

Good afternoon everyone. My name is Karen Todner. I am a solicitor of over more than 30 years' qualification who specialises although not exclusively, in representing those on the autistic spectrum. The remit of my talk today was given to be as Autism in the Criminal Justice System which is a very wide topic. I therefore thought that I should try to bring to you today my practical experience of representing those on the autistic spectrum, the sort of situations that I have come across and some suggestions for how things might be improved. I don't think that I have or pretend that I have, all the answers but perhaps if I tell you some of my stories it may make you think of how this situation can be improved.

You may have heard the expression in the last few months "Justice is Broken". It is the title of a book recently written by someone called The Secret Barrister and it has been in the bestseller's list for the last few months. If you haven't read it, I strongly suggest that you do so. Put it at the top of your Christmas list. The Secret Barrister describes the mix of the Justice is Broken system, it's lack of judges, its falling down courts, its no facilities, its defence practitioners who are paid a pittance, its overworked prosecutors, too few police officers and probation officers, a Criminal Cases Review Commission that is simply overwhelmed and violent and scary prisons that can't protect people. Throw in to that mix, defendants with autism. I can tell you now that the product is very unsatisfactory and unsavoury. That's the reality. I am going to give you a few examples and talk you through some of my experiences.

By far the best well known case that I have represented a client who has been on the autistic spectrum is that of the USA v Gary McKinnon. You have heard from the wonderful Janis this morning, Gary's mother. I started representing Gary in 2002 when he thought he was going to be prosecuted for offences under the Misuse of Computer Act in the UK. He contacted me and told me he had been accused of unlawfully accessing some computers but I had no idea which ones. When I met him and discussed it with him, I asked him which computers and he said oh, the Pentagon, the CIA and the White House, of course I was completely taken aback.

I represented Gary for 2 or 3 years thinking that he was going to face domestic proceedings and then the Americans applied for his extradition. Between 2004-2010 I took the case twice to the House of Lords and the Supreme Court and twice to the

European Court of Human Rights. It was only at the very, very last minute prior to his Order for Extradition that Gary agreed to give an interview to London tonight on television. He appeared at 6.30pm and by 7pm I had received an e-mail from someone who had Asperger's and they said they recognised the symptoms of Asperger's in Gary on the television and that I should have him assessed. The next day I researched Asperger's and what it meant having never heard of it before, found out who the right person was to do the assessment and the following day Professor Simon Baron-Cohen came down to London and assessed him and low and behold, yes, he did have Asperger's and was on the autistic spectrum.

We used this finding to lodge the first judicial review of the Secretary of State's decision to extradite him and there was a long protracted battle between us and the prosecution as to who would be the appropriate doctors to assess Gary. Janis, in particular, was very adamant that only experts in autism should assess him. Eventually Theresa May who was then the Home Secretary agreed that Gary could not and would not be extradited. Not only did this raise significant points of law in relation to extradition, it also I think significantly raised the profile of autism and Asperger's. I think a lot of people in the general public if you mention the word Asperger's or autism will say oh yeah, that's the hacker guy that was going to be taken to America – what's happened to him now? And that I think is really the case that brought autism to the notice of the general public and to some extent the courts.

Following on from Gary McKinnon, Lauri Love was similarly arrested and faced extradition for very similar offences. The evidence that I had in the Magistrates Court of how the Americans treat people with autism and/or depression was actually overwhelming and extremely disturbing. The Prosecution didn't call any evidence to contradict it at all but nevertheless the Magistrate made an Order ordering Lauri's extradition to the US. We appealed to the High Court and were ultimately successful, but it was a long and hard battle which was roughly fought by both sides for a number of years and it certainly took its toll on Lauri and his very supportive family.

Both the cases of Gary and Lauri brought home to me how difficult it was to deal with hackers in particular and those on the autistic spectrum and what was the appropriate disposal for people such as these in the criminal justice system.

Both of those men may well have committed a criminal offence of some sort but clearly prison in the United Kingdom or America was not the place for them. It serves no one any purpose to lock these people up. Both clients suffered horrendously with depression for a number of years as a result of their case, but both are now leading constructive and positive lives. I do look back on it all now and think what was the point of it all, what was anyone trying to achieve by locking either of them up in prison. These are people who are hugely talented and for many years their talents went to waste as they were overwhelmed by depression. They are also two men who went through all of their school years and more without ever being diagnosed as on the autistic spectrum and this is where I think the problems started. They both remain locked in England and Wales as the arrest warrants from America are still out there in the rest of the world.

One case that caused me huge concern every day is that of Tom Hayes. I wake up every morning and think about him spending yet another day in prison. Tom Hayes is the banker accused of manipulating the Libor interest rate. There is no doubt that he is a genius when it comes to numbers and maths and that was partly the reason why he was such a successful Libor trader. He was accused of being very greedy and money orientated but I can tell you now that he is not greedy or money orientated, he is numbers and maths orientated. When I go to visit him in prison he sits there doing algebra in front of me. He was accused of manipulating the interest rate and in the week before his trial his father-in-law said, "Has anyone ever considered the fact that Tom may have Asperger's". Again, he is someone who went through a large portion of his life without diagnosis until coming into contact with the criminal justice system.

I didn't represent him at his trial and I have only been dealing with his appeal but as a result of the comment that the father-in-law made, Tom was assessed and low and behold, yes, he definitely did have Asperger's. It was clear that a lot of people around him, particularly at work, realised already that he was on the autistic spectrum because his nick name at work was actually Rain Man. However, the Judge made a ruling at the beginning of the trial that the jury were not allowed to know the details of his diagnosis or to be of aware of how that may affect him. Tom was awarded an intermediary, someone to stand next to him, and help him to understand the questions to assist him in

communicating his responses and understanding his cross-examination, but apart from that, the jury were completely unaware of his diagnosis of Asperger's.

This was undoubtedly both abused by the Prosecution and misunderstood by members of the jury. For example in reference to an e-mail which someone sent to Tom Hayes, which just said, hopefully the sheep will just copy. Mr Hayes was asked by his own Counsel what do you understand by that and Tom's very literal response was "Well, they are referring to a 4-legged animal". He was also asked, "What does the shape of the book mean – what is your understanding in terms of the market" and Tom's response was "Well, just to be clear, it doesn't mean that it is rectangular, oblong, square or circle". The jury thought he was being sarcastic and clearly hated him for it. They passed notes and made comments essentially expressing their irritation at his responses and no one was ever told well he is making those responses because he gives literal responses because he is on the autistic spectrum. The jury were unaware of the affects of the significance of his diagnosis, and that was abused and taken advantage of. Tom was asked under cross-examination whether or not something was a charade and he responded "Well that is a game that is played at Christmas so I don't think so".

The intermediary that Tom was given was changed almost daily. They didn't have any relationship with Tom and it was difficult to see how they could have improved or facilitated communication enough for him to fully understand the proceedings. It is clear to me that the jury may well have reached an entirely different decision to the one that has now resulted in him serving a term of imprisonment of 11 years, yes 11 years – it has actually been reduced from 14 years originally. Had they been told of his diagnoses or at least understood when he was giving some of the answers that he gave, why he was giving them, their decision might have been very different. Two years after the submission of the appeal to the Criminal Cases Review Commission we still await a referral back to the Court of Appeal and he still languishes in prison.

Certainly, my view is that anyone who is the autistic spectrum and there is a diagnosis of that before the court, then a jury should be made fully aware of that so that at least they know and have some understanding in to the person standing in the dock.

Another case that I have dealt with brings in to focus for me two issues in relation to representing those on the autistic spectrum and I think causes real problems. The first is the use of video links and the second is the fixed fee payment method and poor level of payments for defence solicitors which means that many of them cut corners to an unacceptable level.

The next case I would like to tell you about is that of BC. This is a boy on the autistic spectrum who has severe learning difficulties and when he was aged 19 he had a mental age of a 9 year old and that is never going to improve. He was being constantly arrested and held in police stations for hours upon end. He was accused of being inappropriate towards children although not what I would call significant issues and of course he was someone with a mental age of a nine year old, trying to communicate with other nine year olds. He was eventually given a lengthy sexual risk order which is a Civil Court order. It was two pages long, telling him what he could and couldn't do. But this was a boy who couldn't read or write and obviously he breached that order very quickly within a week and was taken back to Court again, accused of further inappropriate contact with children and taken back to Court and remanded into prison.

He was represented at the police station and the Magistrates Court and the Crown Court by one firm of defence solicitors. During the course of those proceedings which lasted from April to November 2017 he dealt with 19 defence solicitors and paralegals. None of them appeared to have handover from the former solicitor. None of them appeared to be aware of the issues that happened in the previous hearings. They were late for Court every time, because they were trying to cover more than one Court in a day. Because its simply not cost effective to only go to one Court in one day anymore. They always rushed into Court as soon as the solicitor arrived, because they were running late. In the end the outcome was that BC was sent to the Crown Court and was facing a Crown Court Judge. The solicitor who dealt with the case, towards the end of the case did actually in the end raise the issue of unfitness to plead and did obtain psychiatric reports. Both of which actually said that he was not fit to plead. Unfortunately the solicitor didn't upload them to the digital case management system so the Judge was unaware of the contents of them. The Judge actually bullied the advocate into seeing BC over a video link because he was only produced from prison by video link. He described the advocates protestations that there were mental health issues as flim flam. There was no

personal interaction between the barrister at Court and BC. There was no intermediary at Court. And what happened was that the barrister then wrote out a two page confession and signed it on BC's behalf because obviously the barrister is at one end of the video link and BC is at the other. I obtained the court logs and transcripts and this whole process from beginning to end took 17 minutes. They went into Court, the barrister stood up and indicated that BC was pleading guilty and he was promptly sentenced to three and a half years imprisonment. He couldn't have read, never mind written, the confession that was signed on his behalf. He clearly didn't have a clue what was going on. His parents who were in Court did their best to help. In fact at one point the father stood up and started shouting at the Judge, making it clear that they needed an adjournment so that they could try and deal with it, but nobody listened. BC got three and a half years in prison. He was taken off first of all to Wandsworth and then to High down Prison in Sutton in Surrey. In prison he was bullied every day. He was hit. His possessions were taken off him, including his shoes, so he had no shoes. He had to borrow shoes from other inmates and clothes. He didn't know how to fill in any of the forms to allow him to progress through the system. He couldn't attend any of the courses, because he couldn't fill in any of the forms to let him go on the courses. The prison wouldn't let his parents fill in any of the forms for him because he was technically an adult. It was a really horrendous situation. When he complained he was put into solitary, never the attackers, always him.

His father actually worked at a golf club and members of the golf club were so appalled by what happened to the man's son, they raised some funds and approached me and I took the matter back to the Court of Appeal. I am pleased to say that he was fairly promptly, not immediately, but fairly promptly released and is living back with his parents. But it was a classic example to me of how a perfect storm came together to create the most gross injustice. A combination of cuts to the defence, so that the defence solicitors cut corners that they shouldn't cut. This boy had a well documented history of mental health issues but there is no payment at all for defence solicitors to read defence documents and it was clear that many of the reports that the parent provided has not been read at all. Going to the wrong experts, so not experts in autism. Defendants with autism appearing via video link and unable to express themselves. And no intermediaries in Court. All of these factors just all combined together with this broken justice system to produce an absolutely horrendous outcome for this boy.

At the Court of Appeal a probation officer came in to Court and have to say was fantastic and came over to me and said I have just picked up this file and I am horrified by it. She said it looks like we have gone back to the dark ages and we lock up those who are autistic because we don't know what to do with them and that is exactly what it was like.

When he was about to be released the local police were so angry that they made representation to the probation serve that BC should go to hostel in the new forest away from his parents it took string representation to avoid this happening and I'm pleased to say he's now back living at he with his mum and dad. The local police seemed to have no sympathy or understanding of BC. I know they are underfunded and stretched but that cannot come at the price of humanity. There is also a big need for the police to trained in autism and how that can manifest in defendants and how those defendants should be treated. I think this should be a compulsory part of their training.

Another case I would like to mention is a case called GG. GG is now 17, but when he was 15 he was clearly struggling at school. He was overweight. He was academically bright, but clearly found it difficult to socially interact with other pupils at school. He knew he was different, but he didn't know how or why. He described it as a bomb exploding inside his head that he just couldn't cope with or deal with.

One day for no particular reason that anyone can fathom, he took his father's shot gun into school in different parts and went and sat in a music room on his own and put all the parts of the gun together. He immediately realised that it wasn't a bright thing to do and he called the police himself. The police came in riot gear and took him away and he was charged. The duty solicitor came to represent him at the police station and represented him in Court. They didn't actually see him once outside of the police station or Court on any occasion during the whole time that they represented him. They were being paid a small fixed fee to represent him so there was no incentive to spend time to sit down with him and the family to get to the bottom of what had gone on. They did however obtain a psychiatric report on him. It wasn't by an expert in autism, and that psychiatrist did not pick up on his autistic traits. GG went to Court and pleaded guilty at aged 16, he was sentenced to six and a half years imprisonment, which was an horrendous sentence for a boy of that age of previous good character. In particular of huge significance is that

when he became 17, if he was still in custody at that point, he would then go off to the likes of Feltham or Aylesbury Young Offenders institutions, which are tough and hard places to be. The advocate was changed every time and the advocate for his sentence, he met as he walked through the doors of the court.

The family were clearly devastated. They made contact with me because by sheer coincidence I had actually gone to that same school many years ago now obviously, head master and I had exchanged emails about the case. I went to see GG and immediately recognised that he had traits of autism and had him assessed by a psychiatrist specialising in autism, who immediately gave a positive diagnosis. Again I took the case back to the Court of Appeal and GG was ordered to be immediately released. And I am now pleased to say that he is back at home and having completed his GCSEs and receiving the support that he actually needs. But by that time he had spent nine months in a supervised secure children's home.

I think one good thing that has come out of this case is that, although he is an example of yet another boy and it does seem to be more about boys than girls, he is another boy who has only been diagnosed with autism as a result of coming into any interaction with the criminal justice system, just like Gary McKinnon and Lauri Love.

What can we do to improve things? Firstly, I think that there needs to be better screening, when people are younger in schools. Many years of lives such as those of Gary McKinnon and Lauri Love would not have been wasted if they had had a diagnosis earlier in life. I know things are improving now but there is still work to be done - look at GG - the case was only last year and he was 16 before being diagnosed.

I think that if, in one case I dealt with called RC, he was 15 and he had stopped going to school because he was hacking into computers and he lived in his bedroom and his mother brought him food to his door and he had an en-suite bathroom and he literally didn't come out of that bedroom for about nine months. And the first time for nine months that he then had interaction with people was when the police came and arrested him. And I look at a case like that and I think how does that person slip out of society, so that they get into that situation and that nobody else picks up on it.



So I think the first thing is that there needs to be proper screening of people at school and potential early diagnosis, so that people such as Gary and Lauri and RC, don't have to endure the proceedings that they went through and perhaps their talents can actually be diverted to be used in a positive and acceptable field.

Secondly, I think we have to ensure that if we use experts in the criminal justice system, that they are the appropriate experts and I think there needs to be some sort of categorisation or determination of how experts are described and employed.

My own personal jury is still out on intermediaries. I think if they are properly trained and have a relationship that can develop with defendants then they may well be helpful but I think there are some psychiatrists and judges who use intermediaries to declare that if intermediaries are employed, then those who are unfit to plead and or stand trial, miraculously become fit. It's almost a get out of jail – or into jail - card. If intermediaries do not have a relationship with defendants and are not there for the whole of the trial, I think they can actually make things worse and allow higher courts to excuse miscarriages of justice in the lower courts.

Fourthly, we need to understand that the Legal Aid Authority and whichever government is in power and my experience over 30 years is that it hasn't made any difference at all as to which government it is, do not want to pay properly for representation of those who are in the criminal justice system and particularly for those who are autistic. It's not a vote winner. In the lower Courts it really is a case of pile them high, get them in and out as quickly as you possibly can. There are solicitors and barristers who are paid on a set fixed fee, depending on factors such as the page count in a case and the type of offence. There is no incentive to go out there and do a really good job for someone who is really in need, because the financial pressures on Legal Aid practices are such that it is much easier to do as little as possible, such as for example in the case of GG, not even seeing him outside of Court or the police station. I do think that there needs to be some sort of financial recognition for defence practitioners that if they are dealing with mental health cases that they are properly remunerated for that. When I first started in this profession I could say with hand on heart that the level of representation was no different for legal aid clients, than for those who paid privately. That is simply not the

case anymore and unless criminal defence legal aid is reviewed and propped up in some way then miscarriages of justice such as those I've described will continue.

Many defence solicitors have very little insight to information about autism and there is lots of training that can be done, perhaps by the Law Society. I myself have been guilty of it, I represented Gary McKinnon for a good six years thinking I really like him but he's quite odd, he never looks me in the eyes, when his girlfriend cries he is not very sympathetic, and my eyes glazed over when he talked about computers as I didn't understand what he was talking about, without realising the significance of any of those characteristics. Now I can meet someone and at least know whether it is relevant to at least have them tested. I can tell you that there are plenty of solicitors out there who simply have no idea to even think about it. There is room to say that if a Defendant is autistic that they have some form of continuity with their solicitors. The Bar recently had compulsory training for cross examination of vulnerable witnesses. I think a similar project could be rolled out for all defence practitioners about autism and how to spot the signs or identify it. I must say that sending 19 solicitors such as in the case of BC is in my view never a proper service. But I do think there has to be a happy medium somewhere between the two.

The last two matters that I ask you to consider are the Criminal Cases Review Commission. They are simply overwhelmed. Cases do go wrong. Tom Hayes being a classic example. I have had his case for two years now. I speak to the case manager very regularly. He is very nice and he is clearly working hard. But they are just overwhelmed, they can't cope with the number of cases that they have and the work they need to do. There needs to be more funding into the criminal cases review commission.

The one thing that I would say that all of my cases have in common is that the defendants that have come to me have had very loving, caring and supportive families. They have been there to fight their corners and to some extent be their advocates. Without them I am sure that many of them would have ended up in prison, shut away and simply forgotten. What worries me is that what has happened to all those autistic people without loving, caring and supportive families, who are on their own coming into contact with the criminal justice system, coming into contact with the prison service, who have no one to explain their position or look out for them. I think there needs to be some

sort of hot line for friends and family to seek advice, so that they know for example in the case of BC, where they had 19 solicitors that that is not normal. That they are entitled to complain even if they are on Legal Aid.

And lastly my comments about prisons, that “you can judge a society by how well it treats its prisoners” I have researched who said this but I am not actually sure, it could be attributed to quite a few people. But I think it is very poignant and very true. It used to be when I first started doing this job that I could say to people if you go to prison it’s not like it is on the TV, it’s actually alright, but it’s not a great place to be, but you will survive and you will come out the other end relatively unscathed and continue your life. Now I can’t say that. I think prison is now a scary place. I don’t think we can protect people. I don’t think they are protected. I think prison officers are over worked and over run and it’s my view that unless we can actually ensure that someone is safe while they are in prison, that we shouldn’t be sending them there, particular those who are already vulnerable.

I know you also have to think about the safety of the public and you have to think about prevention and deterrence of people committing crime, but there are very few occasions in my opinion that I can think of where locking someone up who is autistic in prison is either good for society or for the defendant. Extradition work has shown me that prison conditions and the justice system in other countries are inadequate in dealing with those who are autistic. This becomes hugely significant in computer hacking cases, where extradition is usually sought by America. The Americans generally treat people with autism by putting them in single cell confinement and isolating them from the rest of prison population. I don’t think that segregation is the answer, but I also don’t think putting them in the general prison population as we do in the UK is probably not very desirable either. Prisons contain inmates who do not understand autism and have no desire to understand it. In a dog eat dog prison environment the autistic individual is vulnerable, has no friends and no one to watch over them. My autistic clients that are in prison are scared on a daily basis. They wake up scared in the morning. They upset people when they point out that a much bigger prison inmate than them has gone to the front of the queue and taken a bigger piece of cheesecake than they got, without realising that its not the done thing to point it out. The consequences of something so minor such as that in prison, for behaving like that, can be extremely serious and pretty

scary. I know that it is not an ideal world and I know that there are financial restraints, but I think in the last, from my experience over the last 30 years, we are now at a real low point and unless some significant action is taken, I think there will be more suicides and deaths in custody.

Over 3000 prisoners are serving a tariff that must meet the requirements of the parole board before release – some of them have served 2 3 or 4 or more times the tariff but not released. How many of these are on the spectrum so they can't complete the courses needs or meet the parole board requirements. This needs to be looked into,

There needs to be more relaxation regarding categorisation of prisoners. Who does it serve for the likes of Tom Hayes to be a cat C or B prisoner - he's not a threat to anyone, never had any adjudications or disciplinary issues – it makes no sense to me.

I read in the Times last week that there are more autistic people being detained in hospital than ever before. I think that's an indication that we are beginning to realise that prison isn't the right place for people with autism but then again maybe neither are hospitals and perhaps there needs to be consideration for a totally different type of 'punishment' altogether.

I am sorry to end on such a depressing note, but I hope that some of the examples that I have given you of cases that I have dealt with have given you some insight into actually what is going on out there. The justice system is undoubtedly broken but perhaps conferences like this will start to put it back together.

Thank you.