Darbyshire on the ELS 2017, update April 2018

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Darbyshire on the English Legal System, 12th ed. (London, Sweet & Maxwell, 2017), *Nutshell on the English Legal System* 9th ed. (London, Sweet & Maxwell, 2016) and *Sitting in Judgment – the working lives of judges* (Oxford, Hart Publishing, 2011), here

This update was completed on 27 April 2018.

Bibliography of this update

Ministry of Justice (MoJ) press releases, Judiciary website (for statistics and judges' speeches), Judicial Appointments Commission, *Westlaw*, including many journals, *Lexis*, including *Criminal Law and Justice Weekly*, Law Society's *Gazette*, *New Law Journal*, *Times Law Reports*, Parliament website, *Legal Action*, BBC News, websites as listed in *Darbyshire on the ELS*.

Further reading

www.newlawjournal.co.uk
Westlaw Journals and current awareness.
The Times, *The Guardian* and *Counsel* may also be useful. *The Guardian* is available free, online. Other quality newspapers are available from *UK Newsstand*, an electronic subscriber database available from libraries. Some of this material below is cut and pasted, as can be seen from the quotation marks and acknowledgements.

Format of this update

The paragraph numbers signify updates to the same numbered paragraph in the textbook.

Brexit (page xliii) and Chapter 3 EU Law

At my time of writing, there are many bills going through Parliament and many inquiries and reports flowing from Parliamentary Committees. You need to visit the UK Parliament website, which is brilliant, to keep up with events!

In Parliament: The European Union (Withdrawal) Bill 2018, as at 28 February but it will be amended. As I write, it is currently going through Parliament. Amendments made in the House of Lords will be amended by the House of Commons

Here are the contents

Clause 1 repeals the European Communities Act 1972 on "exit day".

Clause 2 saves EU derived domestic law (UK law passed as a result of EU membership) into UK law.

Clause 3 incorporates direct EU law, effective up to exit day, into domestic (UK) law. This means regulations, decisions and EU tertiary legislation.

Clause 4 saves into domestic law "rights, powers, liabilities, obligations, restrictions, remedies and procedures" which are recognised and available by virtue of the European Communities Act 1972.

Clause 5 clarifies that the supremacy of EU law ceases after exit day BUT the principle of supremacy applies to law made before exit day so far as it affects "interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day". It clarifies that the EU Charter of Fundamental Rights is not part of domestic law.

Clause 6 states that from exit day, no court or tribunal is bound by the Court of Justice of the EU, nor can they refer any matter to the CJEU. They need not have regard to anything done by the CJEU but may do so. Retained EU law is to be interpreted according to retained case law and retained EU principles. The UKSC is not bound by the European Court.

> "(5) In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law."

Clause 7 is a controversial Henry VIII clause, objected to by Lord Judge, former Lord Chief Justice, as it gives ministers the power, for two years from exit day, to deal with deficiencies and failures in retained EU law by way of delegated legislation.

Clause 8 is another Henry VIII clause, giving power to make regulations to prevent or remedy any breach of the UK's international obligations arising from Brexit.

Clause 9 gives yet another Henry VIII power to make regulations, up to exit day, to implement the withdrawal agreement.

Clause 10 applies all the same rules as above to the devolved authorities.

The Government says there will be a 3 month window after Brexit for taking court cases alleging breaches of EU legal principles.

> "Members of Parliament (MPs) must approve the terms of the UK's departure from the EU after an amendment to the European Union (Withdrawal) Bill 2017 was supported by 309 MPs, with 305 opposing it on 13 December 2017, creating the opportunity for them to reject the terms of withdrawal at a later date." (Westlaw, 14 December 2017).

A group of Scottish Parliamentarians are trying to take a case through the Scottish courts and up to the Luxembourg court for a ruling that Parliament can stop Brexit and withdraw the UK's Article 50 notification. The House of Lords EU Justice sub-committee are still

considering the issue of dispute resolution post-Brexit, having taken evidence in December and January. As they say, the Government will need to negotiate a new international legal relationship with the remaining 27 member states:

> "The Government has said that leaving the European Union will "bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU)." This raises questions about the options for enforcement and dispute resolution mechanisms for UK-EU agreements; and, how EU law will be interpreted in the UK post-Brexit." (Call for Evidence).

There is a House of Commons Exiting the European Union Committee and it reports on the progress on the negotiations with the EU. In answer to a parliamentary question, it explained that, in general, it would not be possible to challenge converted EU law.

Understanding Concerns from Devolved Jurisdictions

The House of Commons Scottish Affairs Committee reported, in November 2017, on their concerns about the Bill above. They said the Scottish government had described the Bill as "a naked power-grab". The UK Government's Secretary of State for Scotland had, however, expressed disappointment at these suggestions. The Government's white paper on the Bill, *Legislating for the UK's withdrawal from the EU*, had promised that there would be "a significant increase in devolved powers. He said he came from a presumption of Membership of the EU had meant "common frameworks" across the EU, including the UK, "including agriculture, competition, consumer protection, environmental standards and fisheries—which harmonise standards and policy across the EU". The UK Government had said it would replicate these frameworks within the UK but would begin immediate discussions with the devolved administrations to identify where common frameworks were unnecessary (and so could be devolved). The Committee welcomed the UK Government's promise not to use the controversial Henry VIII clauses in the Bill/Act without consulting Scottish ministers, who would consult the Scottish Parliament. The Committee noted the Sewel Convention, meaning that the UK Parliament would not normally legislate on devolved topics without the consent of the Scottish Parliament. They welcomed ongoing work between the UK and Scottish governments to try and secure agreement on the clauses of the Bill that affected devolved issues. The House of Commons Procedure Committee recommended that a new and effective scrutiny committee be set up to examine delegated legislation and reject defective rules. The House of Commons Public Accounts Committee called on Parliamentary Committees to reprioritise work. It had identified 313 areas of Brexit work for Parliament.

> "In March 2018, the Scottish Parliament passed a Bill intended to disregard Brexit legislation at Westminster. The EU (Legal Continuity) Bill 2018 was passed after the Scottish and UK Governments failed to agree on the distribution of devolved EU powers after Brexit. UK Government law officers are now likely to refer the Bill, which would transfer devolved EU law into Scots law at Brexit if the two governments cannot resolve their differences by May 2018, to the UK Supreme Court

> and ask it to rule it illegal. This would be the first instance of the UK Government seeking to overturn a Holyrood Bill." Westlaw abstract 22 March 2018.

The Welsh Assembly passed a bill to the same effect but in April 2018, these Bills were referred to the UKSC by the UK Government's senior law officers, to determine whether they are constitutional and indeed are within the devolved powers of Scotland and Wales.

Judges and Brexit

Judges keep giving speeches aimed at reassuring people that the UK is a good place to litigate, arbitrate and launch ADR, because of the reliability of the long-standing institutions and the flexible common law, the independent judges and the spangly new business courts. An example is Chancellor Vos J., "The Future for the UK's jurisdiction and English law after Brexit", 28 November 2017, Judiciary website. He was keen to promote the new business courts but sadly reflected that he was the last President of the European Network of Councils for the Judiciary, which brought together Councils and groups of judges, focusing on "enhancing the independence and integrity of judges and judiciaries across the EU and beyond". Vos J analysed the role of the common law in the context of Brexit. While insisting that legal systems were not in competition, urging judicial cooperation and intellectual exchange, and welcoming the English speaking commercial court in Frankfurt, he nevertheless explained the benefits of the flexible common law.

> "The common law is a non-statutory system of law. It does not turn on the interpretation of codes or statutes, but rather it relies on cases that have been decided by our court hierarchy in the past. The reason why this is a system that business people have found reliable over many years is because it can accommodate frequent changes in business and commercial practice…Let me give one example of where this may be useful. In the case of digital ledger technology (DLT), smart contracts and artificial intelligence (AI), the financial world is about to undergo, if not already undergoing, what is nothing short of a major revolution. Informed opinion suggests that the approximately 3 trillion…financial deals entered into every year will be undertaken by way of smart contracts and DLT within 5 years… My guess is that a legal basis will be required even for a self-executing smart derivatives contract recorded on a digital ledger across numerous servers. If that is the case, the world's legal systems will need to respond quickly, and I would say that our business judges in London are moving swiftly to do so. We need to educate ourselves and to be ready to deal with the regulatory and other problems that will undoubtedly arise." (paras. 12-15)

He also explained why EU law does not impact on the common law:

> "…the common law is not engaged in a number of other areas that will be of considerable concern to you [business people and business lawyers in Frankfurt]. If we are talking about regulation, whether of banks, financial services, competition or of business sectors such as energy, telecoms, and pharmaceuticals, the common law is

not really relevant at all. Regulation, is by definition, imposed by and a function of statute, whether that is European legislation or domestic legislation…This is why European law does not actually have an impact on the common law. European law is almost entirely about mutuality between member states and the regulation of sectors affecting the single market and trade between member states. It a statutory system governing members states in order to make the single market function properly. It has nothing specifically to do with the private law that those member states use to resolve disputes between individuals or businesses. It is a commonly held misapprehension about Brexit that the common law is likely to become uncertain after Brexit because there will be two speeds of European law – European law as frozen into English law and interpreted by our Supreme Court, and European law as determined by the Court of Justice of the European Union after the UK has left the Union. That is not something that is likely much to affect the common law. The common law is, as I have said, a system of judge made principles that allows any novel commercial dispute situation to be resolved in a predictable manner. Of course, the common law operates against a backdrop of the regulation of the businesses and financial services institutions that are in dispute. But the common law itself will be as certain and predictable, and as able to deal with new situations after Brexit as it was before, because the EU law tapestry is only part of the backdrop to the business environment in which the common law operates to resolve disputes governed by it.

So, whilst it is true that English regulatory law may develop slightly differently from European law after Brexit, that will not create uncertainty for the common law or make English jurisdiction any less effective for the purposes of dispute resolution." (paras. 18-21).

Vos J is a member of the Brexit Law Committee, bringing together the legal profession, City of London, CityUK, and main government departments, to "to provide Government with a single voice of the UK legal community". It had, he said, examined intellectual property, competition, judicial cooperation and insolvency, post-Brexit. The LegalUK group (led by the judiciary and representing the same interests) produced an undated report called *The Strength of English Law and the UK Jurisdiction.* In a very similar speech promoting English law and dispute resolution, Hamblen LJ reminded a Hong Kong audience in December that London was home to the world's leading law firms: 200 overseas firms from 20 jurisdictions, including over 100 US firms. He reassured them of reciprocal recognition and enforcement of judgements post-Brexit. ("Myths of Brexit", 2 December 2017).

Ministry of Justice Promoting The UK Legal Services Sector

This campaign is called Legal Services are GREAT and was launched on 14 December 2017.

In the meantime – competition from overseas

In February 2018, the French Justice Minister announced that the international chamber of The Appeal Court of Paris has announced that it will take account of common law and

publish judgments in English as well as French. She cited Brexit as the reason and added that London's attractiveness "will be supplanted by other European jurisdictions".

Chapter 1 Understanding the ELS

1-002 Rule of Law

A really important statement on the rule of law and access to justice was made by the UKSC in Lord Reed's judgment in the July 2017 UNISON judgment on tribunal fees, which is examined in depth below, in the update to chapter 11.

1-029 Bibliography

Correction: the title of the 7th edition of Rivlin's book is *First Steps in the Law*

Chapter 2 Sources of English and Welsh Law

2-015 Henry VIII Clauses

Apart from the concern about them in the EU (Withdrawal) Bill, the House of Lords Constitution Committee expressed concern about the same device in the Sanctions and Anti Money Laundering Bill 2017. Lord Judge, former LCJ, had warned them that Ministers would gain power to create crimes carrying 10-year sentences, with minimal Parliamentary scrutiny.

2-026 Thoroughly Prepared Legislation

The House of Lords Constitution Committee has called for legislation to be better prepared, in order to enable better Parliamentary scrutiny. They called for clearer legislation and more frequent publication of the Government's evidence-base for wanting the legislation: *4th Report of Session 2017-19: The Legislative Process: Preparing Legislation for Parliament*, Parliament website.

2-036 Persuasive Precedent

In an October speech to the Edinburgh Faculty of Advocates, Lady Justice Arden recounted a great personal example of having been influenced by persuasive precedent when there was no binding precedent:

> "This happened to me recently in a case called *Dunnage v Randall* [2015] EWCA 673. The facts were tragic. They raised a novel point of law: could a person suffering from a florid bout of schizophrenia be liable in damages to a person who was injured by his actions? The judge held that this person was not liable because he was not in control of his actions. Strangely, there was no clear domestic authority on this point. There were cases from New Zealand, Canada, Australia and the USA going either way. I eventually decided that the policy of the law was that there should be liability as the price of being able to move freely in society. I therefore held that the test of liability should be objective, which meant that the standard of care would be that of a reasonable person without the particular characteristics of the defendant." ("International Judicial Work", 26 October 2017).

Chapter 3 EU Law

3-041 Example of incompatibility

O'Brien v Ministry of Justice [2017] UKSC 47. A restriction imposed by the Equality Act 2010 on occupational pension payments was incompatible with Council Directive 2000/78/EC.

Chapter 4 The European Convention on Human Rights

4-016 Art 3 inhuman and degrading treatment

In February 2018, in a landmark case, two of the earliest of the many victims of John Worboys, serial sex attacker, won a case in the Supreme Court against the Metropolitan Police. They had reported Worboys in 2003 and 2002 but he had not been charged: *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11.

4-065 Responding to human rights judgments

The latest Ministry of Justice report to Parliament on how the Government has responded to HR judgments in 2016-2017 is here

Chapter 5 Law Reform and the Changing English Legal System

The Law Commission has published its 13th programme of law reform: https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/

Chapter 6 Civil Courts and Chapter 7 Criminal Courts (*and* also relevant to civil, family and criminal procedure and tribunals, Chapters 10, 11 and 12)

6-001 Who runs the courts?

In his recent speeches, The Senior President of Tribunals, Sir Earnest Ryder, has been reminding us of the 2014 HMCTS Framework Document (Cm 8882) which sets out the responsibilities of HMCTS, the Lord Chancellor, the Lord Chief Justice and the SPT to run the courts and tribunals in "partnership". It is a tiny document, here

NB Like Brexit, court closures and digital by default are the other hot topics of spring 2018.

6-027 Digital by Default – Considering the Impact on Justice

Consider this problem: as I keep pointing out in lectures, while the Ministry of Justice, Her Majesty's Courts and Tribunals Service and the top judges keep promoting digitisation as *enhancing* access to justice for the majority of the population, who are used to buying things online, of course it could severely *restrict* access the justice for the people who are not savvy IT users, the dispossessed: the poor, illiterate, immigrants who do not speak English, the mentally impaired and those from severely disadvantaged backgrounds. As I pointed out in my book *Sitting in Judgment*, many years of court observation have taught me that these are the very people who populate the courts. They are the digitally excluded and also, they are

much more likely to use public transport than the population at large so I really cannot imagine how they will get to court many miles away for 10.00 am.

In July 2017, following consultation, the Ministry of Justice decided to close 86 more courts and tribunals.

Fulford LJ is now the Judge in Charge of Reform

6-027 Consultation on Transforming Court and Tribunal Buildings
In January 2018, HMCTS and the Ministry of Justice launched a very comprehensive consultation, *Fit for the future: transforming the Court and Tribunal Estate*, the next big practical paper after the abstract wish-list *Transforming our Justice System* 2016, mentioned repeatedly in Darbyshire 2017. It was a consultation not just about closing eight more courts but about the way these bodies consult on court closures and what the criteria should be for closing court buildings and improving the remainder. The paper is very informative about courts and tribunals and makes radical proposals for merger of court and tribunals buildings, the flexible use of all HMCTS buildings and the renting of other buildings to provide courts and tribunals part-time.

> "Many people who access justice at present do not attend a court or tribunal in person. For example in the 2016-17 financial year, over 898,000 civil default judgements were issued (out of a total of 1,055,000) with no requirement to attend court. Similarly, of the 114,000 divorce cases started only 4,000 hearings took place to resolve the divorce or financial settlement and 28,000 social security and child support appeals are dealt with 'on the papers'." (out of 191,000 total appeals). (para 4.5)

It said that lots of Crown Court case management and preparatory hearings do not need a face to face forum. In 2017, there were 284,000 preparatory or case management hearings, 167,000 of which were preparatory or case management, which did not all require a face-to-face meeting. I made this point, incidentally, in "Judicial Case Management in Ten Crown Courts" [2014] Crim LR 30. At that time and in all the years I had spent observing courts since the 1970s, it seemed to be the default plan to call advocates in to the Crown Court for a "mention", even if that took two minutes and kept the advocate travelling and waiting for several hours. More hearings can be conducted by telephone or video-link but the choice remains in the hands of the judiciary. The paper mentioned judicial speeches championing digitisation, cited in Darbyshire 2017 and adding in Sir Terence Etherton MR's speech, who said in June 2017,

> "justice can be delivered in many ways – by the most appropriate decision-maker; in modern hearing rooms, or in mental health hospital units, community halls or remote locations; by video links, on laptops, tablets and smartphones, and online with the citizen and decision maker coming together virtually." ("The Civil Court for the Future", 14 June).

The paper therefore promised a range of options including fully video hearings. They reported that they were developing virtual hearings for remand cases, allowing police officers

to give video evidence. They were designing a virtual hearing capacity to allow ordinary people to participate using their own computer and a standard web browser. These were being tested on the public, lawyers, judges and government workers.

The presumption in criminal cases was that only things that needed to be done at a physical venue would appear in court: trials and sentencing. The same principle would apply in civil, family and tribunal jurisdictions. They planned to do more to help people resolve their disputes and they said they now offered online services to apply for a grant of probate or divorce since January 2018. Users' feedback had rated them highly. (Why on earth were these not offered years ago? I ask. Tesco delivered its first online order in 1984 and launched Tesco Direct in 1997). One advantage is reducing waste of time and paper. 40% of paper divorce applications were returned because they were incorrectly completed. (I mentioned in my 2011 book on judges' work, *Sitting in Judgment,* that sometimes district judges would have to return their whole pile of paperwork to different solicitors' firms and personal applicants because the forms in all the files were incorrectly completed.)

Flexible hearing times were being piloted.

Most administrative work would shift out of court buildings into **national court and tribunal service centres** so that

> "Aided by the latest technology, those working in local courts and tribunals will be able to focus on what really matters in the justice system: helping and supporting the public through the process, knowing that for many coming to court will be a high-stakes, once in a lifetime experience which needs great consideration and care. They will also be able to provide high quality support for judges and magistrates; and create and maintain a modern professional workplace for all court and tribunal users." (para 1.22)

(Incidentally, the first two such service centres were launched in November 2017, each employing over 300 people. According to the MoJ press release on 2 November, they are designed to be user-friendly:

> "The new service centres are being planned based on research into what users want and need, and in consultation with judges, magistrates and legal professionals, as well as agencies that represent the public and support people with cases going through the justice system.")

On court closures, the consultation paper said there had been rounds of closures since 2010. They were now consulting on eight more closures and there would be future consultations. 121 buildings would now close, reducing courts and tribunals from 460 buildings to 339. As of November 2017, there were 94 Crown Court locations, 160 magistrates' courts, 210 county courts and 141 tribunals, in 350 buildings. 310 were within 15 miles of another HMCTS building. Existing buildings were too inflexible and a new design guide was planned. The maintenance backlog was £400 million. They cited the JUSTICE report mentioned in Darbyshire 2017, *What is a Court?* which emphasised the need for flexibility.

The consultation paper depicts some existing court buildings, illustrating changes, starting with the architecturally stunning Manchester Civil Justice Centre that houses 52 courts and enabled the closure of five small county courts. The consultation paper's producers, HMCTS and the Ministry of Justice, said they were guided by three principles, **access to justice (including for agencies, witnesses and the vulnerable), value for money (including maximising capital raised) and longer-term efficiency (for instance maximising flexibility in building-use and minimising maintenance costs)**.

Because of property values in London, there were opportunities for releasing significant sums. For example, they proposed closing Blackfriars Crown Court, especially as a new combined court was under consideration in the City of London. This would include a new Crown Court specialising in serious fraud and cyber-crime.

On access to justice and location, they said that, instead of calculating travel times to court by car or public transport, they would copy the Scottish courts:

> "we should, as is done in the Scottish system, set an aim that nearly all users should be able to attend court or a tribunal on time and return within a day, by public transport if necessary". (para. 4.19).

On value for money, they said overall utilisation of buildings was around 60% capacity so they needed to use them more flexibly. They provided examples of better listing and management.

> "Using data from past listing and hearing trends, the listing and hearing of small claims and fast track civil claims was centralised from a number of county courts across London to 10 hearing rooms in one site. Increased numbers of cases were listed and heard each day, and hearing rooms were better used, reducing waiting times and adjournments and increasing disposals by 40% for Fast Track claims and 23% for Small Claims cases. During the pilot, data continued to be collected on these lists offering the court up to date information enabling them to flex their approach to accommodate emerging trends. Those courts that sent the work were also able to use the capacity released to reduce waiting times for other work." (para. 4.31).

Evaluation had shown that big courts could have "floating" cases, to be shifted into empty courtrooms. Also multi-jurisdictional use of rooms maximised use of space. They intended to improve data collection and commission condition surveys of all their buildings. They used Newcastle as an example of how they could consolidate court work of different types into two strategic locations for hearings and

> "Alongside our strategic locations we need to make provision for other locations, usually rural areas which are less populous, to ensure that access to justice is maintained where transport links may be poor. This may include retaining existing courts and tribunals even though they may not be well utilised, or have a narrower range of facilities compared to our larger hearing centres." (para. 4.42).

They provided case studies, again with pictures, of the use of buildings other than courts, such as a town hall used for civil hearings every Tuesday, a hall hired from a charity for tribunal hearings and a community centre and a coroner's court. They recognised their obligation to maintain heritage buildings and they intended to carry out an audit of facilities for victims and witnesses. There were already 500 witness links in criminal courts and 137,000 cases were heard by video link in 2016-17. There would be a new design guide with a principle of flexible layout, identifying formal and standard room layouts. (para. 4.84). they depicted refurbishments piloted at three courts.

On digitisation and assisted digital provision, they said they would train 350 people to act as on-site Digital Support Officers.

> "We are researching and testing with a wide range of user groups – including elderly people, the young, vulnerable groups, geographically remote users and users who find accessing our services online particularly challenging. We are using the insights and research findings from these groups to help design services that are easier to understand and navigate. The assisted digital support services will cover a range of channels, from web chat or telephone assistance (delivered by HMCTS through to more intensive face to face support. Access to paper channels will be maintained in some services for those who need them. Face to face assisted digital support will take place in appropriate local settings, such as libraries and community hubs, rather than in court and tribunal hearing centres. We have partnered with the UK's leading digital inclusion organisation, Good Things Foundation, to deliver the face to face assisted digital service through their Online Centres network. Over 5000 organisations such as libraries, Citizens Advice bureaux and local community hubs already participate in the Online Centres network, delivering digital inclusion programmes on behalf of organisations such as NHS England, the Department for Education and Department for Communities and Local Government." (4.92).

I was hoping to find out more about "assisting access to justice" in practical terms from a speech of this title given by the Senior President of Tribunals in March 2018 but it does not provide any more detail on how this is working out.

They had commissioned a review of their evidence base for further proposed estate changes. They set out their plans for future consultation methods and, of course, they posed questions within the paper on all of their proposals. Note that, as I said, they cited the JUSTICE paper that I mentioned briefly in my 2017 book, *What is a Court?* here

In an April 2018 speech, the Lord Chief Justice, Lord Burnett of Maldon said

> "Since the online divorce pilot started in July last year roughly 1500 people have requested links to it. In the paper-based world, an uncontested divorce required an applicant to fill out a form and file it with the court and, in some cases, to be checked by a judge. 40% of those forms were rejected because they had not been completed properly. The new online process takes applicants 25 minutes to complete, compared to an hour for the paper forms. And because the online form is well designed, all but

eliminating the scope for errors, the rejection rate has fallen to 0.5%. This has the potential to save significant amounts of HMCTS staff and judicial time."

He explained that as part of the modernisation plan, more "routine, straightforward judicial functions" (boxwork) were being done under authorisation by case officers (legal advisers). (Association of DJ's Conference, 13 April 2018).

6-027 6-028 Critique of court closures and digital by default

I have already criticised the extent and ramifications of court closures in several editions of this textbook, most recently in chapters 6 and 7 of the 2017 edition. I examine and critically analyse the plans for digital by default at length in chapters 6, 7, 10, 11 and 12. To cut a long story short, my argument is as follows. Closing courts and establishing online procedures within the courtroom and outside it for "petty" crime, civil claims up to £25,000 and divorce applications is lauded by the Ministry of Justice and senior judiciary as enhancing access to justice, because procedures will be easier online than going to court or form-filling and nowadays, people expect to be able to conduct activities online. First, decades of experience up to 2017 has shown me that IT systems and video technology in the courts very often does not work satisfactorily, causing disruption, delay and stress, as well as wasting time and money. Most importantly, users of the civil, family and criminal courts are NOT a normal cross-section of the population, as my research with judges spanning more than 10 years demonstrated. There is a disproportionately high percentage of the mentally ill or impaired, often severely impaired, heavy drug and/or alcohol users, the poor, the homeless, those whose first language is not English, and those who suffer multiple disadvantages and lead chaotic lives and who were born into a cycle of deprivation. They are representative of the digitally excluded. Court closures destroy access to local justice in a courtroom. County courts and magistrates' courts are meant to provide localise justice. Magistrates were representatives of their communities and they benefited from understanding their localities and local people. Until recently, there was a rule that they had to live within 15 miles of their bench. Many have now left the bench because of the travelling they have to do and their concern for court users. When another tranche of courts is closed, the MoJ always point out that most people can still access a court within an hour or two hours drive BUT, as is obvious from my description above, courts users as a group represent a disproportionately high number of people without a car.

Furthermore, courts are meant to be open to the public. The rule of law requires that justice is open. I and many others are entirely unclear as to how online justice can be scrutinised by the public. As for the introduction of pleading guilty online, which has been offered since my 2017 edition was published, the danger is the same as accepting the offer of a caution by the police: the offer is very tempting to the accused but pleaders if they are not represented by a lawyer, they cannot be expected to know if they are technically guilty, as they have no idea of the actus reus and mens rea of the crime with which they are charged and they have no idea of the consequences of a criminal record.

Jane Donoghue's article, "The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice" (2017)80(6) MLR 995–1025 is by far the best critique of digital by default and court closures. She takes a holistic and analytical view of the impact of digital systems (which are growing internationally) on the principles of the justice system by penetrating all this means in practice to court users. Her article is highly researched,

informative, detailed and though provoking, like her previous articles in the MLR and elsewhere. Here is the abstract:

> "This article addresses a little discussed yet fundamentally important aspect of legal technological transformation: the rise of digital justice in the courtroom. Against the backdrop of the government's current programme of digital court modernisation in England and Wales, it examines the implications of advances in courtroom technology for fair and equitable public participation, and access to justice. The article contends that legal reforms have omitted any detailed consideration of the type and quality of citizen participation in newly digitised court processes which have fundamental implications for the legitimacy and substantive outcomes of court-based processes; and for enhancing democratic procedure through improved access to justice. It is argued that although digital court tools and systems offer great promise for enhancing efficiency, participation and accessibility, they simultaneously have the potential to amplify the scope for injustice, and to attenuate central principles of the legal system, including somewhat paradoxically, access to justice."

The article is brilliant and elegantly written: a must read.

On 27 February 2018, the Chairman of the Parliamentary Justice Committee wrote to the Undersecretary of State for Justice to express these concerns about elements of the plan to rationalise court and tribunal estate and close eight more courts.

1. No justification had been offered for their plan to ensure that only 90% of court users could reach the nearest magistrates' court in one hour on public transport. For example, if Northallerton magistrates' court were to close, it would take up to 3 hours 22 minutes for the one-way trip to Harrogate. It would be indirectly discriminatory on women as carers and no adjustment was offered to disabled people.
2. It was questionable whether alternative courts would have the capacity to handle work from the closed courts.
3. They had not consulted on their plan that only trials and sentencing would be done at a physical court venue.
4. The preference for virtual or online justice was announced without recent research, or evaluation of pilot studies.

   > "Focus group and survey evidence from the national charity, Transform Justice (reported in October 2017: *Defendants on video*) suggests that unrepresented defendants, defendants who do not speak English well, and older and younger court users are likely to be particularly disadvantaged by video hearings; there was also evidence of video equipment failures, poor sound quality and mismatches of sound and image. The MoJ appears to have undertaken no evaluation of virtual hearings since its pilot programme in Kent and London, which was evaluated in a report published in 2010. This found that virtual courts were expensive to set up and to run, that defendants appeared less engaged in the process and that the rate of guilty pleas and custodial sentences was higher than in traditional courts for

reasons that were unclear. This discrepancy indicates that further evaluation is needed before moving towards routine use of virtual hearings."

5. They also expressed concern about the capacity of court users to cope with digital justice:

> "were digital justice to become the norm, we believe that substantial barriers would be faced by non-users of the internet, estimated as 18% of 55-64 year aids, 35% of 65-74 year olds and 56% of 75+ year olds. In relation to socio-economic groups, 16% of C2s and 27% of DEs are non-users of the internet (Ofgem, Adults' media use and attitudes report 2017). We do not consider that the MoJ/HMCTS proposals for providing face to face assisted digital support have been adequately developed, evaluated or costed."

6. As for the criminal courts, they were not aware of any pilots or consultation on online pleas.
7. They had "particular fears" about departing from the principle of online justice.

Professor Nicky Padfield was also highly critical of the general plan of digital by default, couple with a mass of court closures. Editorial [2018] Crim. L.R. 351. She cited the example of Cambridge Magistrates' Court, brand new in 2008, in a city of 125,000 with good transport links, yet scheduled for closure in the consultation paper.

Surprise Surprise! The IT is not ready

The Online Court Committee of the Civil Procedure Rules Committee has threatened to withdraw judicial cooperation after lack of communication by HMCTS and false claims. Mr Justice Birss, chair of the committee said that the Online Court, due to go live on 26 March, was not close to being ready and did not take the user further than the existing MoneyClaim Online.

6-004 Business and Property Courts

Business and Property Courts sit in The Rolls Building in central London but also in five provincial centres: Birmingham, Bristol, Leeds, Cardiff and Manchester. In future, the flexible deployment of judges will be easier, as will transferring cases between business courts and between London and other cities. The Civil Procedure Rule Committee passed a new rule in November 2017, emphasising that no case is too big to be heard outside London. An Advisory Note on the business and Property Courts was issued in October 2017 here and it lists the 10 specialist courts and sub-lists, as follows, and explains the work of each: Admiralty Court (QBD), Business List (ChD), (business, financial services and regulatory, pensions), The Commercial Court (QBD), including the Circuit Commercial Court (formerly the Mercantile Court), the Competition List (Ch), the Financial List (financial disputes worth over £50million) (ChD/QBD), the Insolvency and Companies List (ChD), the Intellectual Property List (ChD), the Intellectual Property and Enterprise Court ("IPEC"), the Patents Court, the Property, Trusts and Probate List (ChD), the Revenue List and the Technology and Construction Court (QBD).

6-006 Planning Trials

They hit a ten-year high, of 215 trials in 2017, a 40 per cent increase in five years.

6-009 Financial Remedies (Family) Courts
From February 2018, the President of the Family Division started piloting three financial remedies courts. There will be hearings at regional hubs and Financial Remedies Hearing Centres. He was persuaded by an article by two judges in the journal, *Family Law*.

6-016 UKSC goes travelling
In 2017, the UKSC heard a case in Edinburgh. They were nervous about doing this but well-received and had around 150 visitors. In 2018, they will be hearing the "gay cake" case, *Lee v Ashers Bakery* in Northern Ireland.

6-030 Open Justice
The Civil Procedure Rules Committee has decided to spell out that the default rule is that hearings must be in public, now specified in Part 39.2

The Senior President of Tribunals, Sir Ernest Ryder, made a speech entitled "Open Justice" on 1 February 2018. He interpreted it to mean access to the courts, as well as the courts' openness to scrutiny "the great antiseptic". If we were to accept that the majority of disputes would be handled by private online resolution, there would be a democratic deficit. "Our digital courts must be open courts". He did not explain how this was to be organised but reminded us of his own statutory duty: to ensure that tribunals were accessible (open). He repeated this in a speech on 15th March.

6-034 televising the criminal courts
In his December 2017 press conference (Judiciary website), the LCJ mentioned the piloting of televising sentencing remarks. He was also interviewed about it on BBC Radio 4's *Law in Action* in December. The pilot was being evaluated but he thought it was worth looking at in high profile cases.

7-014 Flexible Operating Hours
In a September 2017 Blog-posting, HMCTS announced that it was suspending experiments with flexible (meaning longer) court sitting hours. This suggestion is just as unpopular as when it was made in the 1970s, for the same reasons. Very predictably, in my opinion, the legal profession had objected and HMCTS acknowledged that alternative suggestions had been made, such as adding in certain work before and after normal courtroom times, and using rooms more flexibly for court and tribunal work. Also, they had failed to find anyone to evaluate the pilot schemes.

7-014 Digitisation: Fare Dodgers' Courts
In November, HMCTS announced that a digitised system run by them and Transport for London had allowed for the swift sentencing of 3000 fare dodgers. TfL could prosecute 18,000 commuter crimes per year more quickly.

Chapter 10 Civil Procedure

10-007 Small claims limit in personal injury cases
In 2017, the Minister of Justice announced that the limit in personal injury cases would rise to £2,000 and to £5,000 in road traffic accident cases.

10-023 Disclosure
In the above speech, Chancellor Vos acknowledged that one perceived disadvantage of common law civil procedure was the extensive requirement for disclosure of documents. A working party led by Gloster LJ had recommended a less onerous and expensive procedure to be piloted in the Business and Property Courts from early 2018:

> "In essence, disclosure will only be required if it is truly necessary to achieve justice and the parties will be able to influence the disclosure regime that will be chosen so that it suits the features of the particular dispute that is being determined." (para. 37).

10-053 Costs penalty comic case
In *Optical Express Ltd* [2017] EWHC 2707, the libel claimants were heavily penalised in costs for their lateness in providing information which might have prompted an earlier offer to settle. They accepted a Part 36 offer of £125,000, having claimed £21.5 *million*.

10-054 Compensation culture continues: comic case but the general story is not funny
In *Liverpool Victoria Insurance Co Ltd v Yavuz* [2017] EWHC 3088, nine people, many of them members of the same family, were found to be in contempt of court for claiming to be accident victims. The "accidents" were staged in the same part of north London. The judge said the law should be changed to make their solicitors liable for contempt too. When I taught at the University of California at Berkeley, in 1992-93, fake car accidents to make fraudulent insurance claims were common in California. I then noticed bunches of them in England by 1997 but, despite judges trying to alert the police, who repeatedly ignored them, and the insurance industry, the insurers were pathetically slow to react and insurers kept paying out, causing increased insurance premiums. This problem has *continued* through to 2018, unbelievably. Insurers have just kept paying out, rather than challenge the claims in court. 30 years too late, in March 2018, the government launched a Civil Liability Bill, yet another attempt to stop the tide of these claims. The Bill, if enacted, will set a tariff for all whiplash injuries. All so-called injuries will continue to be required to be certified by an accredited doctor. The "Whiplash fact sheet", published alongside the Bill, on 21 March 2018, discloses that no fewer than 90% of RTA claims are for supposed whiplash injuries. The small claims limit for RTA personal injuries will be increased to £5,000 and for other PI claims will remain at £2,000. The government are concerned to limit compensation. Evidence from the Government Actuary shows that damages awards produce 120-125% of what is required to compensate people in clinical negligence cases and that was wasting NHS money. Therefore, the Bill provides for a new panel to fix compensation payments, chaired by the Government Actuary. The Government are also clamping down on holiday sickness claims, which are damaging the package holiday business.

In February 2018, it was revealed that the SRA received around 150 complaints per year about personal injury law firms cold calling to tout for business or paying illegal referral fees.

10-059 Jackson Part 2
Jackson LJ has just retired in 2018. In July 2017, just after I finished writing the 2017 edition of this textbook, he published the second part of his review of costs: *Review of Civil*

Litigation Costs: Supplemental Report Fixed Recoverable Costs here . Here are the main points:

> "In England and Wales, the winning party in litigation is entitled to recover costs from the losing party. The traditional approach has been that the winner adds up its costs at the end and then claims back as much as it can from the loser. That is a recipe for runaway costs." (p.9).

There were, he said, two ways of controlling costs, fixed recoverable costs or costs-budgeting in advance. In 2010, he recommended FRC for fast track cases and costs-budgeting for others. Those reforms were now bedded-in but some fast track cases still did not have fixed costs. He was commissioned to do this second review and was helped by 14 assessors. He recommended:

- A grid of fast-track fixed costs (ch 5)
- The establishment of a bespoke process for clinical negligence claims up to £25K
- A voluntary pilot of a capped costs regime for business and property cases up to £250K (ch. 9).
- Limiting recoverable costs in judicial review cases.

See new **proportionality** rules under 44.3.

10-059 NB Civil Costs and Access to Justice (also relevant to the legal aid chapter and Ch. 6, Part 10)
For a really thorough, intellectual consideration, see A. Higgins, "The Cost of Civil Justice and Who Pays?" (2017) 37 (3) OJLS 687. He examined arguments about

> "delivering access to justice in a shrinking state, specifically the Supreme Court's claim in *Coventry v Lawrence (No 3)* [2015] UKSC 50 that it is impossible to deliver access to justice for all litigants without widely available legal aid, and broader claims that the state is failing in its duty to provide access to justice for all".

The article is very thought-provoking and dense, and compellingly argued so it is difficult to sum up and very well worth reading. He examined the recent draconian cuts to legal aid and their consequences, as outlined in ch. 17 of Darbyshire 2017, such as the increase in litigants in person. He scrutinised the "distributive justice" arguments about how to enable access to the courts for those who could not afford it. He acknowledged the view of the European Court of Human Rights that state support was necessary in some cases to uphold article 6 fair trial rights, "the implied right of access to court emphasises the importance of timely decisions at proportionate cost". But he said lawyers overstated the case for public support. He raised the question of 'how much [justice] is enough?' He examined the courts' function in delivering correct judgments. He said there was too much procedure in English law.

The article argued that the optimal level of funding and the precise mix of public and private funding for civil justice was a question of distributive justice, provided the system was compatible with the implied right of access to court and the functional nature of legal process. The article sought to identify the key ingredients of an equitable and efficient private funding model that met these requirements.

He examined private funding models using voluntary or mandatory cross-subsidisation or a mixture. He questioned whether placing the burden of funding access to justice for the poor on other people who could not access the courts was justifiable.

He examined the English models of compulsory cross-subsidisation, such as enhanced court fees, introduced in 2015, that the government said would help fund fee remission for the poor. Also, for centuries, English law had required the loser to pay all the winner's costs, however strong the loser's case was. Like Jackson, he said this system had a distorting effect, dramatically illustrated by the disastrously expensive results of introducing the CFA system. Nevertheless, CFAs themselves were not the cause of such "disastrous" effects, but the failure to properly regulate the costs that were subsidised.

> "As the *Coventry* case demonstrates, the English system delivers bucketloads of process dispensed by lots of well-trained lawyers, but that is not the same thing as legal process. If an optimal legal process requires no more than the most accurate procedure that can be provided at proportionate cost and within a reasonable time the question in the *Coventry* case is not who should pay the hundreds of thousands of pounds to litigate the ordinary nuisance claim, but how much process is due to decide the dispute?"

The costs in the case were ridiculously disproportionate. The claimants' costs alone, over £300,000, were more than 14 times the amount of damages awarded.

He looked at foreign systems. Even the USA accepted that some cross-subsidisation was necessary but they at least recognised the class action, which served the needs of people with good but low value claims. Nevertheless, the costs of litigation and representation were still high, suggesting that in common law systems there was a need for greater competition and a need to reduce the costs of the legal process by reducing the amount of process. Even the USA had accepted that some level of subsidisation was necessary to fund the poor. Claimants who successfully sue a government agency or large corporation can claim their fees back.

He argued that "[an] example of a well-designed funding model, built largely on private finance and using both voluntary and compulsory cross-subsidisation, is the German costs system". It provided for costs shifting, for fixed recoverable costs based on statutory fees. Court costs and lawyers' costs were calculated by reference to the value of the claim. Litigants could pay for a higher level of legal service out of their own pockets and contingency fees were restricted. The tariffs were partly set so as to allow the lawyer to cross-subsidise low-profit cases with more lucrative ones. German households would routinely pay for legal expenses insurance. He also observed that some civil legal systems, such as Italy, regulated the cost of legal representation in court. The European Court of Justice had praised the system in 2011. He concluded that there were five elements of a well-designed funding model:

1. Users need access to a range of funding methods. This will promote cross-subsidisation via insurance and contingency funding.

2. Users, or those funding them, must contribute something to the cost of their access to justice. Litigating an arguable case is not wrong.
3. Without public subsidy, justice for all was only achievable if subsidisation was compulsory.
4. Fees must be fully regulated and proportionate to the value in dispute and therefore predictable.
5. A model incorporating voluntary and compulsory cross-subsidisation is a necessary but not sufficient condition for access to justice for all. Reforming the underlying costs of litigation and representation was also necessary.

10-069 Online Dispute Resolution – Inevitable Extension
In the November speech above, Chancellor Vos said that ODR in commercial disputes would inevitably follow the introduction of ODR in small claims and in tribunals.

Chapter 11 Alternatives to the Civil Courts: Institutions and Procedures

1. Tribunals

Remember that everything said above, about court closures, digital by default, access to courts and the flexible use of courtrooms applies equally to tribunals so, for example, flexible use of rooms as both courts and tribunals is currently being piloted in a few places.

In his recent speeches, the Senior President of Tribunals, Ernest Ryder, has been usefully reminding us of his statutory duties and other duties, as he saw them. In his February 2018 speech on open justice, mentioned above he said,

> "while I carry out my duties I have regard to the need to ensure that: tribunals are accessible i.e., open, their judges are expert, that proceedings are fair, speedy and efficient, [under s.2 of the Tribunals Courts and Enforcement Act] and – perhaps most significantly – [citing his predecessor Lord Carnwath] that there is a 'need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals'"

Judges, he said, should be proactive in reform. He made the welcome announcement that he had indeed established an independent Administrative Justice Council, with an academic board to "advise upon governance and policy in the law".

Shifting work between courts and tribunals
From January 2018, the Central London County Court is piloting a scheme transferring uncontested cases about business leases into the First-Tier Tribunal (Property Chamber).

11-030 Video Pilots
In spring 2018, HMCTS started piloting and testing video hearings for tax appeals:

> "The video hearings will take place over the internet, with each participant logging in from a location of their choice, using a webcam and, for the purposes of the pilot, the judge located in the court room."

The first virtual tribunal case took place in March. A claimant appeared via his laptop camera, from Belfast to Clerkenwell, to dispute an HMRC (Her Majesty's Revenue and Customs) fine.

11-031 Tribunal Fees Scrapped – Denial of Access to Justice

In July 2017, the UKSC delivered a landmark judgment on assess to justice, when they ruled tribunal fees to be illegal, in *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51. As with all of their judgments, it is on their website, along with the usual excellent press summary. The High Court had judicially reviewed the fees, which had been prescribed by the Lord Chancellor (Minister of Justice) by delegated legislation, on an application by the union. The grounds were that it breached the common law and EU law, in that it interfered with access to justice, it frustrated the will of Parliament in granting employment rights and it discriminated unlawfully against women and other protected groups. Statistics demonstrated that the fees had significantly reduced low-value claims and those with no monetary value and the most common reason for not pursuing a claim was fees. In a seven-judge court, Lord Reed gave the lead judgment and Lady Hale gave the judgment on discrimination. The judges were unanimous. He observed that fees were up to £7,200 and counsel for the Lord Chancellor could not explain how they were arrived at. County court fees for small claims were much lower, with a maximum of £745. A couple who both earned the national minimum wage would not qualify for a fee remission. Research showed that the percentage of successful claims was lower after the introduction of fees. Therefore, the LC had not succeeded in deterring unmeritorious litigants, one of his stated aims in introducing fees. The proportion of cases settled by ACAS had decreased, supporting commentators who said employers were delaying negotiations to see if the claimant was prepared to pay the tribunal fee.

Lord Reed's judgment on access to justice is very important and has already been the subject of academic journal articles and has been cited in judges' public speeches so I cite it at length here, with important words emboldened:

> "More fundamentally, the right of **access to justice**, both under domestic law and under EU law, **is not restricted to the ability to bring claims which are successful**. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication." (para. 29).
>
> "**The constitutional right of access to the courts is inherent in the rule of law**. The importance of the rule of law is not always understood. Indications of a **lack of understanding include the assumption that the administration of justice is merely a public service** like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings…" (para. 66).
>
> "It may be helpful to begin by **explaining** briefly the importance of **the rule of law**, and the role of access to the courts in maintaining the rule of law… (para. 67)
>
> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which

> makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. **Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.** That role **includes ensuring** that the executive branch of **government carries out its functions in accordance with the law**. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other." (para. 68).
>
> Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords (*Donoghue v Stevenson* [1932] AC 562), the decision established that producers of consumer goods are under a duty to take care for the health and safety of the consumers of those goods: one of the most important developments in the law of this country in the 20th century." (para. 69).

Lord Reed could hardly have chosen a more important illustration. *Donoghue v Stevenson* was the very inception of the law of negligence, an invention of the judiciary.

> "When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect… **although it is often desirable** that claims arising out of alleged breaches of employment **rights should be resolved by negotiation or mediation**, those **procedures** can only **work** fairly and properly **if they are backed up by** the knowledge on both sides that a fair and just system of **adjudication** will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail." (para. 72).

He cited clause 40 of Magna Carta, as cited in the opening of chapter 6 of my textbook, about not selling, denying or delaying justice. He supported this by citing the authorities, Coke (1620) and Blackstone (1765-69), though that was redundant. He said there were plenty of examples of judicial recognition of a constitutional right of unimpeded access to the courts, citing Lord Diplock's famous statement in the House of Lords in *Bremer Vulkan* [1981] AC 909, 977. He said that, in the present case, for the tribunal fees to be legal, they had to be set "at a level that everyone can afford", reasonably not theoretically (paras. 91 and 93). People did not use tribunals by choice but because of circumstances, often unexpectedly. Even if the fees were affordable, it could be a rational choice not to pursue a claim if the amount claimed was low and there was no certainty of winning *and* the statistics indicated that only half of successful claimants managed to secure the money that they were owed. There was a further matter that was not a separate ground but should not be overlooked:

> "That is the failure, in setting the fees, to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972." (para.102).

The fees placed a disproportionate restriction on a right in EU law and were therefore in breach of EU law. (para 117).

Lady Hale said that the fees order was indirectly discriminatory under the Equality Act 2010 because a higher proportion of women brought the more expensive type of claim, such as pregnancy dismissal.

Fees refunded or to be refunded are around £33 million, with an administration cost of around £2 million.

2. ADR

In his November 2017 speech above, Chancellor Vos mentioned the use of predictive technology to forecast the outcome of disputes, pioneered in the USA and now in Europe. He also said:

> "I have recently been leading a European project involving the European Law Institute, which has investigated ADR across Europe. It has recommended a code of practice for judges to follow in considering whether to recommend ADR and in requiring litigating parties to engage in ADR. This is quite a controversial area in some European countries where the trust in ADR providers is low." (para. 29).

ADR and Arbitration

In the little *Legal Services are Great* brochure, mentioned under the Brexit section, above, it says

> "In 2016 over 22,000 cases in the UK were resolved by arbitration, adjudication and mediation. As home to the world's biggest specialist centre for commercial disputes, London is a leading hub for both alternative dispute resolution and commercial litigation. People across the world choose London as the place to resolve their disputes. At the London Court of International Arbitration 80% of parties are from overseas."

11-038 MIAMS

In January 2018, the list of exemptions was widened so as to make it easier for victims of domestic violence to excuse themselves. In *Family Law Week*, Moore and Brooks argue that they have not been a success. They were introduced in 2011 but parties largely ignored the rule that they were supposed to attend.

> "Attending a MIAM is a compulsory requirement before anyone can make an application to the court for certain financial remedy orders or certain private law applications relating to children, unless a MIAM exemption or a mediator's exemption applies. The application must therefore contain or be accompanied by confirmation

> that either the applicant has attended a MIAM or that a MIAM exemption is applicable." (31 October 2017).

3. Arbitration

In Hamblen LJ's December speech on "Myths of Brexit", mentioned above, he said London was a global arbitration centre because of the choice of specialist arbitrators, many being members of specialist bodies such as the London Maritime Arbitrators Association. London was home to the London Court of International Arbitration, the International Chamber of Commerce, Permanent Court of Arbitration and International Centre of Dispute Resolution. There were plenty of support services and the judiciary were highly supportive.

Chapter 12 Criminal Procedure

In the inaugural Criminal Cases Review Commission annual lecture, on 25th April, Sir Brian Leveson, President of the QBD, reminded us that historically, criminal wrongs were a private matter and not thought of as a crime against the state until Henry II's reign. See J. Langbein's *The Origins of the Adversary Criminal Trial* (2003). With the victim doing the investigating and prosecuting and, generally without a lawyer representing her, and all defendants unrepresented, the trial was, of course, inquisitorial.

> "Justice was not often long-delayed. From the start to the imposition of sentence, in the 16th and 17th century, trials took little more than 15 to 20 minutes to complete; jury deliberations typically took 2 – 3 minutes. They developed a slightly more leisurely pace in the 18th century, when a trial might last up to 30 minutes. A judge could get through up to 20 full trials a day".

Felonies were exceptional. JPs directed procedure, as examining magistrates.

The rise of the lawyers came in the 18th century but so did prosecutorial corruption. The whole speech is well worth a read, a reflection on the development of the criminal process from its swift and simple roots to its highly complex form now and the problems in achieving justice then and now. He is able to provide a highly reflective and intellectual overview as it was he who produced the efficiency review in 2015.

12-004 and 12-008 the presumption of innocence and the adversarial process

In *Defendant Participation in the Criminal Process* (2017) Abenaa Osuwu-Bempah critically examined the increasing obligation on the defendant to actively participate in the criminal process. She argued that it lacked justification and the process had shifted away from the values of fairness and respect for defence rights. She measured the law against the principles of the criminal process and examined the privilege against self-incrimination, the right to silence, disclosure and so on. See summary and review by E. Johnston, [2018] Crim. L. R. 421.

12-018 privilege against self-incrimination

Strasbourg jurisprudence was applied in *R. (on the application of River East Supplies Ltd) v Nottingham Crown Court*, report and commentary at [2018] Crim. L.R. 172. Here, the High

Court cited *Saunders*. The privilege did not extend to "the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers, but which has an existence independent of the will of the suspect, such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing".

12-029 defence lawyers still playing games for the client who pays
R. (on the application of Hassani) v West London Magistrates' Court [2017] EWHC 1270 reiterated the words of Auld LJ in *Gleeson* [2003] EWCA Crim 3357 that "the criminal law is not a game to be played in the hope of a lucky outcome, a game to be played as long and in as involved a fashion as the paying client is able or prepared to afford". This was a typical road traffic case where the client pays the lawyer to drag it out as long as possible and take as many spurious points as he can invent. At the trial, D gave no evidence. Counsel took a large number of points, in an attempt to lengthen the trial. He sought to apply for judicial review, arguing seven points. Permission was refused on the papers and counsel renewed that application. Fresh counsel was instructed and advised that the case be dropped. The Divisional Court chose to give judgment as it wanted to lay down guidelines on how to comply with the Criminal Procedure Rules. It approved the decision in *Cipirani* [2017] Crim. L.R 61.

12-031 Better Case Management
The Better Case Management Handbook was launched in January 2018, on the Judiciary website, here It is too detailed to be summarised here but aims to remind Crown Court judges to stick to national practice.

12-034 Another crowd-funded prosecution
In November 2017, a woman launched a crowd-funding appeal for a rape prosecution, after the CPS refused to prosecute on the grounds that there was insufficient evidence.

12-036 more empirical research on the negative effects of delegating prosecutions to paralegals
In "Prosecuting in the Magistrates' Courts in a Time of Austerity" [2017] Crim. L.R. 847, Laurène Soubise summarised the findings of her 2012 research for her PhD. She showed how most of the CPS workload in magistrates' courts was delegated to Associate Prosecutors, with limited supervision from Crown Prosecutors (lawyers). She argued that "In practice, the rules framing the powers of APs are simply unworkable as concerns over flexibility and speed appear to overcome the need for accountability". Like many academics before her, she expresses concern about the bureaucratisation of summary justice. Note the limitations of this research. The data were collected six years ago in four months in one CPS office.

12-040 Victim culture?
Once high profile media star Sir Jimmy Savile died in 2011, decades of unpunished child abuse were exposed. Similarly, when Sir Cyril Smith MP died in 2010, it transpired that there had been 144 complaints of child abuse against him but prosecutions had been blocked. This started a rash of allegations of sexual abuse of children and/or adults and against other high profile individuals, some of whom were convicted, such as Max Clifford and Rolf Harris in 2014. By 2016, there were more than 2, 228 investigations on the database of Operation Hydrant, the overarching national investigation into historic sexual abuse allegations. The suspects included 286 dead people and the DPP had to remind chief constables that dead

people could not be prosecuted. Nevertheless, the CPS has been accused of a victim culture in some instances. See for example David Corker's excellent analysis of the Court of Appeal's criticism of the DPP in attempting to use Part 10 of the Criminal Justice Act 2003 to apply to retry Mr Reilly for a 1984 murder, despite medical evidence that he would never be fit to be tried: D, Corker, "The Dangers Associated with a Vindictive CPS" 187 *Criminal Law and Justice Weekly*, 804, December 2, 2017.

12-042 Race and criminal justice

The undated and long-awaited final report of the Lammy Review, by David Lammy MP and commissioned by two prime ministers, was published in 2017 here. Its title is *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System.* One primary recommendation was enhanced data collection and

> "If CJS agencies cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities. This principle of 'explain or reform' should apply to every CJS institution." (Recommendation 4).

12-045 Transform Justice reports on bail

In March 2018, the pressure group Transform Justice produced a report on bail here. It examined every aspect of bail statistics and recommended that the criminal process be slowed down, video hearings should not be expanded, judges and magistrates should be better trained and the law should be reformed.

2-057 scandalous disclosure failures

It beggars belief that the CPS could now be performing even worse at disclosure but in early spring 2018, several rape trials had to be dropped when exculpatory evidence came to light at the last minute. In December 2017, a former DPP, Ken (now Lord) Macdonald claimed that defendants were being treated with contempt because of a victim culture. A Criminal Law Solicitors Association survey of 500 lawyers found that 98% reported disclosure failures.

12-065 the brave new world of virtual courts – again

A report by the pressure group Transform Justice in October 2017, *Defendants on video – conveyor belt justice or a revolution in access?* concluded that the mass use of video links from prisons or police stations for court appearances put defendants at a disadvantage:

> "The hidden story of virtual justice is of the harm the disconnect does to the relationship between lawyer and client. The rigid timetable leads to "stopwatch" justice, in which lawyers try to beat the clock to get instructions from their clients, many of whom have challenges understanding the basics of the criminal justice process.
>
> The defendants who appear on video are all, to a lesser or greater extent, vulnerable. They appear alone save a custody officer, isolated from the court, their lawyer, court staff and family, with their ability to communicate hampered by poor technology. No wonder they often appear disengaged or frustrated. Virtual justice further renders people vulnerable by providing no adjustment for those with mental disabilities. In

> some specific circumstances the ability to give evidence on video may be beneficial to those who have mental health issues, particularly social anxiety, but practitioners felt that virtual justice mostly exacerbated existing difficulties in assessing disability and vulnerability and in facilitating the participation of disabled people. Those with English as a second language and unrepresented defendants were also felt to be at a significant disadvantage." (p. 33)

The main source of information was a SurveyMonkey survey to which 180 criminal justice practitioners chose to respond, plus an examination of international articles and research.

Tom Hawker mentions his PhD research in the editorial at [2017] Crim. L.R. 585-6. He interviewed 20 Crown Court judges. They expressed negative comments about prison video links: the loss of gravitas, the practical and physical barriers to communication and technical and procedural concerns.

In March 2018 a district judge took a guilty plea from Thailand on facetime.

12-067 Speedy justice but is it justice?
In November 2017, Sheena Jowett, deputy chair of the Magistrates' Association, said magistrates were reluctant to release offenders back into the community, because they often had too little information on them. They were being pushed for speedy justice and were expected to sentence an offender on the day they pleaded guilty. She said magistrates needed more information before sentencing, yet they had no contact with local community rehabilitation companies. (Westminster Legal Policy Forum seminar – Law Society's *Gazette*, 8 November).

12-083 Appeal by way of case stated
The appeal may be made on an issue of law or jurisdiction. Wrong findings of fact only become an error of law if the finding of fact was "perverse in the sense that no reasonable tribunal could have reached that conclusion", per Ward LJ in *Braintree DC v Thompson* [2005] EWCA Civ 178. The magistrates can refuse to state a case if the application is frivolous. See comment on *R (on the application of Skelton) v CPS* [2017] EWHC 3118 (Admin) at [2018] Crim L.R. 330. Appeals by way of case stated and applications for judicial review are so similar and whether one or the other is appropriate is so confusing that if the Divisional Court thinks the wrong one has been applied for they will treat it as the other type, to save trouble. See comment at [2018] Crim. L.R. 254.

12-089 receiving fresh evidence
See H. Blaxland, "Sappers and Underminers: Fresh Evidence Revisited" [2017] Crim. L.R. 537. He argued that the CA was in danger of reverting to the test in *Stafford v DPP* [1974] AC 878 which, he argued, seemed to allow the CA to decide for itself whether the appellant was guilty and which "so lowered the reputation of the criminal justice system in the public eye that it was deemed necessary to set up a Royal Commission" (p 542).
12-097 the Criminal Cases Review Commission
In December 2017, the Ministry of Justice announced that it was launching a "tailored review" of the CCRC. Each government department is obliged to do this every five years, as part of the government's requirement to reform public bodies.

Further Reading

On Miscarriages of justice in general: M. Sato, C. Hoyle and N. Speechley, "Wrongful Convictions of Refugees and Asylum Seekers: Responses by the Criminal Cases Review Commission" [2017] Crim. L.R. 106.

Chapter 13 Lawyers

There are no significant updates on the legal profession (thankfully!), just tiny news items from *Westlaw*.

13-001 Solicitors keep on multiplying as the Bar declines
As of August 2017, there were over 14,000 solicitors with practising certificates. Some experts had warned that this constant growth was unsustainable. In the meantime, in November 2017, the incoming Bar Chairman warned that the number of barristers of less than five years call had declined by 10 per cent. The number of barristers with more than 30 years' experience was five times as many as in 1990. This bit was not news.

In October 2017, the Criminal Bar Association said that there were now 50% fewer junior barristers of up to five years call than there were a decade earlier. They had received a surge of complaints about bad listing practices in the criminal courts, with bad consequences for caring arrangements and barristers' finances. It was becoming much harder and more stressful to make a living and the Bar was "haemorrhaging talented women". (Chris Henley QC, as quoted by N. Rose in *Legal Futures*, 17 October 2017).

13-003 Inns of Court involvement in Bar training and qualification
In a press release on 23 March, the BSB issued a policy statement that this would continue, in any new training regime. Any new rules will come into effect in 2019.

13-004 SQE
The SRA has now produced its third consultation on the SQE. The response, in November 2017, is on their website. The reason for inventing the SQE was consistency, because results from the current LPC differ between providers. Solicitors' training requirements in future will be SQE 1 and 2 as approved by the SRA, character (meaning ethical behaviour and suitable character), work experience (training contract or apprenticeship etc), and a degree or equivalent.

13-006 Recommended minimum pay for trainee solicitors
Is going up to £21,561 in London and £19,122 outside London from May 1 2018.

13-007 LPC results differ according to ethnicity
SRA research, published in January 2017, *Authorisation and monitoring activity September 2015–August 2016* showed that while 80% of white students successfully completed the LPC, only 53% of Asian students and 40% of black students passed. Research by Chambers Student showed that 51% of trainees at top law firms are privately educated. (*Times*, 15 February 2018).

13-007 "Unlocking the Benefits of Diversity"
This is the title of a review published by the SRA in October 2017. It reviewed existing research. It examined career motivating factors for women and minorities, firms' efforts to develop a diverse and inclusive culture (including the promotion assessment process), and

how some of the identified barriers could be dismantled. Research on what motivates people on the career choices is interesting but some of it has been known for a long time, such as family-friendly and flexible working hours, job security and the firm's culture.

13-007 harassment at the Bar
In a March 2018 article in *Counsel*, Selena Plowden and Kate Brunner complain that harassment of young women is "all too prevalent", with the close-knit nature of the Bar making it difficult to complain.

13-007 gender pay gap
In March 2018, Norton Rose Fulbright disclosed that if you included equity partners, their gender pay gap rose from 17% to 49%.

13-021 law firms
Chicago firm Kirkland and Ellis were the highest earning law firm in 2017, with revenues at $3.165 billion. They have offices in NY and London.

13-034 QASA
…..was abandoned in autumn 2017! Haha! Bar wins this round of Bar Wars. Nevertheless, in November 2017, the BSB confirmed that there would be compulsory registration for youth court advocates, as explained in this section of the textbook.

13-040 ABS examples
There are now over 1000 ABSs. You can discover new examples of alternative business structures in the news section of legalfutures.co.uk, which are in turn reported on Current Awareness in *Westlaw*. Here is an interesting example: solicitors who have set up a firm called Marlborough Law have chosen to be regulated by the Bar Standards Board, not the SRA.

13-040 and 13-041 innovation and regulation

In September 2017, the Lord Chancellor refused to designate the Institute of Chartered Accountants as an approved regulator of reserved legal activities, despite the fact that they had the backing of the LSB.

13-041 market study
In December 2017, the government responded to the CMA market study. The ministry of Justice explained that right now, it was unable to conduct a review of the independence of regulators or the current regulatory framework.

13-042 Fusion: do we need two professions?
June Ventners, the first solicitor advocate QC, who was also called to the Bar in November 2017, was interviewed by the Law Society's Gazette. She was in favour of fusion, though she felt that the two professions were moving apart. Having been a silk for ten years, she had previously complained of the prejudice against solicitor advocates by barristers and judges. ("Time to end solicitor-bar divide, first female solicitor QC says" *Gazette*, 21 November 2017).

Chapter 14 Judges

UK judges internationally

UK judges are spectacularly outgoing and readily learn from overseas visits and judicial visits to the UK. Arden LJ was Head of International Judicial Relations in England and Wales (now replaced by Gross LJ). She drafted the LCJ's Objectives of International Judicial Relations, which are on the Judiciary website. These are (paraphrased):

- Developing links with EU and Council of Europe judiciaries.
- Participate in international judicial bodies and conferences.
- Have bilateral exchanges – these have been going on for years.
- Participate in projects on law reform
- Support the judiciary in developing countries.

In a very informative speech on 26 October, "International Judicial Work", she reported, "In the legal year 2016 to 2017, officials arranged some 41 incoming visits for approximately 222 international delegates from 23 different countries. This comprised four delegations from Africa, five from the Americas, 11 from Asia, six from Europe, and one from Australasia." Among other examples, there is a Head of International Family Justice, a European Committee of the Judges' Council and training for overseas judges, carried out by the Judicial Studies Board. There is a Standing International Forum of Commercial Courts.

14-002 Governance and Leadership

In his recent speeches, the SPT, Sir Ernest Ryder has been explaining the distribution of functions between the judiciary and executive, in managing the courts and judges, and on the governance of the judiciary.

14-003 LC

In January 2018, David Gauke became the first solicitor LC to be appointed Lord Chancellor.

14-019 the public at large criticising judges

In his December 2017 press conference, the LCJ, Lord Burnett said

> "Of course judges must earn that respect, and should not be immune from criticism for their decisions; but fair criticism is different from abuse. By this I mean those cases where judges face a torrent of personal abuse for decisions they have made – increasingly online and in social media – and a growing number of cases where judges are threatened and physically abused. Some is calculated to intimidate judges individually or collectively. Such abuse is capable of undermining the rule of law. Judicial independence and impartiality is at the heart of the rule of law. So I want to build on the work already being done in schools to enable children to learn about the justice system, the rule of law and the independence of the judiciary. Lesson plans are available and perhaps it is something worth focussing on more. We have hundreds of judges visiting schools and working in their local communities and supporting school visits to the courts. This is unsung work of great value."

14-021 bias and 14-044 removal and discipline

Things became worse with Mr Justice Peter Smith. He retired on 28th October 2017, two days before his disciplinary hearing was scheduled. He had been suspended and been asked to stop sitting as a judge for months because of his staggering conduct in 2015. Joshua Rozenberg, one of the most famous legal journalists, tells the ridiculous story, in April 2017, in *Legal*

Cheek here After BA lost his holiday luggage in summer 2015, Smith wrote to complain to the BA Chairman, warning that he was the judge who had been nominated to hear a long-running action against BA. At the end of the hearing, he ranted at lawyers about his own luggage again. As Rozenberg pointed out, the *Guide to Judicial Conduct* states "a judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else." That much is blindingly obvious. As if that were not enough, when Lord David Pannick wrote a critical article for *The Times* in 2015, the judge wrote a complaining letter to Pannick's head of chambers that the Court of Appeal described as "disgraceful". He threatened, "I will no longer support your chambers". Rozenberg criticised the astonishing delay, since 2015, and lack of transparency by the JCIO. He had called on Smith to resign almost a decade earlier.

14-042 politicised selection
Thankfully, a Times poll of nearly 400 barristers showed that 87% were opposed to Baroness Hale's suggestion that politicians should be involved in appointing judges.

14-059 lack of diversity in 2017
In his December 2017 press conference, the LCJ, Lord Burnett, said

> "You really need to look at the proportion of non-white people in the legal profession and perhaps more generally in the working population within the age cohorts where most judges sit. So, 80 percent of judges are over the age of 50, for example, and in that age group only nine percent of the working population is from an ethnic minority and the proportions are much lower for those over 60, for example, when many of the very senior judiciary sit in age terms. So, the figures are perhaps rather better than those people would assume and what is so encouraging is that when one looks at the age profile of the judiciary, the younger the cohort of judges, the greater the proportion of both women and ethnic minority representation."

14-077 UKSC's lack of diversity
Three new UKSC judges were needed in 2018. By autumn 2017 the outgoing President Neuberger had announced more reforms to try and recruit a diverse pool. These included a familiarisation scheme, a flexible part-time working opportunity, and an equal merit test. The last recruitment round ended in January 2018 but the information pack and criteria are still on the UKSC website here

14-078 Lost opportunity
In December 2017, The Bar Council criticised the Government response to the Lammy Review as a missed opportunity to address the lack of judicial diversity.

14-078 2006 reforms have not succeeded
Michael Blackwell of the LSE showed that the 2006 reforms had very little impact on judicial diversity. Also, reducing the necessary post-qualification experience had had virtually no effect. ("Starting out on a judicial career: gender diversity and the appointment of Recorders, Circuit Judges and Deputy High Court Judges 1996—2016") (2017) 44 JLS 586-619.

14-078 Parliament on judicial appointments
In November 2017, the House of Lords Select Committee on the Constitution published Judicial Appointments: follow-up to its 2012 inquiry on judicial appointments here

To paraphrase their concern, these are the main ones:

1. They were "deeply concerned" that judges' grievance about pension changes had damaged morale and reduced the appeal of a judicial career.
2. Working conditions: staff, buildings, IT.
3. The convention against judges returning to practice
4. The fixed retirement age
5. Personal attacks on judges: the Lord Chancellor should proactively defend them as they cannot defend themselves.
6. The ban on recruiting CPS and government lawyers
7. The barrier to legal executives above district judge level.
8. The lack of solicitors and legal executives applying: a cultural change in law firms was needed.

14-078 current stats
As with magistrate statistics, the annual diversity stats are on the Judiciary website, both Excel grids and a narrative summary, which shows that in July 2017, 25% of court judges and 45% of tribunal judges were female. 7% of court and 10% of tribunal judges were BAME. 16% of non-lawyer tribunal members were BAME. 38% of non-lawyer tribunal members were BAME.

Barrister Richard Archer became the youngest recorder appointment in recent times when he was appointed aged 32 in 2018.

14-084 naughty lawyer portrayed as "judge" again
In my 2011 book, I pointed out that whenever a lawyer is caught committing an offence or doing something reprehensible, he or she is reported to be "a judge", if they happen to sit as a part-time fee-paid judge. This was typified by the report of a solicitor convicted of fraud in November 2017, said to be a narcissistic judge".

Welsh appointment
December saw the first judge appointed solely to serve Wales. A new President of Welsh Tribunals was created by the Wales Act 2017.

Chapter 15 Magistrates

15-002 numbers
The July 2017 statistics, on the Judiciary website, show that there were 16, 129 lay justices and 138 professional magistrates (district judges (magistrates' courts)).

15-003 recruitment and eligibility
Despite the continued and significant decline in numbers, "There remains a significant shortfall in the number of magistrates required to deal with an increasing Family workload" (letter from Jo King, national Bench Chairmen's Forum, to magistrates. The letter announced that recruitment criteria had changed accordingly. Magistrates appointed from April 2017 could be recruited straight to the family bench. They would no longer be required to sit in adult criminal courts for two years. The Gov.uk website information has been updated here and there is a new pdf document Becoming a Magistrate in England and Wales - a guide for prospective applicants

Do not forget you can keep up to date on most matters concerning magistrates and their courts by browsing the Magistrates' Association website.

Chapter 16 The Jury

16-027 allegation of impropriety – what not to do

An example of the judge doing the wrong thing and not following the instructions of the law lords in *Mirza* is *R. v Davey (Jason)* [2017] EWCA Crim 1062, report and commentary at [2018] Crim. L.R. 58. The commentator emphasises the importance of the judge following Criminal Practice Directions. Here, deliberation was on a Friday afternoon and after verdicts were brought in, two jurors complained that they had felt under pressure to bring in a verdict so as not to have to return on the following Monday.

In his keynote speech to the Criminal Bar Association conference, on 25 November 2017, Lord Justice Singh reminded lawyers that

> "The introductory remarks by the trial judge to the jury should mention right from the start of the trial that they should not talk about the case even to other members of the jury except when they are all together. This does not always happen and, if it does not, counsel for the parties should remind the judge of the need for this."

He mentioned a Court of Appeal case he had been involved in a few months earlier, where this had not happened. Some members of the jury had talked about the case in the pub but in the end, it did not affect the outcome of the appeal. For your information, good practice for judges is set out nowadays in *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* November 2017, which is on the Judiciary website here See Part 3 Trial Management. He also gave a warning about jurors picking up, via their smart phones, a judge's remarks that had been made in the courtroom in their absence but circulated on social media by someone who had been in the gallery. This occurred when he was a judge in a murder trial at Lewes Crown Court in 2013.

16-040 Juries in fraud trials – renewed criticism

Following inconsistent verdicts in the Libor fraud trials, where city bankers were accused of manipulating money markets, the outgoing head of the Serious Fraud Office, David Green, called for the abolition of juries in serious corporate crime. (*Sunday Times*, 22 April 2018). One person was convicted. Six other traders accused of working with him were acquitted in a separate trial.

16-042 quantum of proof jury direction

I have long argued that the word "sure" should be eliminated from the jury direction on "beyond reasonable doubt". All it does is confuse jurors and send some jurors looking for absolute proof, which is impossible. There is plenty of evidence that it confuses jurors. I see no need to qualify the words "beyond reasonable doubt", other than perhaps to explain that if there is a reasonable doubt in their minds they must give the benefit of the doubt to the accused. See now, *R. v JL* report and commentary at [2018] Crim. L.R. 184. At the trial, the jury unsurprisingly asked the judge, "Do we need to be 100% certain of guilty/not guilty or can we decide beyond reasonable doubt? If so please can you define what beyond reasonable doubt actually means?" Paul McKeown's commentary makes the same point that I have been

making since I criticised the jury direction in 2001, in the meta-analysis of jury research conducted for Auld LJ.

16-044 Jury decision making
In "Ethnicity and the Fairness of Jury Trials in England and Wales 2006-14" [2017] Crim. L.R. 860, Cheryl Thomas expanded and updated her analysis of defendant ethnicity and verdict. She found that BAME (Black, Asian and minority ethnic) defendants did not experience a higher conviction rate than whites. "For offences that make up over three-quarters of all jury verdicts, jury conviction rates were either similar for White and BAME defendants or white defendants were convicted substantially more often than BAME defendants." (p. 860). What is not explained and examined in her article, however, are the effects of differences in the right to elect jury trial. It may be that non-whites are more likely to exercise their right to elect, as previous research indicted.

Chapter 17 Legal Aid

12-032 Legal aid pay cuts
In a March 23rd open letter to the Minister of Justice, a group of QCs from Garden Court Chambers warned of the impact of cuts in legal aid on the criminal defence bar, via the new Advocates' Graduated Fee Scheme. They complained of the 40% cut in the incomes of barristers doing publicly funded work in the last 20 years: thetimesbrief.co.uk. Following similar changes in The Litigators' Graduated Fee Scheme, The AGFS is being changed by delegated legislation on 1 April 2018 to be based on the complexity of the case instead of the number of pages of prosecution evidence. The Criminal Bar Association claims that this will cut legal aid spending by £2 million yet the Ministry of Justice claims spending will increase by £9 million. In the MoJ press release on 23 February 2018, the scheme was promoted as "fairer pay". It is scheduled to come into force on 1 April. By 10 April, it was reported that 50 sets of chambers had joined the direct action and barristers were refusing to take on defence work. A Bar Council survey of 4000 barristers published in April found that one third were dissatisfied with their careers. As I write, on 27 April 2018, a new consultation has just been published.

17-035 Rise in unrepresented family litigants
Statistics demonstrate that since the legal aid cuts came into effect in 2013, there has been a 35% rise in cases where both parties are unrepresented. Judges continue to complain that this is a burden on judges and the point was made yet again by Lord Judge, former Lord Chief Justice.