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Rupert Butler assesses some of the latest developments, including Barry DŜ2NƎŜQă successful appeal against his conviction, ! YySăűè LyűŜNyYl·űλ2yYl·tQă N2fŜ λY l·ăèfdzY cases and the slaughter of cattle

Barry George

The notorious murder of BBC presenter Jill Dando was back in the appeal courts when Barry George successfully challenged his conviction. The decision is reported in R v Barry George [2007] EWCA Crim 2722. Forensic evidence showed that a firearm had been pressed to Dando's head and discharged, causing her death. The bullet and cartridge case were recovered, and discharge residue was found in the case and in her hair. The evidence against George included the discovery in the pocket of his overcoat, a year later, of a single particle of residue that was consistent with that found in the case and the victim's hair.

The prosecution case relied on evidence of identification, credibility, false alibi and the residue particle. George was convicted by a majority verdict and sentenced to life imprisonment. He appealed unsuccessfully, mainly on the issue of identification, but the court concluded that the forensic residue evidence was capable of supporting the case against him, its weight being a matter for the jury.

At trial, expert forensic evidence called by the Crown gave the impression that it was unlikely that the presence of a single particle of firearm discharge residue in the pocket of the accused resulted from innocent contamination. The trial judge summed up accordingly and, in doing so, inadvertently misled the jury because the same forensic science subsequently changed its mind and cast doubt on the probative value of a single particle of firearms discharge. While the residue evidence was not the foundation of the prosecution case, and there was circumstantial evidence capable of implicating Barry George, it was impossible to know what, if any, weight the jury attached to the residue evidence. It was equally impossible to know what verdict the jurors would have reached if they had been told, as the Court of Appeal was, that it was just as likely that the particle came from some extraneous source as it was that it came from a gun fired by George.

The conviction was quashed and the case has been sent for retrial. This was all that the defence was asking the Court of Appeal to do, and George remains in custody. This was a conviction that caused deep consternation and split the legal profession, so it will be intriguing to follow the course of the retrial.

Amnesty International

In (1) IA (Syria) (2) SA (Syria) v Secretary of State for the Home Department [2007] EWCA Civ 1390, the Court of Appeal allowed appeals from two Syrians of Kurdish ethnicity whose claims for asylum had been turned down by the secretary of state and the asylum and immigration tribunal. While two country guidance cases suggested that Kurds returning to Syria without a political profile did not

face a risk of ill-treatment or persecution, even if they had left the country without permission and without a Syrian passport, as in this case, the asylum seekers had produced evidence from Amnesty International and two experts specialising in Middle Eastern affairs contradicting that conclusion.

The tribunal had rejected Amnesty International's opinion of oppression towards Syrian Kurds as being without foundation. The Court of Appeal stated that Amnesty International was an organisation of high repute, and the tribunal was required to engage properly with the substance of any report from it. The difficulty with this result is that Amnesty International will often be unable to reveal its sources of information in detail, and so a tribunal is obliged to accept the foundation of Amnesty's opinion without being able to test the quality of the evidence that underpins it. So while a tribunal is not bound to share Amnesty's opinion, it is required to engage properly with the substance of a report, which creates a significant grey area as to what weight should be applied to it – and will lead to uncertainty. This seems to fly in the face of all orthodox thought concerning the probative value of an expert's opinion based on the quality and transparency of the research and pool of acquired knowledge. There must also be a risk that all manner of local pressure groups, with so-called expertise of obscure foundation, will be produced by parties to the tribunal in an attempt to confer accredited expert status upon them in the same way as Amnesty has been acknowledged. If this happens, how will tribunals be able to gainsay their conclusions?

Periodical payment awards In Tameside & Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5, the Court of Appeal considered four conjoined appeals concerning the correct approach to the exercise of the power to make a periodical payments order under the Damages Act 1996 s 2(1). On top of affirming the decision in Flora v Wakom (Heathrow) Ltd (2006), the appeal court stated that the judge had correctly approached his task by deciding what form of order would best meet the claimant's needs and to as s 2(8) and s 2(9) were concerned, what was appropriate, fair and reasonable, which is described merely as an evidential burden for the claimant.

The question of which indexes to use was a comparative exercise depending on the information available at the time, and a claimant's needs also included those things that he needed to enable him to organise his life in a practical way. As to expert evidence, the report of an independent financial adviser was likely to help the judge. The judge should have regard to the claimant's preferences without the need for evidence to be called, and it would be in only a rare case that it would be appropriate for a defendant to call expert evidence to seek to show that the form of order preferred by the claimant would not best meet his needs. While a logical extension of the principles on which periodical payments are based, this is going to be felt by defendant insurance companies as a further disadvantage in what is already a highly subjective field, where the claimant has a very low threshold to cross.

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In the case of R v TS [2008] EWCA Crim 6, the Court of Appeal quashed the conviction of an alleged rapist and

ordered his retrial when he adduced evidence on appeal from an expert forensic psychologist who had diagnosed him with Asperger's Syndrome. The effect of his condition was to render him unaware of the true intentions of other people, so he might have misunderstood whether or not his former wife was a willing participant in sexual intercourse.

There was a reasonable explanation for the failure to adduce this fresh evidence at trial, which would have had three potential benefits for the defence in front of the jury: it gave an arguable substantive defence through lack of consent, it might allow the jury to determine that the defendant was honest but mistaken, and so retain his credibility; and it also went some way to explaining (and forgiving) the defendant's eccentric behaviour at trial, such as reading a book while the complainant gave her evidence.

Equal pay cases

In Baines v Blackpool Borough Council (2007), the employment appeals tribunal dismissed the appeal of a claimant who had been refused permission by the tribunal's chairman to adduce evidence from an equal-value expert at a hearing to determine whether the employer was entitled to rely on the genuine material factor defence under the Equal Pay Act 1970 s 1(3). The claimant, a solicitor employed at principal officer grade, claimed that she did work of equal value to several male comparators employed at the higher chief officer grade. The local authority relied in part on the genuine material factor defence under the Equal Pay Act 1970 s 1(3) on the basis that chief officers were given particular responsibilities, such as budget control and staff management, which were not given to employees at lower grades, and that it had decided to limit the number of chief officers to one per department, and there was already one in post. Contrary to what some have regarded as accepted practice, the tribunal held that this issue was one of fact, not opinion, and that it could be addressed in a challenge to the factual evidence of the employer by a combination of cross-examination of witnesses and examination of job descriptions, combined with the parties' knowledge of the comparators' role. This, though literally correct, has the unfortunate effect of seriously lengthening, and making more complicating such hearings because the act of probing by the employee will have to be painstakingly thorough. Equal pay cases have just become even more burdensome to employees.

In Middlesbrough Borough Council v M Surtees & Ors (2007), the employment appeals tribunal held that when an independent expert had been appointed by an employment tribunal in respect of an equal pay claim to consider whether work of the aggrieved employees and their chosen comparators was of equal value, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Sch.6 para.11 allowed a party to call another expert, provided that that evidence did not challenge the facts that had already been found.

In this case, the employee felt bound to challenge the methodology of equating value of the tribunal's own expert. The tribunal considered that it had no power to admit evidence in such circumstances, but the tribunal disagreed. Welcome as this will be to parties aggrieved at an independent expert's report, it will lead to proliferation in such party experts and

lead to the likelihood of at least three experts in a case dealing with the same issue – one for each party and one for the tribunal.

Tenets of Hinduism

In Re: M (children) [2007] EWCA Civ 1363, the Court of Appeal confirmed to family practitioners what has long been understood by everyone else, that where an expert had not been required to attend trial and had given evidence in the form of a written report, the parties were, in effect, bound by the statements of fact and opinion expressed in the report, and it was not open to them on appeal to raise issues that ought to have been raised during the course of the trial.

Experts can sometimes make life or death decisions, as was highlighted by the case of R on the application of Swami Suryanada (as a representative of the Community of the Many Names of God) v Welsh Ministers [2007] EWCA Civ 893, where the Court of Appeal heard the case of a Welsh Hindu community against the decision to slaughter its bullock as carrying a risk to the national herd through the chance of carrying, contracting or spreading bovine tuberculosis. The slaughter of any animal is contrary to the central tenets of Hinduism and an act of sacrilege. The decision to slaughter was challenged on human rights grounds as being offensive to the community's right to manifest its religion. The slaughter was held to be a necessary and proportionate implementation of a rational policy to attempt to eradicate the disease, and the expert's decision was upheld.

Postscript:

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