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Olla Podrida

FRANCIS BENNION presents an occasional medley of legal snippets

MPs' Expenses and the Archbishop

Jumping into the MPs' expenses row is a popular pastime. I have engaged in it myself (see below). Dr Rowan Williams, the Archbishop of Canterbury, got into it with an article in *The Times* of 23 May 2009. He said the point has now been adequately made, and the continuing systematic humiliation of politicians threatens to carry a heavy price in terms of our ability to salvage some confidence in our democracy. But if you stop before the full facts have been revealed you will never be sure that that confidence is not misplaced.

Most of the Archbishop's article was based on the false premise that the recalcitrant MPs have not actually broken any rules. He rightly said that 'What can I get away with without technically breaching the regulations' is not a good basis for any professional behaviour that has real integrity. But that is not in fact the basis operating here.

In a letter to *The Times* published on 25 May 2009 I suggested as a former parliamentary counsel that in fact rules *were* broken. The House of Commons Green Book sets out the position. It contains a large number of detailed rules, which perhaps were not broken. But these are expressly made subject to specified overriding principles, which in many cases were broken. It expressly says: 'When making claims against parliamentary allowances, Members must adhere to these principles'. Many did not. The main overriding principles are:

- Claims should be above reproach.
- Claims must only be made for expenditure that it was necessary for an MP to incur to ensure that he or she could properly perform his or her parliamentary duties.
- MPs must ensure that claims do not give rise to, or give the appearance of giving rise to, an improper personal financial benefit to themselves or anyone else.
- MPs are committed to openness about what expenditure has been incurred and for what purposes.
- MPs should avoid purchases which could be seen as extravagant or luxurious.

Another who has commented in the MPs' expenses row is Adrian Turner, consultant editor of this magazine. He did so in a comment published on 16 May 2009 where he describes as 'moonlighting' the carrying on of outside careers by MPs, and says it should not be allowed. I disagree. We should remember that Parliament began as the occasional calling together by the king of the magnates and yeomen of the kingdom so that they could advise him on current issues. Their advice was worth having because of their experience and knowledge of relevant areas of the country's life.

The most useful MPs today are those with knowledge and experience acquired through careers in business, industry, commerce, education, law, the armed forces and so on. The least useful are those who entered politics straight from university and have never done anything else. Mr Turner would require a useful MP to suspend his or her career while serving in Parliament, but this would reduce their usefulness. It would also be unfair in damaging, perhaps destroying their careers. Some MPs have only a short time as such.

The nation gets the MPs it deserves. Every MP is drawn from the populace, so it is not surprising if an MP has the same moral standards as the generality. That does not excuse failures by individual MPs, who should strive to rise above the common level.

Finally I would say, with reforms in mind, that it is a mistake to give MPs allowances related to actual items of expenditure which require production of receipts. Instead they should be given a specified sum, fixed at what is considered reasonable, in respect of each matter - for example the need for an MP with a distant constituency to spend some nights in London. Whenever it is necessary to produce receipts in a climate where openness is insisted on there will inevitably be controversy.

The Troublesome Concept of Fairness

Sometimes a non-lawyer throws a penetrating light on a corner of the law. I am thinking of Will Hutton, prolific author, chief executive of the Work Foundation, and a governor of the LSE. In a recent article[1] he threw light (without meaning to) on the current judicial tendency to equate justice with what is called 'fairness'. Thus Lord Browne-Wilkinson said that however widely a power is expressed in a statute 'it does not authorise that power to be exercised otherwise than in accordance with fair procedures'.[2]

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This is not only a judicial tendency. The Government called its consultation paper on the Equality Bill now before Parliament *A Framework for Fairness.*[3] The opposite of fairness is unfairness, and the responsible minister Ruth Kelly wrote in the paper of the desire of Labour governments to 'remove unfairness'.[4]

This sort of language supposes that we all know what fairness is, and that it is something fixed and certain, like Sir Edward Coke's 'golden and straight metwand of the law'[5]. But, says Hutton, this is not so. 'Fairness can be used to justify any position on the political spectrum . . . and Labour has not managed to build a consensus over what is "fair".'

The non-lawyer Hutton suggests that fairness has four dimensions. There is the fairness of equity, embedded in our DNA and manifested even by young children. There is the fairness of need: if unfortunate, I should be compensated for the bad luck of life. There is the fairness of merit: I have worked hard and deserve reward. Lastly there is the fairness of proportionality: I have a similar job to yours but do it better, so I deserve extra reward.

What is more, says Hutton, in a given case these four dimensions can operate unevenly. On the particular facts, one dimension may trump another – which adds to the uncertainty. To some extent the law takes account of this variability. Thus in an Australian case on appeal from a tribunal, where the tribunal had decided against a literal application merely because that would have been 'unfair', the court held this was not enough. The tribunal ought to have identified 'a construction of language, however slight or tenuous, which could be preferred to the obvious and literal meaning'.[6]

Staying with the law, we find that Lord Mustill said that fairness is 'essentially an intuitive judgment'.[7] He added that the standards of fairness are not immutable, and are not to be applied by rote identically in every situation.[8] In law there may be a private dimension of fairness and also a public dimension. Thus in relation to the right to a fair trial conferred by art. 6 of the European Convention on Human Rights 'a balancing exercise has to be carried

[1] 'Life may not be fair, but that's no excuse for an unjust society', *The Observer*, May 3.
[2] *Pierson v Secretary of State for the Home Department* [1998] AC 539 at 573.
[3] *Proposals for a Single Equality Bill for Great Britain*, HM Government, June 2007.
[4] *Ibid*., p. 6.
[5] 4 Inst. 41.
[6] *Secretary, Department of Social Security v Clear* (1991) 23 ALD 22 at 27.
[7] *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560.
[8] *Ibid*.

out which takes into account the importance of what is at stake for the state on the one hand and the defendant on the other'.[9]

Hutton prompts lawyers to realise that fairness is no fixed metwand but a concept that can have troublesome variability.

More on Torture and the Ticking Bomb

In an earlier column[10] I asked you to set your imagination to work and imagine you are told one day that the six people you love most in the world are being held hostage in an unknown place by a terrorist who has started a bomb ticking. Would you not want the police to torture the terrorist if they had to in order to extract the necessary information from him? That is the ticking bomb syndrome. I return to it because of an article by Con Coughlin that has since appeared.[11]

I argued in the previous piece that where there is a clear and present danger of this sort it is wrong to dismiss necessary torture out of hand, since the law would allow it under the doctrine of necessity.[12] Con Coughlin says:

> 'Imagine the scene. The intelligence service of a foreign country has detained a suspect who holds vital information about a planned terrorist attack against Britain. But this foreign country has scant regard for human rights or the Geneva Convention, and the suspect has been badly tortured.'

Coughlin goes on to explain that, while British intelligence officers would be desperate to interview such a suspect, they are under strict instructions not to do this where a suspect may have been tortured by foreign agents. It is, says Coughlin, an article of faith in British intelligence that torture is counter-productive, as well as being unlawful.

Coughlin concludes by saying that British intelligence and security officials are becoming increasingly concerned that obsession over torture could seriously compromise national security. This is because, as he puts it, 'British officers will not be allowed access to information from any suspect who claims maltreatment, irrespective of how important it might be to preventing a major terrorist attack'.

There are Accidents and Accidents

When is an accident not an accident? Answer: when it happens on an aeroplane. A thing which infuriates non-lawyers is the way the law takes a simple word like 'accident' and uses it in a thoroughly perverse way, to the astonishment and confusion of the citizen.

The Carriage by Air Act 1961 sets out the Montreal Convention 1999. You may wonder how an Act of 1961 manages to set out the words of a convention entered into 38 years later. Was the drafter psychic? No, the Act was amended.

Article 17.1 of the Montreal Convention provides for compensation for damage sustained in the case of the bodily injury of a passenger caused by an accident which took place on board an aircraft. In 2004 Beverley Anne Barclay sustained damage in the case of the bodily injury caused to her by an accident which took place on board an aircraft. She claimed damages under the Montreal Convention. Did she get them? No, she did not.

The case is reported as *Barclay v British Airways plc*.[13] The agreed facts were as follows. In order to reach her seat the claimant passed sideways to her right between the reclined seats ahead and the first seat in her row. In order to do so she had to lean slightly backwards. As she lowered herself into her seat, with her body weight towards the right, the claimant's right

[9] *Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762, [2004] 1 All ER 1 at [41].
[10] See pp. 137-140 *ante*.
[11] *The Daily Telegraph*, 28 March 2009.
[12] For this see *Bennion on Statutory Interpretation* (5th edn, 2008), s. 347.
[13] [2008] EWCA Civ 1419.

foot suddenly slipped on a strip embedded in the floor of the aircraft and went to the left. Upon slipping the claimant heard and felt her knee 'pop' and as it gave way it struck the armrest. This meant that the claimant sustained 'bodily injury'.

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The Court of Appeal rejected her claim, holding that she had not been in an 'accident'. Well I would call that occurrence an accident, and so no doubt would you. Why did the Court of Appeal decide otherwise? I give the answer in the words of that most able judge Laws LJ.

> 'There was no accident here that was external to the appellant, no event which happened independently of anything done or omitted by her. All that happened was that the appellant's foot came into contact with the inert strip and she fell. It was an instance . . . of "the passenger's particular, personal or peculiar reaction to the normal operation of the aircraft".'

Article 17(1) says 'The carrier is liable for damage sustained in case of . . . bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft'. On a literal reading, the condition was satisfied. Following case law, the Court of Appeal held that it was not.

I would not advise a further appeal.

Michael Shields and the Power to Pardon

Can the British Crown pardon an offence that was committed and punished in a foreign country? On first principles, the answer must be no. I cannot pardon an offence you committed against another person; that is for the other person to do (if they so wish). Country A cannot pardon an offence committed against the laws of country B; that is for the authorities in country B to do (if they so wish). It stands to reason. Nothing is law that is not reason said Sir John Powell, speaking of common law.[14] The royal prerogative of pardon arises under common law.

This prerogative power springs from the historical fact that crimes within the realm of England fell to be redressed by pleas of the Crown instituted against a breach of the royal law. The King had power to pardon what was an offence against his own laws, but *non potest rex gratiam facere cum injuria et damno aliorum* (the king cannot grant a favour to one person to the injury and damage of others).[15]

Where a foreign state is involved, first principles bring into play the comity of nations. This was respected under Roman law.[16] In the famous case of the *Parlement Belge*[17] Brett LJ (later Lord Esher) framed the principle of jurisdictional immunity as being the consequence of 'the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state'. In a modern case Staughton LJ said: 'Parliament is not assumed, in a criminal enactment, to have intended to regulate conduct outside this country'.[18] Many similar dicta could be cited.

These 'first principles' were not taken into account in an article by Dr Roderick Munday on the Michael Shields case.[19] Nor are they mentioned in the case Dr Munday discusses in his article.[20] There the Administrative Court held that Her Majesty (through the Home Secretary) had power to grant a pardon to the British subject Michael Shields, who had been convicted

[14] *Coggs v Bernard* (1703), 2 Ld. Raym. Rep. p. 911.
[15] 3 Inst. 236.
[16] Poste, *Gaius* i. Introd. 3: 'The salutary but sanctionless code called the comity of nations'.
[17] (1880) 5 LRPD 197 at 214.
[18] *BBC Enterprises Ltd v Hi-Tech Xtravision Ltd* [1990] 2 WLR 1123 at 1127.
[19] See pp. 181-186, *ante*.
[20] *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin).

by a Bulgarian court of attempted murder of a barman at Varna in Bulgaria following a football match in which Liverpool FC were engaged.

Strangely, the judgment says the British authorities have 'a power under art. 12 of the Convention' to grant a pardon in the case. This is a reference to the Convention on the Transfer of Sentenced Persons 1983. In fact the power (if it exists, which is doubtful) derives from the royal prerogative, not the convention. This is symptomatic. The court lost sight of the true nature of the power, and so failed to investigate the 'first principles' referred to above.

Whether or not the power to do so exists, to grant a British pardon in this case would undoubtedly cause offence to the Bulgarian authorities. It would not 'respect the independence and dignity' of the Bulgarian judicial system, which has exhaustively considered all relevant matters. There would be no question of granting such a pardon if Michael Shields were not held in custody in England under international removal arrangements. It seems that to grant it would be an abuse of those arrangements.

Update On 9 September 2009 the Ministry of Justice issued a statement by Mr Jack Straw MP, Lord Chancellor and Secretary of State for Justice, including the following:

> 'I have concluded, having looked carefully at all the evidence now available, that Michael Shields is telling the truth when he says he is innocent of the attempted murder of which he was convicted in Bulgaria. That being so I have recommended to Her Majesty the Queen that he should be granted a free pardon. Mr Shields is being released from prison today and will return home to his family a free man.'

See also the law report *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin) , [2009] 3 All ER 265.

Earl Forsooth on the Bentley affair

This time I am printing from my archives the letter from Lord Forsooth objecting to the quashing of the 1952 conviction of Derek Bentley for the murder of P.C. Miles.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

1 August 1998

The Rt. Hon. Jack Straw M.P.
Home Office
50 Queen Anne's Gate
London
SW1H 9AT

Dear Home Secretary,

Rewriting history in the Court of Appeal

The Times front page on 31 July 1998 carried the untruthful banner headline 'Bentley is innocent'. Its law report for that day spelt out how the Court of Appeal, headed by Lord Bingham of Cornhill CJ, had overturned not only the Derek Bentley murder conviction but also a fundamental principle of English law. My law man Vencible tells me that this is expressed in the maxim *res judicata pro veritate accipitur* (a thing adjudicated is to be received as true). Related maxims are *interest reipublicae res judicata non rescindi* (it is in the national interest that judgments be not rescinded) and *interest reipublicae ut sit finis litium* (it is in the national interest that legal

proceedings be not protracted). These maxims indicate that once normal appeal procedures have been exhausted a case should not be reopened except for compelling reasons. These exist where a convict is languishing in prison when new evidence suggests the conviction may be unsafe. That was not the position with the late unlamented Bentley.

What was that expensive collection of highly trained lawyers doing, mulling at public expense over the long-ago trial of a long-dead reprobate youth? The short answer, says Vencible, is that they were responding, as the law required, to a reference from the Criminal Cases Review Commission made under section 9 of the Criminal Appeal Act 1995. The full answer involves rather more than that.

The Court of Appeal ordered that Bentley's conviction of murdering P.C. Miles on the night of 2 November 1952 be quashed as unsafe. The sole grounds for this were defects they found in the summing up by the late Lord Goddard CJ, whom Lord Bingham acknowledged to have been 'one of the outstanding criminal judges of the century'.

It is not my contention that the Court of Appeal were wrong in law in their finding that Bentley's conviction was unsafe. I am not in a position to judge that. My assertion is that they had no business to be considering the matter. Bentley was tried by the standards of his day. I well remember the public feeling at the time, and the anger aroused by the foul murder of P.C. Miles at the hands of Bentley's warehouse-breaking accomplice the 16-year old thug Christopher Craig. Bentley too was armed, with what his executioner Albert Pierrepoint called 'a knuckle-duster with a vicious spike upon it - in itself a lethal enough weapon'. But it's history now. What are we doing resurrecting it? Here are some more questions.

The appeal was lodged 'on behalf of' the deceased Bentley by his niece Maria Bentley-Dingwall. Why should his niece have the right to put the law in motion in this way? Suppose there had been no niece, nor any other surviving relative? It is a mere accident that in 1998 there are any known relatives of the long-dead Bentley. Jurisdiction should not hang on such accidents.

At the time, Bentley brought an appeal against his conviction. It was heard by the Court of Criminal Appeal (now abolished) and dismissed. Bentley was then hanged. Under the long-standing policy of the law, that should have been an end of the matter. Why does our generation think it has the right to overrule the generation in whose lifetime the events happened? I call it impudence.

The Bentley jury sat in the days when qualifications were required for jury service. It was not, as now, open to every 18-year old school leaver with or without O levels. The Bentley jury sat in the days when a jury's verdict had to be unanimous. Nowadays dissent is allowed.

So the jury of mature citizens of those post-war days sat in court, heard the evidence, assessed the demeanour of the witnesses, and unanimously found Bentley guilty. Half a century later the Court of Appeal, relying only on paper records and sitting in a different age, presumes to say their verdict is 'unsafe'. Why should this be?

It happened because today's Court of Appeal think the experienced Lord Goddard did not instruct the jury adequately on the burden of proof resting on the prosecution and the fact that they had to be satisfied of guilt beyond reasonable doubt. The Times untruthfully proclaims 'Bentley was innocent'. Why was this untruthful? Because quashing a verdict of guilt as 'unsafe' is very far from saying that the accused was innocent. The overwhelming likelihood is that despite any supposed deficiencies in the judge's direction, the 1952 jury came to a true and fair verdict on the evidence as they were sworn to do.

Awareness of the unreal nature of what he was about comes through in the judgment of Lord Bingham. He rules that in considering anything like the Bentley appeal the liability of a party to a joint enterprise has to be determined according to the common law as now understood, not as understood in 1952. The conduct of the trial and the direction of the jury have to be judged according to the standards which the court would now apply and not according to 1952 standards. Worse, the safety of the conviction also has to be judged according to the standards which the court would now apply. Finally Lord Bingham said:

> 'Where between conviction and appeal there have been significant changes in the common law . . . the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time.'

It is scarcely necessary to say more to indicate what a travesty this so-called appeal was, but one point may be added. The reasoning behind the appeal would have applied equally if the 1952 Home Secretary, Sir David Maxwell-Fyfe (later Viscount Kilmuir), had responded to public pressure and reprieved Bentley. If that had happened Bentley would by now, like his accomplice Craig, have served his prison sentence and been long at liberty. Would it really be right that a man with his record should have his conviction retrospectively quashed nearly half a century later and thereafter rank as a victim of gross injustice entitled to massive compensation from today's taxpayers? I think not.

Should we excuse the Court of Appeal in *Bentley* because they were merely performing a function wished on them by Mr Blair's brand new statute? Again, I think not. There is nothing in Lord Bingham's judgment to show that he and his two colleagues found their task in any way objectionable.

Our generation needs to be reminded of that pregnant saying of L. P. Hartley's in *The Go-Between*. The past is a foreign country: they do things differently there. Or to put it even more succinctly: you can't change history, and you shouldn't even try.

Yours faithfully,

Forsooth