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JUDICIARY OF ENGLAND AND WALES

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KEYNOTE ADDRESS

5RB CONFERENCE 2012

27 SEPTEMBER 2012

The programme for this conference has a full list of topics on the law of privacy and defamation. That is what you have all come to hear about.

But I am not going to talk about that at all. I am going to talk about quite a different topic. I am going to talk about judges.

The present time is an unusual one for the judiciary. The effect of the reduction of the retirement age for judges to 70 is that a substantial number of judges are coming up to retirement. Of particular interest to this audience is the fact that Eady J will reach statutory retirement age in a few months and I will do so in 2 years time. This information, and the other information I shall mention in this talk is publicly available on the judiciary website: <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/list-of-members-of-the-judiciary/senior-judiciary-list>

As a consequence of these judges' retirements, the Judicial Appointments Commission (JAC) has announced that on 17 October 2012 it is expecting to launch a selection exercise for High Court Judges. Other selection exercises cannot be long delayed.

The announcement by the JAC of its forthcoming selection exercise includes the following:

“There are seven Queen's Bench Division vacancies and successful applicants will be expected to demonstrate an ability to work across the Division. Within those seven vacancies we have been asked to identify four specialists, two in crime, one in defamation, and one in planning. In addition all candidates, for both Queen's Bench and Family Division, will need to demonstrate potential leadership qualities: Queen's Bench Division judges will be called upon to act as Presiding Judges...”

As Judge in Charge of the Jury and Non-Jury lists of the Queen's Bench Division (QBD) I am one of a number of judges who participate in decisions about the deployment of judges. Decisions have to be made as to the deployment of QBD judges generally, both on circuit and in the various lists in London. And decisions have to be made as to the allocation of particular cases to particular judges.

One of the most frequent requests that is made to me on behalf of litigants is that there should be allocated to a case a judge with specialist experience and of appropriate seniority.

When I am asked for a specialist defamation judge, I understand the request to be for a judge who practised in the field of defamation law before appointment to the Bench.

There are arguments both for and against allocating specialist judges to freedom of expression cases.

One argument for allocating a specialist judge to a case involving freedom of expression is that if a judge lacks sufficient experience of a specialist field of the law, there is a greater risk that the case will take more time, and therefore give rise to greater costs, and greater delay in the hearing of other cases. Any estimate of

costs depends upon the ability of legal advisers to estimate the time a case will take to be heard. In some cases in my experience a non-specialist judge may take twice as long, or more, to decide a case as a specialist judge would take. This is mainly because a non-specialist judge may have to read for the first time statutes and case law that a specialist judge will already know and understand. And where the judge is not a specialist, counsel have to make submissions as to the law which assume no knowledge on the part of the judge.

There are various arguments for allocating a non-specialist judge to a case involving freedom of expression. First and foremost is the point made in the JAC's recent announcement. All judges appointed to the QBD are expected to work across the whole Division and that includes the Criminal Division of the Court of Appeal. In addition all judges of the QBD may be called upon to act as Presiding Judges, and to carry out other administrative roles, such as my own role of judge in charge of a list. For example, you will all no doubt be aware that the LCJ recently appointed Sharp J as Presiding Judge of the Western Circuit. There is no reason why judges who are specialists in the law of freedom of expression should be an exception to the general rule that all QBD judges should be available to work across the whole Division.

Another argument in favour of allocating non-specialist judges to freedom of expression cases is that there are very few specialist judges. If the very few specialist judges decide all the cases, then criticisms that ought properly to be directed to the state of the law may become wrongly focussed on the person of individual judges. This has happened in the past in the Administrative Court when judges have made decisions which are politically unpopular. And it has happened in relation to privacy cases.

You will all be aware that there are recent and important cases on privacy and defamation which have been decided by non-specialist judges. These include Nicola Davies J, Slade J, Bean J and Lindblom J, to name only some. I regard it as

particularly important that women judges should be amongst those judges who give judgments on issues of law which are socially or politically sensitive. That is the point of having a diverse judiciary.

It follows that if in the forthcoming High Court Selection Exercise there is a successful candidate with a specialism in defamation, that judge will not be allocated to sit in the jury list for any longer period than any QBD judge sits in the QB civil list in London. The new judge will probably not be available in the jury list for more than 3 weeks per term, if that.

The availability of any QB judge to sit in the jury list is very limited. Until my appointment last year as judge in charge of the list, I sat in the full range of cases which QB judges are expected to hear. For about one half of the year a QB judge sits on circuit trying serious crime. For a further quarter of the year a QB judge sits a member of the Criminal Division of the Court of Appeal. QB judges are thus available to sit in the QB list for no more than a quarter of their time. And there are a number of specialist lists. The most demanding list is the Administrative Court. Eady and Nicol JJ are both Judges who practised in cases freedom of expression while at the Bar. Both are also nominated to hear cases in the Administrative Court. Nicol J is also Presiding Judge of the South Eastern circuit. So he is very rarely available to sit on media cases. Eady J has sat extensively in the Administrative court since he ceased to be judge in charge of the jury list. So he too has been available only rarely to hear freedom of expression cases.

It is already very difficult to find a specialist media judge to allocate to cases freedom of expression. And it is going to become more difficult.

Eady J was appointed in 1997 and I was appointed in 2003. We both had professional experience in the cases which are tried in the jury list. Since then two other judges whose professional practises included media cases have been appointed: Sharp J and Nicol J were both appointed in 2009.

However, as I have already said, Eady J will retire shortly, and I shall follow him no later than October 2014. Since Nicol J and Sharp J are Presiding Judges, the availability of each of them to sit in the jury list will be very limited indeed.

The position in relation to specialist circuit judges is similar. At present there are two Circuit Judges who are defamation specialists: HHJ Moloney and HHJ Parkes. There is a pressing need for circuit judges who are specialists in defamation, and both these two judges sit regularly as Deputy High Court judges, as well as on the South Eastern Circuit County Courts.

Fortunately, the statutory retirement ages of these judges are some way into the future.

Unfortunately, it is becoming increasingly difficult to find specialist defamation judges for appointment to the High Court and the County Court benches. At its last High Court Selection Exercise the JAC also identified a defamation specialist. But no defamation specialist was appointed.

One reason for there being a difficulty in appointing specialist judges is that in the last 30 years there has been an increasing trend towards specialism in all areas of the law. The result is that there are more specialist cases to be tried, but the judges appointed to the QBD include fewer who had more than one specialism in their professional practises. Many of you will remember that Sir David Hirst and Sir Brian Neill had specialised at the Bar in both commercial law and defamation. When appointed to the Bench they sat at first instance mainly in the Commercial Court, but they made important contributions to the development of defamation law, particularly in the Court of Appeal.

Although there are benefits in allocating specialist media cases to non specialist judges, it is in my view very much in the public interest that there should always be a number of specialist media judges. The first reason for this is that since the importance of the European Convention on Human Rights came to be appreciated

in the 1980s, and in particular since the Human Rights Act incorporated into English statute law the rights to respect for private life and freedom of expression under Arts 8 and 10, there have arisen a series of issues of law which it would be very difficult for a non-specialist judge to deal with in the time available to judges to decide cases. I shall explain in a moment what the available time is.

Another reason for the need for specialist judges is that in defamation and privacy cases it is common for there to be self represented litigants. It is not infrequent that both sides are self represented. Most defamation and privacy cases do not involve the media. Most such cases are disputes between family members, work colleagues or neighbours, or claims by or against employers. Where litigants are self represented, it is unrealistic to expect a non-specialist judge to be able to manage the case effectively. For example, in July of this year two of the cases in which I gave reserved judgments involved self represented litigants. In one of them I had to devote the equivalent of a whole day to doing work which, if the litigant had been represented, was work which would have been done by solicitors or counsel. I was only able to do this because of my experience in doing such work at the Bar. The time constraints under which judges work have now become a major issue.

High Court Judges in the QBD now commonly work for 50 to 60 hours per week during term time, and they devote a significant part of the vacations to catching up with reserved judgments and other administrative work. This statistic is very worrying. It has a major impact on the time that a judge can be expected to devote to a case. It is even more worrying for another reason: the public rightly wants diversity amongst judges. But judges are usually appointed in the 40-50 year age group. At that stage in people's lives, many have children or adolescents at home. And that number of hours at work, together with time spent on circuit away from home, places a strain on family relationships.

By way of example of the time constraint, I will take my own work during the last month of last term, July of this year. In that month there were 22 working days.

On only three of those days was there no hearing listed before me in the case list. On 19 working days there was one or more cases listed, and on a number of days I heard urgent cases which had not been listed at all. I handed down a number of reserved judgments, and I delivered a number of ex tempore judgments as well.

In much of the work of the High Court judges do not deliver judgments. For example in the Crown Court they deliver a summing up to the jury, which is public, but is not posted on any website. And in the Administrative Court and the Criminal Division of the Court of Appeal, judges deal with many of the cases on paper, giving brief written reasons for many of their decisions, which, again, are not available on any website.

But in the QB List most of what I do is in court and results in public judgments. So it is possible to demonstrate how the time is spent. Anyone can see many of my judgments on the 5RB website, and even more of them on the Bailii website. Those attending this conference will know that when doing that work, I regularly deliver judgments each week amounting on average to over 10,000 words or over twenty pages of text. In July I handed down about 50,000 words. That is over 100 pages of judgments. Not every month is like that, but many are.

When and how are those judgments written?

Judges write, or dictate, every word of a judgment. They have clerks who work tirelessly for them, transcribing dictation. But clerks are not clerks in the American sense of that word. It is no part of their duties to assist in the drafting of judgments, other than by typing from dictation.

As I said, in July when there were only three days when no case was listed before me. But I cannot write 100 pages of judgment in three days. And in addition to hearing cases in court and writing judgments, a judge is required to do much else. A judge has to pre-read papers before a hearing. As you know, bundles of papers commonly include thousands of pages of documents, both documents concerning

the case itself and bundles of authorities. And every month every QBD Judge has a pile of cases to decide on paper. These include applications for permission to appeal to the Criminal Division of the Court of Appeal, and applications for permission to appeal to the High Court from decisions of the County Court.

Judges ask the listing officers for judgment writing days. In practice it is difficult to grant these requests. If a judge is available to sit in the QBD for only a few weeks, then judgment writing time makes serious inroads into the time that judge is available to sit in court.

So the work of a QB judge in London is quite unlike the work of a barrister. A barrister may work very long hours to prepare a case, but at least in my own experience as a barrister, the periods of intense activity and long hours were followed by periods of lower activity. There are no periods of low activity for a QB judge sitting in the QB list in London.

The position is the same, if not worse, when QB judges sitting in the CACD. To give an example, on Tuesday this week there were two constitutions of the CACD listed. The Case list included 9 cases in Court 6 and 7 cases in Court 8. It is the practice in the CACD for judges to give ex tempore judgments in all but the most difficult cases. If they did not do that, there would be no hope of keeping up to date with the work. The papers are prepared by lawyers in the office – a role that does not exist outside the CACD. These lawyers do excellent work in preparing summaries. But a judge must read all of the papers and each judge must, and does in fact, prepare his or her own ex tempore judgment. In a three judge court a judge will commonly give two or three ex tempore judgments each day. There are reading days, but in my experience they are rarely adequate for reading the papers and preparing the judgments.

So there is simply no time for a non-specialist judge to do for a self represented litigant the work that a lawyer would do for that litigant. And judgments have to be written at unsocial hours.

There is a further reason why specialist judges are required in freedom of expression cases. When injunctions are granted in privacy and defamation cases, third parties are affected, in particular the media. Third parties have a right to apply to the court for a variation or discharge of an injunction that affects them. But, as I have remarked in a number of judgments, media organisations rarely do apply to the court. This is not because they are content with the injunction. On the contrary, they often criticise the grant of the injunction in the pages of their newspapers.

But freedom of expression is a right under the Human Rights Act. And that Act requires judges not to grant injunctions which are incompatible with a Convention right. So in these cases a judge is not performing the traditional role of a judge. The traditional role of a judge is to resolve disputes between litigants who choose to appear before the court and argue their sides of the case. If defendants choose not to raise a defence to a claim, the judge is not required to raise the defence for them. But in a freedom of expression case the judge is obliged not to interfere with the rights of third parties, even if those third parties choose not to attend court.

This places a very great burden on judges. They have to write judgments without the benefit of any submissions from an advocate. I have had to write a number of judgments in this way. Probably the best known is one of those referred to in your Programme. Judgments granting or refusing injunctions have to be produced in a very short time. Reasons have to be given, whether the judge is a specialist or not. This is particularly difficult for a judge who has no professional experience of the applicable law.

What I would like to do today is to urge all of you, both barristers and solicitors, those in private practice and those who are employed, to consider where the specialist judges are to come from in the future to hear freedom of expression cases, whether in the High Court or in the County Court. As the recruiting posters

put it: Your country needs you. If no one with experience is willing to become a judge, there will be no specialist judges.

In fact, as I know, some of you, both solicitors and barristers are part time judges. And if full time judges are to be appointed in practice they are likely to come from amongst the part time judges. There is a good reason for this. Once appointed, judges cannot in practise be removed if they unable or unwilling to work to the standard, and at the speed, that is required. So appointing judges is not like appointing employees or civil servants. If a judge is appointed who is not up to the job, he or she will slow down the system, and increase the costs and delays for many years. That is part of the price that has to be paid for the independence of the judiciary.

So what are the personal qualities required of a judge? In an address earlier this year the Lord Chief Justice said that the quality most required of a judge is fortitude. He may have had in mind the four cardinal virtues: *prudence, justice, fortitude, and temperance* (Book of Wisdom 8:7). I would respectfully agree with the Lord Chief Justice that fortitude is the personal quality most required of a judge. Prudence, justice and temperance are virtues which are required of everyone, including judges. At first sight many people might put prudence, justice and temperance as the primary virtues required of a judge, rather than fortitude. But there is good reason for what the Lord Chief Justice said.

I remind you of the judicial oath:

“I will do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill will.”

One difficulty is that many of the people to whom judges have sworn to do right are very unattractive, and some of them are utterly abhorrent. Another difficulty is that the oath is to do right “after the law and usages of this realm”. It is not to do

right according to the judge's personal principles or preferences. There is no conscience clause in the judicial oath.

Those who criticise the decisions of judges may not always have in mind what the judicial oath requires. This applies both to the media and to politicians. If judges are publicly criticised for making unpopular decisions which the judicial oath requires them to make, no good can come of that.

I have now been a judge of the QBD for nearly 10 years. I count it a very great privilege. I was one of the last judges appointed upon the invitation of the Lord Chancellor. Most of those who received such an invitation considered that it was their duty to the public to accept it. Since then judges have been appointed by selection exercises such as the one recently announced by the JAC. This system of appointment has many advantages, including the advantage of transparency. No one would wish to return to the old ways.

But there was one advantage of the former system that cannot be replicated under the present system of appointment. Under the present system it is less clear to lawyers that they may have a duty to the public to apply for appointment. To decide not to apply may not seem to be the same as to refuse an invitation from the Lord Chancellor. But the effect is the same. That person does not become a judge.

Those attending this conference are in one respect unusual. Many of you work wholly or partly for media organisations, and you and your clients are regularly engaged in litigation. The media often express their views on the judgments of the High Court. That is one of the reasons why the right of freedom of expression is important in a democracy. But the public in general, and the media in particular, should not just express views about particular judgments. They should, and they do, express views about diversity and other issues relevant to the appointment of judges. You and your clients do and should consider carefully what sort of people you want as judges, and where you expect them to come from.

It is not for judges to decide upon the future of the judiciary. It is for the public to express their views, for the JAC to conduct selection exercises, and for the Government and Parliament to decide on the applicable legislation. But if those members of the public who are likely to be most affected by the appointment of judges do not form their own views, express those views, and act on their own principles, they are less likely to get the judges they want. If you, or if people you know, are qualified to apply but decide not to apply, you should consider what the reasons are. And you should make known in public what those reasons are in general terms. If those responsible for judicial appointments do not know why qualified applicants decline to apply, it will not be possible for those issues to be addressed.

I hope that those who would be best qualified for appointment to the High Court Bench will apply in the course of the forthcoming selection exercise. If specialist lawyers do not apply, there can be no specialist judges. That is a prospect that greatly concerns me, and I am sure it concerns all of you here today as well.

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