

Examinations, Using the civil process for criminal matters, QC appointments, Liberty in the legal system

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Examinations

As you approach the season of exams, three observations about revision might be helpful.

1. Ensure that your revision is organised according to a thoughtfully divided timetable of your own design so you can see at a glance how your topics are distributed across the revision time available to you.
2. Aim to learn by moving from reading simple accounts (these might be seminar or lecture notes) in which the basic structure and principles of a topic are articulated to the more detailed texts, critical articles, and primary materials.
3. Aim to test the extent of your knowledge and understanding after each revision session by writing unaided notes or reciting topics in an organised way to a patient friend, relative, or even an imaginary audience.

There is a lot to learn in law and the absorption is best achieved in steps if the knowledge is to be retained. The voluminous quantity of information, though, won't stay forever in the heads of *everyone* who learns it. A lawyer was recently walking towards court holding an enormous stack of books. Seeing him a friend shouted "I thought you carried all that law around with you in your head". "Oh, I do" came the reply "these are for the judge".

Using the civil process for criminal matters

In the United States, a recent development provides an interesting indication of what might be taken up within the English legal system. Rocky Delgadillo has just started a fight with the gangs of Los Angeles. This Rocky, however, does not use boxing gloves, he uses law books. He is City Attorney in LA and his fight is an unprecedented civil action against the city's gangs.

Delgadillo is suing to recover money for all property damage caused by gang members, loss in local household property value, and for the emotional distress, personal injury, and related medical expenses of residents. The claim also seeks compensation for loss of amenity during periods when residents could not use public parks because of gang activity.

All the proceeds from the seized homes, cars, and criminal business assets of the gangs will go back to the local communities that have suffered from gang activity. The litigation has been made possible by a Californian law that allows state lawyers to act on behalf of members of any community affected by gang activity. Rocky Delgadillo is the state's Robin Hood.

In explaining the civil action, Delgadillo has stated that as the gangs who terrorise neighbourhoods evolve, "so too must we adapt our laws and our tactics to fit the times." Addressing LA gangs at large he said "If you break the law, we will...take away your money, your property, your homes, and your cars."

The English legal system already allows for the criminal courts to make compensation orders against those people they convict when it is appropriate to make the convicted defendant compensate the victim (Powers of the Criminal Courts Act 1973)

but that is different from the LA development because the English version currently provides only for victim-specific compensation. In the English system, the defendant in a criminal case can be ordered to make a payment to his particular victim. Section 35 (amended by the Criminal Justice Act 1988, Part VII, states:

35.—(1) Subject to the provisions of this Part of this Act, a court by or before which a person is convicted of an offence, in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as "a compensation order") requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence....

Similarly, under the Criminal Justice Act 1988 and the Proceeds of Crime Act 1995, the financial fruits of crime can be confiscated by the state but the resultant money is not allocated directly to any particular part of the community affected by the crimes in question.

There is not yet any English system to garner wealth from those who have won it through crime and to hypothecate the proceeds to the communities most affected by the crimes. There is, though, a continuing development of cases in which people have sought to use the *civil process* to deal with *criminal matters*.

The use of the civil process to achieve justice can be seen in the case of Michael Brookes. In a civil case in 1991, a High Court judge ruled that Michael Brookes had killed Lynn Siddons, a 16-year-old stabbed 40 times in 1978. Her family were awarded £10,641 damages. The original police case was found to have been bungled, but, after the civil case, Brookes was later convicted following a fresh criminal investigation of the murder.

In April, 1978, Lynn Siddons vanished from her home near Derby. A Metropolitan Police cadet found Lynn's body in a chance discovery by the Trent and Mersey Canal six days later. She had been brutally stabbed and strangled to death. A 15-year-old near neighbour, Roy Brookes, was charged with murder.

In November 1978, Nottingham Crown Court jury found Roy Brookes not guilty of murder. Derbyshire Police said they had insufficient evidence to charge another suspect, Roy's stepfather Michael Brookes. In 1979, a petition was launched calling for the police to do more, and it attracted thousands of signatures. Mick Thompson, who had since moved into the Brookes' family home, discovered a knife and sodden clothing in the garden which were passed to the police. The Director of Public Prosecutions later confirmed these crucial pieces of evidence were lost by police. In April 1981, the Director of Public Prosecutions again said there was insufficient evidence to charge Michael Brookes after a fresh year-long police investigation.

In April 1987, the Siddons family issued civil proceedings for damages against Michael and Roy Brookes. The claim was based upon Lynn's loss of potential earnings. In November 1989, the compensation case was initially rejected after a judge ruled such cases had to be heard within three years of the incident. The family successfully appealed against that decision and went on in

1991 to win the civil case. In that case, Mr Justice Rougier said he was left "in no reasonable doubt" that Michael Brookes was Lynn's killer.

In July 1992, Michael Brookes was finally arrested and charged with Lynn Siddons' murder. In July 1996 he was found guilty of murder after a 34 day trial, and was sentenced to life imprisonment.

There have been other comparable cases of civil courts determining matters arising from crimes. In 1997, not long before O.J. Simpson was found liable in a Californian civil court for the homicide of his former wife Nicole and her friend Ronald Goldman, a civil summons relating to homicide was issued in London by the father of a murdered doctor, Joan Francisco.

The Central London County Court summons was a claim for assault and battery against the man who Dr Francisco's relatives believed was her killer. It was the first civil action arising from a murder where no previous criminal prosecution had been brought (in the Michael Brookes case, above, Brookes' teenage stepson had earlier been tried and acquitted). The action was part of a growing use of the civil courts to litigate against people who have committed crimes for which the state has been unwilling or unable to convict a culprit.

In 1998, Mr Justice Alliot identified Tony Diedrick as the killer of Dr Joan Francisco. He awarded her family £50,000, despite acknowledging that there was "no direct evidence" against Diedrick. Diedrick was, though, later convicted and sentenced to life imprisonment.

The judge said that the family of Joan Francisco, a gynaecologist who was strangled in her flat on Boxing Day, 1994, had proved during a three-week High Court hearing that she was murdered by Diedrick, an obsessive former boyfriend who had been questioned about the killing but released without charge. The family had launched the civil action for assault and battery against Mr Diedrick.

Mr Justice Alliot determined the Diedrick case on the civil standard of proof, but he said he bore in mind that the allegation was of the utmost gravity. He said: "This is a dreadful judgment to have to pass on any man, and not one which I have come to without the most anxious consideration, but I find the assault and battery alleged – in effect the murder – to have been proved."

The court had been told that Diedrick had stalked 27-year-old Dr Francisco for months out of a "violent and perverted obsession" before strangling her with a vacuum cleaner flex at her flat in St John's Wood, North London. Dr Francisco's family had called 31 witnesses to prove that there was compelling circumstantial evidence against Diedrick, who declined to give evidence.

Of that, the judge said: "If the defendant did not kill the deceased, I deem it incredible that he would not seize the opportunity to declare his innocence. The effect of that failure is that a prima facie case becomes a very strong or even overwhelming case."

Mr Justice Alliot said the family had established that Mr Diedrick was obsessed by Dr Francisco and regularly stalked her home, that he believed she was about to leave for America for good and was desperate to speak to her on the day she died, and that he had demonstrated explosive violence in the past. The judge also noted that Mr Diedrick had no alibi for the morning of the murder and had repeatedly lied to the police.

He was later tried at the Old Bailey for her murder and jailed for life in 1999.

The use of civil procedure to address wrongs which appear essentially criminal raises many important questions both practical and jurisprudential. Perhaps the most serious question is – does such cross-litigation matter?

In essence, there is no difference between a crime and a civil wrong. Nothing is inherently and eternally criminal. Lending money at a rate of interest used to be a crime in early English

history, but now it is a reputable business. The use of opiate drugs for recreational purposes used to be acceptable, but in modern times such behaviour is criminal. A crime is simply anything the state has chosen to criminalise. There are more than 9,000 different crimes but, as Lord Atkin once said, "the only common nature they will be found to possess is that they are prohibited by the State, and those that commit them are punished".

It is the violation of this principle (that crimes deserve to be punished) that can be sufficiently enraging to some victims or their relatives to propel them into the civil courts, motivated not by the desire for compensation, but by a wish for a court to condemn the alleged wrong-doer. Caron Thatcher, the solicitor acting for the family of Dr Francisco, in 1999 said: "The family's ultimate aim is to have justice done for Joan...we hope that during the course of these proceedings more evidence may emerge which will result in the CPS reviewing the case."

A similar feeling prompted Linda Griffiths into the civil courts in 1995. Ms Griffiths complained that she had been raped by Arthur Williams, a former chef at the Dorchester, while working for him in 1991 as a dishwasher. The Crown Prosecution Service (CPS) decided not to prosecute Mr Williams. Ms Griffiths then sued Mr Williams for trespass against the person, and was awarded £50,000 damages (*The Times*, 13th April, 1995).

The use of the civil courts for criminal matters is problematic in two ways. First, the burden of proof is lower in civil courts than in criminal courts, so that just because conduct is certified by the civil system as a civil wrong does not mean that a crime has been committed. For a conviction, a case in the criminal courts must be proven "beyond a reasonable doubt", whereas, in the civil courts a claimant can win "on the balance of probabilities" (i.e. just enough to tip the scales of belief in favour of the claimant). After the Court of Appeal had found against him, Mr Williams said: "I still maintain that I am not guilty of rape. God help anyone who is accused of rape in a civil court."

In the O.J. Simpson case, the criminal trial in 1996 failed to find him guilty beyond reasonable doubt, whereas in 1997 the civil jury found him liable for the homicides on "a preponderance of the evidence".

The second problem evident in the use of civil courts to deal with crimes is the level of failure in the criminal justice system that such civil actions reflect. The civil process is a notoriously protracted experience. The process is also an increasingly expensive and risk-laden business, so the fact that an apparently growing number of crime victims are disposed to fight their cases in such a system is a token of grave dissatisfaction with the ordinary prosecution process.

QC appointments

According to the latest figures from the General Council of the Bar, there are 12,065 barristers in private practice in England and Wales. Of these, 8,330 are male and 3,735 are female.

Queen's Counsel (QCs) are senior and distinguished barristers of at least 10 years standing who, as a result of outstanding merit, have received a patent as "one of her Majesty's counsel learned in the law". The latest figures shown there are 1,123 Queen's Counsel, of whom 1,107 were men and 116 were women. To these, in 2009, were added another 104 QCs. Forty-two percent of 247 applicants for Queen's Counsel were successful, including 16 women and four lawyers from ethnic minorities.

That compares with an acceptance rate of 29 per cent (98 out of 333) in 2007-08 and 40 per cent (175 out of 443) in 2006-07. The list also includes three solicitor-advocates and two employed barristers — the first time that in-house lawyers have attained the rank of QC.

Liberty in the legal system

Historically, the English legal system is famed for being one of the

most civilised in the world. It is well-known across the planet for having championed the rule of law and the sacrosanct status of 'due process' (legal disputes or charges must be handled according to set legal procedure) since the Magna Carta was signed in 1215. Since 2000, when the Human Rights Act 1998 came into force, it has incorporated a range of human rights directly into the law of the UK.

The legal system itself, though, is not encapsulated in one document like a written constitution. It is simply the aggregate of many and diverse common law judgments, treatise, Acts of Parliament, customs, and conventions. This means that our legal system is not an inert rule book but an organic, developmental set of arrangements and processes that can operate differently according to how the system has been modified by politicians and judges. Arguably, a most significant change to the complexion and principles of the legal system has occurred during the last ten years. This concerns the retitling of power in favour of the state and against the individual civil liberties of ordinary people.

Since the Labour government came to power in 1997 there has been a substantial change to the English legal system achieved incrementally by the passing of various laws and the promotion of certain social policies whose combined effect is to make the UK a less free and a less open society. Much of the governmental justification for this has been that in the face of terrorist attacks like those in New York and London, the only way to protect people is to give the state much more power.

However, the range of distinguished observers expressing alarm about legal changes gives some cogency to the view that the system is not developing in a way that is desirable for the majority of people. Three recent contributions in particular can be noted:

1. The views of Dame Stella Rimington, formerly Director-General of the Security Service.
2. The views of Sir Ken Macdonald QC, formerly Director of Public Prosecutions
3. A report made by UCL Student Human Rights Programme for the Convention on Modern Liberty

Dame Stella Rimington

Dame Stella Rimington, the former head of MI5, accused the Government of exploiting people's fear of terrorism to restrict civil rights (*The Times*, February 17th, 2009). She stated

"It would be better that the Government recognised that there are risks, rather than frightening people in order to be able to pass laws which restrict civil liberties, which is precisely one of the objects of terrorism: that we live in fear and under a police state."

Sir Ken Macdonald QC

In a recent article, the former DPP highlighted the way that the criminal justice system had been reengineered to focus disproportionately on penalising petty criminals and social inadequates while allowing major fraudsters who hurt thousands of people to be ignored or treated leniently. Referring to the government, he asked (*The Times*, 23rd February, 2009)

"Do they really believe that an illiterate mother-of-five drug mule from a village in The Gambia should be serving five times the sentence of a millionaire City fraudster?"

He argued that the use of illiberal soundbites and the promotion of fear in order to justify the erosion of civil liberties was wrong:

"Let's have fewer terrorism Acts, fewer laws attacking our right to speak frankly and freely. Let's stop filling our prisons with junkies, inadequates and the mentally damaged."

He condemned the "paranoiac paraphernalia" of national databases and identity cards and other "liberty-sapping addictions of the Home Office" and urged greater attention to the sort of financial crimes whose social cost is pervasive.

The Convention on Modern Liberty

The recent report of this campaign organisation is an audit of the changes to civil liberties law made since 1997: http://www.modernliberty.net/downloads/abolition_of_freedom.pdf

The report (The Abolition of Freedom Act 2009) cites 60 provisions in 31 pieces of legislation that erode liberty in various ways including the power to detain people without charge, to cover up governmental errors, to hold the DNA of unconvicted citizens and to share personal data among public bodies. The report criticises police powers to detain terror suspects for 28 days without charge, new stop-and-search powers handed to police (allowing them to stop people without reason at airports and other designated areas), and restrictions on the right of peaceful protest. The growth in surveillance is also charted including monitoring under new law allowing individuals to be electronically tagged, and the legal interception of letters, emails and phone calls.

The Coroners and Justice Bill, currently before Parliament, is also cited because as it stands it will give power to the state to prevent embarrassing revelations of Government failure becoming public. The Bill would diminish the obligations of the state to protect the 'right to life' under Article 2 of the European Convention on Human Rights: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally" The obligation to investigate violations of the right to life is a clear one on any signatory government to the ECHR. The report notes (p. 4):

The right to life can only be secured if the executive investigate suspicious deaths to determine whether a violation of the right has taken place. New proposals will end the independence of coroners who until now have been able to investigate the cause of suspicious or uncertain deaths and criticise government departments and agencies, (for example in the death of Iraqi civilians under the control of the British Army)... [the Bill] trespasses on this independence, granting the Executive power to suspend the inquest even when it may involve a homicide. The inquest may be forced into secret session by the minister for reasons of national interest, to protect relations with a foreign country or if the hearing threatens to harm the public interest.

The major transformation made to the English legal system during the last decade, by which the state has extended its eyes, ears, and grab-arms throughout civil society, has been made in insidious and incremental steps. Whether these changes need to be progressed further or reversed is a political question but anyone studying the legal system should become familiar with the before-and-after photographs of the legal landscape in 1997 and 2009.