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£2.5 Billion for Building Prisons £1 Billion for Building Schools

Last weekend's re-announcement of plans to waste £2.5 billion building four new prisons brings home just how deeply entrenched prisons are as social institutions. This latest announcement is something of a repackaging and enhancement of a pledge made several years ago, during David Cameron's premiership, though with a difference. Cameron's government proposed a "new for old" policy. The latest plans, a manifesto pledge from last year's General Election, are unambiguously expansionist: 10,000 new places, on top of the 3,500 pledged under a previous programme.

To put these latest plans in perspective, alongside its prison plans, the government also announced, plans to spend a mere £1 billion, over a decade, on a "major new investment" in school buildings. There can be few better examples of misguided priorities than this. Governments in London and Edinburgh are busily expanding prison capacity. Over 25,000 additional places have either been created or are being planned in the coming years.

Wolf in Sheep's Clothing: Whilst extolling the benefits of prison construction to local economies is a tried and tested way of selling it to wary local residents, the reiteration of the policy in this way and at this point in time suggests that the Conservative government see deteriorating economic conditions as the perfect opportunity to thrust new prisons onto desperate communities. But there is another, more malign way in which the building of new prisons will interact with the economic and social consequences of coronavirus. Unemployment is expected to surge this Autumn if the furlough scheme is not extended. There have already been significant increases in out-of-work benefit claims. Social distancing measures and lockdown have interrupted other forms of social provision and support, and social isolation is having a heavy toll on mental health. In short, precarity and vulnerability are being extended to greater numbers of people, and intensified for those who bore the brunt of a decade of austerity. The pool of candidates for prison is increasing.

Reimagining the Law: Transcribing injustice

A recent project by the British Institute of International and Comparative Law (BIICL) invited a range of legal commentators from practising lawyers to former judges, academics and journalists to 'reimagine the law' and ask what they would change about the justice system. Jon Robins, editor of The Justice Gap, proposed: 'At the end of the trial defendants should be presented with a USB stick with an audio-recording of the entire trial. Trials are digitally recorded anyway; transcripts are prohibitively expensive and (bizarrely) courts destroy recordings after seven years. In one (almost) cost free move, the courts could increase transparency and provide a lifeline to the wrongly convicted.'

This article supports this call for defendants in criminal trials to be given an audio-recording of the entire trial at the end of the proceedings. In so doing, it highlights the barrier to justice that court transcription services can present to alleged innocent victims of wrongful convictions who hope to overturn their conviction in the Court of Appeal (Criminal Division) (CACD) or by a referral back to the court of appeal by the Criminal Cases Review Commission (CCRC).

This barrier to justice exists because alleged innocent victims of wrongful convictions who were convicted at the Crown Court and hope to overturn their convictions in the CACD or by a referral by the CCRC must, save in exceptional circumstances, have 'fresh' evidence, interpreted as something that was not or could not have been available at the time of the original trial (under s.23(2) of the Criminal Appeal Act 1968). Yet, the exorbitant cost of obtaining transcripts of criminal trials can and does inhibit investigations into claims of innocence by alleged victims of wrongful conviction and/or imprisonment cases. It means that they may never find the so-called fresh evidence that is required by the CACD or the CCRC to have their convictions referred and/or overturned.

The argument forwarded here, then, is straightforward. Transcripts of the trial are essential for alleged victims of miscarriages of justice (or those assisting them) who need to know in detail what was said in the trial so that they are well placed to find the fresh evidence that is required by the CACD.

Put simply, you need to know what went on in the trial to know whether the available evidence is new or fresh. These issues are explored in the remainder of this article through an analysis of the restrictive costs of obtaining transcripts of the trial in a case of an alleged wrongful convictions that is being assisted by Empowering the Innocent.

Last month, I wrote for the Justice Gap about the case of David Nash and his dying declaration of innocence, exploring whether a posthumous application could be made to the CCRC on his behalf by his surviving sister or daughter (here). Readers may recall that he was convicted, along with eight other defendants of an alleged drugs conspiracy that was likened during the trial and in the press to the Netflix series, Breaking Bad (see here and here), for which he was given an 11 year prison sentence.

Empowering the Innocent is also assisting one of hie co-accused, Steven Williams, who was sentenced to seven years for his alleged part as the 'facilitator' in the alleged drug conspiracy, although no drugs or trace of drugs or drug making equipment was ever found in any of his premises. Mr Williams has been given permission from the HM Courts & Tribunals Service to obtain the transcripts of his trial. We need the transcripts to attempt to verify his claims that false and misleading evidence was given at his trial by police officers and forensic science expert witnesses and decide whether we can assist him in making an application to the CCRC.

The Transcription Agency in Kent is the Ministry of Justice approved supplier of offsite transcription dealing with the request. The standard rate of transcription that has been quoted in an estimate to Mr Williams for his transcripts is £1.13 per folio from audio recordings plus VAT, with a folio consisting of approximately 72 words uttered during the course of the hearing. More specifically, the quotation provides an example of the indicative cost for 291 minutes of audio recording of the trial at the standard rate of £765.33 + VAT, which works out as £918.40.

To calculate the estimate for a full set of transcripts of Mr William's trail, 291 minutes of audio recording equates to 4.85 hours of the trial, which is approximately one day of court time as a normal court day is 5 hours, 10 am to 4 pm, with an hour for lunch. Mr Williams had two trials. One that lasted six weeks and a second that ran for 12 weeks. This equates to 18 weeks or 90 days at £918.40 per day, which amounts to £82,620 for his transcripts. According to Mr Williams, however, this is a conservative estimate as some days the court sat as late as 5.30 pm.

In addition, the estimate letter explains that the final number of folios is subject to change depending on the nature of the hearing, the speed at which individuals speak and the number of interjections from parties. This would also increase the overall cost of obtaining the transcripts of the trial if there were more folios than estimated. The cost of the transcripts would increase still further if he wanted them quickly as the standard rate quoted in the estimate applies to a 12 working day turnaround service, with an uplift in the folio rate, and the cost of the transcripts, for shorter turnarounds depending on whether a seven working day, three working day, 48 hour or 24 hour service was required. To add further context, Mr Williams claims that he was financially stable with a lucrative business before his alleged wrongful conviction but now lives on £64 a week carers allowance, which he receives for looking after his elderly mother who is 87 years old.

Moreover, Mr Williams claims that not only did his business collapse whilst he was in prison, that he now has tens of thousands pounds worth of debts relating to business rates that he failed to pay when he was in prison that he did not have when he was convicted, which he is also fighting to overcome. The bottom line, then, is that Mr Williams cannot afford to pay for the transcripts so we can neither confirm or deny his claims that lies were told in his trial and that the evidence against him is not to be relied upon.

This means that his only hope of overturning his alleged wrongful conviction is by an application to the CCRC setting out his claims with a request that they investigate them. However, with a current rejection rate of 99% of applications (here), and nothing to substantiate his claims of police and expert witness corruption and misconduct, the CCRC is unlikely to use its powers and dwindling resources (here) to determine whether Mr Williams' application meets it's 'real possibility test' (here) and may well simply view it as just another convicted criminal trying it on.

Emily Bolton of the legal charity APPEAL (formerly the Centre for Criminal Appeals) noted in response to a previous article in the Justice Gap: '[I]n the US you have access to the full transcript of the trial and in many states, all the police file and all the prosecution file, once a conviction becomes final when the direct appeal is denied…[in] Mississippi, a prisoner gets a record of everything that was said in his or her trial.' One might be forgiven for thinking that the notion that the British criminal justice system is the best in the world is a myth. The more one delves, the more barriers to justice one discovers.

UK Intelligence Torture Case to be Held in Secret After Challenge Fails

Dan Sabbagh, Guardian: Judges throw out demand by two MPs and human rights charity for public hearing. A judicial review aimed at overturning a decision to ditch a judge-led inquiry into the involvement of British intelligence in torture and rendition will be heard in secret after a challenge involving two MPs failed. The Conservative David Davis and Labour's Dan Jarvis had joined with human rights charity Reprieve to demand the case be heard in public after it emerged that a further 15 potential cases of post 9/11 human rights abuses may exist.

Presiding judges Dame Victoria Sharp and Mrs Justice Farbey ruled on Tuesday that neither the charity nor the MPs had a right to have the full case heard in public because they were not themselves victims of torture or rendition. "In these circumstances, it is difficult to envisage how the present judicial review proceedings – which concern the investigative duty – have anything to do with the claimants' civil rights," the judges concluded.

Reprieve said it had wanted to see a "bare minimum" of information to properly understand the UK government's defence and said in a statement it would consider an appeal. "History shows that in the absence of public testing and scrutiny of the evidence, justice is not done," Maya Foa, the director of Reprieve, said. If the decision is not appealed against, a full hearing will be heard in secret with Davis, Jarvis and Reprieve represented by two special advocates, who will not ordinarily be allowed to communicate with the claimants.

An earlier hearing heard that 15 potential cases of torture or rendition involving British intelligence at the height of the "war on terror" were examined last year in a previously secret Whitehall review. MI6 had told the court that "none of these 15 cases presents an extant and unmet investigative obligation" – a form of words that did not rule out that torture or rendition involving British intelligence had in fact taken place. Priti Patel, the home secretary, added in a witness statement that extra material could not be disclosed to Davis, Jarvis or Reprieve or heard in public because the interests of national security would be damaged as a result.

The MPs and the charity want the government to reverse a decision made by Theresa May in the dying days of her premiership to abandon a promise made by the former prime minister David Cameron to hold a judge-led inquiry into British involvement in torture and rendition in the years following 9/11. The most notorious case is that of Abdel Hakim Belhaj, a Libyan dissident who was abducted by the CIA in 2004 from Thailand and sent back with his wife, with the help of information supplied by MI6. Once back in Libya he was tortured and sentenced to death, although he survived and ultimately received an apology from May. A public inquiry under Sir Peter Gibson was halted by the government while the Belhaj case was concluded in the courts. An ensuing inquiry by the intelligence and security committee was abandoned after being prevented from taking evidence from witnesses in the intelligence agencies.

Benjamin Bestgen: 21st Century Lie Detection – Part One

Last month, I sketched out some definition problems we encounter when considering what a lie is. I also noted that humans are bad lie detectors. Research tells us that even supposed experts on lying – police, lawyers, psychologists, HR personnel – are not great at classifying truth and lies correctly, with an accuracy only slightly above 50 per cent. Based on feedback received, lie detection seemed to spark some interest, so I dug deeper into the subject – naturally not with the aim of making anyone a better liar. Most of us need help with spotting lies better, not telling them. How can we do that? The gold standard for lie detection is to tell accurately when a specific individual lies about or in response to a specific question or scenario. A mere guess – educated or not – that someone may be lying is not good enough.

Can technology help? Humans have pondered lie detection techniques for centuries. Some believed liars would be unable to recite certain prayers or touch holy objects. Others considered that liars are anxious and cannot produce much spit, so a suspect was forced to stuff their mouth with dry rice and spit it out again (tricky even if your mouth isn't dry, I've tried). Nowadays, an entire industry wants to help spotting liars more reliably. In the US, polygraph ("lie-detector") tests are conducted not only by law enforcement but can form part of job interviews for the police or paramedics, being an estimated US$2bn/pa business.

Polygraphs have been debunked repeatedly as completely ineffective, are hardly used outside the US and are generally inadmissible in court. But they exemplify the common belief that liars display physical signs ("tells") that truth-tellers don't and a polygraph helps detecting some of those. Blood pressure, perspiration, breathing, eye contact, pupil size, pulse, a dry mouth, various facial micro-expressions are all physical signs allegedly involved in lying. But they can also indicate stress, illness, medication, fatigue, excitement, concentration, surprise etc. A truthteller might be stressed trying to recall an event accurately or nervous because of an intimidating interrogation while a liar could be well at ease. Polygraph methodology and results are so ropey and open to interpretation as to be useless for telling truths from lies.

More recently, fMRI (functional magnetic resonance imaging) analysis explores if lies could be detected by analysing brain regions associated with the cognitive processes involved in lying. Problems of methodology aside, the brain areas most closely associated with lies and deception are also involved in planning, working memory, attention and inhibition control. fMRI also does not measure "brain activity" itself. It follows the flow of oxygenated blood: more oxygenated blood in a specific area indicates more neural activity. But blood flow and oxygenation levels are also influenced by age, medication, fitness or vascular capacity. The influence of anxiety, tiredness, stress or fear on fMRI results are also poorly understood to date. In their current state, experts

note that fMRI lie detection attempts are unsuitable for use: it is highly debatable how fMRI results should be interpreted, what neural activity really indicates, how reliable the tests are or whether lie detection tests done in laboratory conditions even work in real-world settings.

How about truth serums? In law enforcement or intelligence services, learning the truth can be a matter of justice, security or life and death. Intelligence agencies combine well-structured interview techniques with breaking down a person's ability to concentrate or refuse cooperation. In narcoanalysis, suspects might be given sodium thiopental or amobarbital which induces disorientation, drowsiness and makes the subject talkative.

Another technique involves depriving a suspect of food and sleep for several days, followed by a hearty meal and a large glass of wine. The exhausted body is overwhelmed by the food and alcohol, blood flow goes towards the stomach and a skilled interviewer may find it easier to elicit unguarded responses. The ethics and legality of such techniques aside, they are not that reliable either. Narcoanalysis or alcohol tend to make subjects more talkative generally, eliciting both true and false information but do not reliably help to divide truth from falsehood. Similar points apply to all kinds of torture, which may well make a person talk but does not guarantee truthful statements. But not all is lost – in part two of this article, I will present some psychological research that appears more promising and does not require technology, drugs or "softening up" a suspected liar through torture and inhumane treatment.

Challenge Concerning Lack of Safeguards for Immigration Detainees in Prison

The Court of Appeal has granted our clients permission to appeal in the case of MR (Pakistan) and AO (Nigeria) v SSJ and SSHD [2019] EWHC 3567 (Admin). Immigration detainees held within immigration removal centres (IRCs) have access to important safeguards to limit the detention of vulnerable individuals. This includes Rule 34 (which mandates all individuals entering the detention estate to have a full medical examination within 24 hours) and Rule 35 (which requires doctors to report to the SSHD cases where an individual claims to be a victim of torture, have suicidal ideations or whose health is likely to be affected by detention, so that their suitability for detention can be reviewed accordingly). There are no such equivalent safeguards for those detained under immigration powers in prison. In a judgment handed down on 20 December 2019, Mr Justice Supperstone dismissed the Claimants' claim for judicial review, largely on the basis that medical issues and vulnerabilities for those detained under immigration powers in prison are usually already known to the SSHD, due to the time that the individual is likely to have spent in prison serving their custodial offences.

In considering the Claimants' appeal, the Court of Appeal has granted permission on the following grounds: a. The fact that detainees' medical information is already held by the prison estate is no answer to the critical question as to whether a detainee is a (potential) victim of torture because the Prison Rules do not prompt the question. There is nothing in the Prison Rules that compels the provision of any medical information held by the Prison Service to decision makers considering continued detention. b. Where such critical information has not reached the decision maker, it cannot be fair, and offends public law duties (Secretary of State for Education and Science v Tameside MBC [1977] AC 1014). c. The Judge had erred in his approach to the test laid down in R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber) and others [2015] 1 WLR 5341 (endorsed by the Court of Appeal in R (Howard League for Penal Reform) v Lord Chancellor [2017] 4 WLR 92) [98 – 99], holding that the Claimants "had not provided evidence about the "full run of cases [that go through the system]". The Claimants had adduced witness evidence that plainly met the test required in Detention Action and Howard League. d. The Judge failed to apply the test required by Howard League [52] to be met by the Defendants, as conceded by the Lord Chancellor in that case: "in a systemic unfairness case it was incumbent on her to supply evidence of the system". e. The Judge's disposal of the general discrimination claim pursuant to Article 14 ECHR and Equality Act 2010 duties [104] failed to engage or engage fully with the five questions set out in R (S) v Chief Constable of South Yorkshire [2004] 1 WLR 2196 at [42]. In particular, there was no evidence adduced by the Defendant as to justification and/or the Judge failed to explain how the Defendant met that test in reaching his conclusion.

Claimants represented by Toufique Hossain, Sulaiha Ali, Philip Armitage at Duncan Lewis and counsel Hugh Southey QC Matrix Chambers and Raza Halim Garden Court Chambers.

Quality of Legal Advice For Suspects "Faltering Under Lockdown"

Neil Rose, Legal Futures: The quality of legal help for suspects in police custody has "suffered significantly" due to Covid-19 amid concerns over confidentiality and restrictions on lawyers talking to clients, a new report has found. International criminal justice watchdog Fair Trials said its findings "paint a deeply worrying picture of the criminal justice system in England & Wales under lockdown" and that human rights violations could be the result. In trying to keep the justice system functioning during the pandemic, it said, "the rights of defendants have, in practice, been largely overlooked, and it is questionable whether initiatives to safeguard suspects' and defendants' rights and their safety have worked effectively so far". In Justice under lockdown, Fair Trials surveyed a range of people on "the frontline" of the criminal justice system, although a majority of the 89 responses came from defence lawyers.

Some 71% of respondents, and over 80% of defence lawyers, said Covid-19 had a 'significant' or 'moderate' negative impact on suspects' ability to access prompt in-person legal assistance, with 59% saying the same about access to legal assistance during police interviews. Lawyers said having to give advice remotely was "a poor substitute" for being there. "It was challenging to build trust and rapport with their clients without meeting them in person, and that generally, it was more difficult to provide advice to and take instructions from their clients. "It was also pointed out by some respondents that they were able to spend less time speaking to their clients because they could not see them in person. Concerns were also raised that remote legal assistance had a particularly negative impact for vulnerable suspects, who require support for their welfare and effective participation during criminal proceedings."

Some lawyers also questioned the extent to which confidentiality was being respected during lockdown, as it was harder to ascertain whether conversations were being overheard. "One respondent complained that, on at least two occasions, police officers had tried to facilitate telephone consultations in an open custody suite. Fair Trials found no consistent approach amongst the police to ensure legal and other forms of assistance during police interviews. "This has, on occasions, resulted in police interviews taking place in the absence of a lawyer or other essential sources of support, or suspects being detained unnecessarily." Where advice was provided remotely, there was evidence that videoconferencing equipment failures meant that defence representation attendance by telephone was becoming the default. "Several lawyers were also concerned that despite the insufficient measures in place to prevent the spread of Covid-19 in police stations, they were still being expected, or even pressurised to turn up to attend interviews in person."

Fair Trials said that, although some solicitors and barristers believed that the increased use virtual hearings was a positive development, particularly for efficiency reasons, the survey results showed that the majority have "significant concerns about their impact on defendants' rights". It continued: "We are concerned that the government could promote remote hearings as a way to address the backlog of criminal cases built up during the lockdown (and over the years prior to the pandemic) without adequately addressing these concerns." Survey responses clearly showed that client-lawyer communications have been badly affected before, during, and after court hearings. This was in part down to the technology, but "some courts are not appropriately set up to facilitate effective, confidential conversations between defendants and their lawyers".

The survey found courtrooms having to be vacated so that lawyers could speak to their clients in private, but when they were, "minimal time was allowed for those conversations". It added: "We were also concerned to learn that in some cases, judges were explicitly preventing post-hearing client-lawyer consultations from taking place via video-link or telephone, leaving defendants in custody stranded, with severely restricted access to legal advice." Fair Trials said: "It is clear that many of the challenges identified in this survey are not confined to the several months in which the lockdown has been in place. "So long as Covid-19 continues to be a generalised risk to the public, precautions (such as social distancing and the use of PPE) will need to be taken at courts and police stations for the foreseeable future, continuing to create obstacles for the exercise of defence rights. "Already, we are beginning to see that COVID-19 is creating a long-term legacy of delays and backlogs to the criminal justice system, which in the absence urgent action from the government to enhance capacity, could create extraordinary challenges and serious human rights violations."

Prisoners (Disclosure of Information About Victims) Bill

Even if the Bill is not, in law, creating a new criminal offence of non-disclosure, the effect of deliberate non-disclosure is inexorably going to lead to the conclusion that the prisoner poses a risk and, as a result, requires to be kept in prison.

First, the Parole Board must consider the prisoner's state of mind and whether for some reason, such as the presence of mental disorder, they cannot form the requisite intention to withhold the information. Secondly, the board must be satisfied that the prisoner has the mental capacity, within the meaning in the Mental Capacity Act 2005, to decide whether to disclose. In moving these amendments, I put on record yet again my support for the principle of this Bill and my admiration for Marie McCourt. I acknowledge the Bill's importance to grieving families in achieving closure in the most terrible circumstances.

In Committee, the Minister expressed two objections to my amendments. I am very grateful to him for taking time to discuss them in advance of today. His first objection was that my amendments would prevent the Parole Board taking into account any previous occasions on which the offender had had the opportunity to co-operate with the authorities and reveal a victim's whereabouts, but had refused to do so. He argued that if this offender later became unable to make a disclosure for reasons of deteriorating mental health, for example, my amendment would leave the board unable to consider any prior refusal to co-operate in assessing the risk the prisoner posed to the public in the event of release on licence. The amendments tabled today meet this objection by including the potential for historical consideration.

His second concern is more fundamental and goes to the heart of what I see as the underlying problem with the Bill. Throughout its progress, he has repeated the Government's

view that the board's discretion to consider all possible reasons for non-disclosure must be unfettered. He contends that my amendments give undue prominence to one factor among the many the board will take into account when making a public protection decision.

But this in effect exactly what the Bill does. It turns consideration of non-disclosure—already a standard practice in parole panels—into a statutory duty. But it fails to create a parallel statutory duty of what must be a fundamental responsibility of the board in coming to its view: to consider whether the prisoner is able, for reasons of mental capacity or disorder, to disclose that information. The Bill therefore comes dangerously close to collapsing together the question of whether there is missing information with that of whether the prisoner should be held responsible for it.

Even if the Bill is not, in law, creating a new criminal offence of non-disclosure, the effect of deliberate non-disclosure is inexorably going to lead to the conclusion that the prisoner poses a risk and, as a result, requires to be kept in prison. Therefore, the Bill is in effect creating a statutory hurdle to release in those cases where deliberate non-disclosure is established. Given this, it should be explicit that that statutory hurdle can exist only where the prisoner can be held responsible for their own actions—that is to say that they are not suffering from a mental disorder or otherwise from impairment of mind or brain that should be seen as alleviating that responsibility.

The noble and learned Lord the Minister has been consistent in arguing that the Parole Board must be allowed to take into account a wide range of factors in making its decisions. But in relation to the Bill, which is so tightly focused on non-disclosure, there are really only three possible scenarios a board would face. The first concerns those cases where disclosure is not possible because the prisoner, for whatever reason, was not party to the disposal of remains and so genuinely does not know where the body is. Of course, there will also be cases where prisoners continue to protest their innocence. This is a problem for the board, but it is not what the Bill is about.

The second scenario concerns the non-disclosure cases where the verdict is not disputed and the facts of the case leave no room for it to be argued that the prisoner does not know where the victim's body is located. In both those scenarios it is simple. There is either an inability to disclose or there is deliberate non-disclosure, which is culpable. The prisoner who persists in this wilful refusal, amplifying again the distress already visited on the family of the victim, must take the consequences, and in its efforts to address this particular issue, the Bill has my full support.

But it is the third scenario that my amendments address—a scenario on which the Bill is silent. It is the scenario in which the prisoner, for reasons of mental disorder, cannot form the requisite intention to withhold information, or lacks the mental capacity to take the decision to do so. By failing to mention any possibility of the contrary, the Bill assumes that the prisoner has the ability to disclose, thus making any non-disclosure culpable. Prolonged detention for non-disclosure in such cases would be unfair, unjust and a potential infringement of human rights.

By elevating non-disclosure to statutory status, the Bill already departs from the Government's stated policy of leaving to the Parole Board decisions as to what weight, if any, it gives to the many factors it must consider. The Government have accepted, at the Dispatch Box here and in the other place, that the board should take state of mind and mental capacity into account. But the Bill provides the board with no guidance as to how its statutory duty is to be performed with regard to this. By extension, it fails to guide victims' families as to what they should expect of the Parole Board in cases of this kind. My amendments would address this discrepancy by elevating in parallel the related imperative to take the ability to disclose into account.

If the Minister is not willing and able to accept these amendments, as I fear he is not, and this guidance is to be dealt with outside the statute, can he at least provide clarity as to

what this guidance to the Parole Board is to be, where it is to be found and how its use will be monitored? I would be grateful if he could confirm definitively what training members of the Parole Board receive to support them specifically in making determinations under the Mental Capacity Act 2005. If the board's responsibility to take mental disorder and mental capacity into account is not to be a statutory duty, it will be vital that its members are fully conversant with the Act and its use within the criminal justice system. I beg to move.

Capacity to Consent to Chemotherapy?

Rosalind English, UK Human Rights Blog: This case is a timely illustration of the unenviable task faced by judges, doctors and mental health professionals during Lockdown. This judgment was delivered following a remote hearing conducted on a video conferencing platform of an urgent application brought by the University Hospital Coventry and Warwickshire NHS Trust. In this final hearing, held remotely, the Trust have asked the Court of Protection to consider questions of capacity and best interests relating to a young woman named in this judgment as "K."

K, the patient, was 36 years old and lived in secure accommodation. She had never been formally assessed but had been to a special needs school and was recognised as having learning difficulties. In late May she was diagnosed with cervical cancer. In this application, the Trust sought an order declaring that K lacked the capacity to consent to the medical treatment for her cancer and further, that it was in her best interests to undergo a combination of radiotherapy and chemotherapy with the aim of trying to cure her or at least to provide her palliative and symptomatic relief.

The judge noted consensus amongst the treating clinicians both in respect of K's capacity to understand the treatment and that receiving the treatment would in K's best interest. K's mother agreed. But the application had been properly brought before the court. Firstly, because the proposed treatment was highly intrusive, secondly it involved the premature onset of menopause, but most importantly because the treatment plan was so onerous that there was distinct possibility that K might withdraw her co-operation from it as it became more challenging.

As Hayden J observed, K was a young woman who had an understanding that she had a condition which was serious or bad, but he did not believe that she understood that she might die from it: although K has heard the word, "cancer," it had not sunk in that this is a life – threatening condition. The judge accepted the expert evidence to the effect that "K can understand words and concepts to a degree but cannot retain them to evaluate them so as to be able to use or weigh them. In these circumstances she lacks the capacity to consent to medical treatment."

It was with "very little hesitation" that the court concluded that K did not have the capacity to evaluate the necessary decision in relation to her medical treatment. Hayden J granted the hospital's application and commended the pre-emptive approach taken by the trust, which was to commence chemotherapy treatment on the 30th of June 2020.

Investigating Complaints in Lockdown

We are now well into the third month of lockdown and we know how challenging it has been for everyone who lives, or works, in prison. With regimes restricted and most outside agencies unable to work within the walls, independent scrutiny of our prisons has never been so important. In March, along with other scrutiny bodies, we had to suspend our visits and, at the same time, couldn't access our post to read letters of complaint or to receive documents to inform our investigations. And so, necessity became the mother of innovation; we had to find new ways of working and we had to find them quickly.

In normal times, changing things in an organisation like ours takes time, people get comfortable

with the way things have always been done and are nervous about breaking new ground. But these aren't normal times and that gave us the permission, and the appetite to get on and find solutions. That's what we have done, and these are some of those solutions. They will, we think, allow us to investigate eligible complaints just as effectively, they might even bring us, with baby steps, into the 21st century. The letters sent to us from prisons are now directed to an organisation that can scan them securely and email them to a PPO mailbox. From there, complaints can be triaged, assessed and allocated to an investigator in the same way as before, just without the pieces of paper.

We are trying out the 'email a prisoner' service to acknowledge a complaint and, for some cases, to send the outcome of the complaint to the complainant. Of course, we know the emails are not protected in the way that Rule 39 letters are. So, we are carefully considering where it's appropriate to use the service and, for some sensitive complaints, we will still send letters. How we do that is yet to be finalised; like everyone else, we have been told to work from home so we need to find a way to print letters, put them into our PPO envelopes and frank the letters for posting. That can't be done from home so we are working on a safe way to do it and we will let people know when that can happen.

For our investigations, prisons have scanned documents and sent them to us digitally, rather than the photocopies we would have expected in the past. That is quicker, greener and we should be asking ourselves why we didn't do that years ago. We are still able to carry out interviews with staff, we have always done most of those by phone or video call and that hasn't changed. So, this use of technology to support our processes is certainly overdue and we will keep these new ways of working under review and make changes where we need to. We'd welcome feedback from the people who complain to us and we will be looking to do even more to make sure that our scrutiny of prisons is as good as it can be until we can get back into prisons safely.

Complainants can write to us at the Prisons and Probation Ombudsman, 3rd Floor, 10 South Colonnade, London E14 4PU or call us on 0845 010 7938.

Impact of the Covid-19 pandemic on Fatal Incident Investigations

We have continued to investigate all deaths in custody during the Covid-19 pandemic but have had to adjust some of our working practices due to the restrictions in place. Investigation evidence.We have been unable to access our office since mid-March and all our investigators have been working from home. This has led to delays in accessing post that has been sent to our office. However, in most cases, we have obtained replacement documentation in electronic format and we now request all documentation to be sent to us electronically. This has been working well and we are grateful for the cooperation from prison staff on this. We continue to experience some difficulties with viewing CCTV footage and body-worn video camera (BWVC) footage, as well as listening to PIN phone recordings, because we cannot access equipment in our office that we would normally use to view and/or listen to this evidence. Investigators have been able to view some CCTV and BWVC footage at home, but not all. These arrangements are not satisfactory and we have written to HMPPS to ask that they consider how the footage can be shared with us securely, possibly as part of their Technology Transformation Programme.

Acces to prisons - Since mid-March we have been unable to visit prisons. This has meant that we have been unable to conduct opening visits for investigations into non-natural deaths. We have asked for photographs of the deceased's cell where necessary. We would normally visit prisons to conduct interviews with staff and prisoners, which cannot currently happen. We have instead been

conducting interviews by telephone, or in some cases by videoconference using MS Teams

where this is available. Interviews continue to be recorded and transcribed as before. In some cases where we consider it essential to conduct interviews in person, our investigation may be delayed until we are able to do so. At present it is unclear when we will resume our visits to prisons. We are keeping the situation under review and aim to resume our visits as soon as it is safe.

Contact with families and next of kin - We continue to engage with the families and next of kin in all investigations. We continue to write and/or telephone the next of kin at the start of every investigation. It is more difficult for us to send hard copies of reports to the next of kin at present, because we cannot access our office. However, we are obtaining an email address where possible, so that we can send the next of kin an electronic version of our investigation report.

Investigation timescales - We have been working hard to continue with our investigations and to issue our investigation reports within our normal timescales. However, some cases will inevitably be delayed. We are identifying cases that are likely to be delayed and letting the deceased's next of kin, coroners and other relevant stakeholders know. In some cases, there have been delays in obtaining documentation and in organising interviews (particularly in the early stages of the pandemic). This has sometimes meant that we were unable to meet our original timescale for issuing our investigation report. Some cases have also experienced delays in obtaining the cause of death from the coroner and in receiving the clinical review report. We are unable to issue our investigation report without these, so any delays are likely to have an impact on our ability to issue our report on time. We continue to work hard to keep delays to a minimum and to issue reports on time wherever possible.

How Judges Make Their Decisions – is Witness Demeanour a Myth?

Madeleine Whelan, barrister: This is the part that most will be familiar with: witnesses go into the witness box, swear on a holy text or give an areligious affirmation to tell "the truth, the whole truth and nothing but the truth". Then they tell their side of the story. In an ideal world, the judge would be able to trust this evidence completely because the witness had sworn an oath. Obviously, this is not the case: the witness is human, and humans have the capacity to exaggerate, overstate, twist and sometimes, outright lie. The task of the court at this stage is to try and tell when this is happening and discern the truth from the differing human accounts.

So: how do judges do this? Well, the most important task for a court to undertake is a detailed assessment of all the circumstances of the case, including all facets of all the evidence and take what the witness says in context with that assessment. However, the nature of human evidence is that it undoubtedly leaves a human impression: judges are humans too, and they can assess other humans in several ways.

A judge may look to demeanour, non-verbal and verbal cues, body language and presentation when assessing the honesty of a witness. I emphasise here that this is not the only aspect of evidence a judge should look at, and a judge must be careful not to place undue emphasis on these factors when assessing the credibility of a witness. This is highlighted by Mr Justice Hayden in the case of PS v BP [2018] EWHC 1987 at para 18: "The Judge found there to have been "overwhelming evidence" supportive of the allegations and evaluated F as "deceitful, dishonest and dishonourable". When analysed, these conclusions proved not to have been rooted in the substance of the factual allegations but essentially predicated on the Judge's observation of F's demeanour. Whilst the impression a witness makes upon the Judge will always be important and signals the inestimable advantage the first instance Judge has, in assessing the evidence, it is not a substitute for a detailed analysis of those features of the evidence

which reinforce the reliability of the allegation."

It is acknowledged in this passage that the judge can, and should, take into account a witness's demeanour when assessing a case, but he or she cannot only take into account demeanour to the detriment of the sense of the evidence. This seems sensible, given that we know humans respond to stress (which the author assumes being in a courtroom would elicit in most people) in a variety of ways – some may be given over to laughter, some to excessive sweating, some to stammering. However, none of these responses in isolation would allow someone to know whether that person is telling the truth or not. The judge must take this demeanour into context and evaluate the rest of the case using demeanour as a tool.

How then, in the current crisis, is a judge still able to make a holistic assessment of a case? The coronavirus pandemic has forced courtrooms into computers and there is no longer physical attendance at court and certainly no physical attendance of witnesses in front of the judge. Trials with contested evidence and disputed facts are being heard via video platforms without any of the parties in proximity to one another. The question is, what happens to witness demeanour in these circumstances when a judge cannot see the witness and physically assess them? The pandemic has given us a unique insight into just how important demeanour is, as, never before in the family court system has an entire hearing determining facts or making permanent decisions about children's' welfare been conducted remotely.

Thankfully, this question has already been tackled by the senior judiciary in the Court of Appeal over the last month due to the fact that nearly all hearings are being conducted remotely due to the pandemic. The first answer came in the form of a judgment from the President of the Family Division, Sir Andrew McFarlane in the case of Re P (A Child: Remote Hearing) [2020] EWFC 32. Briefly, that case concerned the issue of fabricated or fictitious illness (FII) and whether the parents had been involved in faking illness in their child. The President is clear that the judgment is fact-specific on that basis. However, it gives a useful insight into how much weight the courts should place on physical demeanour and manner of witnesses, as at para 26: "The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment." Therefore, clearly, the senior court felt in this instance that the judge could not make a proper assessment of the witnesses, particularly the parents, without physical attendance at the court. However, as mentioned, the court was keen to stress this case was fact-specific and should not be extrapolated outside of its facts.

Nevertheless, helpfully, the question was tackled again only two weeks later in the case of Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583. This case concerned a final hearing where non-consensual adoption was being considered (that is, against the parents' wishes) and was also heard before Sir Andrew McFarlane P. Again, he emphasises that the case is fact-specific, but gives further insight into his views on witness demeanour and presentation at para 58: "the more general point that a judge will be in a better position to assess the evidence of a witness who gives evidence live from a witness box than one who speaks over a video link is plainly right. There is, however, a need for caution when the only witness(es)

required to attend court are the lay parties when others, for example the key social worker, are not." Here, the key point is made that it is preferable for a trial judge to hear evidence in person rather than via video link – clearly, this is because judges do factor in the physical presentation of a witness, or they should, when such serious outcomes are being decided, that is, whether or not a child should be adopted outside of its family.

That may well have been the end of the matter – the answer is, according to the cases, that yes demeanour is a factor, but it must be reviewed in the context of other factors and it is important to establish for each case whether physical attendance is required. However, a further case was handed down at the tail end of last week which added further to the narrative of witness demeanour. That case was A Local Authority v A Mother [2020] EWHC 1086 before Mrs Justice Lieven. This case concerned a child in care proceedings who had suffered potential non-accidental injuries. The judge had heard the medical evidence about the injuries to the child via Zoom and the question was then whether the hearing should continue via Zoom for the parents' evidence (who were accused by the local authority of inflicting the injuries). The case comes from a lower court than the decisions discussed above, and therefore has less legal 'weight'; however, it contains an extremely useful discussion of witness demeanour at para 23: "One important factor in a decision whether to proceed, particularly in a fact finding case, is the question of whether the judge will be in a less good position to judge whether or not the witnesses are telling the truth if the case is conducted remotely. This was clearly an issue of particular concern to the President in Re P at [26] where he refers to the benefits of seeing the witness in court. The issue of the weight that a judge should give to the demeanour of witnesses is an intensely complex one and has been the subject of considerable judicial debate."

Lieven J then refers herself to the case of SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391 which is a Court of Appeal case and contains some extremely useful points on demeanour at paras 36 and 40: "[36] Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. "[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories."

Having considered these comments from the Court of Appeal in that case, Lieven J then concludes the following in relation to her own case regarding the injuries to the child at para 27: "Having considered the matter closely, my own view is that is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from Re A that the Court of Appeal is not saying that all fact-finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating." The judge

takes the view that the matter should proceed because, amongst other factors, she does not feel the witnesses will be prejudiced by giving their evidence remotely and that her ability to judge their evidence will not be affected. It is clear from her comments that this judge does not feel that demeanour is a helpful tool, and her reasoning appears to be sound on this point. Some humans are good at lying, and this will be the case whether they are in a courtroom or their own living room – either way, the court will have to determine the truth.

And so, for parties facing the court system, is demeanour important? Patently yes, and it is considered by judges, naturally, whether they like it or not. However, this can and should be in the context of a raft of other factors and it is clear that demeanour should never be the determining factor. Some judges may be better at controlling how much weight demeanour holds for them, but all judges are taking demeanour and presentation into account in some way when they determine cases. Parties must have confidence in the court system and, in my view, appreciating that judges are assessing their manner and presentation – be it by video link or in person – may humanise the process somewhat and allow them to know that their case is being considered from all perspectives and not only on the basis of what is written in the papers.

Justice for Habib' Paps' Ullah & Bring Elliot Home!

Friday the 3rd July 2020 was the twelfth anniversary of the death of Habib' Paps' Ullah who died during a stop and search in a car park in High Wycombe in 2008. In September 2017 we reached a settlement with Thames Valley Police and had a formal apology from them after nine years. Since then there have been other deaths in Thames Valley, in the UK, and deaths in America which have been highlighted on a worldwide basis.

However, the day to day experiences of Black and other communities of colour do not always make the headlines. Elliot X is the stepson of Zia Ullah from the campaign. Elliot was maliciously removed from his mother in 2012, aged 11 after she instigated a judicial review of her local authority's unlawful blanket policies regarding support and education for autistic and ADHD children. Elliot is autistic and affected by severe PTSD and various other mental health issues due to suffering bullying, including racist abuse, in-state primary school, then in boarding school, and in local authority care. Elliot is also a child victim of domestic abuse, which seems to have been perpetrated by the state against his mother.

He was sentenced to 6 months in prison after having a meltdown in his foster placement in May 2019. Shortly before his release from prison, he was sentenced to a further six months for offences committed before his incarceration. Upon his release, he was not permitted to come home to his family but instead was forced to go to a bail hostel 2 hours away from us, despite social services packing up and delivering all of his belongings to his home address. His belongings were all damaged by damp and mould, and some of his personal items were covered in swastikas and the 'n' word. On Friday 12th June 2020, when we went to collect him from prison, we were met by three plainclothes officers who took Elliot to the hostel. We were allowed to follow behind them but were forced to leave the premises almost immediately upon Elliot's arrival there.

On Wednesday 17th June 2020 he was assaulted by police after asking for directions back to the bail hostel, was arrested, and recalled to prison. He was then assaulted again in custody, and we had no idea of his whereabouts until he was able to make a call to us on Saturday 20th June 2020. Elliot has since received a report stating that he is a dangerous threat to all around him, which has devastated him.

A neighbour had this to say about him in a Facebook post: "He is [Elliot] a beautiful soul. He has been a good friend to me for a long time and would do anything for anyone. His

music was sick, and he had a passion! He built an orange BMX, and it was the coolest thing I had ever seen! When I moved out of the flat, I was alone with a baby. He helped me lug stuff down four flights of stairs, and we laughed about it and would not accept anything from me to say thank you. He is not a danger to anyone. I saw how he was treated. I even made complaints to his care worker about how he was being treated by people staying in his flat.

We have serious concerns about his present and past care, his current welfare in prison, and as to why his, and our own, very many past complaints have not been adequately addressed by the authorities, as his corporate parents, and we seek an urgent review of his case. The matter of his police assaults has been formally lodged with the IOPC.

Force Police to Impartially Investigate all Cases of Alleged Abuse & Disclose all Data

CPS's Starmer/Saunders "believe the victim" has resulted in many innocent people being convicted of a crime they did not commit because the Police do not carry out a full and thorough impartial investigation to determine the truth in sexual and domestic abuse cases. Police are known to amend statements or falsify them to secure a conviction. Police & CPS withhold vital evidence from the trial which could exonerate the innocent "suspect". Police believe the accuser even if it is obvious that the story is bizarre, incredible, inconsistent, unreliable, changeable or erratic. The "suspect" is branded "guilty" from the onset. A Police investigation is therefore not deemed to be "necessary".

At trial, the jurors base their verdict on the uncorroborated evidence given by the false accuser. Any exculpatory evidence is removed before the trial. The defendant therefore has nothing on which to base his defence. The falsely accused is doomed. A conviction follows with a long prison sentence. On the one-sided evidence presented, the jurors find a man Guilty of a non-existent crime, and our failing UK Justice System allows this to happen! Numerous cases should not have even made it to the charging stage, let alone get to a trial!

With cuts in Legal Aid and poor legal representation, more and more people are being sentenced for a crime they did not commit, or that didn't exist. False accusers are coming up with stories for revenge, attention or financial gain of generous compensation from CICA. There is no deterrent to stop the barrage of false accusers and nothing to stop them making more than one false accusation as in the case of Jemma Beale. They are not prosecuted for lying under oath, perverting the course of justice or fraud – if they were – we could stop this injustice right now as false accusations would drop dramatically. Every false accusation has an effect on the real victims of sexual or domestic abuse who deserve justice. The effects of being false accused are harrowing and distressing not only to the falsely accused but to their families including their children and grandchildren.

Due Process has been abandoned as has the Presumption of Innocence and Innocent Until Proven Guilty. With the non-disclosure of vital evidence this amounts to hundreds of innocent people receiving an Unsafe Conviction and an Unfair Trial which is against Article 6 of the Human Rights Act. Some falsely accused of sexual or domestic abuse are forbidden to see their children and some commit suicide seeing no way out. The Appeal Process is notoriously lengthy and is not legally possible unless the wrongly convicted produces "new" evidence. Families of the wrongly convicted normally carry out their own investigation which can take several months or even years. Some hire private investigators. Evidence that wasn't used in the first trial is now put into the Appeal Process and an appeal is granted. It is of interest to note that since October 2019, 199 appeals - all for sexual offences - have been granted. This is an average of 22 per month – all 199 seemingly finding "new" evidence to prove their innocence – or producing the evidence which wasn't allowed to be disclosed or was removed on the first trial? The wrongly convicted is released from prison and a retrial is sometimes arranged. The wrongly convicted can be exonerated on some cases or found Not Guilty. However, the false accusers still keep their compensation and anonymity, the wrongly convicted has not cleared his name and has to start again having spent most of his savings on defending himself, some selling their homes. The cost to the taxpayers of each wrongly convicted prisoner is £43,000 pa and there are hundreds of wrongly convicted men currently in prison, some awaiting Appeals. Add to this CICA compensation handed to the false accuser, and the cost to the taxpayers runs into £billions. Men are just one false accusation away from a prison sentence! We want justice for the innocent whether falsely accused of domestic or sexual abuse and the false accusers prosecuted!

MoJ Accused of Undermining Independence of CCRC and 'Clipping its Wings'

Jon Robins, Justice Gap: The Ministry of Justice was accused of deliberately undermining the independence of the miscarriage of justice watchdog and 'clipping the wings' of its commissioners in the High Court last week. Lawyers acting on behalf of prisoner Gary Warner, sentenced to 16 years in prison for his role in an armed robbery, argued that the Criminal Cases Review Commission (CCRC) was not sufficiently free from government control. Warner is challenging a decision by the watchdog to reject his application. Lord Justice Fulford and Mrs Justice Whipple heard the arguments remotely in what could be a key challenge to the CCRC which is the subject of an inquiry by the all-party parliamentary group on miscarriages of justice and has been accused of being overly cautious by critics including the House of Commons' justice committee. Warner's lawyers called the relationship between the MoJ and the CCRC 'dysfunctional' and accused the ministry of 'misusing its sponsorship role' by 'placing pressure' on the commission to 'reconstitute its Board so as to reduce the influence of Commissioners'. They also argued that the CCRC introduced its own internal reforms with the effect of downplaying the power of commissioners out of a 'fear of displeasing its sponsor'. At the heart of the challenge are changes unilaterally imposed by the MoJ to the tenure and pay of the 11 CCRC commissioners whose independence was supposedly guaranteed under the Criminal Appeals Act 1995. The independence of the commissioners and their ability to properly review cases is critical to the watchdog because it takes the agreement of three commissioners to refer a case where there are concerns about the safety of a conviction back to the Court of Appeal. The number of referrals made by the watchdog has collapsed over the last few years during a period in which a generation of CCRC commissioners has been replaced by a new intake on less preferential terms. From the start of the CCRC in 1997 until 2012, commissioners were employed on a full-time or near full-time basis on generous salaries (£93,796 in 2013) and a pension. Almost all commissioners are now employed on minimum one-day-a-week contracts and paid on a £358 daily rate which is significantly less than a basic judicial rate (for example, £502 a day for a judge in the first tier tribunal).

Serving Prisoners Supported by MOJUK: Walid Habib, Giovanni Di Stefano, Naweed Ali, Khobaib Hussain, Mohibur Rahman, Tahir Aziz, Roger Khan, Wang Yam, Andrew Malkinson, Michael Ross, Mark Alexander, Anis Sardar, Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan & Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Robert Knapp, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Peter Hannigan.