

Is it Time that Criminal Damages Law Woke Up to Social Justice?

As very recently widely publicised in our news, on 5 January a jury at Bristol Crown Court gave its verdict in the trial of four young people tried for damaging the statue of Edward Colston during a Black Lives Matter protest in that town 18 months previously.

While pleading not guilty, the defendants had admitted involvement in bringing down the statue and plunging it into the harbour. And, Edward's fall from grace had even been filmed. Thus, it was, and remains, the cause of some astonishment that a Bristolian jury acquitted. The defendants walked out of court to tumultuous celebration, their minor place in history now assured under their new title of 'The Colston Four'.

Yet, it is a verdict that had polarised the nation, where for every cheer there is also an equally urgent cry of panic from those agin the species of havoc wrought by the protest. There has been talk of a 'loophole' in the law, and of need for legislation to close it.

On 5 January the Secret Barrister published an article online in his/her typically excellent style, both calm and analytical.^[1] While not justifying the statue's ordeal *per se*, SB nonetheless puts this case in context, and attempts to dispel the panic.

In this brief public interest article, I will look at this type of case from a Scots perspective, where concern has also been expressed for the future (and, indeed, future safety) of some of our own historical statues. For example, the Melville Monument, i.e. Henry Dundas (1742—1811) is of note, where that umwhile practitioner at the Scots bar has also unfortunately attracted revisionist criticism for his perceived role in the slave trade, such as bedevilled poor Eddie and earned him an up-close-and-personal encounter with the Avon.

How would a case such as this be tried in Scotland. And, would the outcome be any different ?

Who Was Edward Colston, Anyway ?

In the 17th and 18th centuries, Eddie was a successful and thus wealthy Bristolian businessman (and also briefly MP for that town). While initially making his loot in trading tangible and perishable commodities such as fruit and textiles, he eventually joined and became governor of the Royal African Company, which

oversaw the transportation of tens of thousands of slaves from Africa to the Americas, where they would be put to work in sugar and tobacco plantations.

Approximately 19,000 slaves died on their voyage.

In modern eyes, that seems like a very nasty business. At the time, however, the slave trade was largely considered normal. And, Eddie also gave away considerable parts of his wealth to local poorhouses, schools, hospitals and churches. Thus, in a very real sense he helped make Bristol a better place for those residing there, and he contributed to its ongoing success over subsequent centuries.

Hence, his statue.

Yet, the slave trade, and hence also what became of his statue on 7 June 2020.

It is unknown whether the protestors deliberately chose to pitch him in the harbour as some form of poetic justice, where many of those slaves who died at sea would likewise have been unceremoniously chucked overboard. In any event, the question put to the jury was whether this was justice at all.

Who Are the Colston Four ?

This article is not about the protestors *per se*, and where their case remains susceptible to appeal, in any event it would be improper to comment at this stage to any greater extent than has already been done. However, suffice it to say that they are three young men and one young woman, all aged in their twenties or early thirties, and who joined the BLM protest in mid-2020. None of them are black.

What SB Says

The Secret Barrister analyses the case by reference to the relevant statutory provision, being s.1(1) of the Criminal Damages Act 1971 (E&W):

1 *Destroying or damaging property*

(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence...

S/he also refers to s.5, which in effect raises the prospect that a defendant might defend a charge under s.1(1) on the basis of 'lawful excuse'. And, s/he also refers to divers other provisions in E&W statutes, which raise the prospect that the public display of a statue of a slave trader might itself constitute a crime, thus entitling a defendant to argue use of reasonable force to prevent that crime, i.e. by removing the statue.

Further lines of defence arise out of the question of ownership and freedom of expression. In terms of ownership, if a statue is owned by the town and its residents, or at least if a defendant honestly believes this, then can the statue be described as 'property belonging to another' ? In terms of freedom of expression, Art.10 of the ECHR might also be apt for consideration.

Ultimately, however, SB concludes that the jurors deliberated on their verdict in private, where they gave no reasons for it (and nor can they be required to do so). Thus, in a sense, we shall never know precisely how they approached their decision-making exercise, or why they decided to acquit.

That said, jury history does provide earlier examples of acquittal despite apparently incontrovertible evidence of guilt, especially back in the days when many relatively modest offences attracted capital punishment. In essence, during the industrial revolution rich and poor often found themselves living cheek by jowl, whereupon property crime soared. The government's response was to attempt to deter such offences by hanging the culprits.

In England in the 18th and 19th centuries, there were as many as 223 capital offences. These included livestock-rustling, poaching, pickpocketing, forgery, chopping trees, and damaging fishponds.^[2] Occasionally, defendants were convicted and put to death for trivial infractions. For example, in 1801 a 13-year old boy was hanged for stealing a spoon.^[3]

However, in many cases the jury's response was, in effect, to ignore the evidence, and indeed the law *per se*, and instead to apply their own natural justice.^[4]

Scotland

North of the border, the default analogue defence is vandalism as provided for by s.52 of the Criminal Law Consolidation (Scotland) Act 1995:

52 Vandalism

(1) Subject to subsection (2) below, any person who, without reasonable excuse, wilfully or recklessly destroys or damages any property belonging to another shall be guilty of the offence of vandalism...

Thus, it can be seen that s.52 is extremely similar in its terms to s.1(1) of the Criminal Damages Act 1971.

However, s.52 only refers to the offence being prosecuted by summary procedure, i.e. at its highest at the Sheriff Court before a sheriff sitting in judgment alone without a jury. It makes no provision for prosecution upon indictment, i.e. by sheriff and jury, or by High Court judge and jury.^[5] And, the maximum sentence is only three months of imprisonment.^[6]

Whereas the Colston Four were prosecuted at the Crown Court. The Crown Court has no direct analogue in Scotland. In hearing cases at first instance, it only ever sits with a jury. Accordingly, such either way offences as are prosecuted before it tend to be those considered by the CPS to be more serious, thus, if resulting in conviction, deserving of more severe disposal.

Given the large scale of the protest on 7 June 2020, and the extent of its publicity, it is understandable that the CPS chose to try this case at Crown Court level. Likewise and accordingly, if a comparable offence were to be prosecuted in Scotland, it is conceivable that the Crown would raise it upon indictment for the Scots common law offence of malicious mischief.^[7] Usually, the *actus reus* consists of actual physical damage, or 'injury', to another person's property, albeit the degree of damage might be relatively modest.^[8] The *mens rea* consists of 'deliberate and wicked intention', or of recklessness.

While, being a common law offence, there is no specific analogue of the 'without reasonable excuse' element per s.52 of the 1995 Act, or of the 'without lawful excuse' element of s.(1) of the 1971 Act, nonetheless the requirement that it be wicked tends to anticipate such a potential line of defence. Indeed, the *nomen juris* itself also suggests this, i.e. it must be 'malicious'.

Thus, reasonable / lawful excuse is apt for consideration. And, turning back to the jurisprudence on s.52 of the 1995 Act and its earlier iteration,^[9] it can be seen that such an excuse can even proceed on the basis of mistaken belief.^[10]

Sheriff Summary Proceedings

Were a number of persons somehow to topple Viscount Melville from aloft his perch in St Andrew Square in broad daylight, then pitch him into the Water of Leith, and were this filmed whereupon they admitted their deed, if subsequently prosecuted before a sheriff sitting alone, then it is extremely hard to believe they would walk out of court as free individuals.

They would obviously be damaging the monument. Even if they took care to detach the statue from its pillar intact, the mere act alone of removal would be sufficient to constitute damage within the meaning of s.52 of the 1995 Act and its jurisprudence.

And, it is hard to conceive of a sheriff accepting that they had a reasonable excuse insofar as they believed Henry Dundas supported slavery, thus his statute constitutes a public obscenity and hence a crime. There is nothing inherently obscene about the statue itself.^[11]

And, nor would any Art.10 argument carry much prospect of success, where freedom of expression is proportionate and subject to the state's interest in maintaining public order. It is inconceivable that anyone would consider such a protest as occurred in Bristol to be consistent with normal public order. It had more of a flavour of insurrection — justified or justifiable, perhaps, but broadly out of keeping with typical peaceful protest.

Jury Trial

By contrast, there is no reason in principle for firm belief that Edinburgher and Bristolian juries would necessarily arrive at polar opposite verdicts. While acquittal would be surprising, and doubtless provoke similar commotion, it is certainly a possibility that should not be overlooked.

What this says about juries, and what weight it might attach to or detract from current proposals for withdrawal of trial by jury in certain types of cases, is intriguing. Besides highlighting this as an issue, it is beyond the scope of this current article to explore it in any greater detail. Readers may already have their own views in any event.

However, for those who do continue to place value on juries, suffice it to say that history shows they can serve as a brake on the will of the state, where that tends towards excess. And, indeed, they may also assert the commonweal of natural justice amid evolving societal values and reflections on our past.

Ultimately, therefore, I have to conclude that I do not concur with SB on this point (not something I say often or lightly). Where s/he dismisses any need for legislative reform, yet leaves open the prospect for future such instances of mob rule, then the state does have an interest in taking measures to deter and prevent any repetition.

You can't be a revolutionary and expect impunity from the status quo that you're trying to overturn.

That's not how revolutions work.

1. www.theseecretbarrister.com/2022/01/06/do-the-verdicts-in-the-trial-of-the-colston-4-signal-something-wrong-with-our-jury-system-10-things-you-should-know/
2. This author, honours dissertation, Adbn, 1996, p.8
3. Norman St John-Stevas, Right to Life, Hodder & Stoughton, 1963, p.90
4. This author, The Jurisprudence of Jurisprudence (And Why Human Judges Can Never be Replaced by Robots): www.terrafirmachambers.com/articles.html?article_id=276
5. By contrast, 'either way' statutory offences tend to refer to both modes of prosecution in the body of the principal provision, e.g. s.51 of the Civic Government (Scotland) Act 1982 in respect of obscene material
6. Six months for any subsequent commission of the same type of offence
7. For example, as written upon by institutional writers, Hume, i.122; Alison, i.448; Macdonald, p.115; and Anderson, p.214
8. For example, Ward v Robertson 1938 JC 32, where the damage consisted merely of trespassing on a field of grass where sheep were grazing
9. Section 78 of the Criminal justice (Scotland) Act 1980
10. MacDougal v Yuk-Sun Ho 1985 SCCR 199, where the accused had smashed the windscreen of a car in the mistaken belief that it belonged to a person who was escaping his premises after breaking and entering
11. And, many would argue that Henry Dundas did not support the slave trade, and in fact only initially opposed its abolition out of concern that it would flourish unchecked as an illicit activity