COSTS ORDERS IN CRIMINAL PROCEEDINGS IN THE ROYAL COURT

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This article considers whether the Royal Court of Guernsey has power to award costs in criminal cases, with a particular focus on whether a defence costs order (meaning an order for payment of the defence advocate's fees) may be made against the prosecution in the event of an acquittal.

Introduction

1 The issue of defence costs orders has been raised by some defence advocates over the years but there have been no detailed written arguments setting out the legal basis for such a claim—that is until such a claim was made in late 2020 by one of the acquitted defendants in a gross negligence manslaughter prosecution. Specifically, the claim related to payments made by the accused by way of legal aid contributions. Following detailed written submissions exchanged between the parties, the application was ultimately withdrawn without a contested hearing. This article aims to consolidate and note for public record these arguments, provide an overview of the legal position with the (inevitably optimistic) aim of providing as definite an answer as possible—at least, short of a judgment from the Royal Court. It includes a comparison with the position in both England and Jersey.

Why might it be considered there is a power to award costs in criminal cases?

2 There is no known decision of the Guernsey courts where, in the event of acquittal, the prosecution have been ordered to pay defence costs, consisting of either the outlay of the defendant for legal aid contributions or advocates' fees. It is considered that there is no difference in the legal principles involved in either case. The issue of the payment of defence disbursements will also be addressed.

3 As there is no obvious statutory mechanism to allow costs to be paid in the lower court, this analysis is focused on the powers of the Royal Court at customary law and in the Royal Court (Costs and Fees) (Guernsey) Law, 1969 ("the 1969 Law"), which purports to provide an unfettered discretion for the Royal Court to award costs. Section 1(1) states:

> "The costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have the power to determine by whom and to what extent the costs are paid."

4 This must be read in conjunction with s 1(7)(b) which states: "the expression 'Proceedings' means civil or criminal proceedings and it includes ex parte proceedings and any other matter".

5 As was argued on behalf of the defendant, on the face of that wording it is apparent there is a wide discretion vested in the Royal Court to order all types of costs in criminal proceedings.

6 What became apparent, however, through further analysis was that there was very little underlying legislation covering crucial matters such as who might have to pay (*e.g.* the States of Guernsey or the Law Officers), where the money would come from (*e.g.* HM Receiver General, seized assets funds, or general revenue), or how the court might decide when an order was appropriate (*e.g.* for all acquittals or rather where the court considered the prosecution should not have been brought in the first instance). As will be argued, the lack of any clear statutory framework supports the view that there is no power to make defence costs orders. Indeed, if the provision were to be interpreted as giving such wide-ranging power, then it would it not equally mean that the prosecution could apply to obtain costs following a conviction? As is further explored below, such costs' orders have never been made in favour of either the prosecution or defence. Before setting out the respective arguments the historic position in Guernsey needs to be explored.

Guernsey law—a review of the history of costs orders in criminal cases

7 The pre-existing customary law position was that a defendant was *not* entitled to advocates' fees following acquittal. See Laurent Carey, who stated:

> "*Il [le Procureur du Roi] peut impunément accuser et déférer en Justice ceux qu'il connaît coupables, sans qu'il soit assujetti à aucuns dommages ni dépens envers la partie accusée, s'il ne prouve pas son accusation . . .*[1]
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> [He [the King's Attorney] may with impunity prosecute and bring to Court those he thinks guilty without being subject to any

[1] L Carey, *Essai sur les Institutions, Lois et Coûtumes de l'Ile de Guernesey* (1889), at 41.

> damages or expenses to the accused party if he does not prove his accusation . . .]

8 Further, paras 4794–4798 of the Royal Commissioners' Report into the State of the Criminal Law in Guernsey[2] confirms this to be the case: "He gets no costs if he is acquitted?—No: and the costs which I have mentioned are the costs he has to pay."

9 As already indicated the claim made was for the accused's contributions to legal aid and so it is important briefly to explain legal aid in Guernsey. The Legal Aid (Bailiwick of Guernsey) Law, 2003, as amended created the Office of the Legal Aid Administrator and a statutory framework for the provision (see s 1):

> ". . . of legal assistance throughout the Bailiwick with a view, when the interests of justice so require, to helping persons who might otherwise be unable to obtain that assistance on account of their means."

10 As is explored later, legal aid was previously available for specific proceedings, such as an appeal to the Court of Appeal but until the 2003 Law it was not available for representation at first instance in the lower courts or for trial on indictment.

11 This leads to inevitable questions such as what occurred where there was an acquittal and the defendant could not then afford to pay the fees. Did advocates not seek to claim their costs, and possibly their disbursements?

12 To assist in answering these questions it is important to note the experience and recollections of advocates who practised criminal law prior to the full legal aid regime coming into force. Recorded here are the experiences of a practitioner who regularly defended serious criminal cases in the 1970s and early 1980s whilst at the private Bar.

13 The system in operation before legal aid was Guernsey's equivalent of the "dock brief". A prisoner on indictment to be tried before the Royal Court was entitled to be represented by an advocate of his choice, conflict excepted (and if there was no conflict the advocate could not refuse to act). Indeed, prisoners were originally put before the Royal Court, the list of advocates was read out, and the prisoner could choose his counsel therefrom.

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[2] *Second Report of the Commissioners appointed to inquire into the state of the criminal law in the Channel Islands—Guernsey*, at 182 (HMSO London, 1848).

14 Following the conclusion of the case, an advocate could present a bill for legal fees, but the usual practice was then *not* to seek recovery of the fees, even though they may have been legally recoverable. The reality was that many accused who faced prosecution in the Royal Court simply did not have the means to pay, but an advocate was bound to take the case to ensure that a proper defence could be mounted, thereby ensuring a fair trial. It was the practice that in serious cases on indictment the Law Officers would meet the disbursements necessarily incurred by the defence—whatever the outcome of the case. This would include disbursements, such as the costs of an independent pathologist's report in murder cases (where the costs were often not insignificant). This is discussed in the Commissioners' Report[3] at paras 4413–4418, and at para 4414 it is noted that a defence advocate would not "feel bound" to pay defence disbursements from his own pocket, even where they "might be essential to prove a prisoner's innocence." It appears this was essentially a voluntary payment by the Law Officers to avoid injustice and ensure some parity.

15 In the event of an acquittal, free representation, and irrecoverable fees, meant that claiming legal costs for an acquitted defendant was not a practical consideration in the previous century. In essence, it was a *pro bono* system of representation for those who could not afford it. Today, the notion of advocates acting for free on complex cases is a distant memory and clearly defendants are obliged to pay a contribution to legal aid where so required (and, as noted, that is what the defendant sought to recover in the present case).

16 The full background to the creation of the legal aid scheme in Guernsey is fully set out in *Billet d'État* No XVII of 2001 which includes the report, dated the 2t June 2001, of the States Advisory and Finance Committee. As it succinctly states at para 7:

> "In Guernsey there is no single or comprehensive statutory scheme for the provision of legal aid. Historically Guernsey has relied on the Advocates in private practice providing legal aid on a pro bono basis for 'deserving cases'. There is no clear definition of what is a 'deserving case' although the main criterion is the risk of a sentence of imprisonment. There is no mention of 'the interests of justice', the complexity of the case, the capacity of the defendant to represent himself or the potential consequences for the defendant."

17 As indicated earlier specific legislation did, prior to the creation of the legal aid scheme, allow payment for legal fees in certain instances

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[3] *Ibid*, at 159.

and this will now be explained, together with identifying where Guernsey law expressly does deal with costs in criminal cases. This will, when compared with England and Jersey, highlight the absence of any statutory equivalent to the Prosecution of Offences Act 1985 or the Costs in Criminal Cases (Jersey) Law, 1961 (covered further below). The obvious point to make at the outset is that where it has been considered there should be a specific power to award payment for fees and costs, express provisions have been created either by means of detailed primary legislation, or by secondary legislation, orders of the Royal Court or by practice directions.

18 Beginning with the Court of Appeal (Guernsey) Law, 1961 ("the 1961 Law"), s 33 introduced legal aid for appellants who cannot afford legal representation, provided it is in the interests of justice to grant that aid (s 33). This covers representation during the appeal itself, and any preliminary/incidental hearings to that appeal.

19 If an appeal against conviction is allowed, the Court of Appeal has power under s 36(2) of the 1961 Law to award to the successful appellant, "any expenses properly incurred by him in the prosecution of his appeal", which includes any preliminary/incidental hearings to the appeal. These are paid by the States of Guernsey and not the Law Officers by virtue of s 36(2). Section 36(4)(a) expressly applies to the "fees and expenses of any advocates assigned to the appellant under section 33 of this Law."

20 This provision does not provide the Court of Appeal with power to award costs or advocates' fees relating to the trial itself; they have the power to compensate the appellant for the advocates' fees associated with remedying the erroneous decision of the court below, but do *not* have the power to compensate them for the advocates' fees associated with the actual trial. The Criminal Appeal (Fees and Expenses) (Guernsey) Ordinance, 1964 sets the maximum amount recoverable by the advocates but only for the costs incurred in the prosecution of the appeal—which are paid by the court rather than the legal aid service. The point is that this legislation expressly allows for the payment being made and the fees recoverable.

21 In 1989, legal aid also became available in similar terms for those appealing a decision of the Magistrate's Court, by virtue of s 4 of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988. This is again funded by the States of Guernsey and is also subject to limitations on the amount recoverable regarding advocates' fees. Section 8 enables the successful appellant to recover up to £75 for his "out-of-pocket expenses properly incurred by him in the prosecution of his appeal, including any proceedings preliminary or incidental thereto". There is no express mention of advocates' fees and £75 would clearly not meet such fees incurred in appealing successfully. Further if an application

for leave to appeal, or the appeal itself is dismissed, then HM Procureur may recover "costs" up to £75 but there is again no express mention of advocates' fees.

22 Again, there is no provision for the appellant to recover his advocates' fees in relation to the trial itself. So, as with the 1961 Law, this Law does not provide for the recovery of defence advocates' fees incurred in connection with the prosecution in the lower court.

23 It is now necessary to return to the 1969 Law which (as already observed), on the face of the statute purports to give the Royal Court power to award costs in criminal proceedings. Of course, looking beyond plain statutory wording, where there is no ambiguity on the face of the statute is not normally permissible and no parliamentary material should be considered (see *Bogle v Law Officers*[4]). However, as an academic exercise, it is considered necessary to see if there is any background to assist in understanding the remit of the 1969 Law.

24 The States Resolution and Policy Letter which preceded the 1969 Law are both very short and reveal no intention to empower the court to make the order sought—simply stating that a new law should be introduced to, *inter alia*, empower the Royal court to make orders "in relation to court proceedings and for the recovery of such fees in such proceedings."

25 A review of the Law Officers' archives yielded nothing as to the background of this document, or indeed the legislation then drafted. Reference is also made in the Policy Letter to the 1931 Law[5] and this "provides for Advocates' fees which are recoverable when ordered by the court." This was repealed by the 1969 Law, but there is nothing within that provision empowering the court to order the Law Officers to pay advocates' fees in the event of an acquittal.

26 The Policy Letter also assists with explaining how it was anticipated the process of creating new regulations would operate:

> "We are all agreed that as this matter directly concerns proceedings before the Court it is desirable that it should be regulated by Order of the Royal Court and not by Order in Council . . . It will be necessary to repeal [the previous provisions] . . . and to insert in the repealing *Projet* a provision which will empower the Royal Court from time to time by Order to make provision for the payment and the recovery of the fees referred to."

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[4] 2020 GLR 218.

[5] Order in Council Vol IX, at 38.

27 It appears that the legislative intention was to delegate the making of new legislation related to the recovery of fees to the Royal Court, and indeed various orders have been made by the Royal Court. It is submitted that it is only through subsequent Royal Court orders that the specific power to award costs and fees would be generated. Arguably, it was never the intention to give the Royal Court the power to award costs in the event of acquittal, rather the intention was to give wide ranging power to make subordinate legislation, but the Royal Court has not made any orders creating an express power to award defence costs. In short, it is submitted that there is no clear statutory basis for concluding that there is any power to award advocates' fees in the event of an acquittal. The position remains as stated in the 1848 Commissioners' Report.

28 Clearly, if the court had been considered to have a discretion to award costs, then this power would have existed since 1969, potentially leading to liability for defence costs for 50 years of acquittals, claims that could be substantial. Perhaps that is a pessimistic view as one would hope that the court would apply its discretion by looking at the conduct of the prosecution, and only make an order where it considered the case should not have been brought.

29 To support the position being taken, it assists to look at the 1969 Law from another perspective and to ask how wide the apparent power in s 1(1) might be? If read literally, the power could arguably include the court being able to order the defence costs to be paid by the court itself if the court had fallen into error, *e.g.*, if a different judge sitting in the same case had wrongly decided to exclude key evidence leading to the prosecution offering no evidence. The court could arguably order costs against the media if they reported on matters contrary to a court order if this led to the case being stopped. Could the press then also be ordered to pay the costs of the re-trial? If a victim of crime was not believed on oath could the court order that he or she pay the costs of the prosecution and defence? These are deliberately extreme arguments to highlight the absurdity of concluding that s 1 creates an unfettered discretion to award costs at large. As explained below, *Steele Forde v CPS (No 2)*[6] shows that, if the intention had been to empower the Royal Court to award costs against the Law Officers, unambiguous wording would be required as found in English and Jersey law.

30 To ensure that all relevant matters have been considered, we refer to the Royal Court (Costs and Fees) Rules 2012, made pursuant to s 1 of the 1969 Law.

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[6] [1994] 1 AC 22.

31 Rule 1(3) states:

> "In criminal proceedings there shall be paid, in respect of a proceeding or matter corresponding to one described in column 1 of the Schedule, a fee of the amount specified in column 2 in relation to the corresponding proceeding or matter."

32 The Schedule mentions criminal proceedings only in para 3(a)(iv) as follows:

> ". . . in proceedings relating to any civil or criminal appeal from the Magistrate's Court, the Court of Alderney or the Court of the Seneschal or any appeal from a decision of an administrative body or tribunal, *excluding* proceedings described in sub paragraph (vi) below [which is not relevant]."

33 Rule 2 sets the maximum advocates' fees recoverable, but specifically limits this to "civil proceedings". No such rules have been made regarding advocates' fees in criminal proceedings. It is submitted that in the absence of a clear statutory provision an order for the payment of advocates' fees (including disbursements as *per* r 10) cannot be lawfully made.

34 Rule 3 then deals with witnesses' allowances in criminal proceedings but there is nothing dealing with advocates' fees. It is suggested that the express mention in rr 2 and 3 of what is payable, and in what proceedings, illustrates that it was never the intention of the Royal Court to create a power to make a defence costs order.

35 It is submitted that, while the legislature intended to include criminal proceedings within the remit of "proceedings", it did not intend to allow the recovery of advocates' fees in the event of an acquittal, as illustrated by the dearth of underlying legislation setting out how the court might exercise its discretion, what rates might apply *etc*. A full analysis of English and Jersey law is undertaken later, but it is useful to note here the words of Lord Bridge in *Steele*: "I find it difficult to visualise any statutory context in which such a jurisdiction could be conferred by anything less than clear express terms".[7]

36 One other consideration, if an order were made against the Law Officers, is from which fund would it be paid? There is no relevant consolidated fund. Could the Crown be asked to bear the costs?

37 Until shortly after the Second World War, the Crown bore the costs of the criminal justice system out of Crown revenues, *i.e*., (principally) *treizièmes* from property transactions on Crown fiefs, This fund bore

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[7] *Ibid*, at p 41.

the costs of the prison, the establishments of the Lieutenant Governor, Bailiff and Law Officers, and into which fines were paid. By a post-war agreement between the United Kingdom Government and the States of Guernsey (and Jersey), income arising from hereditary Crown revenues were ceded to the States in return for the States henceforth bearing all Crown expenses, such as the cost of criminal justice.

38 This agreement is set out in the Jersey and Guernsey (Financial Provisions) Act 1947 which states:

> "There shall be issued out of the Consolidated Fund . . . at such times as the Treasury may direct and shall be paid to the States of Jersey or the States of Guernsey sums equal to any sums paid into the Exchequer on or after the first day of April, nineteen hundred and forty-seven, on account of hereditary revenues of the Crown which have accrued in the island of Jersey or the island of Guernsey, as the case may be."

39 Does this mean the States of Guernsey would be legally obliged to pay a defence costs order? The golden thread running through this article is that there is no clear power to make the order, but it is acknowledged as arguable that, by necessary implication of the 1947 Act, if such an order were made then this could provide a cause of action against the States of Guernsey (assuming there were no voluntary payment).

40 Of course, the fact that there has never been an order, and the fact there is no obvious person against whom the order might be made, is not to say that if the court found a power it could not make the order sought. Equally, however, defendants and defence advocates might have something to say if the prosecution in Guernsey suddenly sought to use the apparently unfettered discretion of the Royal Court to seek prosecution costs when historically they had never done so. There are strong public policy reasons against recognising such wide powers where there is no clear basis for them. One would expect consultation with all relevant bodies. Further, this would of course require consideration by the States of Deliberation of any projected cost to the taxpayer, and how any central fund created would be funded.

41 Consideration would also need to be given as to whether to limit the court's discretion to award costs; in England the Crown Prosecution Service can only be held directly liable for an acquitted defendant's costs if they were incurred "as a result of an unnecessary or improper act or omission."

42 In *R v P*,[8] the CPS appealed a decision to award costs to an acquitted defendant. It appears that the basis upon which the judge at first instance made the order was in some doubt, and the case provides a useful summary of the position in England and Wales. Crucially in terms of the operation of the court's discretion the Court of Appeal stated that:

> ". . . the decision to prosecute or not is a thoroughly difficult and delicate one. It is one on which two perfectly responsible lawyers may easily differ. It is only in the clearest possible cases that a decision taken by the appropriate authority in good faith could possibly justify a penalty in costs [and at para 15] . . . It is important that the making of that decision should not be overshadowed by the fear that if a prosecution is continued and fails there may be an order for the payment of costs."[9]

43 This approach has been further underlined in *R v Cornish (Errol)*:[10]

> "According to the Prosecution of Offences Act 1985 s.19(1) and the Costs in Criminal Cases (General) Regulations 1986 reg.3(1), the court might award costs in favour of a party to criminal proceedings who had incurred such costs as a result of 'an unnecessary or improper act or omission' by another party. Improper conduct meant an act or omission that would not have occurred if the party concerned had conducted his case properly, DPP v Denning [1991] 2 Q.B. 532, [1991] 3 WLUK 85 applied. The test was one of impropriety, not merely unreasonableness, R. v Counsell (Geoffrey) [2014] 3 WLUK 332 applied. A failed prosecution, even where the defendant was found to have no case to answer, was not in itself sufficient to overcome the threshold criteria for a s.19 costs order. The conduct of the prosecution had to be so starkly improper that no great investigation into the facts or decision-making process was necessary to establish it, Evans v Serious Fraud Office [2015] EWHC 263 (QB), [2015] 1 W.L.R. 3595, [2015] 2 WLUK 441 applied. Even where a case failed as a matter of law, the charge was not necessarily improper since many legal points were properly arguable. It was important that s.19 applications were not used to attack decisions to prosecute by way of a collateral challenge: the courts had to be vigilant to avoid imposing too high a burden or standard on a public prosecuting authority in respect of prosecution decisions, Evans applied, R. v P [2011] EWCA Crim 1130, [2011] 4 WLUK 170 followed. Accordingly, a successful s.19 application would be very rare and

[8] [2011] EWCA Crim 1130.
[9] *Ibid*, at para 13.
[10] [2016] EWHC 779 (QB).

> would be restricted to those exceptional cases where the prosecution had made a clear and stark error as a result of which a defendant had incurred costs justifying compensation (see paras 7–8, 10–16 of judgment)."

44 It is suggested that the Royal Court would, in the absence of any express statutory basis, have some difficulty adopting these provisions as representing the law in Guernsey.

45 The point is that, in the absence of a consolidated fund, or any statutory regime at all, the question of how this would operate in practice is very unclear. The States of Guernsey do not budget for being the ultimate source for funds. It is only by turning to look in more detail at the position in England and Jersey that this point can be properly expressed. But before doing that it is important to identify why the Guernsey courts might pay heed to those jurisdictions.

Analogy with other similar jurisdictions

46 As acknowledged at the outset, the 1969 Law appears to indicate unambiguously that the Royal Court has the power to make any costs orders it wishes. However, it should now be clear that the position is not quite as straightforward as an initial reading might suggest.

47 As the seven-member Guernsey Court of Appeal said in *Wicks v Law Officers*:[11]

> "Guernsey is a separate jurisdiction and has its own legal system. It is, therefore, free to set its own sentencing levels as the Island's courts think appropriate for Guernsey. Guernsey no more has to follow sentencing practice in England than it has to follow sentencing practice in Scotland, Northern Ireland, Jersey or, for that matter, France; it can, of course, in exercise of its autonomy choose, but for the same reason of autonomy cannot be compelled, to do so. In our judgment, no authority is required to justify this elementary statement of the constitutional position which has been regularly stated on previous occasions."

48 The issue there was the suggestion that "unless there is a significant difference between social or other conditions in Guernsey and those in England, the Guernsey courts should follow English sentencing practice".[12]

49 That suggestion was readily rebuffed but there is a sufficient commonality between English law and Guernsey law that assistance

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[11] 2011–12 GLR 482, at para 16.
[12] *Ibid*, at para 14(i).

may be derived from the former to assist in understanding the latter. Indeed, it has being accepted, at least since the 1848 Commissioners' Report, that Guernsey courts may have recourse to English law to assist in determining Guernsey law. This is obviously most common where the Guernsey statute is similar to the equivalent English provisions.

50 It is worth recalling the decision in *Law Officers v Harvey*.[13] In the Royal Court, Sir de Vic Carey (then Bailiff) was tasked with considering the law of insanity and diminished responsibility as it applied in Guernsey. The difficulty was that Guernsey had not enacted any provision equivalent to the Homicide Act 1957 and one of the key issues was whether the court "should accept that the defence of diminished responsibility as it has developed in the last 40 years in England should be incorporated into the criminal law of Guernsey."[14] The Crown invited the court to consider the well-known English *M'Naghten* rules as reflecting the position in Guernsey law. Defence counsel argued the court should follow the law of Jersey and, in particular, the decision in *Att Gen v Prior*[15] in which Sir Philip Bailhache, then Bailiff of Jersey, had found no previous case in the Jersey courts where the *M'Naghten* rules had applied, and declined to accept them as part of Jersey law. In considering the position in Guernsey, the then Bailiff quoted heavily from the 1848 Commissioners' Report and commented:

> "10 It appears that for some time prior to that the criminal law had developed in an unstructured way and the need was to have a clear criminal law with offences defined and categorized and the various glosses on such offences developed over the centuries in the English courts imported into Guernsey jurisprudence. Consequently, since 1848 one has witnessed the development of common law offences on parallel lines to those offences in England and also the development of local legislation dealing with the more common offences of dishonesty and other offences such as criminal damage that have been the creatures of statute mirroring English provisions. Jersey law, I accept, has not always developed in a similar direction."[16]

51 The Bailiff went on to cite a number of examples of the *M'Naghten* rules applying in Guernsey law, before then exploring the development of the defence of diminished responsibility in English law. He questioned why it had not become part of Guernsey law, commenting

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[13] 2000–02 GLR 189.
[14] *Ibid*, at para 6.
[15] 2001 JLR 146 (affirmed on appeal 2002 JLR 11).
[16] 2000–02 GLR 189, at para 10.

on the 'incapacity of the Law Officers to move law reform in this area" through being "under-resourced" before stating:

> "I think I should take account of this being a small jurisdiction with a certain limitation on its resources for promoting legislation, and further, emboldened by the judgment of the Court of Appeal in *Morton* v. *Paint* . . . which mildly chastised me for declining the opportunity of bringing the law on occupiers' liability in Guernsey into a modern state by means of a piece of judicial law-making, I am going to set off down the path of engaging in some judicial law-making, fully cognizant of the admonition of Southwell, J.A., in *Morton* (21 GLJ 61, at p.55) that 'development of the civil common law by the Courts is more readily undertaken than that of the criminal common law.'"[17]

52 He concluded by directing the Jurats that the law in Guernsey included the *M'Naghten* rules and that diminished responsibility was available as a defence to murder, allowing the court to convict of manslaughter instead.

53 Although Guernsey did not follow Jersey law in that case, they did favour the Jersey approach to the interpretation of the offence being concerned in the supply of controlled drugs in the decision in *Law Officers v Bishop.*[18] Judge Finch rejected the approach of the English courts that there had to be proof of an actual supply, and in doing so aligned Guernsey law not only with Jersey law, but also Scots law. Interestingly, the English courts later moved in line with Guernsey, Jersey and Scots law in determining this was not a necessary element of proof. It is worth quoting from the judgment, which it is suggested accurately reflects approach to be taken in Guernsey law:

> "We have English, Scottish and Jersey judges in the Court of Appeal. Cases from all these jurisdictions are cited regularly in Guernsey and, although of high persuasive authority, are not binding."

54 Finally, it is worth keeping in mind the words of Lord Wilberforce in *Vaudin v Hamon*:[19]

> *"*Their Lordships were referred to a number of authorities under various systems of law relevant to prescription, its nature and its effect. These were said to be applicable, or at least relevant, by analogy to the present case. This argument appears to their

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[17] *Ibid*, at para 20.
[18] Guernsey, unreported, May 2013.
[19] [1974] AC 569, at 581–582.

> Lordships to be too widely stated. If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter."

55 The argument being put forward here is that the gaps in Guernsey law relating to costs orders in criminal proceedings can only be properly highlighted by looking at the position in England and Wales, and then Jersey.

English law

56 The purpose of analysing English law is to contrast the detailed statutory regime underpinning the power to award criminal costs in England. The decision in *Steele Forde v CPS No 2*[20] definitively covers the position for these purposes. As summarised succinctly in *Bennion on Statutory Interpretation*:

> "They [the House of Lords] held that section 51(1) [of the Supreme Court Act 1981 s 51(1)—which is effectively the same as the 1969 Law] did not empower the court to order costs to be paid out of central funds where this power was not expressly provided, since to do so would infringe the constitutional principle that no money can be taken out of the Consolidated Fund except under a distinct authorisation from Parliament."[21]

57 To add some more detail from the judgment of Lord Bridge in the House of Lords:

> "Modern legislation has given authority to the courts, in a variety of well-defined circumstances, to order the costs incurred by a party to criminal proceedings to be paid out of 'central funds.'"[22]

58 The orders here under appeal were made by the Civil Division of the Court of Appeal for the payment of the several respondents' costs out of central funds in circumstances where no express statutory authority to make such orders could be invoked but in purported exercise of a power to do so which the court held to be implied in s 51(1) of the Supreme Court Act 1981 which, until recently amended by s 4(1) of the Courts and Legal Services Act 1990, provided:

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[20] [1994] 1 AC 22.
[21] 5th edn, at 594.
[22] [1994] 1 AC 22, at para 29.

> "Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court . . . shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

We interpose that it is clear where the draftsperson obtained the wording for the 1969 Law.

> "The operative language of this provision reproduces in identical terms language which was originally enacted by section 5 of the Supreme Court of Judicature Act 1890 (53 & 54 Vict. c. 44) and which has remained on the statute book ever since. Hence the Court of Appeal's interpretation of it not only has the far-reaching consequence that a general power in all civil proceedings is conferred on the court to order payment of costs out of central funds whenever a successful litigant cannot recover his costs from any other source; it also leads to the startling conclusion that this power was conferred by Parliament in implied terms many years before a similar power was first conferred in express terms on courts in criminal proceedings, and the power has since remained dormant for a century, its existence unsuspected until now . . ."

And at 12:

> "But still more important, in the present context, is the special constitutional convention which jealously safeguards the exclusive control exercised by Parliament over both the levying and the expenditure of the public revenue. It is trite law that nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less stringent is the requirement of clear statutory authority for public expenditure. As it was put by Viscount Haldane in Auckland Harbour Board v. The King [1924] A.C. 318 , 326:
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> > 'it has been a principle of the British Constitution now for more than two centuries . . . that no money can be taken out of the consolidated Fund into which the revenues of the state have been paid, excepting under a distinct authorisation from Parliament itself.'
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> Before considering whether, in spite of these apparent difficulties, an unexpressed power to order payment of costs out of money provided by Parliament can properly be implied in any of the sections in question, it is necessary, if tedious, to consider in some detail the nature, context and provenance of the legislative provisions in which jurisdiction is specifically conferred to award payment of costs out of central funds."

There is then a summary of the relevant history of costs—see further below.

And at 15:

> "Thus, throughout the history of the legislation in which jurisdiction has been expressly conferred to order payment of costs out of money provided by Parliament we find that the circumstances in which such an order may be made have been precisely and specifically defined, that, save in the provisions relating to licensing authorities, those circumstances can only arise in criminal proceedings and that, so far as the Court of Appeal is concerned, jurisdiction to make such orders has only been conferred on the Criminal Division of the court . . . The strictly limited range of the legislation expressly authorising payment of costs out of central funds in criminal proceedings no more lends itself to extension by judicial implication than does the equally limited range of legislation authorising payment of costs out of the legal aid fund in civil proceedings . . ."

And at 19:

> ". . . I hope I have said enough to explain why I cannot attribute to the legislature any general willingness to provide the kind of publicly funded safety net which the judiciary would like to see in respect of costs necessarily and properly incurred by a litigant and not otherwise recoverable. It is for this reason that I find it impossible to say that whenever the legislature gives a right of appeal, whether in civil or criminal proceedings, in circumstances where a successful appellant may be unable to recover his costs from any other party, that affords a sufficient ground to imply a term enabling the court to order the costs to be paid out of public funds. The strictly limited range of the legislation expressly authorising payment of costs out of central funds in criminal proceedings no more lends itself to extension by judicial implication than does the equally limited range of legislation authorising payment of costs out of the legal aid fund in civil proceedings. Some general legislative provision authorising public funding of otherwise irrecoverable costs, either in all proceedings or in all appellate proceedings, would no doubt be an admirable step in the right direction which the judiciary would heartily applaud. But this does not, in my opinion, justify the courts in attempting to achieve some similar result by the piecemeal implication of terms giving a power to order payment of costs out of central funds in particular statutes, which can only lead to anomalies . . . The courts must always resist the temptation to engage, under the guise of statutory interpretation, in what is really judicial legislation, but this is particularly important in a

sensitive constitutional area, such as that with which we are here concerned, where we should be scrupulous to avoid trespassing on parliamentary ground. I would hold that jurisdiction to order payment of costs out of central funds cannot be held to have been conferred by implication on the courts by any of the statutory provisions which I have examined. Indeed, I find it difficult to visualise any statutory context in which such a jurisdiction could be conferred by anything less than clear express terms. I would accordingly allow the appeals and set aside the orders made for payment of costs out of central funds. I would also overrule the Bow Street and Central Television cases in so far as they relate to costs."

59 Further as stated in the All England Annual Review:

"The House of Lords has held that the court had no jurisdiction to order the solicitors' costs to be paid from central funds. Section 51(4) of the Supreme Court Act 1991 (as introduced by s 4 of the Courts And Civil Services Act 1990), explained Lord Bridge, goes back to s 5 of the Supreme Court of Judicature Act 1890. At that time at common law the Crown was not liable to costs at all, except in some limited categories in which statute provided that the Crown could be liable. In fact, he observed (at 773), the Crown's general liability to costs did not arise until the passing of the Administration of Justice (Miscellaneous Provisions) Act 1933, s 7 of which provides:

'(1) In any civil proceedings to which the Crown is a party in any court ... the costs of and incidental to the proceedings shall be in the discretion of the court . . . to be exercised in the same manner and on the same principles as in cases between subjects, and the court . . . shall have power to *make an order of the payment of costs by or to the Crown accordingly* . . .' [Emphasis added to highlight the express statutory wording needed to establish a power to order costs against the Crown.]

Lord Bridge explained that the statutory power to order costs against the Crown turns on this provision and continued (at 773):

'Hence the words of s 5 of the 1890 Act "the court . . . shall have full power to determine by whom . . . [the] costs are to be paid", while apt to embrace an order for payment of costs by the Crown in those categories of civil proceedings in which the Crown as a party was amenable by statute to such an order, could not have been intended then to apply to the Crown as a party to any other category of proceedings, let

> alone to authorise payment by the Crown of the costs of civil litigation to which the Crown was not a party.'"

60 *Craies on Legislation*, after quoting parts of the speech from Lord Brige set out above, states:

> "The distinction to be drawn is between supplying a deficiency without which the Act is incomplete in its own terms ('within its four corners') and seeking to expand the policy of the Act so as to deal with an ancillary matter for which the legislature did not provide, although they might have chosen to do so had they thought of it. Contrasting Inco Europe with Holden makes the point clear: a system for the regulation of traffic that operates by reference to classes of transport must not be allowed to fail because one class has not been provided for in one respect, provided that is it clear what provision can presume to have been intended for that class. But it is not integral to the efficacy of the system of prosecutions that a particular class of costs should be paid from central funds, however desirable it might be that they should be paid."[23]

61 The Prosecution of Offences Act 1985 ("the 1985 Act") provides a clear statutory regime for the award of costs in criminal cases. The relevant provisions are not repeated here but are covered extensively in *Archbold* 2021 (and commented on further below). The Act creates the power to award costs (both to the prosecution and defence) and deals with related matters (*e.g.* how the discretion can be exercised, where the money comes from). The 1985 Act also established the Crown Prosecution Service, of which Guernsey has no statutory equivalent.

62 To illustrate the very different positions in England and Guernsey, it is worth noting that the 1985 Act repealed the Costs in Criminal Cases Act 1973 ("the 1973 Act") which itself repealed the Costs in Criminal Cases Act 1952 ("the 1952 Act"). The 36th edition (1966) of *Archbold* includes commentary on the latter provision, and the 41st edition (1982), providing details of the former provision. The point of working backwards was to see if the power to award costs was ever derived from common law. If a common law power could be found, particularly one found after the 1848 Report, this might strengthen the argument that it was in turn part of Guernsey's common law. The research undertaken can be summarised as follows:

(a) The 1952 Act created the power to award prosecution costs at s 1(1) and defence costs at s 1(1)(b), and the payment was made from local funds. This was in respect of cases before assizes or quarter

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[23] 10th edn, at 777.

sessions where a person was tried on indictment and was thus analogous to the prosecution of cases in Guernsey's Royal Court (to the extent it governs costs in more serious prosecutions). Indeed, the 1952 Act appears to have been in the mind of the Jersey legislator when introducing a similar statutory power to award costs in that jurisdiction—see further below.

(b) *Archbold's Criminal Pleading Evidence & Practice* states:

> "It would be quite wrong that costs should be awarded as of course to every defendant who is acquitted. In the opinion of the judges the power to award costs to a defendant who has been acquitted will be appropriately exercised in cases where it is clear that a mistake has been made, or there is no foundation for the charge. Practice Note (Costs), 36 Cr.App.R.18)."[24]

This shows that from an early stage guidance was given, in a Practice Note, as to how the provision was to operate in practice and how judges were to exercise their discretion.

(c) There is further commentary as to the operation of the provision and the exercise of judicial discretion. Factors to be taken into account were "whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings, or their continuation upon himself are among the matters to be taken into consideration."[25]

(d) Paragraph 769 deals with s 7 of the meaning of costs payable "out of local funds."

(e) There is further analysis of costs available in other courts, but this is less relevant, other than to illustrate that in each instance there is a clear statutory regime creating the power to order costs.

(f) It appears the 1952 Act was preceded by an earlier statute, the Costs in Criminal Cases Act 1908.

63 The 1952 Act was repealed by the 1973 Act which again provided a clear and detailed statutory regime.[26] To conclude, it is clear that there been a statutory basis in England for the award of costs in criminal cases for over 100 years.

64 No such underlying provision exists in Guernsey. Indeed, it was at this point that it was considered unnecessary to go back further as it was

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[24] 36th edn, at 266, para 761.
[25] *Ibid*, at para 762.
[26] See further *Archbold*, 41st edn, at 695: "Central funds, i.e. money provided by Parliament".

considered it had been established there was a sufficiently long standing statutory regime governing costs in criminal cases in England and Wales. It was quite clear that if any common law provisions governing costs existed (none has been identified), they had been long superseded in English law.

Jersey Law

65 The position in the two Islands is very different. The relevant legislation in Jersey is the Costs in Criminal Cases (Jersey) Law, 1961.[27]

66 The position can be summarised as follows:

(a) All costs which may be awarded pursuant to the statutory provisions are from a "public fund" meaning "money of the States" (s 1) and not money of the Law Officers of the Crown. There is a "public fund" of States money from which to pay defence costs.

(b) Section 2(1)(a) creates the power to award costs in favour of the prosecution in the event of conviction—see s 2. It is understood prosecution costs are ordered to be paid regularly by those convicted in Magistrate's Court prosecutions, but less so in the Royal Court.

(c) Section 2(1)(c) creates the power to award "the costs of the defence" in favour of the accused if "discharged from the prosecution or acquitted." It is understood that the defence do on occasions have their costs paid in the event of acquittal.

(d) There is some assistance as to how the court might operate its discretion set out in s 1(3) (in connection with prosecution costs) and s 1(4) in respect of defence costs). The term used is "reasonably sufficient to compensate" and in the case of defence costs this applies to "the expenses properly incurred by the accused in carrying on the defence."

(e) Section 3 deals with costs on appeal.

(f) Section 4 deals with how the payment from public funds is arranged and involves the Judicial Greffier.

(g) Section 5 deals with enforcement.

67 Finally, there is no statutory or common law power in Jersey to award costs against the Law Officers themselves.

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[27]The author is very grateful to Howard Tobias of the Law Officers' Department in Jersey for his assistance with the law and practice of that Bailiwick.

Supplementary arguments

68 It is hoped the preceding paragraphs will have established that, whilst at first blush the 1969 Law might allow the court to order costs against the Law Officers, there is no jurisdiction to do so. If comparisons with English and Jersey law had not found favour with the court additional arguments would have been presented on behalf of the Law Officers as follows:

(a) That this interpretation would be at variance with the intention of the legislature, and be obnoxious to principles of public policy. It is submitted that the "golden rule" of statutory construction applies, and this can be summarised as follows:

(i) A literal interpretation of a statute is not always required.

(ii) Indeed, there are occasions where the court does not even have to make do with the words used in a statute. Language may be varied or modified in limited circumstances. Accordingly, the golden rule can be applied even where the words may, *prima facie*, carry only one meaning.[28]

(iii) As to what those limited circumstances may be, it would appear that this rule applies in the following situations when the ordinary meaning of the words:

  (i) would be at variance with the intention of the legislature (see *Becke v Smith*,[29] followed in *Metronet Bail BCV Ltd (in administration)).*[30]

  (ii) would lead to manifest absurdity or repugnance (*Becke v Smith* and *Re Grey and Others.*[31]

  (iii) Would cause a result that is obnoxious to principles of public policy: *In re Sigsworth*.

(b) If the court were to conclude there was the power to award the costs it would have been argued the draftsperson had fallen into error in drafting s 1(1) so widely. By doing so, unintended consequences potentially arise, as set out above, which could have grave consequences to the prosecution of criminal offences in Guernsey. See *Bennion on Statutory Interpretation*:

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[28] *In re Sigsworth* [1935] Ch 89.
[29] [1836] 150 ER 724.
[30] [2007] EWHC 2697 (Ch).
[31] [1857]10 ER 1216, at para 106.

> "The literal meaning of, at least of a modern Act, is to be treated as pre-eminent when construing the enactments contained in the Act. In general, the weight to be attached to the literal meaning is far greater than applies to any other criterion. The literal meaning may occasionally be overborne by other factors, but they must be powerful indeed to achieve this. With older Acts the weight attached to the literal meaning tends to be less. As Lord Bridge said of an Act of 1847, it is 'legitimate to take account, when construing old statutes, of the prevailing style and standards of draftsmanship.'"[32]

(c) The following text in *Bennion* is also worth considering—where it is acknowledged that the, "absurdity may be so extreme so to induce the court to depart from the literal meaning". It is suggested the absurdity would be extreme if the Royal Court were so empowered. As per the summary of Guernsey law, above there is no clear indication in the Policy Letter that preceded the 1969 Law that it was the intention of the legislature to permit the court to make the order sought and this is where the draftsperson fell into error in drafting such an arguably wide provision.

(d) As already mentioned, it may well not be the Guernsey draftsperson's original work anyway (see *Steele*, at 8) as the operative provisions of the 1969 Law may be based on s 5 of the Supreme Court of Judicature Act 1890. The view of Lord Bridge was in distinct contrast to the Court of Appeal and notwithstanding that s 1(7)(b) of the 1969 Law extends the definition of proceedings to include criminal proceedings and, by analogy with the approach taken by Lord Bridge, this does not mean it can be implied this would permit the order sought.

(e) There is a significant public policy element at stake. Trials are expensive and the prosecution team at the Law Officers' Department are ultimately funded by the taxpayer. Should costs be awarded against them, as a matter of course, every time there is an acquittal, it could lead to serious financial consequences for the taxpayer. The same argument can be applied if the States of Guernsey were found to be ultimately responsible to foot the bill.

(f) The unintended consequences of making the order could also be considerable. Would the Jurats be less inclined to acquit if they knew the prosecution could be left with a large bill?

(g) Further, to set such a precedent might have a chilling effect on an individual prosecutor's ability to consider a case objectively, and without being concerned as to the potential financial consequences of a

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[32] At 866.

prosecution. The English case of *Perinpanathan v City of Westminster Magistrates Court*[33] involved costs being claimed by an individual after successfully defending an application, made by the police, for a forfeiture order. As the case was civil in nature, the High Court would have been unable to order the costs out of central funds, as would be the case (in England) following an acquittal in a criminal trial. The court had to decide whether to use their discretion to make such order as it thought just and reasonable. The court acknowledged:

> "it is crucial that the police act honestly, reasonably, properly, and on grounds that reasonably appear to be sound. In both cases there is a need to make and stand by honest, reasonable and apparently sound decisions in the public interest without fear of exposure to undue financial prejudice, in one case if the decision is successfully challenged, in the other if the application fails. There is a real public interest that the police seek an order for forfeiture if they consider that on the evidence it is more probable than not that the money was intended for an unlawful purpose. It would be quite contrary to the public interest if, due to fear of financial consequences, it was decided not to seek its forfeiture, but simply return the money. The public duty requires the police to make an application in such circumstances."[34]

(h) In civil cases in England, the courts have been reluctant to award costs against those who are honestly, reasonably and properly discharging a public duty. A prosecutor's task is not to make decisions based on economic risk; it is to apply the evidential and public interest tests. It would therefore be contrary to the interests of justice financially to penalise the Law Officers where a prosecution, brought in good faith after carefully considering these tests, results in an acquittal. The decision to prosecute in Guernsey follows a well-established process based on the approach taken by other prosecuting authorities in England and Wales.[35]

(i) The Court further commented, at para 31 of *Perinpanathan*, that:

> "It seems to me, moreover, that there is a distinction between an award to a successful defendant in criminal prosecutions of his costs from central funds, and an order against the police should an application for forfeiture fail, albeit properly made. In a criminal prosecution no question arises, absent of bad faith, of the successful defendant's costs being ordered against the Crown

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[33] [2009] EWHC 762.

[34] *Ibid*, at para 29.

[35] http://www.guernseylawofficers.gg/article/160958/Decision-to-Prosecute

Prosecution Service or the police; the body or bodies which decide whether or not to bring the proceedings."

(j) There is no central fund in Guernsey. The concerns of the court in *Perinpanathan*, in being asked to order costs against the police, despite their having made an honest, reasonable and apparently sound administrative decision, are equally applicable here. Whether a regime akin to central funds should be introduced in Guernsey is a matter for the States of Deliberation. For such a drastic change to occur, it must, it is suggested, be expressly brought about by the legislature.

(k) The principle of Crown immunity prevents the Royal Court from making an order against the Law Officers. *Bennion on Statutory Interpretation* explains the nature of the doctrine: "Since an Act is made by the Queen in Parliament for the regulation of subjects, it follows that, unless the contrary intention appears, the Act does not bind the Crown itself."[36] This is a common law doctrine, and so it applies to Guernsey law where Crown functions are being performed, as is the case in criminal prosecutions. As the 1969 Law is not expressed to bind the Crown, no order under s 1 can be made against the Crown or officers who are discharging a Crown function. *Bennion* states: "The doctrine of Crown immunity is not limited to the Monarch personally, but extends to all bodies and persons acting as servants or agents of the Crown, whether in a private or public capacity. In particular, the doctrine embraces all elements of the executive government . . . This brings in government departments and their civil servants."[37] There are examples of statutes that are expressed to bind the Crown—see the Data Protection (Bailiwick of Guernsey) Law 2017 which provides in Schedule 1 "(1) This Law binds the Crown and is applicable to public committees." Another example is the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law 2016, which in s 29 simply states: "This Law binds the Crown." There is no such provision the 1969 Law.

(l) To reject an application for costs would not contravene an acquitted defendant's human rights. The jurisprudence of the ECtHR is unequivocal in stating that Article 6 does not grant a person charged, but subsequently acquitted, a right to reimbursement of costs incurred in the course of criminal proceedings, however necessary these costs might have been. The existence of such a right is subject to domestic legislation. See, *e.g.*, *Masson v Netherlands*.[38]

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[36] At 206.
[37] At 207.
[38] (1996) 22 EHRR 527, at para 49.

Conclusion

69 This article has sought to establish why s 1(1) of the 1969 Law does not confer a general discretion to award costs in "all proceedings". In particular, there is no power to award advocates' fees against the Law Officers or the States of Guernsey in the event of an acquittal. It seems that in the 50 years since the commencement of this Law, the Royal Court has exercised that discretion only in respect of civil proceedings and never in criminal proceedings. The prosecution has never actively sought the payment of costs by the defence.

70 It is submitted there is no statutory basis for concluding that the legislature intended to confer power on the Royal Court to make defence costs orders. It is respectfully submitted (as explained by Lord Bridge in *Steele*) that it is not for the Royal Court to fill a lacuna other than where it acts under the delegated powers given by s 1 of the 1969 Law. It will be noted these powers can only be used by the Full Court, and not the Bailiff sitting alone (see s 1(6)). In any event such a significant change would require consultation with all interested parties, and a central fund would need to be created to allow costs to be paid in appropriate cases.

71 To conclude, whilst Crown immunity has been mentioned above, it should be further noted that "The doctrine of Crown immunity applies to the Crown in its overseas dependent territories in much the same way as in the UK".[39] As a Crown Dependency this is common sense: indeed, Her Majesty would clearly not welcome a large costs bill emanating from the courts of Guernsey.

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[39] *Bennion on Statutory Interpretation*, at 212.