush to politics benefit, really?

I am reminded, often, of an experience watching the sentencing phase of a capital murder trial. The proven murderer had come to the country, in which he was being tried, from a war-torn country as a young child. His family gave evidence in the jury trial to decide if he should be executed or imprisoned for life without parole. He was the youngest of many siblings. His eldest sister took the courtroom back, in her evidence, to the convicted man's life as a small boy. He had witnessed a grandparent's murder, close up. He had seen severed heads on fences as warnings to others. The violence he had seen had infected him. As an adult, he went on to murder more than once. His brothers and sisters believed that they had badly failed the youngest of their family, that they could have protected him better and prevented the recurring cycle of violence. Despite the pleas from those older siblings before the court, begging for the killing to stop, their brother, too, was put to death by a jury and by the state. I wonder which way his own offspring will turn. They have two stark paths. Forgiveness or anger. Both can seem like an abyss.

The religious leader who gave evidence in the defendant's mitigation told the court that many of the men he ministers on death row are just terrified children locked inside the big, broken bodies of men. We are all, deep down, recovering children.

In 1624, when it must have seemed impossible to foresee Protestants and Catholics living harmoniously in England, John Donne famously wrote:

No man is an island,
Entire of itself,
Every man is a piece of the continent,
A part of the main.
If a clod be washed away by the sea,
Europe is the less.
As well as if a promontory were.
As well as if a manor of thy friend's
Or of thine own were:
Any man's death diminishes me,
Because I am involved in mankind,
And therefore never send to know for whom
the bell tolls;
It tolls for thee.

I am so sorry for all the loss and the pain. I hope you find pockets of peace at this time of year and in these confounding times. If in doubt, if at a loss, cohesion and healing can begin at home.

Love,
Flawyer

A Great Mistake

Michael Sternberg KC KCFO | 4 Paper Buildings

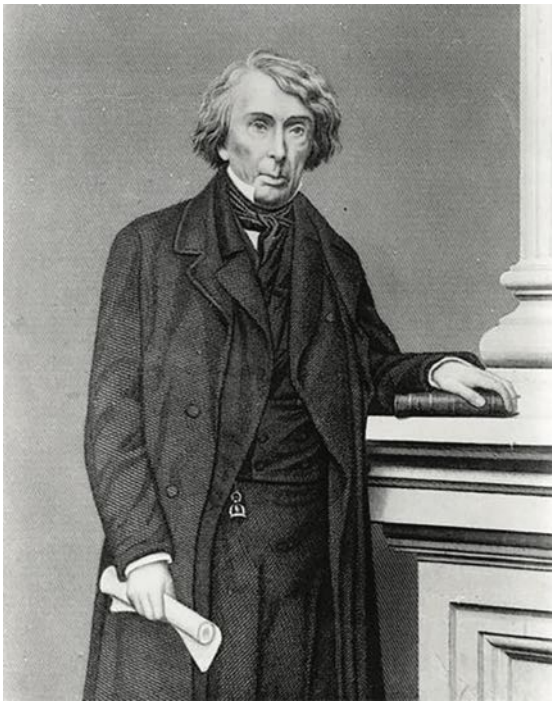
The great economist J.M. Keynes famously observed, "It is a disadvantage of the long run that in the long run we are all dead." It is perhaps less well known that he continued, "... But, I could have said equally well that a great advantage of the short run is we are all still alive."

It is alas a condition of being alive that we make huge mistakes. I do feel comforted a little because greater minds than mine, some in control of national destinies, have messed up spectacularly.

Take the British failure in 1955 to take over what turned eventually into The Common Market. Jean Monnet, the EU's founding father, wanted desperately the British Foreign Secretary to attend the discussions in Brussels of the ECSC – the precursor to the Common Market - and to lead the European Project. The F.O. sent instead one Russel Bretherton, an undersecretary in the Department of Trade with, "Neatly parted hair, clipped moustache, chalk striped suit and a waistcoat," His brief was, "To cooperate, to be helpful, but to enter into no commitment." And so, the chance to order what became the EU to the UK's advantage was utterly lost, a mistake for which we are now grievously paying. There is a hugely attractive description of this in Matthew Engel's beautifully written, "The Reign – Life in Elizabeth's England," which I recommend warmly to you, from page 136 – in the chapter entitled "The Reign of Error".

Or the decision by Pete Best to give up on being the Beatles' drummer, which then led in 1962 to him being fired by Brian Epstein, to be replaced by Ringo Starr.

Or President Kennedy's decision to tour Dallas in an open limousine on 23 November 1963, despite being warned that this was enormously dangerous. Early that month, Byron Skelton the Democratic National Committeeman for Texas advised Bobby Kennedy, the President's brother, against it. He wrote there were people there waiting "to harm" the President; others gave similar advice; all their warnings were mistakenly ignored.



Chief Justice Taney whose mistaken decision in Dred Scott v Sandford 60 U.S. (19 How.) 393 (1857) ushered in the American Civil War.

Even more cataclysmic was Chief Justice Taney's infamous and legally mistaken US Supreme Court Judgement in Dred Scott v Sandford (1857) that enslaved people were not citizens of the United States and, therefore, could expect no protection from the federal government or the courts; further that Congress had no authority to ban slavery from a federal territory. This led almost inevitably to the American Civil War. (Compare and contrast,

Shanley v Harvey (1763) 2 Eden 126 – as soon as a slave sets foot on English soil, he is free; affirmed in Somerset v Stewart (1772) 98 AER, per Mansfield L.C. – but some Americans prefer to ignore these cases – certainly, Chief Justice Taney did!)

Or perhaps that ill-fated decision, at Cliveden one hot afternoon in July 1961 of John Profumo, Secretary of State for War, to chat up Christine Keeler, in what Lord Denning later described as, "a light-hearted and frolicsome bathing party, where everyone was in bathing costumes and nothing indecent took place at all."

"Interesting" I hear you say, "but what has any of this got to do with wine?" The answer, my learned friends, is that many of us, of course on a far, far, smaller scale, and with far fewer horrible consequences, have, without realising it, made a number of wine mistakes.

My greatest mistake, which I confess now to you with intense shame, is to never, in the many years I have been writing this column for Family Affairs, recommend you join The Wine Society– which emphatically, I do now. Originally, I was told the Society was stodgy and boring, so I ignored it – now like Humphrey Bogart in Casablanca, I find I was "Misinformed."

For those who know nothing of the WS, it was founded in the Summer of 1874 by an architect and an eye surgeon, its objective was "To introduce foreign wines, hitherto unknown." Nowadays the WS does far more than this, with a series of zoom tastings, a fascinating education programme and an online community. The Society also runs a subscriptions scheme; it can help you buy in bond; it can store your wines and it has a team of experts to give advice if you contact them. Even better, it's a cooperative owned by its members, each of whom has one share. You need to become a member to place orders. Joining is easy. A one-off lifetime membership will be added to your basket automatically. Their delivery system is the best I have come across, which is a huge advantage.

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They increased prices by only a little in the last two years, unlike many merchants; they are also holding them stable for the rest of this year. And their wines are truly excellent value. Here are a few of my favourites.

You need not fear Danaans bearing gifts, and the Society's Greek Wine is no Trojan horse, exceling as it does in a floral mixture of honey, peaches and flowers, which is hugely refreshing. I have never thought much of the Moschofilero grape, yet here it is highly appealing. This is a lightly aromatic dry white wine which just won a Decanter Medal. It is only £8.95 a bottle, duty paid, so probably it's the least expensive wine I have ever recommended. Its 12.5% proof and it's a gift!

From the Three Choirs Vineyard in Gloucestershire, comes The Society's English White 2022. This is delicious, light, and refreshing, with an appealing mix of gooseberry and peaches on the tongue, followed by a fresh and delightfully intricate aftertaste. It costs only £9.95, duty paid, which by the way is significantly below what all Three Choirs' wines are priced at on the vineyard's website – so my learned friends, it is a total bargain. It is certainly the least expensive English wine I have ever bought and at 11.5% proof, it's also unlikely to give you much of a hangover.

I have often regretted tasting wine merchants "Own Labels" and when I did, been tempted to utter the words of Winston Churchill's fellow cavalry officer, Colonel Jack Barbazon of the 4th Hussars, who when offered wine in 1893 in the Officer's Mess, asked laconically, "Pray tell me, what chemist do you get this mixture from?" This could never, ever be said about any of the WS's "own label" wines which I have tasted.

But not every single one of the WS's wines are great – I would give their 2018 Bourgogne Jean Marie Vincent (£24.50) a miss – it's not bad, simply uninteresting and the WS has far better wines at lower prices, in particular their Exhibition Chablis Premier Cru Chablis Montmains 2021. This is a well-made, beautifully balanced mixture with just the right amount of acidity and fruit. It opens with a steely welcome which softens as the air does its work. I defy you to find a better Chablis Premier Cru for £22 a bottle. Once again this is another WS selection which is low in alcohol at 12.5%.

They do whisky too. The Society's Blended 8-year-old Malt is sweet, lightly fragrant, with an echo of baked apple, oranges and walnuts. It is harmonious and fruity with hints of ripe raisins, honey and lemon. It is blended exclusively for the WS, and they have driven a hard bargain because it is only £21 a bottle duty paid. It is an elegant whisky which glides down your throat dangerously. Try as I might, the next cheapest 8-year-old blended malt whisky I could find was £8 a bottle more.

The Burrier family have been making wine in Beaujolais since the 17th Century and they certainly ought to know what they are doing, but their Saint Amour Cote de Bresset 2020 (13%) at only £18 a bottle is really something. It comes from the most northerly cru of the Beaujolais region, and it is the lightest wine of the appellation. Their 2020 has a smoky, dark cherry fragrance with a mineral, well-balanced taste, composed of pleasant acidity, and with a clear but soft structure. It's a solidly well-made wine, of which the French drink a lot around Valentines' Day and having just tasted some for the first time I can understand why.

Also, from WS comes a 2021 Fleurie (one of the best of the Crus of Beaujolais) at only £14 a bottle. It is an accomplished deep garnet coloured, well-structured wine with a good balance of fruit and tannin made by Coudebert, which will improve over the next 18 months. Yet again, the quality set against the price is remarkable. This is a silky and supple wine and please don't be put off by the fact that there are pictures of two ugly, looking horses heads on the label. It's dry, elegant and with a medium range finish. I advise decanting it for 45 minutes.

WS also, as you would expect, provides classic claret: Chateau Tronquy Lalande is a not a classed growth, "merely" a Cru Bourgeois, but it punches well above its weight. The wine is made by those who create Chateau Montrose. The scent of their 2014 Tronquy, which by the way was an excellent year in Bordeaux, is of blackberry and mild tobacco and its fruit emerges gradually. You can taste the harmonious firm tannins as you realise this is a seriously good wine. It can be drunk now, but it also will be better in a few years, as its tiny touch of austerity softens. This is an elegant and well-balanced wine, with an attractively complex after taste. At £32 a bottle It's the most expensive wine mentioned in this article, but compared to its peers it is excellent value.

Of course, my learned friends, many of you may already be buying from WS, but many more won't - and you really should. It was my huge mistake to have neglected their wines for so long. But life is a process of making mistakes and occasionally being able to put them right. When I was contemplating a career at the Bar, an elderly solicitor uncle told me he had two pieces of advice for me. "Shave off your beard and do tax law!" he intoned ponderously. I did neither. Whether or not that was another huge mistake, others will have to decide.

CHRISTMAS QUIZ

In the Ditloids (questions 1-83), proper nouns are capitalised as are any words that appear in titles. Numbers do not include ordinals. Some questions have been put into categories to make life a little easier. Good luck!

This quiz was set by Petra Teacher of 29, Bedford Row. Could you please send your entries to this competition to her at pteacher@29br.co.uk Entries should be received by 4 pm on Friday the 19th January 2024. The winning entry will receive half a case of claret.

Miscellaneous

1. 16litLD
2. 40w
3. Itlotbt1emik
4. Asits9
5. 2itoepn
6. 3sttw
7. 1sdnasm
8. 366dialy
9. 123ib4i1323
10. Agm1fb1000
11. It2tt
12. 15PMdtQr
13. MYwtNPPatao17
14. LJG-T9DQ
15. LT-t49dPM
16. 4hota
17. 360diac
18. 52ciap
19. 1ab
20. 7ds
21. Ach9l
22. TETi1083fh
23. TNi4160ml
24. 3sm
25. Foa4c
26. TIDCfTi992
27. C9
28. 10ap
29. 1mmiamp
30. 31saitSF
31. QErf70y
32. Wba212dF
33. Ada12
34. 2habt1
35. 21gs
36. 24wiaAC
37. 1ftr
38. T3GbAC
39. 16ytptML
40. 16ptiMB

Sport

41. SBatWC:23g4s3b
42. NDhw24GS
43. MSwtWCisatao17
44. SCR10.65SJ10.72SAFP 10.77
45. TA2023:Ab2w;Ab43r;Eb3w;md;Eb49r
46. 4pfarisj
47. 7pfactir
48. 21ptwagib
49. A10pfstbiW
50. Adeigi3up

Television and podcasts

51. 3BS
52. AHORMI500S
53. 13ahpDW
54. H50
55. 21JS
56. AHOTWI100O
57.B99
58. 3soHV
59. 30R
60. STHwtcooACU12

Literature

61. WSw154s
62. 24siTCT
63. 7bitHPs
64. ACw33HPn
65. ATO2C
66. S11
67. HTTYD10-HTSADJ
68. 4mciWITW
69. Af1a1fa
70. S5bKV
71. 1F2FRFBF
72. ABHO7K

Music

73. 4oiTRC
74. SbE17
75. TEO17
76. Dqyaso17
77. 1989bTS
78. T3T
79. 7NAbTWS
80. 50WTLYL
81. 99RB(a99L)
82. 10lal11pp12dd
83. BECiPCN5iEfMO73

What links?

84. The Mediterranean Sea and the Red Sea

85. Dame Sue Carr; Baroness Hale; Dame Elizabeth Lane; Dame Elizabeth Butler-Sloss; Sandra Day O'Connor

86. 6, 8, 12, and 15; 10, 15, and 20

87. Andorra; Chad; Moldova; Romania

88. Johnny Lee Miller; Benedict Cumberbatch; Robert Downey Jr; Basil Rathbone; Peter Cook

89. Malleable mixture used to make bread; lead singer of The Kinks; first person singular; synonym for distant; Spanish sun; the yellow Tellytubby; Titanium; slang for "money"

90. Had a Damascene conversion; American slang for "toilet/bathroom"; cashless parking app; Husband of Martha in "Who's Afraid of Virginia Woolf?"

91. Lad Baby; The Justice Collective; Lewisham & Greenwich NHS Choir; Rage Against the Machine

92. Aslan; Megaloceros giganteus; 1981 novel by Thomas Harris; subject of Rick Deckard's dream

93. 2003/04; 2001/02; 1997/98; 1988/89; 1970/71

94. Schoolchild; song by the Goo Goo Dolls; Lentil in Latin; synonym for whip/flog

95. Ben Nevis; Snowdon; Scafell Pike; Slieve Donard

96. Black Sea and the Sea of Marmara

97. P!nk; Rihanna; Dido; Sia; Gwen Stefani

98. Shannon; Biscay; Forties; Sole; Trafalgar

99. Ben Hur; Lawrence of Arabia; Mary Poppins; Jaws; Rocky; Rain Man; Frozen

100. Winston Churchill; Jane Austen; J M W Turner; Alan Turing

A Glimpse into the Archive

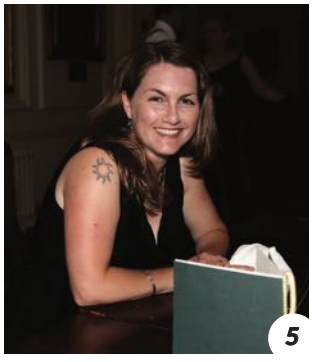
For the archive in this edition of Family Affairs we have travelled back a decade to the retirement party for HHJ Horowitz, held in Gray's Inn during 2013. Michael Horowitz will be known to most of our readers, since despite falling foul of the (then) governing rule for judicial retirement at age 70, he has remained active in many spheres, legal and otherwise, and indeed is to be found on page 58 of this edition of FA. A popular figure, described by many as compassionate and some as avuncular, Michael is seen here showing obvious delight in slicing up an edible copy of the Red Book.


1


2


3


4


5


6


7


8


9

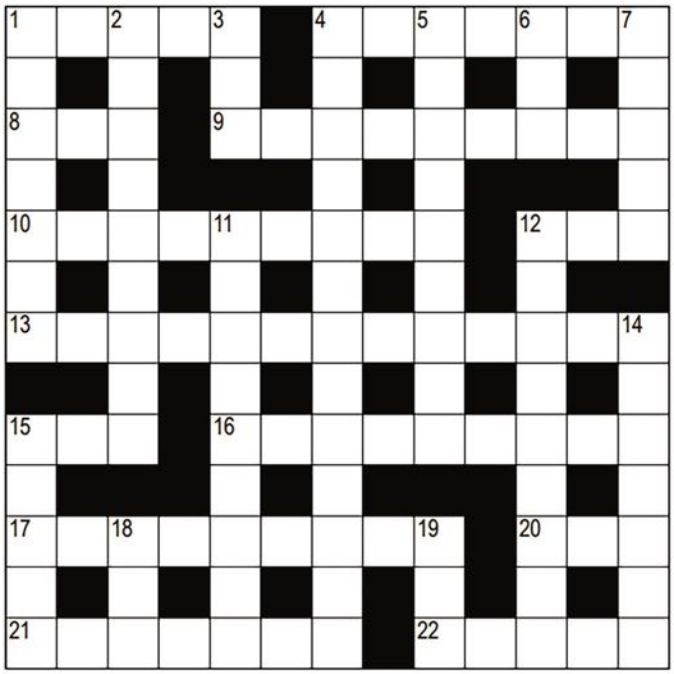

10

1. *Previous Chairs of the FLBA*
2. *Mr Justice (Anthony) Hayden and Sarah Morgan QC*
3. *Phiip Marshall QC and Taryn Lee QC*
4. *Taryn Lee QC and HH Michael Horowitz QC*
5. *Lucy Reed*
6. *Mr Justice (Mark) Hedley and Mr Justice (Stephen) Cobb*
7. *Philip Cayford QC*
8. *Mr Justice Moor, Mr Justice Cobb and Sir Alan Ward*
9. *HH Michael Horowitz QC cutting up the Red Book*
10. *Sir James Munby, P and Mr Justice (Paul) Coleridge*

Crossword Number 53

Seasonal Cheer

by Pippa 'N' Kumar



Across

1. Mortimyr Rhys holds a Xmas gift (5)

4. The law is a mess around the head of conduct: a relevant case (7)

8. Tear copy (3)

9. South Dallas family causes a buzz at this mending event (6,3)

10. Wrongly repeal her. A writer of injustice. (6, 3)

12. He ran company, a constant (3)

13. HMCS list RTAs a muddle! We hear this every December! (4, 9)

15. Marsh sang about Yuletide isolation (3)

16. Begins Reims' excellent Champagne; demands flutes! (9)

17. Lady spied carelessly and revealed (9)

20. An ancient character within Baluchistan (3)

21. Bear with us going back round to see this Ballet (7)

22. Joe tried to buy a lot in France (5)

Down

1. Observes judge first of all making award rightly sharing house and liabilities (7)

2. Colour around an expression put differently (9)

3. Man's informal greetings (3)

4. Wow, ok. I cruelly rewrite Queen's famous tune. (2, 4, 4, 3)

5. Wayward son forces one who hears secrets (9)

6. Judges like a hot one for those in the know (3)

7. Rest for example turned up for this Standard Belgian team (5)

11. Besieged unruly cleric in finale (9)

12. Initiated gents come after internet domain before this month, in short, is up. (9)

14. Noises turned up around state opening leads to a period of sitting (7)

15. America behind government department. That's the way! (5)

18 Spring within clock's parts (3)

19. Speak over an upset mate (3)

Crossword Solution | Number 52

Readers should send their completed crosswords to John Wilson KC at jaw@1hc.com by Friday 19th January. A half case of claret will be awarded to the winner.

Many congratulations to ***Will Tyler KC of 36 Family*** who is the winner of the last Crossword Competition. A half case of claret will be making its way to him in due course.