

FB's Column in *Criminal Law & Justice Weekly* (No. 4)

Page 137

Olla Podrida

FRANCIS BENNION presents an occasional medley of legal snippets

The Meaning of *Olla Podrida*

I have been investigating the meaning of *olla podrida*. It is a Spanish term deriving from the Latin *olla*, a pot, and *podrido*, the Spanish masculine for "rotten" from the Latin *putridus*. *Olla* is pronounced, and sometimes spelt, *olia*. Another variant is *olio*.

Spanish country folk had the practice of keeping a highly-seasoned stew going in a clay pot held over a fire. Into this, meat, fish, vegetables and spices would be thrown from time to time. So we find Sancho Panza, the "squire" of Don Quixote, saying:

"That big dish that is smoking farther off seems to me to be an olla podrida. Out of the diversity of things in such ollas, I can't fail to light upon something tasty and good for me." [Miguel de Cervantes, *Don Quixote*, Pt. II, ch. XLVII.]

A French variant is *pot-au-feu*.

The *OED* cites Smollett's *Humphrey Clinker*, written in 1771: "He taught me to cook several outlandish delicacies, such as ollas, pepper-pots, pillaws . . ." Here by metonymy the olla or pot gives its name to that which is cooked in it. The *OED* has Longfellow writing in 1843: "Give a Spaniard his mass, his olla, and his Doña Luisa".

From this the meaning of *olla podrida* expanded to mean any assorted mixture or medley, in which something good might be expected to be found. William Pearson, the eighteenth century astronomer, is quoted as writing "All the conversations were in English . . . the whole olla podrida spiced with the latest gossip".

In 1787 a periodical work called *Olla Podrida* began to be published in London. It ran to forty-four numbers, with the invocation to readers: "Sit down and feed, and welcome to our table". [Shakespeare, *As You Like It*.] In 1840 Frederick Marryat, known as Captain Marryat, published a book of ramblings and musings and called it *Olla Podrida*. In 1855 Ele Bowen published in Philadelphia a book on the Baltimore & Ohio Rail Road titled *Rambles in the Path of the Steam-Horse*. This he called "An off-hand Olla Podrida".

And so it went on. Many more examples could be cited. We are in interesting company.

Torture and the Ticking Bomb Syndrome

The Foreign Secretary David Milliband says "The British Government abhors torture and would never authorise it or condone it". [Letter in *The Observer*, 15 February 2009.] He forgets the ticking bomb syndrome. I too abhor torture, but I do not forget the ticking bomb syndrome. Let me explain.

I ask you to set your imagination to work, very seriously. Think hard of the people you love most in the world. Perhaps they are your wife or husband, your children and your parents.

Let's say there are six of them altogether. Now suppose that you are told one day that these six people are being held hostage by a terrorist whom I will call X.

Later you learn more. X has been captured and is being held by the police. He has told them that the hostages are confined in a building whose location he refuses to divulge. There is a bomb in the building, with a timing device. This has already been started, and the bomb is due to explode in fifteen minutes.

The police continue to question X, with increasing urgency. They send parties far and wide to find the building. You wait with mounting anxiety, panic even.

In these circumstances would you not want the police to torture X if necessary in order to extract the necessary information from him?

That is the ticking bomb syndrome. It is meant to stand for all the possible situations where the use of torture is arguably justified in order to avert the risk of something a great deal worse. It is not a notion I have invented: it is a classic in philosophy. Why does our Foreign Secretary not recognise it?

I would argue that, where there is "a clear and present danger" of this sort, then necessary torture is excusable. The law would allow it as an exception under the doctrine of necessity. [For this see *Bennion on Statutory Interpretation* (5th edn, 2008), s. 347.] I put that phrase "a clear and present danger" in quotes because it has a history. Justice Oliver Wendell Holmes used it in the famous U.S. Supreme Court decision of *Schenck* 249 U. S. 47 (1919). It was a free speech case under the first amendment to the U.S. Constitution. Holmes said:

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic".

He held that the first amendment did not apply where "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has

Page 138

a right to prevent". I suggest that equally the prohibition of torturing a person should not apply where torture is necessary to prevent or end a clear and present danger arising from the conduct of that person.

In his book *Why Terrorism Works* Alan M. Dershowitz, a professor of law at Harvard, suggested that in a ticking bomb case torture should be legal if permitted by an *ad hoc* judicial order. [Yale University Press, 2002.] Mr Milliband should consult the Attorney General on the wisdom of introducing such a law in Britain.

The Meaning of Reasonable Doubt

When a jury is told by the Judge that it must only convict if it has no reasonable doubt of guilt, what exactly does that mean? I would be inclined to say that it equates to what I call "real doubt" when speaking of the legal meaning of an enactment. [See *Bennion on Statutory Interpretation* (5th edn, 2008) s. 3.] Or it might be said that a doubt is reasonable if one can give a convincing reason for it. In a new book, James Q. Whitman, a professor of law at Yale, goes deeper. [*The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2009).]

According to reviewer Theo Hobson, who is not a lawyer, Whitman says that to understand the concept of reasonable doubt in the jury connection we must drop the assumption that it was developed as the best way to get at the truth, since it actually emerged as the best way of sharing the moral and religious burden of sitting in judgment on one's fellows. [TLS, 6 February 2009, p. 7.] This burden arose from Christ's instruction to his followers to "judge not, that ye be not judged". [Matthew 7.1. It continues: "2. For with what judgment ye judge, ye shall be judged, and with what measure ye mete, it shall be measured to you again".]

This instruction made the early Church deeply unsure whether the legal work of Judges and juries could be accommodated within the Christian ethic. The culture gradually solved the dilemma by ritualizing the criminal trial. It became a solemn event in which the court and the community formally took responsibility for inflicting punishment on a convict.

Juries evolved from groups of local witnesses. But medieval people were reluctant to play a role that was likely to contaminate them with blood-guilt, and also make them blood-feud targets. The fear survived into later times. A seventeenth century pamphlet warned that to be a juror was potentially “to build yourself a mansion in Hell”. But justice required that, instead of being on the spiritually safe side and acquitting the guilty, the juror had to be nudged into convicting despite religious qualms.

Whitman says that these qualms had to be accommodated; and the concept of reasonable doubt was part of the “moral comfort” that jurors needed. Controversially, Whitman adds that “we have embarked on the hopeless project of transforming an old moral comfort procedure into a modern factual proof procedure”.

Why the professor calls it “hopeless” I do not know. Such transformations are a familiar part of cultural evolution. We can agree when Hobson reports Whitman’s conclusion:

“But jurors should be kept in touch with the theological roots of the trial. They should be reminded that their function is not simply to decide whether or not someone is guilty of a crime, but also to share in the responsibility of worldly judgment.”

John Mortimer’s “Bag of Tricks”

The consulting editor of *Criminal Law & Justice Weekly*, Adrian Turner, recently wrote two Comments on the late Sir John Mortimer QC. [2009, pp. 42 and 66.] In the second he said he was grateful to those who corresponded with him about the first, and then went on to mention Mortimer’s “bag of tricks” as an advocate.

Adrian Turner got this term from an email I sent him, in which I congratulated him on his first Comment and went on to refer to a long-ago article of mine about one of Mortimer’s successful trials at which I was present on behalf of the Defence of Literature and the Arts Society (of whose executive committee I was a member). [The article was published in *New Statesman*, 18 February 1977, www.francisbennion.com/1977/003.htm.] In my email to Adrian Turner I said:

“The acquittal was achieved by the well-known advocacy skills of John Mortimer. When I congratulated him in the robing-room at the end of the trial he shrugged modestly and said: ‘I just deployed for the umpteenth time my well-worn bag of jury-pleasing tricks’.”

This chimes with the description anti-pornography campaigner Mary Whitehouse gave of John Mortimer and his entourage: “Mortimer’s travelling circus”. [See John Sutherland, *Offensive Literature: Decensorship in Britain, 1960-1982* (Rowman & Littlefield Publishers, Inc., 1983). This gives an extensive account of the trial I wrote about (see pp. 160-163).]

In his second Comment Adrian Turner, drawing on my email, says that, while he would not question the sincerity of Mortimer’s belief that criminal defenders are vital champions of jury trial, he is “equally sure that even he would have felt some discomfort about the reliance on the use of theatre and a bag of tricks to bemuse juries”. He goes on to argue that there is a need to display more sophistication and integrity than simply “throwing bricks” at the other side, and to reduce reliance on pure theatre to influence juries.

I feel uneasy about this, as not really portraying what the John Mortimer I knew was about. Arguably he was just defending his clients by deploying brilliant advocacy. Surely there is still room for that in our forensic system.

What Constitutes Hunting?

Bye, baby bunting
Daddy's gone a-hunting . . .
Nursery rhyme

Page 139

The question of what exactly Daddy did when he went a-hunting came before the Administrative Court in *Director of Public Prosecutions v Wright* [2009] EWHC 105 (Admin). In a private prosecution brought by the League Against Cruel Sports, Anthony Wright, the Huntsman of the Exmoor Foxhounds, was fined £500 for hunting a wild mammal with a dog, contrary to the Hunting Act 2004 s 1. The case stated asked the court to rule whether hunting a wild mammal with a dog includes the mere searching for a wild animal for the purpose of stalking or flushing it, which is all that Mr Wright had been doing.

The court's answer was no. It said that the Act's purpose was the composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should be stopped. The question whether a person hunts a wild mammal with a dog is "heavily fact specific".

"A wild mammal which is never identified as a quarry does not suffer. If it is said that searching for a wild mammal has a potential for causing suffering to wild mammals generally, an answer is that hunting wild mammals is not banned absolutely and searching for them for the purpose of exempt hunting is permitted." (Paras. 36, 37.)

The case stated also asked whether the combined effect of the 2004 Act and the Magistrates' Courts Act 1980 s. 101 is such as to place a burden on the defendant to prove the exemptions set out in Schedule 1 to the 2004 Act. Again the answer was no, so Mr Wright's conviction was quashed.

The judgment contains important dicta and citations on the exceptions rule, which in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 at 130 Lord Wilberforce described as "the orthodox principle (common to both the criminal and the civil law) that exceptions, etc, are to be set up by those who rely on them". [See *Bennion on Statutory Interpretation* (5th edition, 2008), pp. 1092-1094.] In particular the dicta and citations related to art 6 of the European Convention on Human Rights and the distinction between the "persuasive" and "evidential" burdens on an accused.

Johnsoniad 1709-1728

I have started reading James Boswell's *Johnsoniad*, as Thomas Carlyle called it, otherwise known as his *Life of Samuel Johnson*. I will record in this column any snippets that catch attention as relevant to our time, gallantly refraining from adding comment of my own. Here are some fragments relating to the period from Johnson's birth in 1709 to his being a student at Oxford in 1728.

Samuel Johnson's father was a bookseller in Lichfield and "a citizen so creditable as to be made one of the magistrates". Asked how he had achieved his knowledge of Latin, Johnson said:

"My master whipped me very well. Without that I should have done nothing . . . I would rather have the rod to be the general terror to all, to make them learn, than tell a child, if you do thus, or thus, you will be more esteemed . . . A child is afraid of being whipped, and gets his task, and there's an end on't; whereas, by exciting emulation and comparisons of superiority, you lay the foundation of lasting mischief . . ."

As a boy Johnson “might, perhaps, have studied more assiduously; but it may be doubted, whether such a mind as his was not more enriched by roaming at large in the fields of literature . . . The flesh of animals who feed excursively, is allowed to have a higher flavour than that of those who are cooped up. May there not be the same difference between men who read as their taste prompts, and men who are confined in cells and colleges to stated tasks?”

As an undergraduate at Pembroke College Oxford, Johnson neglected attendance on his tutor. “Mr Jorden asked me why I had not attended. I answered, I had been sliding on Christ Church meadow.”

BOSWELL That, Sir, was great fortitude of mind.

JOHNSON No, Sir, stark insensibility.

Tribulations of an Immigration Judge

The following are extracts from the judgment of the Court of Appeal in *R (on the application of AM (Cameroon) v Asylum & Immigration Tribunal & Another* [2008] EWCA Civ 100.

“By judgments dated February 21 2007 we granted AM permission to apply for judicial review of certain interlocutory decisions and indeed the final decision of Immigration Judge Sacks relating to AM’s appeal under section 82 of the National Immigration and Asylum Act 2002. We thought it arguable that certain interlocutory decisions which had resulted in AM not being able to put in the evidence of two witnesses, and which had refused her an adjournment on the grounds of ill health so that she could not give evidence herself, had prevented a fair hearing. We thought it was arguable that his final decision, to dismiss her appeal on the ground that her version of events was not credible, had been reached in breach of natural justice . . .

(a) The decision not to allow a video or telephone link for the taking of evidence from key witnesses

. . . far from being prepared to reconsider the position, the immigration Judge seems to have reacted in a quite unjudicial way . . . When the matter came on for hearing on August 11 the immigration Judge made clear that he was not prepared to hear any argument, stating that his decision was a judicial decision and he was ‘entitled to exercise his discretion as he thought fit’.

Comment

. . . it was a clear breach of natural justice for the immigration Judge to make up his mind to refuse to reconsider without hearing argument.

(b) The manner of behaviour in court

Page 140

. . . At some stage during this period the Judge banged his fist on the table. The Judge does not remember this but it is not only the evidence of Bridget McVay, supported by Mr Bell and AM herself, but also that of Mr Craven the HOPO. Mr Craven thought it was banged in frustration, whereas the others thought it was in irritation. AM says that at this stage in the light of the Judge’s refusal to listen to her counsel and the banging of his fist she became afraid of the Judge and she was frightened that she was not being given a fair hearing. She left the court feeling unwell.

Comment

Sometimes, as a Judge, one can feel a sense of frustration or irritation but it is vital at such times that one curbs such feelings and remembers the overriding importance of acting fairly and being seen to act fairly. Refusing to listen and banging a fist whether in frustration or irritation is quite unacceptable conduct.

(c) Attitude to medical evidence

During this period also, in refusing an adjournment, the immigration Judge described the medical report relating to AM's health as 'mere supposition' . . . This would not only add to the impression that the Judge was not viewing the case with an open mind but would obviously cause serious anxiety to a person who did have a serious condition as AM clearly did.

(d) The adjournment and hearing of 18th August

AM left the court. Outside court she collapsed and had to be taken to hospital . . . [In the words of Judge Sacks, dealing with the question of adjournment] 'I considered that the evidence within the file, including all statements by the Appellant, all documentary evidence, all the objective evidence and all other relevant documents enabled me to deal with this appeal in the absence of the Appellant without, in my opinion, the Appellant being prejudiced.'

Comment

1. To suggest that the appeal could be dealt with in AM's absence and without the evidence she wished to call without the appellant being prejudiced, when the issue was her credibility, is not a view any reasonable Judge acting fairly could take.
2. Not to take any heed of statements even though supplied late when AM had not given evidence herself is indicative of an unbalanced view towards AM's appeal.
3. Not to have adjourned at least to September, which was all that was asked, was unfair . . .
4. What appears to have happened is that the immigration Judge felt that his authority was being challenged; and he also thought, at least initially, that someone was attempting to pull the wool over his eyes . . .

Conclusion

. . . The position of immigration Judges is not easy. Applications for adjournments must be commonplace and by the rules they are encouraged to resist them. Applications based on the grounds of ill health have to be scrutinised with care. But at all times, in seeking to carry out that difficult task, the Judge must remember above all that those who come before them must feel that justice has been fairly administered. In seeking to carry out that difficult task on this occasion this Judge fell below what is required."

His Lordship on the Single Party List

In the following letter from my archive Lord Forsooth gets cross about European elections.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

3 June 1999

The Rt Hon Michael Howard MP
Leader of Her Majesty's Opposition

Dear Sir,

There are European elections soon, and the Castle has received a leaflet from your lot. There is a great deal wrong with it. I will pick out just two things.

It is plastered with a clever-clever slogan: “In Europe, but not run by Europe”. This manages to be irritating in a number of ways. What is the use of merely being *in* Europe? Why should we object to being run by “Europe” so long as we have our proper share in its decision making? Do we in fact have that proper share? The leaflet raises such questions but does nothing to answer them.

I was enraged to see the following statement in your leaflet: “In this election you can vote for a party list, but not for an individual party candidate”. Why was this not accompanied by a remark such as: “The Conservative Party is very sorry about this. We did our best to oppose it, but Mr Blair insisted”. Was it because it would have been untrue?

I cast my eye down the list of eleven Conservative candidates for whom I am invited to vote *en bloc*. I know most of them personally. Some are good eggs; others I would not touch with a bargepole. Why on earth should I be expected to vote for the whole mass of them, without the opportunity to differentiate? That is not my idea of democracy. A better name for it would be gerrymandering.

Yours faithfully,

Forsooth

The following letter was published in 173 CL&J (7 Mar 2009) 160.

Dear Sir

I was fascinated to read Francis Bennion's piece in the CL & J at p.137 *ante* (*Olla Podrida*) under the sub-heading: ‘Torture and the Ticking Bomb Syndrome’. The reader is asked to set his/her imagination to work.

I do not have to imagine: I recall Harry Callaghan (film: *Dirty Harry*) apparently torturing the villain in order to ascertain the location of a girl kidnapped by the villain whose life was in grave danger (in fact she was already dead but Harry Callaghan was unaware of that fact).

The plot thickened. Because Callaghan had entered the villain's premises without a search warrant and had extracted certain information under torture the villain could not be prosecuted for murder because all of the evidence obtained thereby was apparently inadmissible (according to the District Attorney and a Judge who lectured on Constitutional Law in *Dirty Harry*).

Perhaps the script of *Dirty Harry* needs to be re-written to take account of *Schenk* (1919) and the views of Alan M. Dershowitz?

Yours sincerely

Fred Davies