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EDITORIAL

Since this is the first issue of the *Nottingham Law Journal* under my editorship I should like to take this opportunity to thank my predecessor, Adrian Walters, for his sterling work over the last five years. He leaves the *Journal* in excellent shape. Furthermore, on a personal note, he has eased my transition into his shoes with much valued practical advice and many a sage word. I would also like to extend a special thanks to the *Journal*'s assistant editor, Jane Ching, whose astonishing abilities and hard work have proved invaluable to me over the past few months.

Nottingham Law Journal has always been a general legal journal, a "broad church" catering for, and providing a window into, the professional and academic legal worlds. In this way it might be said to reflect the essential nature of Nottingham Law School itself. In this issue we have striven to maintain this tradition: in addition to both doctrinal and practice-oriented pieces, this issue also provides the launch-pad for a new project whose aim is to salve some of the apparent antagonisms between legal practice and legal theory and their respective disciples. Practical Applied Legal Theory (PALT) is the brainchild of Graham Ferris, who provides a manifesto and call to arms and, along with Erica Kirk, an opening salvo in the form of a reconsideration of the work of the great American legal philosopher, Wesley Hohfeld. It is to be hoped that this will be the first of many such offerings and certainly this editor will strive to foster and maintain the *Journal*'s inclusive approach.

TOM LEWIS

NOTTINGHAM LAW JOURNAL

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ARTICLES

HONORARY DEGREE ADDRESS GIVEN AT NOTTINGHAM TRENT UNIVERSITY BY SIR IGOR JUDGE, PRESIDENT OF THE QUEEN'S BENCH DIVISION, ON 19 JULY 2007

Vice-Chancellor, ladies and gentlemen.

I am acutely conscious that the university has done me a great honour and I am touched and grateful for it. I must say that it is extremely pleasant to be honoured for doing something I thoroughly enjoy. As patron of the Nottingham BVC I am granted the privilege of seeing a little of the next generation of young men and women drawn from the brightest and the best in this country. It must be so stimulating to talk and listen to them. In my next incarnation I hope to be bright enough to become a don. I should teach law. The best students read law at this university.

Apart from the work that you have done in tort, or criminal law, or contract, what should those who have studied law have understood from their years at university? My answer to this question is that you should have learned the critical importance of the rule of law. Some who are not lawyers might suggest this is mere legal gobbledegook, cobbled together in some form of self-justification for lawyers. But it is not. The concept is probably best expressed in the words attributed to Thomas More by Robert Bolt in *Man for All Seasons*, chiding his son-in-law, Roper:

> This country is planted thick with laws from coast to coast – and if you cut them down – do you really think you could stand upright in the wind that would blow then?

It is the rule of law that protects us all, society, the community as a whole and each precious individual in it from anarchy, from the law of the jungle, from triumph of the wildest and worst and the rule of tyranny.

I am not talking about rule by judges or lawyers or administrators or ministers or governments. I am talking about the rule of law. John Locke summed it all up in five words in his *Second Treatise of Government* in 1690: ''wherever law ends, tyranny begins''. Tyranny, that is, not only of the dictator, but tyranny of the mob. And for all of us, whatever offices we hold, Thomas Fuller told us in the middle of the 17th century, ''be ye never so high, the law is above you''. It is a salutary reminder that in the end we are answerable for our own actions.

The world does not love lawyers. Ever since the first person began arguing a case, the lawyer and the law have been exposed to criticism. Some of it is justified, some not. Those of you who know your Shakespeare will remember *King Henry VI*'s Part II, where blood having been spilled for 100 years on the battlefields of France, Jack Cade's rebellion enters London. In all that blood and gore there is one moment at which every audience that I have ever been among laughs out loud. It is when Jack Cade says ''Let's begin by killing all the lawyers''. I wonder how many in the audience who laugh heartily at Shakespeare's joke perceive the link between the killing of the lawyers and

the breakdown of law and order and the Civil War which follows and ends with the haunting, pitiful scenes of the son who discovers he has killed his father and the father who has killed his son? These are not the great nobles, fighting and murdering to establish a dynasty and destroying the rule of law by their ambitions and dying in the process and causing others to die beside them. These are the saddest scenes of all. Perhaps the most touching moment is when the son remembers that he will have to tell his mother what he has done and the father will have to tell his wife. These are the sadnesses of the common man and woman, betrayed because the rule of law was not there to protect them. The rule of law is indeed a bulwark against such disasters.

That is why, as a community, we believe in it. And we do. Even when we do not know very much law. But deep down, somewhere in our history and traditions as a nation we have an instinctive feel that the rule of law has served us well. It has not made, and it could not make, a perfect society. But our society would be catastrophically worse without it. And you, now graduating, happily celebrating and rightly enjoying the benefit of your work and effort, each with your own individual futures, hopes and aspirations, each now with a great personal opportunity, will have to carry the torch and safeguard this most precious heritage of our community. What's to come is still unsure, but it surely will be in your hands.

PERMANENT BORROWING AND LENDING: A NEW VIEW OF SECTION 6 THEFT ACT 1968

*ALEX STEEL**

INTRODUCTION

The offence of theft[1] and the recently repealed offence of obtaining property by deception[2] require that the accused appropriate property with an intention to permanently deprive. When the Theft Bill 1968 was introduced into Parliament, no definition of an intention to permanently deprive was included, but a partial definition was added during the course of debate.[3] This is contained in section 6:

> *With the intention of permanently depriving the other of it*
> (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
> (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for the purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

The meaning of section 6 has long been considered difficult to understand, due to the way in which the two limbs of section 6 (1) are linked.[4] The second limb defines a subset of borrowing and lending that can fall within section 6. The difficulty is in determining whether that subset falls within a broader concept set out in the first limb, or whether the use of the word "and" (rather than "but") to connect the two limbs means that all forms of borrowing and lending fall outside of the scope of first limb.

Commentators[5] had argued that the passage of the section through Parliament created the strong implication that the section was only meant to replicate the pre-1968 common law position of three extensions to the general requirement that there be an intention to permanently deprive. These extensions were the so-called ransom cases where the stolen property was sold back to the victim (generally through deception);[6]

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[1] Section 1 Theft Act 1968.

[2] Section 15 Theft Act 1968, repealed by the Fraud Act 2006.

[3] For the history of the sections see Spencer, "The Metamorphosis of Section 6 of the Theft Act", [1977] Crim LR 653.

[4] It was famously described by Spencer as a section that "sprouts obscurities at every phrase" (*op cit* at 653) a description adopted by the Court of Appeal in *R v Lloyd,* [1985] QB 829 at 834. As the Parliamentary debates make clear, much of the second limb was originally attached to the end of s 6(2) and moved to the end of s 6(1) immediately prior to the passing of the Bill. See Spencer, *op cit,* for a detailed discussion.

[5] See Spencer, *op cit*; Griew, *The Theft Act 1968 and 1978* (5th Edn, 1986, Sweet & Maxwell) at 2–85 ff; Smith, *The Law of Theft* (5th Edn, 1984, Butterworths), [127] –[132]; and Williams, *Textbook of Criminal Law* (2nd Edn, 1983, Stevens & Sons) at 714; Williams, "Temporary Appropriation Should be Theft", [1981] Crim LR 129.

[6] Despite the general acceptance that the ransom principle was a part of the common law, there seems to be little case law to support it: Spencer (*op cit*) footnotes two cases: *Hall,* (1849) 3 Cox CC 245, and *Peters,* (1843) 1 Car and Kir 245; 174 ER 795. ATH Smith suggests that *Spurgeon*, (1846) 2 Cox CC 102, is the only direct authority (*Property Offences* (1994, Sweet & Maxwell) at 225); while Glanville Williams ("Temporary Appropriation should be Theft", [1981] Crim LR 129 at 132) refers to a notorious taking of a Goya painting with a ransom for its return where the principle appears to have not applied (*Bunton*, *The Times* 11 November 1965); a case that ATH Smith considered the inspiration for the second half of s 6(1). For a modern Australian example and discussion of the cases see *Lowe v Hooker,* [1987] Tas R 153.

cases where the nature of the property was changed[7] or its value exhausted before its intended return;[8] and cases where the property was put at risk by putting it beyond the defendant's control, such as where the property had been pawned or used as security.[9] This approach was adopted in *Lloyd*[10] where the Court of Appeal held that the first limb of section 6(1) referred to ransom cases and the second limb to changed nature/exhausted value cases, a situation the court described as when "all its goodness or virtue has gone".[11]

This analysis appeared to read down the scope of the section in a significant way, although not all later cases followed the approach.[12] However, in *Fernandes*[13] the Court of Appeal held that the section was "not limited in its application to the illustrations given by Lord Lane CJ in *Lloyd* . . . Nor. . . did Lord Lane suggest that it should be so limited". Instead, in *Fernandes*, the Court of Appeal stated that the correct approach to section 6(1) was:

> The critical notion, stated expressly in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights". The second limb of subsection (1), and also subsection (2), are merely specific illustrations of the application of that notion.[14]

However, the court in *Fernandes* did not attempt a detailed explanation of the operation of the section, and decisions on the section have been characterised by a lack of detailed discussion of the section. Making matters more difficult, courts have not always been referred to previous decisions on the section and the result is a confused and at time Delphic collection of judicial statements. This article attempts an analysis of all of the judicial statements in an attempt to see if an underlying approach can be gleaned and as a result suggests a new way of understanding the section.[15]

DIFFICULTIES WITH *FERNANDES* AND CHOSES IN ACTION

While *Fernandes* contains a strong statement that nothing in *Lloyd* is to be seen as limiting the scope of section 6, the reasoning in *Fernandes* itself is subject to significant difficulty. That is because *Fernandes* involved the appropriation of electronic funds and was decided prior to *Preddy*.[16] In *Preddy*, the House of Lords accepted that general property law concepts relating to the transfer of choses in action apply to the interpretation of the Theft Act. Specifically, it was held that in a "transfer" of a chose in action, the chose held by the transferee is a new and identical one to that "transferred", which is, in fact, destroyed as a result of the transaction. Consequently,

[7] *Richards,* (1844) 1 Car & Kir 532; 174 ER 925; *Smails,* (1957) WN (NSW) 150.

[8] *Beecham,* (1851) 5 Cox CC 181.

[9] *Medland,* (1851) 5 Cox CC 292; *Johnson* (1867) 6 SCR (NSW SR) 201 at 207. Such an intention eventually to return the property has also been removed as a defence under NSW law by s 118 *Crimes Act* 1900.

[10] [1985] QB 829 at 836.

[11] At 837. See also *Warner,* (1970) 63 Cr App R 79 at 97–8; *Easom* [1971] 2 QB 315, at 319 and *Cocks* (1976) 63 Cr App R 79.

[12] See *R v Bagshaw, The Times* 13 January 1988; [1988] Crim LR 321, (Transcript: Marten Walsh Cherer).

[13] [1996] 1 Cr App R 175.

[14] [1996] 1 Cr App R 175 at 188. Counsel for Fernandes sought to restrict the scope of the first limb to acts of attempted re-sale, relying on *Warner,* (1970) 63 Cr App R 79; *R v Lloyd*, [1985] QB 829 and *Duru,* [1974] 1 WLR 2 (at 186).

[15] It is recognised that at times the argument articulated might seem somewhat stretched, but this is an inevitable outcome of the wording of the section and the history of its interpretation. It is hoped that, while readers might not agree with all of the arguments advanced in this article, the attempt to provide an overall understanding of the section is of assistance in illuminating both the true breadth of the section and its difficulties of interpretation.

[16] *R v Preddy,* [1996] AC 815.

the chose held by the accused in a theft case is not the same as the one originally held by the victim and any "returned" chose would be a third distinct legal right. It is thus doctrinally impossible to not permanently deprive the victim of the chose in action. While section 6 refers to the intentions of the accused, it is very unlikely that an accused considers that he or she is replacing the exact chose that was taken,[17] and consequently section 6 can only apply to tangible property.[18] On this basis the decision in *Fernandes* cannot be correct on the facts.

Additionally, the explanation of the section essayed in *Fernandes* contains significant difficulties. In stating that the second limb and section 6(2) are merely illustrations of the first limb, the court appears to have overlooked the fact that the second limb of section 6(1) specifically states that a borrowing or a lending can only fall within the first limb "if, but only if" it "is for a period and in circumstances making it equivalent to an outright taking or disposal". Consequently, it is suggested in this article that those specific illustrations in fact act as a significant boundary to the practical scope of the first limb because the second limb acts to excise from the scope of section 6 any borrowing or lending that is not "equivalent to an outright taking or disposal".

Finally, the court in *Fernandes* stated that:

> We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss.[19]

There is some uncertainty as to whether the court in *Fernandes* applied the first or second limb of section 6(1) in coming to its decision. This article aruges that the facts of the case and the words used by the court best fall within the concept of lending in the second limb and thus this statement in *Fernandes* should be seen to apply to the second limb, not to the first limb. Consequently, they do not shed light on the scope of the first limb.

THE RELATIONSHIP BETWEEN SECTION 6 AND THE OTHER ELEMENTS OF THEFT

The modern form of theft requires an act of appropriation, which is now held by the courts to require only the assumption of any one property right of the owner.[20] However, as section 6 is predicated on the intention that the victim is not permanently deprived of the property and that the accused intends to treat the property as his or hers to dispose of, the property right appropriated must be one that is great enough to be characterised as a right of disposal, but not one of destruction. It is argued below that this must amount to the assertion of the rights of ownership. Combined with the fact that intangible property cannot be returned, this means that section 6 applies only to that subset of theft where the accused assumes the rights of ownership over tangible property.

The broad interpretation of appropriation also raises the question as to what additional intention section 6 refers. Appropriation includes within it an intention to

[17] This is particularly the case if the money has been invested in the meantime, and what is intended to be returned are the profits.

[18] In rare cases it may be arguable that the accused is not aware of the legal nature of choses in action and may have a belief that his or her actions will not amount to a temporary deprivation. In such cases the first limb s 6(1) might have a role to play.

[19] [1996] 1 Cr App R 175 at 188.

[20] *DPP v Gomez,* [1993] AC 442.

deal with a property right of the victim in a manner that is analogous to a trespassory act. Such an intention can be described as an intention to deal with the property ''regardless of the other's rights''. In the light of this, the key aspect of the first limb of section 6 is the meaning of the intention to ''treat the thing as his own to dispose of'' as it is this element that is additional to the mental element of appropriation.

A conviction for theft also requires that the accused appropriate the property dishonestly. Under the test in *Ghosh*,[21] that requires that the accused be aware that his or her actions would be considered dishonest by ordinary people. In nearly all cases where section 6 applies, the accused will thus be acting dishonestly as section 6 requires that the accused intends to act ''regardless of the other's rights'', or to borrow or lend property in a way that amounts to ''an outright taking or disposal''. Both situations would be regarded by ordinary people as something that ought not to be done, and thus dishonest. Consequently, in circumstances where resort to section 6 is required, it is likely to be determinant of liability.

THE FIRST LIMB OF SECTION 6(1)

There are only two Court of Appeal decisions that discuss the scope of the first limb in any detail: *Coffey*[22] and *Cahill*.[23] There is some difficulty with reconciling the two decisions as *Coffey* is only partly reported[24] and not referred to in *Cahill* and neither decision is referred to in *Fernandes*. Two earlier Divisional Court decisions also shed light on the appropriate interpretation.

Coffey and Thompson

In *Coffey* the accused was in an unresolved dispute with the victim and had arranged for the purchase of equipment from the victim by means of a dud cheque in a false name. He was charged under Theft Act 1968, section 15. Coffey claimed that the equipment was useless to him and the only reason he had obtained it was to exert pressure on the victim to settle the dispute. It was unclear whether he intended to detain the goods until the resolution of the dispute or merely until negotiations had begun, and there was also no evidence as to what he intended to do if his purpose in detaining the equipment failed. As Coffey must have obtained the equipment with the knowledge that the strategy might fail, the court had to determine what the appropriate directions would be to enable a jury to return a verdict on either of two bases: that he intended to return the goods if his purpose failed, or that he intended to abandon the goods in such an event.[25] Both the trial judge and the Court of Appeal saw the situation as one falling within the first limb; that is, it was not considered to amount to a borrowing.[26]

It was argued by the prosecution that Coffey's actions fell within the first limb because the creation of a situation where the victim could only retrieve the property by

[21] [1982] QB 1053.

[22] *The Independent*, 2 February 1987, [1987] Crim LR 498, (Transcript: Marten Walsh Cherer).

[23] [1993] Crim LR 141, (Transcript: Marten Walsh Cherer).

[24] The report of the case in the Criminal Law Review extracts only that part of the judgment discussing the requisite degree of awareness of the accused.

[25] A third possibility, considered by the court, was that he was lying and meant to permanently deprive. This possibility did not require consideration of s 6(1).

[26] No reference to this approach is made in the judgment. Presumably a borrowing did not occur because the victim was induced to hand over all property rights. See the discussion below.

complying with Coffey's demands automatically amounted to "treating the thing as his own to dispose of". The court disagreed:

> There may well, we believe, be cases where this argument would be correct. For example, the "ransom" situation where the true owner has to pay for the return of his goods . . . But this will not always be so. The words quoted ["his own to dispose of"] can be misleading unless it is clearly recognised that not every wrongful conversion is theft.
> In our judgment the analogy between the situation now under discussion and the case of ransom is imperfect, and it would have been an error for the Judge to have directed the jury that they were bound to convict on the assumed facts.[27]

Thus, the court accepted that section 6(1) includes, but is not limited to, the so-called ransom cases where the stolen property is sold back to the victim. In such cases the accused asserts a right of ownership against the victim and intends to deny the victim any property right to the item. *Coffey* however goes further than this and accepts that other situations might fall within the first limb. On the facts of *Coffey*, this includes a detention of goods with an intention that they finally return to the victim. Further *Coffey* also decides that the refusal to return the property unless a condition is fulfilled is not automatically within the section.

By way of contrast, in the earlier decision of *Thompson v Lodwick* ("*Thompson*")[28] the Divisional Court had adopted a suggestion by Sir John Smith that the limb referred to an intention to assert a better right to possession than the victim.[29] Thompson had taken the engagement ring of his victim because the victim's fiancé had not repaid a debt to Thompson's step-father. The court held that Thompson's behaviour fell within the first limb of section 6(1) because:

> No doubt the expectation was that the ring should go back to Miss Richards on the payment of the debt; but nevertheless . . . his intention was that the ring should be retained inconsistent with her rights unless and until a certain sum of money should be paid and should only be returned to her if that was done.[30]

Even though the court accepted that Thompson intended to return the ring undamaged, the court appeared to hold that the intention to assert possession for a certain period of time was of itself sufficient to satisfy section 6. The Court of Appeal in *Coffey,* however, held that more is required to satisfy section 6. In many ways the facts of the two cases are the same, but, while the Divisional Court in *Thompson* was happy to conclude theft had occurred, in *Coffey*, the Court of Appeal saw the issue as more equivocal.

The principle enunciated in *Coffey* is that there is a range of wrongful assertions of proprietary rights to property. Some are so fundamental that they practically amount to an intention to permanently deprive. But others, although wrongful, are not sufficiently egregious to fall within section 6. This, of course, then leads to the question how egregious an interference with the owner's rights must be to fall within section 6. The court in *Coffey* held:

> . . . the culpability of the appellant's act depended upon the quality of the intended detention, considered in all its aspects: including, in particular, the appellant's own

[27] Robert Goff LJ (Forbes J agreeing). Unpaginated transcript.

[28] QBD, (Crown Office List). CO/197/83, (Transcript: Marten Walsh Cherer).

[29] Smith, *Law of Theft*, (4th edition, 1979, Butterworths), in [126]–[127], at 67–68. Smith suggested that this was what lay at the heart of the common law ransom cases, although this is an broader way of expressing the ransom principle than the common law cases suggested because in *Hall,* one of the common law cases said to establish the ransom principle, the right asserted was described as one of ownership (*Hall* (1849) 3 Cox CC 245).

[30] Unpaginated transcript.

> assessment at the time as to the likelihood of Hodkinson coming to terms, and of the time for which the machinery would have to be retained.[31]

In addition to theft occurring if the intention is to assert ownership by selling the property back to the victim, *Coffey* also accepts that section 6 may also cover an intent by the accused to detain property temporarily in the hope of a condition being fulfilled, but to accept that, failing that condition being fulfilled, the owner has a better right to possession. Whether the behaviour of the accused is such as to amount to an "intention to treat the thing as his own to dispose of regardless of the other's rights" is to be determined by examining all relevant circumstances. In this case the key circumstance was the effluxion of time.

The judgment thus considers that section 6(1) operates not only in situations where the accused intends to make absolute demands – which if unsatisfied will result in the permanent loss of the property by the victim – but also in situations where property is only intended to be temporarily detained in the hope of a demand being satisfied and where there remains an intention to return the property irrespective of the outcome of the demand.

It also decides, by implication, that such situations fall outside of the scope of borrowing in the second limb. While no reason is given for this, it would seem that an intention eventually to return property cannot be borrowing if the reason for appropriation is to directly and deliberately inconvenience or deny possession to the victim. In both *Thompson* and *Coffey* (assuming an intention to keep the property beyond a demand from the victim) more than an unauthorised use of the property occurred. The direct communication between the accused and the victim was intended to assert a complete denial of the rights of the victim, an assertion of rights greater than that contemplated by unauthorised borrowing and amounting to an intention to permanently deprive at common law.

Cahill and Smith

The approach in *Coffey* was, however, not considered by the Court of Appeal in its decision in *Cahill.*[32] Cahill had been observed taking a bundle of newspapers from a package left for a newsagency. Cahill claimed he was drunk; had only picked up the papers at the insistence of his friend and that his friend had told him to pick them up and dump them on another friend's doorstep. The trial judge initially described the essence of section 6 as "an intention to treat property as one's own regardless of the rights of the true owner" without including the words "to dispose of". In response to a question from the jury, he added that the element was proved if the jury was satisfied that the accused:

> . . . took them intending to use the papers as their own – that is to say, do with them what they wanted, whether it was to sell them, throw them away or dump them on someone's doorstep, or whatever – then, if they had that intention – either of them – that is an intention permanently to deprive, for the purposes of the Theft Act.[33]

The Court of Appeal held that this omission of the words "dispose of" was critical and not cured by the re-direction. Potts J held:

> In particular counsel submits that to use the phrase "dump them on someone's door step" does not sufficiently come within the definition of the word "dispose".

[31] Unpaginated transcript.

[32] [1993] Crim LR 141, (Transcript: Marten Walsh Cherer).

[33] Unpaginated transcript.

> In this connection it is helpful to refer to Professor Smith's book, the *Law of Theft*, sixth edition. At pages 72 and 73 of that volume the learned author analyses section 6 of the Theft Act. On page 73 (paragraph 133) there is the following passage:
> "The attribution of an ordinary meaning to the language of s 6 presents some difficulties. It is submitted, however, that an intention merely to use the thing as one's own is not enough and that 'dispose of' is not used in the sense in which a general might 'dispose of' his forces but rather in the meaning given by the Shorter Oxford Dictionary: 'To deal with definitely; to get rid off; to get done with, finish. To make over by way of sale or bargain, sell."
> Looking at the whole of the original direction given by the learned recorder and the learned recorder's answer to the specific question posed by the jury, we are satisfied that no adequate direction was given as to the effect of the words "dispose of" in the context of section 6.[34]

Cahill appears to give a very restrictive meaning to the limb. When one combines the quotation from *The Law of Theft* with the re-directions said to be inadequate, *Cahill* seems to decide that an intention to be able to dispose of property must be an intention to deal with the property in such a way that all the accused's proprietary claims to the property are extinguished, such as in a complete sale. To leave property in the possession of another or to offer a gift that has not yet been accepted (either of which could be characterisations of "dumping them on someone's doorstep") on the reasoning in *Cahill* cannot constitute a disposal and thus such actions do not evince an "intention to treat the thing as his own to dispose of regardless of the other's rights".[35]

Sir John Smith, in a commentary on *Cahill,* reinforced the impression that *Cahill* was a restrictive reading of the section by commenting:

> The primary case which the draftsman had in mind was probably that where D takes P's property with the dishonest intention of selling it to P as if it were D's own property, which was larceny at common law: *Hall* (1849) 2 Cox CC 245. It should probably be confined to that and other cases where D intends "to usurp the entire dominion over the property" (*per* Parke B in *Holloway* (1849) 3 Cox CC 241) as where he sells or gives the property to a third party expecting that the owner will, in due course get it back.[36]

But, in so doing, he failed to mention the reasoning in *Coffey* and it also would seem that the decision was not drawn to the attention of the court in *Cahill.*

On the facts, there is a strong similarity between *Cahill* and the earlier Divisional Court decision in *Chief Constable of the Avon and Somerset Constabulary v Smith* ("*Smith*").[37] In *Smith* the four accused had broken into a car and removed two bags but claimed they had no intention to permanently deprive on the basis that one bag had been left in a lavatory and the other thrown into a hedge.[38] The Divisional Court disagreed, holding that there was evidence of an intention, at the time the bags were taken, to treat the briefcases as the accuseds' own, to dispose of regardless of the true owners' rights.

> [The] evidence of disposal was, in my judgment, evidence from which one might infer an intention within the terms of section 6(1) at the time of disposal and, having regard to

[34] Unpaginated transcript.

[35] Sir John Smith makes the point that the evidence was sufficient to enable conviction on the general grounds of an intention permanently to deprive without any need to consider s 6(1), [1993] Crim. L.R. 141 at 143.

[36] *Cahill,* (1993) Crim LR 141 at 143.

[37] QBD, (Crown Office List) CO/661/84, (Transcript: Marten Walsh Cherer).

[38] The accused argued that they had only taken them to see if there was anything worth stealing and that they should be acquitted on the basis of the reasoning in *R v Easom,* [1971] 2 QB 315. The court distinguished *Easom* on the basis that the bags had not been left where they had been found.

> considerations to time and distance, it was evidence from which one might also infer that the same intention existed at the time the articles were removed from the motor-car.[39]

What is important in this reasoning, in the light of the approach in *Cahill*, is that the Divisional Court's reasons emphasise that the acts of disposal are merely evidence from which the "intention to treat the thing as his own to dispose of regardless of the others' rights" is to be determined. It is also clear that the court considered that the act of leaving the bags behind constituted an act of disposal. The decision suggests that disposal is a concept that is less onerous to establish than that of abandonment or alienation. An intention to "dump" the property may be sufficient.

Thus, at face value, *Cahill* appears to be a direct overruling of the reasoning in *Smith*, in that there seems little to distinguish the intention to dump the newspapers from the leaving of the bags by Smith's group in the toilets and behind a hedge.

Reconciling Coffey and Cahill

The difficulty, then, is to determine whether *Cahill* actually had the effect of overruling *Coffey* and *Smith,* or whether the decisions can be read together. This can be done by considering whether the breadth of the quotation from *The Law of Theft* relied on by the Court of Appeal in *Cahill* is less than it seems by placing it into its original context. While definite acts that place the property out of the control of the accused are emphasised in the quoted passage from the *Law of Theft*, in another section of the work Sir John Smith argues that retention of property until a condition is fulfilled should also fall within the first limb[40] as accepted in *Thompson* and *Coffey*. Consequently, Sir John Smith must have considered that such actions as occurred in both *Thompson* and *Coffey* also fell within the scope of his idea of definite and final disposal.

It is suggested that the answer lies in an appreciation that "an intention to treat the property as his own to dispose of regardless of the other's rights" is a combination of a number of intentions. It can be easy to jump to a consideration of whether certain acts amount to a disposal of property when considering section 6(1). However, the element of theft that is being considered is an *intention* to permanently deprive. Thus no act other than one amounting to appropriation need have occurred and a conviction can be secured entirely on the basis of confession as to intent or on inferences drawn from the circumstances in which the appropriation occurred.

What section 6(1) does in expanding this element is to set out an alternative state of mind and this again does not require proof of any action. Importantly, the section does not require proof of any disposal, nor does it require proof of any intention to dispose. In fact, what is required is a more attenuated mental state. Section 6(1) requires proof that the accused intend to treat the property *as if* he or she had a right to dispose. The section thus contemplates that the accused has an intention to have a relationship to the property that is one that would be maintained by a person having a right to dispose.

Section 6(1) also begins with the proposition that the accused does not mean the victim "permanently to lose the thing itself". While the wording clearly includes the common law issues of loss of usefulness or virtue in the property,[41] the core pre-requisite for the application of the section is that the accused must not intend to

[39] Unpaginated transcript. McCullough J (with whom Robert Goff LJ agreed).

[40] *The Law of Theft*, (6th Edition, 1989, Butterworths) [136] and [137]. Para [136] in the 4th Edition had been relied on in *Thompson*.

[41] Discussed below.

permanently deprive. Consequently, the accused must therefore be either reckless as to the permanent deprivation or in fact be intending to return the property.

In such a context, it is not logically possible for a person to also intend to get rid of the property finally or to fully transfer it to a third person except in the very rare case that such a complete divestiture of proprietorial rights is accompanied by a positive belief that such a transaction will not permanently deprive the victim of the property.[42] *Cahill* must, therefore, only stand as authority for a description of the range of rights that the accused intends to assert he or she has over the property, but rights that the accused does not intend to exercise. In other words, the accused must intend to assert the right to sell, transfer or destroy but at the same time intend to act in a way that will not cause permanent deprivation to the victim.

Consequently, the phrase ''to treat the thing as his own to dispose of regardless of the owner's rights'' is equivalent to an assertion to the full bundle of rights comprising ownership; and this is what *Cahill* emphasises. However, the rights of ownership asserted are so asserted without any actual intention to exercise them in a way that would prevent the victim regaining possession of the property. In essence this means that the first limb deals with situations where the accused creates the impression that he or she will dispose of the property (whether by threats to do so, or by the nature of his or her dealing with the property), but where the accused contends that he or she never really meant so to act.

A comparison of the reasoning in *Thompson* and *Cahill* also highlights the degree of property right that needs to be asserted. *Thompson* follows Sir John Smith in deciding that an assertion of a better right to possession is sufficient to establish that the accused is ''treating the property as one's own''. But it is implicit in the court's reasoning that liability arose because, in addition, Thompson represented to the victim that he would choose when and if to return the property, or otherwise dispose of it. *Cahill* decides that this assertion of the right to be able so to dispose is critical. Similarly, the decision in *Coffey* can be explained on the basis that the uncertainty in the evidence as to when Coffey intended to return the property meant that it was uncertain whether his actions asserted a right to dispose of the property. If Coffey had intended to return the property as soon as the victim made contact with him and demanded its return, section 6 might not have applied. On the other hand, if Coffey had intended to detain the property despite demands until the dispute was resolved, section 6 would probably have been satisfied.

The importance of the requirement that there be an intent to create the impression that the property will be disposed of can be illustrated by the problems with the decision in *DPP v Lavender*.[43] In that case, the accused unlawfully relocated the front door of one council house to another council house which had a damaged door. The Divisional Court rejected the trial magistrates' reliance on ''disposing'' as requiring that the property be ''got rid of'' or sold and instead held that all that was required was that the accused ''deal'' with the property. The court further interpreted *Lloyd* as holding that such a dealing had to be *vis-à-vis* the victim. This led to the strange result that Lavender's intent was held to fall within section 6 even though he had not denied the council's ownership of the door and had returned it to the council's possession by re-attaching it to a council property.[44] The analysis above suggests that not all dealings

[42] An example of this is *Marshall,* [1998] 2 Cr App R 282, where the accused on-sold train tickets that were eventually captured by the ticket reading machines.

[43] Queen's Bench Division (Crown Office List), [1994] Crim LR 297; *The Times* 2 June 1993; *The Independent* 4 June 1993, CO/2779/92, (Transcript: John Larking), 20 May 1993.

[44] Somewhat strangely, the judgment makes no mention of the fact that the doors were fixtures and thus unable to be stolen without the aid of s 4(2) Theft Act. There are also meritless doctrinal difficulties with the doors existing as a form of

can amount to evidence of an intention to treat the property as his or hers to dispose of.[45] The actions must represent an intention to destroy or to transfer to a third party. These are the actions that go beyond appropriation and can be relied on to establish an intention to permanently deprive. It is suggested that in fact, Lavender should have been considered to have fallen within the borrowing limb of section 6.[46]

Returning, then, to the facts of *Cahill* and *Smith*, it seems that recourse to section 6 was necessary because of a defence argument that there was no positive intention to permanently deprive. As there could not have been an intention to return the property either, both cases are examples of recklessness as to the return of the victim's property. On the analysis in this article it is not necessary to decide if the actions in either case amounted to an actual disposal. All that it is necessary to determine is the accused's intentions. Acts of abandonment (whether legally effective or not) are acts normally only associated with ownership and consequently the acts of the accused in both cases could have been evidence of the assertion of the bundle of rights that included disposal. The difficult issue for the prosecution in both cases however, was to establish that there was a positive *intention* to assume the rights of ownership. The need to establish this separately from the issue of recklessness as to permanent deprivation of the victim would require careful direction by a trial judge.

APPLICATION OF THE FIRST LIMB TO EXHAUSTION OF VALUE AND CHANGE OF NATURE SITUATIONS

As mentioned above, the restrictive reading of section 6, now rejected by *Fernandes*, was that the first limb only applied to ransom cases and the second limb to exhaustion of value cases. It is argued below that the reasoning in *Lloyd* that borrowing requires proof of removal of all virtue in the property is misplaced and inappropriate. However, an intention to deal with property in such a way that its value is significantly diminished or exhausted may well constitute an intention that falls within the first clause. One complicating factor is the situation where all value in the property is exhausted. The common law cases on tickets decided that if a ticket is returned after its expiry then the total exhaustion of value meant that the victim had been permanently deprived of it,[47] and similar reasoning has been applied to cheques under the Theft Act.[48] But if so, it seems logically impossible for the accused's intention then also to fall within section 6, which is predicated on an intention not to permanently deprive. This must then mean that section 6 only has operation in those situations where the property is returned with some residual value or somewhat the worse for wear.

A contrary argument is that the use of the phrase "the thing itself" in section 6 is intended to mean the return of the property with its value exhausted. It may well be that, pragmatically, this is an approach that the courts find useful, but it is an approach that is only possible if the thing remains the same type of thing despite the exhaustion of value or change of nature. For example, in the New South Wales case of *Smails*,[49] the accused took railway sleepers and cut them in half to make the tent he was living

personal property prior to their severance and thus belonging to another (a point not covered by s 4(2)) and also with what might be seen as the destruction of the property when it was re-affixed and merged with the land.

[45] Similar criticisms can be made of the undefined use of the notion of dealing in *Chan Man Sin* [1988] 1 A11 ER 1 and *Fernandes*. Both are discussed below.

[46] This is discussed below.

[47] See *R v Beecham,* (1851) 5 Cox CC 181.

[48] See *eg*, *Duru,* [1974] 1 WLR 2; but note the rejection of aspects of the reasoning in *Preddy.*

[49] (1957) WN (NSW) 150.

in more comfortable. He intended to replace the cut sleepers. This was held to be larceny. The reasoning was that what were replaced were not in fact sleepers, which had a requisite size, but merely lumber. The court found that "to all intents and purposes they had ceased to exist and had been destroyed as railway sleepers just as much as if the appellant had cut them up and burnt them in the fire".[50] It would be stretching the meaning of the term to describe such lumber as "the thing itself", rather than "another thing".

The true role for section 6 is in situations where some residual use for the property might be argued by the accused. A good example is *DPP v SJ*[51] where the victim's headphones were snapped in half and then recklessly thrown to the ground by the accused. The parties agreed that dealing with property in such a way rendered it useless. On that basis the Divisional Court considered the case fell within the first limb of section 6 and the test in *Cahill*. It is suggested that the better analysis would have been that the headphones were severely damaged, but not irreparable. They were still headphones, but broken headphones. In these circumstances section 6 would operate to prevent an accused successfully arguing that he or she had intended to return the thing itself, albeit somewhat damaged. Such an intention amounts to treating the property as if it were one's own to dispose of because the intended act appears to be that of an owner. By intending to damage, the accused demonstrates an intention to behave in such a way that an observer would consider amounts to the exercise of a right of an owner to destruction or disposal.

Mention should also be made of the series of cases involving the dishonest negotiation of cheques and other negotiable instruments which consider the specious argument that the accused, in passing such an instrument, intends the document to be returned to the victim after negotiation. While such actions have been held to be theft without the need to rely on section 6,[52] suggestion has been made in passing that such actions also satisfy section 6(1).[53] It has been stated that negotiating a cheque or voucher falls within the first clause,[54] but no reasons have been articulated for such a conclusion.[55] There is some difficulty with these statements as, in practice, cheque forms and other documents tend not to be returned to the victim.[56] The argument also sees the chose in action as, in some way, an aspect of the paper and not as a separate property right. Given that the chose in action is destroyed in the negotiation, there is no need to rely on section 6 to prove an intention to permanently deprive.

DETERMINING THE STATE OF MIND OF THE ACCUSED

As the judgment in *Coffey* emphasises, the element is a mental one, not a physical one. Thus all discussion of what acts amount to a disposal takes place in the context that

[50] *Ibid.*

[51] [2002] EWHC 291; 2002 WL 45422 (QBD (Admin)).

[52] See *eg*, *Duru* [1974] 1 WLR 2; but note the rejection of aspects of the reasoning in *Preddy*.

[53] *Duru,* [1974] 1 WLR 2 at 8.

[54] *R v Downes,* (1983) 77 Cr App R 260; [1983] Crim LR 819. While the court in *Downes* did not elaborate on this; on the basis of the approach suggested below the negotiation of cheque cannot amount to a borrowing as the property is disposed of to third parties. Neither can it be a lending, as there is no intention that it be returned in the same state as it was given.

[55] Most recently, s 6(1) was applied in *R v Arnold,* [1997] 4 All ER 1. A number of cases were reviewed and the court concluded that there "was good reason for the application of s 6(1) if the accused intended the benefit in the document to be exhausted before its return".

[56] In Australia, for example, the courts accept that they are not: see *Parsons v R* (1999) 195 CLR 619. A similar point is made in D Ormerod and DW Williams, *Smith's Law of Theft*, (9th Ed, 2007, OUP) at 125.

those acts are not determinative of liability. What is determinative is the nature of the intention of the accused at the time of appropriation. How that is determined has been set out in *Coffey*:[57]

> How then should the jury have been directed? . . . In the present instance the learned Judge could usefully have illustrated the first part of section 6(1) by borrowing from the second part of the expression "equivalent to an outright taking or disposal". If they thought that the appellant might have intended to return the goods even if Hodkinson did not do what he wanted, they would not convict unless they were sure that he intended that the period of detention should be so long as to amount to an outright taking. And even if they did conclude that the appellant had in mind not to return the goods if Hodkinson failed to do what he wanted, they would still have to consider whether the appellant had regarded the likelihood of this happening as being such that, taken in the round, his intended conduct could be regarded as equivalent to an outright taking.[58]

In the circumstances of *Coffey*, a retention of property situation, the court considered that the question whether the accused had an "intention to treat the thing as his own to dispose of regardless of the other's rights" could be determined by examining how long the accused intended to keep the equipment. In such an examination there are two possible standards. One is to determine liability on the basis of what the accused thinks is the point in time at which retention amounts to an outright taking. The second is what objectively amounts to such a point in time, with a further issue as to who makes that assessment. While the court's suggested direction as to the first of the alternatives can be read as requiring a subjective approach, the suggestion that the jury be directed to assess whether the accused had considered whether "his intended conduct could be regarded as equivalent to an outright taking" appears to require an objective assessment.

Given that section 6(1) requires proof that the accused has a specific intention, the requirement that the accused assess his or her intention as ostensibly falling within the section requires jurors or magistrates to engage in a two-stage test similar to the test set out in *Ghosh*[59] for dishonesty.

Generalising the test from *Coffey*, the judgment appears to require the finders of fact to conclude that:

a) On an objective basis, the relationship the accused intended to have to the property can be described as treating it as his or hers to dispose of regardless of the rights of another
b) The accused was aware that this relationship might objectively be so described.

The basis on which the finder of fact assesses whether the relationship can be seen as falling within section 6(1) is not made clear, but in the light of the approach in *Ghosh* and in the absence of any explicit requirement of reasonableness, it is probably appropriate that the standard be that of the ordinary person.

The time at which the state of mind must exist is also important. The judgment in *Coffey* distinguished the so-called "conditional appropriation" cases, where the courts held that a putative thief who rifled through bags to see if anything was worth stealing did not commit theft until he or she decided to keep a particular item, despite the clear interference with the property of another the taking and opening of the bag represented.[60] They held that those prosecutions had fallen foul of the need to establish the intent to deprive at the time of the appropriation. Although not explicitly stated

[57] No other decision has discussed the test.

[58] Unpaginated transcript.

[59] [1982] QB 1053.

[60] See *Easom* [1971] 2 QB 315; *Husseyn* (1978) 67 Cr App R 131n.

in the judgment in *Coffey*, this reasoning requires that when one is assessing whether the accused has an awareness that the length of the detention might amount to an outright taking, that awareness has to be at the time of appropriation. Thus, if Coffey had optimistically thought the dispute would have been resolved in a week at the time of taking, it would seem that the fact that he still had the property some months later would not be relevant in assessing the period of the borrowing.

Summary

Common law cases and those under the Theft Act[61] decide that an intent to permanently deprive exists where property is returned that has had all of its usefulness or value exhausted, or where the nature of the property has changed. Section 6 is not required to establish liability in such cases, and there is a logical difficulty in so doing. That section 6 has operation beyond these situations is now clear from the decision in *Fernandes*. [62]

The scope of section 6 is however constrained by the requirement in the first limb that the accused does not intend ultimately (permanently) to deprive the victim of the property. Despite an overall intention to return the property (or recklessness as to the deprivation of the victim), the first limb of section 6 establishes liability if the intention of the accused is to behave in such a way as to create the impression to the victim or others that no such return will automatically eventuate and that the accused is likely to dispose of it, irrespective of the interests of the victim. Importantly, while there is no need for any such disposal to occur, or to be intended to occur, it is critical that such an eventuality appear to be intended by the accused. In both *Thompson* and *Coffey*, it was, therefore, not possible for the accused to claim that all that had occurred was a mere ''non-theftuous'' borrowing because, although both accused intended to return the property, the basis of the leverage they were hoping to apply to the victim was based on creating the impression that they would dispose of the property. They were intending to ''treat'' the property as if they were intending to dispose.

Expressing this more broadly, if an accused appropriates property in such a way that is unauthorised but does not amount to a direct repudiation to the victim of his or her rights, this may be a borrowing. But if the accused intends to have the victim understand that the appropriation amounts to a repudiation of the victim's rights, this cannot be a borrowing and falls within the first limb. This does not include deceptions as to the intentions of the accused towards third parties.

Deceptions of third parties as to the intentions in regard to the property

What if the accused intends no dealing or interference with the property of another, but wishes deceptively to suggest that he or she does, in order to defraud a third party? At common law, such actions were not considered to amount to larceny.[63] In *Chan Man-sin,*[64] a 1988 appeal to the Privy Council from Hong Kong, the forging of cheques was held to amount to an intention to permanently deprive the victim companies of their money under the Hong Kong equivalent of section 6(1). The accused argued that, as the victim's bank had no right to honour the cheques, any payment by the bank would not amount to any permanent deprivation of a chose in action of the victim. The Committee stated that even if the accused was aware of this, the accused's intentions

[61] *Eg Duru* [1974] 1 WLR 2.

[62] See also *DPP v SJ*.

[63] *R v Bloxham* (1944) 29 Cr App R 37.

[64] [1988] 1 All ER 1.

fell within section 6(1) because: ''Quite clearly here the appellant was purporting to deal with the companies' property without regard to their rights.''

No further elaboration was given, and it is suggested, with respect, that the Committee misconstrued section 6(1). There appears to be a significant slippage in this reasoning between theft and fraud; a slippage aided by the broad interpretation of appropriation. The accused was convicted of theft of the chose in action in the victim companies' bank account on the basis of an appropriation which the Committee held amounted to merely drawing, presenting and negotiating a cheque on the account. Assuming that the accused was aware that such actions would lead to a loss of money by the bank, but not by the victim company, there is, in fact, a belief and intention that no deprivation at all would be suffered by the victim. Section 6 requires that the accused intend that the victim not ''permanently'' lose the thing. Implicit in this is that the accused intend that the victim temporarily lose the thing (or be reckless as to the loss). In a fraud such as *Chan Man-sin* there is no evidence of any intention to appropriate anything of the company's that can be seen as amounting to any deprivation, even temporarily. Recklessness as to the loss is probably unlikely as the accused would be aware of the fact that the loss would be borne by the bank. Instead the aim was to appropriate the property of the bank through fraud.

This suggests that, although it might be the case that it is possible to appropriate a property interest without in anyway dealing with it, the requirement that there be some degree of deprivation of the victim as a result, even under section 6, means that fraudulent representations as to one's property interests cannot amount to theft.

SECTION 6(1): THE SECOND LIMB

While the intentions of the accused are at the centre of the enquiry in the first limb of section 6(1), by contrast, the second limb sets up a largely objective test for whether an intention to permanently deprive will be deemed to exist.[65] If the finder of fact determines that the activities of the accused amount to an outright taking or disposal, the property is deemed to have been treated as if it was the accused's to dispose of and a short-cut to liability is established.

Fernandes decides that the first limb governs the second limb and that borrowing and lending are merely examples of the operation of the first limb. However, the practical scope of the first limb is significantly restricted by the operation of the second limb because only those instances of borrowing or lending that are equivalent to an outright taking or disposal fall within the scope of the first limb. All other instances of borrowing and lending are excised from the scope of the first limb.

As ATH Smith makes clear,[66] the final phrase of the second limb of section 6(1) should be read as linking ''an outright taking'' to borrowing and a ''disposal'' to lending. Thus, the section sets up two possibilities: a borrowing for a period and in circumstances where it can be seen as amounting to an outright taking and a lending for a period and in circumstances that can be seen to amount to a disposal. Further, the meanings of borrowing and lending in section 6(1) are not the common ones. Instead they involve a loose colloquial use of the term by the accused, who claims that,

[65] That is, other than the intent to borrow, lend or pawn. Such intentions are however, generally alleged by the defence as an exculpating factor.

[66] ATH Smith, *op cit*, at 213.

despite appropriating the property without consent[67] and dishonestly, he or she intended to return the property to the victim or get it back from the lendee.[68]

The reference to borrowing appears to be a modified preservation of the common law rule against borrowing amounting to stealing.[69] The modification is that, in the light of the fact that many specious claims to have merely ''borrowed'' the property arise, the section imposes an objective test, rather than requiring the prosecution to disprove the accused's claim as to his or her intentions. For practical purposes, if a finder of fact determines that the length or circumstances of a borrowing or lending amounts to an outright taking or disposal, this satisfies the first limb of section 6(1) and the accused is deemed to have an intention to permanently deprive.[70]

While claims of mere borrowing had been a part of the common law offence of larceny, it seems the additional reference to lending is intended to deal with those circumstances of fraudulent misappropriation that the drafters of the Theft Act aimed to bring within the ambit of theft.[71] Thus, while borrowing relates to the unauthorised appropriation of the property from the control of the victim, lending relates to misuse of property by those otherwise lawfully in possession (such as bailees) and the provision in relation to lending could be less elegantly described as envisaging situations where the accused permits a borrowing by a third party.

It would seem that the relevant period of time that must elapse before the borrowing or lending can amount to an outright taking or disposal can be either the actual period of time elapsed, or the period of time for which the accused intended to borrow or lend the property. While the section is one that relates to the element of an intention to permanently deprive, and thus the intentions of the accused at the time of appropriation would normally be key (as they are for the first limb), the objective nature of the tests in the second limb would allow an assessment of an outright taking or disposal based on the actual lapse of time since the appropriation. It also suggests that an intention to take or borrow the property for an indefinite period of time would be strong evidence establishing an intention to permanently deprive under this section. However the elapsing of a period of time on its own is insufficient to establish liability.[72]

Somewhat surprisingly, there does not appear to have yet been any finding by the Divisional or Appeal Courts that upholds a finding of borrowing or lending under section 6(1). The only allegations of section 6(1) borrowing before the courts have been rejected, and no reliance has been placed on section 6(1) lending. This may be a result

[67] Cases such as *Hinks,* [2001] 2 AC 241, decide that appropriation can include lawful and consensual transfers of property, suggesting that situations of detinue might amount to theft. On the other hand, the requirement that the disposition be ''regardless of the other's rights'' might mean that in a situation of fraud or unconscionable transfers the ''consent'' of the victim might mean that s 6(1) is not applicable (see the reasoning of the Court of Appeal in *R v Clark* [2001] EWCA Crim 884; [2002] 1 Cr App R 14).

[68] As noted by Mustill LJ in *Coffey*.

[69] See *R v Phillips and Strong,* 2 East, Pl Cr Ch16, s 98 and *cf R v Holloway* (1948) 1 Den 370; 169 ER 285.

[70] The use of ''may amount to so treating'' in the second limb of s 6(1) suggests that it must *first* be established that the borrowing or lending amounts to an outright taking or disposal and *then subsequently* be determined whether this constitutes an intention to ''treat the thing as his own to dispose of regardless of the other's rights''. In relation to the need to prove the intention, what ''may'' result is an actual ''treating of the property as his own . . .'' rather than merely an intention to so treat the property. It seems extremely artificial to determine that the property was ''treated as if it was his own . . .'' and then examine whether the accused had the intention to do so. Consequently, it is assumed in this article that if the borrowing or lending is determined to amount to so treating the property, the finders of fact will also conclude that the accused also intended such a treating to occur. In relation to whether such an outright taking or disposal ''may'' amount to such a treating, it is also assumed in this article that any finder of fact who concludes an outright taking or disposal exists is highly unlikely to consider that this did not amount to an intention to treat the property as his or hers to dispose of regardless of the rights.

[71] Criminal Law Review Committee, *Eighth Report: Theft and Related Offences*, (Cmnd 2977) 1966 at [33].

[72] See *Warner* (1970) 63 Cr App R 79.

of the way in which decisions such as *Lloyd* had read down the section to require that the property lose all its "virtue".

Borrowing

In the absence of any judicial consideration of the meaning of borrowing in section 6, dictionary definitions must be resorted to. The Oxford English Dictionary[73] gives as the primary meaning of "borrow":

> I. To give security for, take on pledge.
>
> 1. trans. a. To take (a thing) on pledge or security given for its safe return; b. To take (a thing) on credit, on the understanding of returning it, or giving an equivalent; hence, to obtain or take the temporary use of (a thing recognized as being the property of another, to whom it is returnable). . . .

This definition makes clear that the central notion of borrowing is the recognition on the part of the borrower that the property should be returned to the victim and that in taking the property (albeit, for section 6 purposes, without consent) the accused accepts a duty of care in relation to the property to ensure that it is returned undamaged.

This recognition is one that is subjectively held by the accused. It must therefore either be claimed by the accused or proved by the prosecution. It would also seem that it must be an intentional state of mind. If a person were to take property reckless as to whether he or she would preserve the property for eventual return to the victim, this state of mind would fall outside that required for borrowing. Consequently, an intention to take the property and return it, either entirely exhausted of value or changed in nature, is a rejection of such a duty of care and thus falls outside the scope of borrowing in section 6(1). On this basis, any exhaustion of value or change in nature will amount to an intention to deprive under section 1 without the need for recourse to section 6.[74]

However, this is not what *Lloyd* decides. In *Lloyd*, the accused were caught taking cinema films for short periods in order to make pirate copies. Lord Lane CJ held:

> This half of the subsection, we believe, is intended to make it clear that a mere borrowing is never enough to constitute the necessary guilty mind unless the intention is to return the 'thing' in such a changed state that it can truly be said that all its goodness or virtue has gone. . . . The goodness, the virtue, the practical value of the films to the owners has not gone out of the article. The film could still be projected to paying audiences . . .[75]

While the subsequent decision in *Fernandes* clearly decided that the section was not limited to the virtue analysis, it did not clearly state that the analysis was an incorrect way of determining the issue. But it seems that Lord Lane's approach ignores the clear words of the second limb. On His Lordship's analysis, time or circumstances are only relevant if they establish that virtue has gone out of the property and the focus is on the circumstances of the property's return, not the intended time for which the property will be taken or the circumstances in which is taken or held. However, it is clear that there is nothing in the section that limits the nature of the circumstances that may be

[73] (2nd ed 1989, OUP).

[74] See *Smith* at 218ff for elaboration of this argument. This was the approach preferred in *Downes* (1983) 77 Cr App R 260, 266.

[75] At 837.

relevant, nor that the circumstances must exist at the time of the return of the property.[76]

Other than *Lloyd*, there are two cases that discuss borrowing and the virtue analysis. The first is *Lavender*,[77] where the accused relocated doors belonging to a council. In holding that the second limb did not apply, the Divisional Court stated:

> We do not think the second limb of Section 6(1) applies to this case. It is difficult, as a matter of language, to describe the taking of a fixture or fitting from one property and fitting it to another belonging to the same owner without his knowledge or consent, as a borrowing and return. But even if it can be so described, the doors themselves would retain their essential quality (''goodness or virtue'') as doors. The fact that in a more general sense they were more useful to the council fitted to 25 Royce Road than 37 Royce Road does not persuade us that this part of the subsection applies. The character of the property the subject of charge did not change as a result of what happened.[78]

On the virtue analysis, it would be near impossible to steal a door if the accused maintained an intention to return it at some point. Even if attached to his or her own property, the virtue of a door as method of closing a doorway can only be destroyed by the destruction of the door. Many years may pass and the virtue would remain intact. This suggests that, when one is considering the borrowing of a door, the usefulness of it as a door is not an appropriate basis on which to determine whether the borrowing amounts to an outright taking. Given that doors maintain their usefulness for long periods of time, the more appropriate perspective is to consider the impact the borrowing has on the victim. If the victim is forced to purchase a new door to replace the missing door, then, in the circumstances, the ''borrowing'' surely amounts to an outright taking.

The artificiality of the virtue analysis is also demonstrated in *Clinton v Cahill*,[79] an Irish Court of Appeal decision, in which the court considered whether a section 6 borrowing could apply to the unpaid use of heated water in a central heating system. The cooler, used water was returned through the pipes to the heating station and thus there was no intended permanent deprivation of the water. Accepting that the approach in *Lloyd* was correct, for Carswell LCJ the only uncertainty was whether all the virtue or substantially all of the virtue in the property had to be removed to amount to section 6(1) borrowing. Without attempting to resolve this issue, the court found that under either test sufficient virtue remained for no theft to have occurred because the returning water was still significantly warmer than the temperature of the water at the beginning of the heating process, and so less energy was expended returning it to the operating temperature.

This decision illustrates the very strange results the imposition of the virtue requirement into the otherwise clear wording represents. The court did not directly state what it understood this virtue to be, although it seems clear that the court considered that the virtue in the water was any heat greater than ''stone cold''. But, from a user's perspective, the water is essentially useless as it is not hot enough to warm a house. By being forced to concentrate on one aspect – heat – and see that as a virtue to be totally removed from the property, the reality of the situation was not fully considered.

[76] The relevant circumstances might well be the nature of the appropriation, such as a surreptitious appropriation designed to ensure that the victim was unable to ascertain who had ''borrowed'' the property, or a change in circumstances during the borrowing such as the accused discovering that the victim was about to move permanently overseas, thus making the possibility of returning the property much harder to achieve.

[77] [1994] Crim LR 297, *The Times* 2 June 1993, *The Independent* 4 June 1993, CO/2779/92, (Transcript: John Larking).

[78] Unpaginated transcript.

[79] (1998) Court of Appeal (Criminal Division) CARE 2595 (Transcript).

If one ignores the issue of virtue, it is clear that the accused had no intention to keep the water permanently and it is clear that the taking of the water was for a short period of time. Thus, on the wording of the section, the basis for deciding liability should have been to consider whether, despite these two exculpating factors, in the circumstances, it amounted to an outright taking. Those circumstances would have included not only the cost to the council of reheating the water and the fact that the accused had as a result avoided the need to expend any money on alternative heating sources, but also the fact that the cost was no cheaper than the cost of reheating water returned from paying users. By taking all these factors into account, the court could have come to a conclusion that avoided the artificiality of basing the decision solely on the ambient temperature of water in winter.

Contrary to these decisions, on the analysis of borrowing suggested above, the facts of *Lloyd*, *Lavender* and *Clinton v Cahill* are all instances of borrowing. In each case the property was taken out of the possession of the victim with an intent to return the goods undamaged. In each case, however, the degree of interference with the owner's rights that might amount to an outright taking should be assessed by an additional consideration of the period of time of possession and the circumstances in which the borrowing occurred.

While time is a mandated factor to consider, there is nothing in the section that limits the range of other relevant circumstances and, consequently, each case will depend on its own facts. Who is to make the determination of the factors which are relevant and how they are to be weighed is also unstated. It would seem that the question posed is one that is quintessentially for the finders of fact, with any relevant circumstance put to them by the parties.

It seems that in *Lloyd* the time that the property was out of the possession of the victim was too short to fall within section 6(1) in the light of the overall useful life of the film and the lack of any evidence that that particular period of time was of great significance to the victim. On the other hand, in *Clinton v Cahill,* the period of time was sufficiently long to require the victim to have to reheat the water and so, given the substantial change in the usefulness of the water, a further examination of the surrounding circumstances would be needed to determine whether the borrowing amounted to an outright taking. In *Lavender*, although the time was short, the circumstances were such that it was likely that the council would have considered the door to have been lost and would have thus incurred the expense of replacing it with a new one.

Lending

Exactly when a lending amounts to a disposal has not been discussed directly by the courts. There are no reported cases of an allegation of section 6 lending. The general consensus amongst commentators is that the lending is an act done by an accused otherwise authorised to have property and that the lendee is a third party.[80]

The Oxford English Dictionary gives the primary meaning of ''lend'' as:

> 1. a. trans. To grant the temporary possession of (a thing) on condition or in expectation of the return of the same or its equivalent.[81]

[80] See *eg*, D Ormerod, *Smith and Hogan Criminal Law* (11th Revised ed, 2005, LexisNexis) at 707. This also appears to have been the understanding of the trial judge in *R v Bagshaw*, as noted without adverse comment by the Court of Appeal (*The Times* 13 January 1988; [1988] Crim LR 321, (Transcript:Marten Walsh Cherer)).

[81] In the light of the law on fungibles, return of equivalence would not fall within the Theft Act concept. See *eg*, *R v Williams* [1953] 2 WLR 937.

Translated into legal terms this amounts to a bailment. The accused, who otherwise lawfully has possession of the property, must voluntarily pass possession to another on a temporary basis. The time that it is envisaged the lending will last; the nature of the use of the property by the third party and any consideration due for the lending are all factors that are to be considered in determining whether the lending amounts to a disposal.

There is one case, *Fernandes*, which, on the facts, appears to refer to lending although not identified as such by the court. Fernandes, a solicitor, had dishonestly arranged to have client funds invested with a firm of money lenders. If section 6(1) has any role to play in such scenarios at all,[82] the investing of funds with third parties would appear most easily to be described as a loan of money. Yet the trial judge directed the jury on the basis of the first limb of section 6(1) and the prosecution argued that, at best, it was an instance of borrowing.[83] Quite unhelpfully, Auld LJ for the Court of Appeal held:

> The critical notion, stated expressly in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights". The second limb of subsection (1), and also subsection (2), are merely specific illustrations of the application of that notion. We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss.
>
> In the circumstances alleged here, an alleged dishonest disposal of someone else's money on an obviously insecure investment, we consider that the judge was justified in referring to section 6.[84]

On the facts, this was a lending and the description of the actions of the accused by the court as a disposal[85] of an investment while lawfully in possession of the property allow the judgment to be read as considering the actions to be a lending.[86]

In this light, the statement of the court that the section may apply to a person who deals with property knowing that he or she is risking its loss does not amount to any significant expansion of the scope of the section, but is merely an observation that the second limb can apply to persons who do not intend the victim to suffer loss.[87] While the assessment of whether a lending amounts to an disposal is an objective test on the same basis as the borrowing provision, the reference in *Fernandes* to the accused's awareness of the risk amounts to a judicial suggestion that one circumstance that is relevant to the objective assessment in lending cases is the degree of risk

[82] Electronic transfers of funds are also considered to be acts of extinguishment and creation (*R v Preddy*) so that the only basis on which s 6(1) could have applied would have been if there had been the possibility that Fernandes had erroneous beliefs as to the law in this area.

[83] *R v Fernandes* [1996] 1 Cr App R 175 at 188.

[84] *Op cit* at 188.

[85] ATH Smith's suggestion that a lending must amount to a disposal was not available to the court in *R v Fernandes* [1996] 1 Cr App R 175 as *Property Offences* was not published until the following year. ATH Smith was similarly unaware of *Fernandes* as it had not been reported prior to the completion of the manuscript.

[86] The characterisation of the accused's act as a lending raises some difficulties with the reasoning of the court. If a transfer has occurred, and that transfer falls within the meaning of a lending, then s 6(1) requires that liability can be established "if and only if" the lending is for a period and in circumstances amounting to a disposal. If the transfer was alleged to amount to a disposal, the trial judge was required to explain to the jury that such an allegation could only be proved if the jury was satisfied of this on the basis of the period and circumstances. It is thus a misdirection to refer to the first limb of s 6(1) as a determination of what the accused's intention is can only be a basis of liability if the transfer was not a lending or borrowing.

[87] Whether the limb can apply to persons who lend property honestly believing there is no risk – when, objectively, there is – remains undetermined, although the tenor of the section suggests such beliefs would not exculpate. Such beliefs are separate from the question of dishonesty. One can dishonestly lend property with a belief that there is no risk.

involved in the loan. The higher the risk, the more likely that the loan amounts to a disposal.[88]

But this is only relevant to the objective circumstances to be determined by the finders of fact. The state of mind of the accused cannot be relevant to any determination whether the accused has an intention to treat the property as his or her own. This is because the section clearly states that so treating the property may amount to so treating it "if but only if" it is objectively a disposal.

In *Fernandes*, the money had been transferred into a speculative investment with a back-street lender whose financial accounts and evidence in court were highly suspect. This, combined with the fact that the investment involved a significant amount of money, had been done secretly, and in breach of a court order and the solicitor's fiduciary duties allowed a jury to conclude it was equivalent to an outright disposal.

SECTION 6(2)

It is also necessary briefly to refer to section 6(2). No reported decision has yet discussed its meaning. It seems however that the sub-section operates as a form of strict liability. Once a person parts with the possession of property in circumstances where there is no automatic right to regain possession, he or she is deemed to have had an intention to permanently deprive.

Sir John Smith and ATH Smith have suggested that a pledger falls outside section 6(2) if he or she has a certain belief that he or she can regain possession of the property.[89] This appears to be because they consider that the subsection merely states the form of intention that may satisfy the first limb of section 6(1) and their analysis seems linked to earlier understandings of a restricted meaning for the section. But this interpretation overlooks the deeming nature of the subsection. There is nothing in section 6(2) that refers to any belief on the part of the accused and, by contrast with the second limb of section 6(1), section 6(2) is "without prejudice" to the scope of section 6(1). There is no element of excision contained within it. On the arguments of Smith and Smith, a person with a mistaken belief that he or she can redeem the pawned property falls outside the scope of section 6(1), even though the act of pawning is clearly one that amounts to an intention to treat the property as if he or she had the right to dispose of it. Excising this would be to the prejudice of the generality of section 6(1).

It is suggested that such a belief is the very argument made by the hopeful pledger[90] that the section is designed to overcome. Even though the pledger may believe that he or she is able to perform the condition, there remains a chance that he or she may not be able to do so. The mere fact that he or she has exposed the owner's property to this risk is the basis for the liability. Section 6(2), thus, deems any dealing with property where a person loses complete control over it without authority to do so from the owner to be an act that is so intentionally or recklessly in disregard of the owner's rights that it should be automatically seen as an intent to deprive.

This means that the operation of the subsection is more severe than the second limb of section 6(1). There is no scope for a finder of fact to assess the length or risk of the

[88] The equation of risk with disposal by the court does, however, suggest that the statements in *Cahill* about disposal requiring that the property be "got rid of" may overstate what is required to establish that the loan was equivalent to a disposal.

[89] ATH Smith, *Property Offences* (Sweet & Maxwell, 1994) at 234. Sir John Smith's view is maintained by D Ormerod and HW Williams, *Smiths's Law of Theft* (9th ed, 2007, OUP) at 123–4.

[90] See *eg*, *R v Treblicock* (1858) Dears & Bell 453 and *cf R v Williams* [1953] 1 QB 660.

pawning activity. All instances are deemed to evidence an intention to permanently deprive.

CONCLUSION: THE RESIDUAL SCOPE OF THE FIRST LIMB

Section 6 is a deeming provision, deeming that certain intentions that fall short of an intention to permanently deprive will nevertheless satisfy that element of theft. In so deeming, section 6 provides two routes by which to establish liability. The first, contained in the first limb of section 6(1) provides a general principle of an ''intention to treat the property as one's own to dispose of regardless of the other's rights''. This requires proof of subjective intent on the part of the accused. The second route is to rely on the second limb of section 6(1) or section 6(2) to establish that the appropriation amounted to a borrowing, a lending or a pawning. If this is established, then the element is established largely on an *objective* basis, without the need for the prosecution to establish the actual intent of the accused.

This is linked to a logical order of inquiry. First, the lending and pawning provisions operate only in situations where an act that transfers the property to a third party has already occurred. Section 6 operates to control the inferences as to the accused's intention that can arise from those acts. To establish liability in these two instances, the prosecution must prove the act has occurred and then argue liability on a characterisation of that act. If neither of these acts has occurred and the accused claims to have merely borrowed the property, the key question is whether any acts inconsistent with a borrowing have occurred. This article suggests that the defining feature is whether the accused accepts a duty of care for the safe return of the property. If the accused has, or there is no evidence that the accused has not, liability can only be established if the borrowing is objectively equivalent to an outright taking.

Thus on the approach taken in this article, the section operates in the following way. Intention to permanently deprive is established if:

a) Pawning: the accused transfers property of the victim, without authority, to another, subject to a condition as to its return that is not in the control of the accused. This is automatically deemed to be an intention permanently to deprive irrespective of the actual intention or belief of the accused.
b) Borrowing: the accused appropriates property of the victim with the intention that it eventually be returned to the victim undamaged, but either the intended or the actual time and circumstances of the borrowing are objectively equivalent to an outright taking. All other forms of borrowing fall outside the section.
c) Lending: the accused, being in lawful control of the victim's property, lends it to another, and does not intend that the property is not to be ultimately returned to the victim, but nevertheless intends to lend it for a period or in circumstances that can objectively be seen to amount to a disposal of that property. All other forms of lending fall outside the section.

If the *acts* of the accused do not fall within these three scenarios, attention then turns to whether the *intentions* of the accused fall within the first limb. However, in relation to the first limb of section 6, the test to be applied is not linked to any act and it is the pure subjective intention that must be established.[91] No act is a pre-requisite for

[91] However, that intent appears to be currently based on a *Ghosh*-type community standard that is partly objective (*R v Ghosh* [1982] QB 1053).

inclusion or exclusion other than that there must not have been a lending, pawning[92] or borrowing.

Any intention to permanently transfer the property to a third person would generally amount to evidence of an intention permanently to deprive[93] and it has been argued that a similar result would exist if there was an intention to return the property destitute of value or changed in nature. In neither case is there a need to rely on section 6. When combined with the suggested meanings of borrowing and lending, this means that the residual scope of the first limb of section 6(1) is: where the accused appropriates property where the accused does not transfer property to any third person, and where the accused also:

a) fails to have both an intention to permanently deprive and an intention to preserve the property and return it to the victim or
b) has an intention to have the victim believe that the property will not be preserved and returned.

The current approach of reliance on the first limb of section 6(1) is misplaced and, in most cases, reliance should instead be placed on the borrowing, lending and pawning limbs. These aspects of the section involve more objective elements and should be easier for juries to apply. Importantly, a stronger emphasis on the borrowing and lending aspects of the section will provide a principled, if somewhat vague, boundary to takings that are not theft. The clear implication of section 6(1) is that most unauthorised borrowings and lendings are not theft, while all pawnings are theft. The first limb of section 6(1) – that the accused intended to treat the thing as his or hers to dispose of regardless of the other's rights – should only be relied on when no borrowing, lending or pawning of property occurs.

[92] This is in practical terms. There is nothing in s 6(2) that precludes situations of pawning from being assessed by the first clause, but it is an unnecessary and significantly more difficult route to liability.

[93] Unless, of course, the transfer was subject to a condition or expectation that the third party would return the property to the victim. In such circumstances it might be possible to see this as a borrowing, with the third party as an agent of the accused.

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CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

PROPENSITY, CREDIBILITY AND BAD CHARACTER

R v Campbell

[2007] EWCA Crim 1472; [2007] 1 WLR 2798 (CA) (Lord Phillips of Worth Matravers CJ, Henriques and Teare JJ)

Throughout the common law world, courts have been typically reticent to admit evidence concerning the accused's previous convictions. However, the enactment of the Criminal Justice Act 2003 overhauled the well-established evidential regime which offered the defendant a "shield" against evidence of bad character being used against him.[1] Section 101(1) of the 2003 Act sets out seven "gateways" through which the prosecution may adduce evidence of bad character.[2] Gateway (d), the most frequently relied upon, stipulates that such evidence may be admitted "where it is relevant to an important matter in issue between the defendant and the prosecution".[3] As its wording suggests, this provision is wide-ranging; and to this end section 103 of the Act gives some further guidance as to the type of matters which would commonly fall under this head. Such matters, we are told, include the question as to whether the accused has a propensity to commit offences of the kind charged (section 103(1)(a)), as well as the question whether the accused has a "propensity to be untruthful" (section 103(1)(b)). It was the scope of this latter provision that primarily concerned the Court of Appeal in *Campbell*.

Although *Campbell* is undoubtedly one of the most significant cases to be heard on the scope of the new rules, the facts were fairly prosaic. The defendant had been convicted of false imprisonment and committing an assault occasioning actual bodily harm against his girlfriend. At trial, the prosecution applied under section 101(1)(d) of the Act to adduce evidence of two prior convictions that the defendant had for violence

[1] Formerly, evidence of the accused's previous bad character was only admissible where it fell within the scope of the similar fact rule at common law, or under a specific statutory exception. The most significant provision, however, was the Criminal Evidence Act 1898, s 1(f). Under this section, the defendant could be cross-examined about his or her bad character only where he or she adduced evidence of his or her own good character or where the nature or conduct of the defence had cast imputations on the character of prosecution witnesses and deceased victims.

[2] These are: (a) where all the parties agree to the evidence being admissible; (b) where the evidence is adduced by the defendant him- or herself, or is given in answer to a question asked by him or her in cross-examination and intended to elicit it; (c) where it is important explanatory evidence; (d) where it is relevant to an important matter in issue between the defendant and the prosecution; (e) where it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant; (f) where it is evidence to correct a false impression given by the defendant; or (g) where the defendant has made an attack on another person's character.

[3] It can be noted, however, that gateway (d) is subject to a judicial discretion to refuse to admit the evidence if, on application by the defendant, the trial judge is of the opinion that it would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

against previous girlfriends. Permission was granted on the grounds that the convictions showed a propensity to commit acts similar to those which were the subject of the current charge. The judge proceeded to explain the relevance of these convictions to the jury, in line with the Judicial Studies Board's specimen directions. He also told them, in the following terms, that the convictions were not only relevant to the accused's propensity to commit acts of violence towards women, but also to the question as to whether the defendant had told the truth to the court: "[a] person with a bad character may be less likely to tell the truth, but it does not follow that he is incapable of doing so. You must decide to what extent, if at all, his character helps you when judging his evidence".[4]

The defendant was convicted, and argued on appeal that the judge should have had regard only to the specific gateway through which the evidence was admitted. Thus, the jury should not have been told that his previous convictions were relevant to his propensity to tell the truth. Applying the earlier decision of *R v Highton,*[5] the Court of Appeal dismissed this argument and stated that once evidence of bad character was introduced, it was for the jury to determine in what respect it was relevant. Thus, in the view of the court, it was unhelpful for the judge to draw a distinction between matters pertaining to propensity to commit the type of offence charge and matters pertaining to credibility. As a matter of common sense, where the jury learnt that a defendant had shown a propensity to commit criminal acts, they may in turn conclude that he was less likely to be telling the truth whilst testifying:

> The summing up that assists the jury with the relevance of bad character evidence will accord with common sense and assist them to avoid prejudice that is at odds with this. . . It is open to the jury to attach significance to it in any respect in which it is relevant. To direct them only to have regard to it for some purposes and to disregard its relevance in other respects would be to revert to the unsatisfactory practices that prevailed under the old law. . .[6]
>
> In considering the inference to be drawn from bad character the courts have in the past drawn a distinction between propensity to offend and credibility. This distinction is usually unrealistic. If the jury learn that a defendant has shown a propensity to commit criminal acts they may well at one and the same time conclude that it is more likely that he or she is guilty and that he or she is less likely to be telling the truth when he or she says that he or she is not.[7]

So far, this reasoning appears relatively straightforward, and echoes the case law to date.[8] More problematic was Lord Phillips' view that a defendant's propensity for being untruthful would not normally be capable of being described as "an important matter in issue" for the purposes of gateway (d), unless dishonesty was an actual element of the offence with which he or she was charged. Even then, the propensity to tell lies would only be likely to be relevant if the lying was done in the context of committing criminal offences.[9] In these circumstances, the judge should always explain the relevance of the evidence to the jury and warn them that a propensity for untruthfulness would not, of itself, go very far to show that the accused had committed the offences charged.

[4] At [9].
[5] [2005] EWCA Crim 1985, [2005] 1 WLR 3472.
[6] At [24–25].
[7] At [28].
[8] See *Highton* (*supra* n 4); *R v Awaritefe* [2007] EWCA Crim 706; *R v McDonald* [2007] EWCA Crim 1194.
[9] At [31].

This reasoning is difficult to reconcile with the relatively straightforward wording of section 101(1)(d), which simply requires that evidence be relevant to an important matter in issue between the prosecution and defence. In the vast majority of contested cases, the prosecution will be alleging, impliedly at least, that the defendant has lied, either to the court, or the police, or both. It is therefore difficult to envisage how the truthfulness of his or her account could fail to constitute an important matter in issue between the parties. If there is evidence that the defendant has shown a propensity to be untruthful in the past, then such evidence is surely directly probative of whether the account given in any instant case is true. Taking Lord Phillips' comments to their logical extreme, it seems that evidence would only be admitted under section 103(1)(b) in an extremely narrow range of cases, which was clearly not the intention of Parliament. The decision also sits uneasily alongside the much broader and more logical approach adopted by the Court of Appeal in *R v Lawson*,[10] where it was held that previous convictions which did not involve an offence of untruthfulness could have substantial probative value in relation to the credibility of an accused who had given evidence undermining the defence of a co-defendant for the purposes of section 101(1)(e).

This curious line of reasoning was not the only noteworthy aspect of the decision in *Campbell*. It was also somewhat surprising that the Court of Appeal took the highly unusual step of criticising elements of the specimen directions provided by the Judicial Studies Board. Seemingly, the directions did not provide a sufficiently clear set of instructions to the jury:

> We would make the following observations about these specimen directions. They direct the judge to identify the gateway or gateways through which the bad character has been admitted by reference to the wording of the Act. We question the desirability of this. It is right that in *Edwards* the Vice-President said that "it should be explained why the jury has heard the evidence" but we think that reciting to the jury the statutory wording in relation to the relevant gateway is likely to be unhelpful. It cannot assist the jury to be told "this evidence has been admitted because it may help you to resolve an issue between the defendant and the prosecution, namely whether the defendant has a propensity to commit offences of the kind with which he is charged".[11]

Thus, instead of referring to specific gateways, Lord Phillips held that summing-up to the jury should be individually tailored to the facts of each case, should use simple language, and should caution the jury against attaching too much weight upon evidence of bad character. No reference should be made to the fact that a defendant of bad character might be more likely to lie, although the jury were nonetheless at liberty to arrive at such a conclusion:

> If [the jury] apply common sense they will conclude that a defendant who has committed a criminal offence may well be prepared to lie about it, even if he has not shown a propensity for lying whereas a defendant who has not committed the offence charged will be likely to tell the truth, even if he has shown a propensity for telling lies. In short, whether or not a defendant is telling the truth to the jury is likely to depend simply on whether or not he committed the offence charged. The jury should focus on the latter question.[12]

Moreover, Lord Phillips then added that a judge's failure to direct a jury direction in accordance with a specimen direction should no longer automatically be treated as

[10] [2006] EWCA Crim 2572, [2007] 1 WLR 1191.

[11] At [37]. *R v Edwards* [2005] EWCA Crim 1813, [2006] 1 Cr App R 3.

[12] At [30].

a basis for an appeal, let alone a ground to allow an appeal. Instead, it should be asked whether a jury would have arrived at the same conclusion by the application of common sense to the evidence, irrespective of any specimen direction that was given. These comments were particularly surprising since the Lord Chief Justice made specific reference to good character directions and hinted that there was no longer a requirement that they be given in full. This observation, though *obiter*, flatly contradicts the common law position,[13] and will certainly raise eyebrows among many criminal practitioners who had assumed that the 2003 legislation had no impact upon the need to provide a good character direction in appropriate cases.

Although the trial judge's summing up was considered to be defective, the appeal was ultimately dismissed since the convictions were still considered to be safe. Nonetheless, the issues raised in the judgment will give both academic commentators and the appellate courts plenty of food for thought. Although it is now clearly established that evidence admitted under any gateway may be considered as relevant to both propensity and credibility, it is highly questionable whether the observations of Lord Phillips, both in relation to the scope of section 103(1)(b) and the requirements regarding good character directions, will pass the test of time. In the months and years ahead, we can expect that the Court of Appeal will be confronted by these challenging issues on a relatively frequent basis. Ultimately, some future clarification from the House of Lords on these matters would certainly be welcome.

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[13] See *R v Vye* [1993] 1 WLR 471; *R v Fulcher* [1995] 2 Cr App R 251.

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TREATMENT OF EMPLOYEE CLAIMS IN INSOLVENCY

Leeds United Association Football Club Ltd (in administration)

[2007] EWHC 1761 (Ch), [2007] ICR 1688 (Pumfrey J)

This case illustrates the tension that can arise between saving businesses that are in financial difficulties and providing adequate protection to the employees of those businesses. In recent years significant legislative attention has been focussed on providing procedures to support companies in financial distress. Administration, under the Insolvency Act 1986, is the most well known of these proceedings. This procedure provides a company with short term protection against the claims of creditors while an administrator with specialist expertise in insolvency cases determines the best way forward for the company. However it is most commonly the case that nothing can be done to save the company and efforts will be concentrated instead on preserving its business,[1] that is, its means of production, as a going concern with a view to a sale, followed by the liquidation of the company. The term ''saving businesses'' in the first sentence of this note is therefore chosen deliberately, even though the 1986 Act places the emphasis on saving the company[2] as a legal entity.

In cases of financial distress a tension can arise between business salvage and employee protection. The tension arises because the greater the number of employees that are retained, and the greater the level of benefits paid to them, the more expensive the operation of the business, and the prospects of successful salvage can suffer as a result. In the case of business sales it is notable that where the company's business is to be sold, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) apply in respect of the sale and provide rules regarding the transfer of employee contracts[3] and the protection of employees from unfair dismissal.[4] The basic approach under TUPE 2006 is that the contracts of employment of the employees of the business are transferred to the transferee on their existing terms, together with the rights, powers, duties and liabilities in connection with the contract.[5] In light of these requirements the administrator may face greater difficulties in finding a buyer willing to pay an adequate price for the company where liabilities to employees are large. However there is some relaxation of the rules where the transferring company is insolvent and business transfers are facilitated by a provision that the administrator can agree changes to the employees' contracts of employment in the context of the transfer.[6]

The TUPE regulations applied in the *Leeds United* case, although in a more unusual way than is normally the case, other than in football insolvencies. The respondents were a group of players who had not yet accepted variations to their contracts of employment. Under the proposed variation the contracts would be adapted so that all or part of the remuneration due to them would be deferred until either the administrator could be sure that the remuneration could be paid as an expense of administration, or under the TUPE regulations. This variation had been accepted by some other players under a deed of deferral.

[1] See Sandra Frisby, *Report on Insolvency Outcomes* http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf, pp 58–61.

[2] See Insolvency Act 1986, Sch B1, para 3(1)(a).

[3] TUPE 2006, Reg 4.

[4] TUPE 2006, Reg 7: a dismissal that is not for economic, technical or organisational reasons.

[5] TUPE 2006 Reg 4(2).

[6] TUPE 2006, Reg 9.

The *Leeds United* case was unusual in that normally an administrator will face a difficult decision early in the administration as to which contracts of employment should be adopted and which should not and so the administrator is afforded a 14 day period in which to make these decisions. To this end, actions taken within the first 14 days of the administration are not taken to amount to or contribute to the adoption of the contract[7] and the administrator will only be regarded as having adopted a contract of employment if he or she causes the company to continue the contract for more than 14 days following his or her appointment.[8] However in the *Leeds United* case the administrators were anxious to retain all the players until such time as a business transfer could be arranged since, if the contracts of players were not adopted, a very valuable asset would be lost, since the players would be free to join another club for nothing, rather than for a handsome transfer fee. However the administrators were also anxious to ascertain the position in respect of possible wrongful dismissal liabilities to players who were kept on but whom the administrator was unable to pay. Specifically the issue was whether such liabilities would be treated as an expense of administration.

The Insolvency Act 1986 contains provisions dealing with the payment of the administrator's fees, expenses, contractual liabilities and other outgoings. The significance of these provisions is that in administration there will not tend to be enough funds to pay all creditors and so the legislation establishes priorities as to which claims are to be met first. Under this framework priority is given to the administrator's fees and expenses, and a position of "super priority"[9] is accorded to contracts, including employment contracts, that the administrator, or his or her predecessor, entered into prior to the cessation of the administration.[10] Since administration expenses stand to be paid ahead of the claims of ordinary creditors it is in the interests of creditors and potential creditors, such as the Leeds United players, to argue that their claims are expenses of the administration. The relevant provisions rather curiously refer only to the position where the administrator has ceased to be in post. However, it was accepted by Dillon LJ in *Re Paramount Airways Ltd (No 3)*[11] in the context of the original administration regime, that as a practical necessity, expenses might need to be paid before then and so the provision is taken to apply also while the administration is ongoing.

Although liabilities arising under contracts of employment adopted by the administrator occupy a position of super priority,[12] account is only taken of liabilities that can be regarded as "wages or salary".[13] The issue in the *Leeds United* case was therefore whether damages for wrongful dismissal would be included within this definition. In *Delaney v Staples*[14] Lord Browne–Wilkinson considered the meaning of the term "wages":

> I agree with the Court of Appeal that the essential characteristic of wages is that they are consideration for work done or to be done under a contact of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word "wages". It follows that if an employer terminates the employment

[7] Insolvency Act 1986, Sch B1, para 99(5)(a).

[8] *Powdrill v Watson* [1995] 2 AC 394; [1995] 2 WLR 312; [1995] 2 All ER 65.

[9] *Re Huddersfield Fine Worsteds Ltd* [2005] EWCA Civ 1072: [2005] 4 All ER 886.

[10] Insolvency Act 1986, Sch B1, para 99(5).

[11] [1994] 2 All ER 513, p 522, see also *Re Atlantic Computer Systems plc* [1992] Ch 505 and *Re Salmet International Ltd* [2001] BCC 796.

[12] Insolvency Act 1986, Sch B1, para 99(5).

[13] Insolvency Act 1986, Sch B1, para 99(5)(c).

[14] [1992] 1 AC 687; [1992] 2 WLR 451; [1992] 1 All ER 944; [1992] ICR 483.

> (whether lawfully or not) any payment in respect of the period after the date of such termination is not a payment of wages (in the ordinary meaning of that word) since the employee is not under obligation to render services during that period.

The manner in which the term ''wages or salary'' is used in the Insolvency Act 1986 has been held to reflect this normal meaning of the term identified by Lord Browne-Wilkinson.[15]

In the *Leeds United* case if the damages for wrongful dismissal were to be regarded as ''wages or salary'' they would be paid in priority to all other expenses of the administration, including the administrator's remuneration and sums due to creditors with whom the administrator had entered into contracts during the course of the administration. In order to qualify as wages or salary the damages would have had to be in respect of ''a debt or liability arising under a contract of employment''.[16] The Insolvency Act 1986 provides instances of payments that fall within the term ''wages or salary'', including holiday pay, payment in lieu of holiday, payment in respect of a period of absence and contributions to occupational pension schemes.[17] This is not an exhaustive list but Pumfrey J noted that these examples all related to payments in respect of a period during which the contract of employment subsisted and noted, in addition, the interpretation by Lord Browne-Wilkinson, quoted above. The statutory scheme was therefore that not all liabilities arising under a contract of employment qualified for priority, rather it was only ''wages or salary'' and this term was to be given its natural meaning. On this basis Pumfrey J granted a declaration that claims for unfair dismissal do not come within the definition of wages or salary.[18] A further possibility that was considered was that such claims might be regarded as ''necessary disbursements'' of the administration.[19] In this event they would have qualified for priority over unsecured creditors, although not the super priority of wages and salary.[20] However following earlier case law in which the court had taken a restrictive approach to the interpretation of this term[21] Pumfrey J held that they did not fall within this definition either.

The case therefore is in line with earlier case law where the courts have considered in relation to a number of different forms of consideration whether the definition of ''wages or salary'' is met. In those cases, as in the *Leeds United* case, a generally restrictive approach to the issue has been taken. In *Re Huddersfield Fine Worsteds Ltd*[22] it was held that a payment of wages in lieu of notice would normally fall outside the definition, since the employee who has been dismissed is not employed by the employer during the period to which the money in lieu relates. Also in that case it was held that protective awards imposed under the Trade Union Labour Relations (Consolidation) Act 1992, section 189 on grounds that there has been no consultation or inadequate consultation with employees regarding potential collective redundancies during a designated ''protective period'' are not to be regarded as wages or salary. In *Re Allders Department Stores Ltd*[23] it was held that redundancy payments do not meet

[15] *Re Huddersfield Fine Worsteds Ltd* [2005] EWCA Civ 1072: [2005] 4 All ER 886.

[16] Insolvency Act 1986, Sch B1, para 99(4).

[17] Insolvency Act 1986, para 99(6)(a).

[18] *Re Leeds United Association Football Club Ltd* [2007] EWHC 1761 (Ch); [2007] ICR 1688.

[19] Under Insolvency Rules 1986, r 2.67(1)(f).

[20] Insolvency Act 1986, Sch B1, para 99(3).

[21] *Re Allders Department Stores Ltd* [2005] EWHC 172: [2005] 2 All ER 122: [2005] ICR 867; *Exeter City Council v Bairstow, Re Trident Fashions plc* [2007] EWHC 400 (Ch); [2007] BCC 236.

[22] *Re Huddersfield Fine Worsteds Ltd* [2005] EWCA Civ 1072, [2005] 4 All ER 886, CA, paras 48–52.

[23] [2005] EWHC 172, [2005] 2 All ER 122; [2005] ICR 867.

the definition of "wages and salary" and are therefore ineligible for super priority payment.

The narrow approach to the interpretation of the scope of employee entitlements in the *Leeds United* case was therefore predicable in light of previous case law. A clear line has been drawn that liabilities arising after the employment relationship has ended do not count as "wages and salary". This consistency of approach goes some way to resolve the uncertainty of the legislation which, in only giving a few examples of "wages and salary", is not as clearly drafted as it might have been. It is evident from the case law that the interests of business rescue are preferred over employee benefits in every case, with the social security provision being left to provide to employees what they are owed. For example in the *Huddersfield* case it was noted at first instance that the employees stood to receive from the Secretary of State up to 75 *per cent* of the award that was due to them.[24] The term "necessary disbursements" is however even less clear, and it has been held that the interpretation of this term is not a matter for the discretion of the administrator.[25] It may be inferred that an approach to interpretation that prioritises business rescues will again be taken and this will not provide a loophole for the payment in priority of remaining employee claims.

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[24] [2005] EWHC 1682 (Ch.), para 11.

[25] *Exeter City Council v Bairstow, Re Trident Fashions plc* [2007] EWHC 400 (Ch); [2007] BCC 236.

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BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

FREEDOM OF RELIGION AND BELIEF

Freedom of Religion, Minorities and the Law by SAMANTHA KNIGHTS, Oxford, Oxford University Press, 2007, xxxv + 216 pp, Hardback, £46·95, ISBN 978-0-19-929062-8.

The publication of *Freedom of Religion, Minorities and the Law* comes at an opportune time. In the middle years of the second half of the 20th century many would have assumed that religion would play an ever decreasing role in modern, technologically advanced British society. Recent years, however, have witnessed a marked increase in cases in which disputes concerning religion have been brought before the courts.[1]

The reasons for the increase in such disputes are complex, but the juxtaposition of the terms ''Freedom of Religion'', ''Minorities'' and ''Law'' in the title of this book is surely significant in this regard, for it is a virtual truism that it is only when religious practices are exercised by *minorities* that the law becomes involved at all. Legal disputes with religion at their centre were comparatively rare in the UK in the early decades of the 20th century when there existed a broad Christian general consensus. But increasing immigration over the last five decades has resulted in an increase in the number of those minorities with religious beliefs different to those of the majority; it has resulted in Britain becoming a much more religiously diverse place.

Conflicts involving law and religion tend to occur when the religious practices of minorities are perceived to be at odds with those of the secular or moderately Christian majority consensus as embodied in society's legal rules. Indeed it might be said that, in the liberal democratic state, it is really only for minorities, those *dissenting* from the mainstream, that the right to religious freedom assumes real importance at all. For it is only *their* religious practices that tend to rub up against long standing legal and societal norms and conventions. The author quotes the philosopher and revolutionary Rosa Luxembourg, writing in a different context: ''[f]reedom always means freedom for the dissenters''.[2]

There is of course a further reason why religious conflicts are far more frequently being played out in the UK's courts in the early years of the twenty first century: the incorporation by the Human Rights Act 1998 (HRA) of article 9 of the European Convention on Human Rights (ECHR); the right to freedom of thought, conscience

[1] See *eg, R (Begum) v Denbigh High School Governors* [2006] UKHL 15; *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; *Azmi v Kirklees MBC* [2007] ICR 1154; *R (Playfoot) v Millais School Governing Body* [2007] EWHC 1698 (Admin); *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893; *Copsey v WWB Devon Clays Ltd* [2005]. EWCA Civ 932.

[2] At p 17.

and religion.[3] Whereas before, protection for the right to freedom of religion did not exist – there was just the freedom *simpliciter* – there now exists a positively expressed right. This, as the author notes in her preface, "marks a fundamental change in English law and its protection of civil liberties".[4] Post-HRA any interference with a person's manifestation of his or her religion or belief has to be in accordance with the strictures laid down in the second paragraph of article 9. Most importantly it must not be disproportionate to the aim sought to be achieved (for example the protection of health or morals or the rights of others). The HRA has provided the main legal avenue via which the claims emanating from the societal tensions briefly touched on above have been brought to the courts.

Furthermore, this is an area which is unusually subject to strange and paradoxical sensitivities. For *within* minority religious groups there may be others, not least women and children, whose interests may run counter to the dominant religious beliefs of the group (or at least its leaders). Take for example the children of members of certain Christian groups who believe that "to spare the rod is to spoil the child";[5] the Muslim woman who is *required* to wear the *hijab* upon entering a public space; or Jewish boys circumcised as infants. As the author says "[w]hilst sensitivity to religious and cultural difference is important, it should not be used as a means of undermining the rights of the vulnerable and the weak".[6] Yet there is a further twist still, for often it is the supposed "vulnerable and weak" individuals, those apparent victims of oppressive religious doctrine, who actually *bring the claims themselves*.[7]

In the preface the author notes that, in determining the level of legal protection to be afforded to religion, difficult questions are raised about "how a liberal democracy should balance the interests of the individual or group against the interests of the modern state, the extent to which the state will intervene in the affairs of religious organisations, and about the politics of assimilation and multiculturalism".[8] It is against this complex background with its swirling undercurrents of politics, philosophy, culture and history that the author sets out her aim:

> to provide a bridge between some of the underlying issues that feature in academic writing, and the practice of law. [The book] is intended as a user-friendly guide for practitioners, while at the same time placing these issues in context.[9]

This is no easy bridge to build: to give both a meaningful glimpse at the undercurrents themselves whilst at the same time providing a workable "black letter" guide to the law for those litigating these claims before the courts. In trying to achieve two separate, and in their own right ambitious aims, there is a danger that such a work will fall short of both.

However in this reviewer's opinion the author has emphatically succeeded in her aim and avoided these potential traps. The first three chapters of the book deal largely with the underlying context whilst the remaining chapters deal with specific areas in which conflict has arisen whilst keeping an eye on the context.

[3] Also of particular importance in this context is article 2 of protocol 1, (the right to education, which states that the state shall "respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions") and article 14 (the right not to be discriminated against in relation to the other ECHR rights).

[4] At p vii.

[5] See *Williamson*, note 1 above.

[6] At p 12.

[7] See *eg*, the religious dress cases *Begum* and *Azmi*, note 1 above.

[8] At p viii.

[9] At p ix.

Chapter 1, "Context and Background", provides an elegant and pithy account of the historical and political factors that have led to the current religiously diverse population. It then goes on to consider some of the political and philosophical underpinnings of religious freedom and multiculturalism. Finally the relationship between religion and the state is examined, with particular reference to the status of the established Church of England. Chapter 2 provides an overview of the main relevant domestic law: the common law; the Race Relations Act 1976; the Human Rights Act 1998; the Equality Act 2006 as well as EC Directives and other European instruments. There follows a comprehensive section on article 9 ECHR: when the right is engaged, and when limitations may justifiably be imposed on the manifestation or religion or belief. There is an up to date summary of the case law including recent domestic decisions such as *Williamson*, *Begum* and *Copsey*.[10] There follows a section on the provisions relating to discrimination: in particular article 14 ECHR. Chapter 3 examines the issue of how to balance conflicting rights and interests: perhaps the central issue in all human rights adjudication. It considers, specifically, possible tensions between the religious freedom of the individual and that of the religious group, the rights of the child and those of the parent, and the rights of the majority versus those of the minority. The remaining four chapters deal, in detail and depth, with the civil law in several specific areas: education, employment, immigration and asylum, health and safety, animal rights, planning and prison law. These chapters provide an excellent guide to what are sometimes complex legal regimes.

One of the issues which has been controversial in the recent case law is when exactly there is considered to be an *interference* with manifestation of religious belief so as to require a justification under article 9(2). There has been a series of employment cases in which an employee's religious beliefs have come into conflict with the terms of his or her employment, ending in dismissal. In such cases the courts have held there to be no interference with article 9 rights (since the employee is free to seek employment elsewhere) thus precluding any need to examine justifications under article 9(2).[11]

The author is critical of this approach. She tellingly compares the approach to cases involving other rights in which the courts have been much less willing to accept the existence of potential alternative employment. For example in the field of article 8, the right to respect for a private life, dismissal from employment on the grounds of sexual orientation has been found to be an interference, notwithstanding the existence of alternative employment opportunities.[12] She comments that "while it is plain that certain professions . . . may require religious beliefs to be subjugated to the needs of the job . . . it would be preferable to recognise the interference and deal with it on the basis of justification".[13]

The author is also critical of the ease with which this logic has been transplanted into the field of education. In *Begum*, the House of Lords, relying on the employment case-law, held that the refusal by a state school to allow a female pupil to wear a *jilbab* (long Islamic cloak) did not constitute an interference with her article 9 rights since she could have attended another school which would have permitted such attire.[14] As the author notes "it is questionable whether the provision of state funded education can be so readily aligned with the situation of private employers".[15]

[10] Note 1 above.

[11] See *eg*, *Ahmad v UK* (1982) 4 EHRR 126; *Stedman v UK* (1997) 23 EHRR CD 168.

[12] *Smith and Grady v UK* (2000) 29 EHRR 493. Similar approaches have been adopted in the fields of article 10 and 11 also.

[13] At p 136–7 para 5.30.

[14] Note 1 above.

[15] At p 48 para 2.72.

Perhaps one area which bears heavily on the protection of religious rights, and on which this reviewer would have liked to see a little more critical comment, is the margin of appreciation doctrine. Under this international law doctrine latitude is given to states by the Strasbourg court on the basis, partly, that there exists no consensus in Europe on questions of religion. There are hints in recent case law on religion that the doctrine will find its surrogate in the UK.[16] Of course, as noted at the beginning of this review, it is usually only when the consensus, the majority view, is departed from, (axiomatically by *minorities*) that legal rights need to be invoked at all. There is a certain irony in the fact that the margin of appreciation, or its domestic equivalent, is invoked because of an absence of consensus, when it is this very absence (and the presence of diversity) that renders the right to freedom of religion and belief of such importance.

This is perhaps a carping criticism however. For this is an excellent book which successfully achieves the difficult tasks it sets itself, bridging the gap between the contextual academic and practitioner text without losing sight of either, and achieving the strengths of both. It deserves to be read not just by practitioners, but also by academics, students and all those with an interest in what is, without doubt, one of the most difficult and pressing questions of the age.

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[16] See *eg*, the speech of Lord Hoffmann in *Begum*, note 1, at [62–64].

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PRACTICAL APPLIED LEGAL THEORY

The Practical Applied Legal Theory project is an institutional attempt to establish a new approach to research at Nottingham Law School. Anybody interested in finding out more, or establishing personal or institutional links with the project, please contact Graham Ferris at: graham.ferris@ntu.ac.uk

This is a call for contributions to a new section of the *Nottingham Law Journal*. In part the idea is to provide a place for publications that might not fall easily within the conventional criteria for research publications and yet represent valuable work that merits entrance into academic discourse. It is envisaged that pieces will generally be of relatively short length, up to around 4,000 words, although there is no absolute bar on longer pieces being considered. The criteria for inclusion in this section of the *Journal* are deliberately open textured. However, illustrative guidelines follow.

The application of legal theory (broadly defined) to teaching practice at Higher Educational level is one area of research that we hope to feature. There are several ways in which legal theory can inform teaching: as a selection tool when considering course content; as a guide to ordering the presentation of material selected; as a tool for analysing student difficulties with material; as a source of explanatory material and as a source for contextual material in the attempt to make material vital for students. The articulation of potential links between theoretical work and the application of that work to everyday delivery of legal education is far from simple. Far too often the process takes place purely within the consciousness of the course designers and valuable insights are lost to the profession, to be reborn through individual efforts in another institution. It is our hope that the possibility of recognition and publication here might encourage some, including some who might not view themselves as ''researchers'', to articulate the process of transmuting theoretical understanding into useable techniques and materials of legal education.

The theoretical consideration of practical legal insight is another area in which we hope to break some new ground. The human agents of the legal system, – lawyers; state agencies and non-professional service providers – are a dynamic force in generating and moderating law. The apparent inability of some doctrinal writers to incorporate the primacy of transactional avoidance of inconvenient law renders their work at times ''theoretical'' in a manner that is decidedly not practical. The inability of some lawyers to see the general importance of theoretical and doctrinal legal activity renders their work ''practical'' in a manner that is almost anti-theoretical. Those attempting to generalise an understanding of legal practice find it hard to locate a place for publication. Publications primarily directed towards practitioners may feel the generalisation irrelevant and distracting. More academic publications may find the anecdotal and particularised material indigestible and request another six months' work developing it for an academic audience. We welcome material that tries to build the link between what is done and what is pronounced as law. After all, some law is explicable by identifiable failures of legal teams in preparing and presenting cases to judges. It will never be useful to seek the doctrinal reasons for such decisions, but it could be very useful to educators, practitioners and lawmakers to reflect upon the misfiring of the legal engine.

The application of legal theory to the solution of practical legal problems is another area of research we hope to feature. Approaches to doctrinal problems are always informed by some kind of theoretical position, whether it be conscious or not. There is a natural propensity amongst academics to elaborate upon Gordian knots, adding another strand of erudite commentary to knotty areas of law. At its most useful legal theory can provide simplifying conceptual blades for cutting through such knots. An approach that is informed by discourse at a higher level of generality can potentially provide the means for identifying the underlying issues that generate doctrinal knots. However, the process of analysing the doctrinal debate blow by blow is prolonged and fatiguing. We hope that work at a suggestive level can find a home in these pages, not demonstrating the correctness of the insight, but inviting consideration of insight as a working hypothesis that makes sense of the field for practical purposes today.

Finally, we welcome appreciations of theoretical work because it has been useful in some manner to the reader. There is a tendency for academic commentary to be destructively critical rather then appreciative. In a world of practical application it is not possible to await the discovery of the definitive and ultimate theoretical treatment, even if one believed in such a thing. Theory is often useful despite being limited; palpably wrong in places; not capable of generalisation outside of its favoured field and underdeveloped. What we wish to encourage are accounts of the way in which legal theory can be used and how it can help in solving problems of decision, or action. There are many works of theory of considerable age and hoary distinction that remain as useful today as when they were first composed. Forgetfulness of the old and attraction to the new seems to be a feature of modern society. We welcome submissions reviewing material that is old but serviceable, focussed not upon weakness but strength of theoretical approaches. The first substantive publication in this section of the *Journal* will be of this type, reviewing the work of a jurist with an unenviable reputation for obscurity and difficulty among students, Hohfeld, and discovering a surprisingly useful and practical theoretician.

GRAHAM FERRIS

Fundamental Legal Conceptions by WESLEY NEWCOMB HOHFELD, edited by Walter Wheeler Cook, New Haven, Yale University Press, 1964, *xxv* + 114 pp ISBN 1584771623

This very short book is a reprinting of the two articles in which Hohfeld explained his eight types of legal relations: *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*,[1] and *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.[2] The book also contains a foreword by Arthur L Corbin, and an introduction by Walter Wheeler Cook (itself reprinted from (1919) 28 *Yale Law Journal* 721).

Hohfeld died in 1918 without ever finishing his planned book on analytical jurisprudence.[3] *Fundamental Legal Conceptions* was an attempt to make his work more widely available, a service perhaps more effectively achieved now by HeinOnline. Hohfeld is usually remembered in connection with the eight legal relations he described, and the associated analysis of legal problems using them. This association is so strong that he has become eponymous in such expressions as ''Hohfeldian power''. The legal relations were first outlined publicly in a footnote (n 33) in an article: *The Relations Between Equity and Law*,[4] which was largely comprised of a synopsis produced by Hohfeld for his students, in other words in a note on his teaching materials.

Two aspects of Hohfeld's work are prominent in this short tale of a book engendered by a jurist who struggled to finish what he was writing. Hohfeld developed the analysis for practical purposes, and he developed it to be used for solving practical legal problems.

Fundamental Legal Conceptions is essentially an expansion of a note to teaching materials, a note that became a two-part article that took four years to publish. This suggests Hohfeld developed his analysis because he needed it to explain the relationship between law and equity to his students. To explain this relationship it was necessary to discriminate clearly between law and equity. To discriminate clearly between law and equity it was necessary to come to an understanding of the nature of legal and more challengingly equitable property interests. The analytical framework was not produced for aesthetic or grandiose intellectual reasons, it was not an attempt to find the hallmark of ultimate truth and justice.[5] Rather, Hohfeld seems to have been faced with a familiar desperation, caused by trying to explain something that felt obvious to the orator, and yet was patently not at all obvious to the audience. Hohfeld found the language available to him inadequate to the task. His words betrayed him both through unintended ambiguity and inadequacy of discrimination. He was wrestling with language that could not discriminate between legal relations that had significant dissimilarities in a clear and consistent manner, language that produced confusion and misunderstanding. Hohfeld wanted simplicity and economy in the relationship between technical expression and legal relation, one word to denote each legal thing. Overly broad ideas and language produced an apparent simplicity of statement, but only by hiding the unresolved ambiguity. Hohfeld needed the kind of simplicity that made the

[1] (1913) 23 *Yale Law Journal* 16.

[2] (1917) 26 *Yale Law Journal* 710.

[3] See p 4 of *Fundamental Legal Conceptions*; and n 1 of (1917) 16 *Yale Law Journal* 710.

[4] (1913) 11 *Michigan Law Review* 537.

[5] Hohfeld was not trying to determine any necessary features of the legal system, he was not trying to do what Hillel Steiner was trying to do in *An Essay on Rights* (1994, Oxford University Press). Hohfeld was not seeking ''elementary particles of justice'', his legal conceptions were ''fundamental'' because they were, he believed, the simplest of legal relations. The idea is obviously reductionist, every legal thing should be capable of being analysed into its simplest component parts, and such analysis reveals the true nature of the legal thing. NE Simmonds rejects the attempt by Steiner to deduce features of justice in *The Analytical Foundations of Justice* (1995) 54 CLJ 306.

true legal situation and the available legal choices visible through precision of expression and analysis.

This practical genesis of the analysis, is consonant with the second aspect of Hohfeld's work, a consistent emphasis on the practical value of the analysis. Both are confirmed by the Introduction and the articles themselves.[6] Hohfeld aimed to provide a tool, and the value of a tool is measured by its usefulness. The Foreword confirms Hohfeld's conviction that his analysis was necessary if the law was to be understood. It also confirms that Hohfeld found it hard to gauge what his students would consider a reasonable scholastic load.[7] A full analysis of any legal situation using Hohfeld's legal relations is laborious. Although it is mere supposition, upon re-reading Hohfeld, it is hard not to feel that one reason he did not publish more was that his analysis always lent itself to further elaboration. He felt it was necessary to classify and portray the familiar legal environment in his own terminology before he could commence his analysis. His introductory remarks, setting up the analysis that formed the focus of his enquiry could easily exceed in quantity the analysis itself.[8] Even more threateningly the preparatory account of the law could reveal the desirability of restating neighbouring areas of law in order to fully contextualise the research. Hohfeld showed a characteristic tendency to struggle with the necessary task of selection of material that needed to be dealt with. Death intervened before the definitive account of his analytical method was ready for publication in book form. One wonders if a more selective elaboration of legal problems might have allowed for the production of more completed analyses. Perhaps Hohfeld suffered from a compulsion to continue his analysis beyond the practically useful, in an attempt to reach a state of intellectual fulfilment. If so his distress has equipped us with a technical vocabulary of elegance and power.

Before considering the familiar account of "jural relations" it is worth noting where Hohfeld started his analytical endeavour. Hohfeld started by distinguishing factual from legal relations; this conflation of fact and law continues unabated to the present. A piece of paper is described as a contract, a collision in a road as a tort, a house is described as the subject matter of property. Things, people, and the actions people perform are physical phenomena. The reasons people offer for their actions are psychical phenomena. Law is concerned with events, but law is not the same as those events. A contract is the set of legal consequences that flow from the existence of an enforceable agreement; a tort is present if the law imposes damages in the circumstances in which a collision took place; one does not own a house (a physical thing) one has various rights (legal relations *ie,* claims, privileges, liberties, immunities) in relation to the estate (a legal thing) that relates (a metaphysical conception) to the place (a physical thing) the house occupies. Hohfeld's distinction is clearly correct and equally clearly tedious and capable of causing confusion if invariably insisted upon. Hohfeld proceeds with a distinction between different types of fact, distinguishing operative facts, facts that are in issue, and evidential facts. Briefly, operative facts are those that determine legal relations, and are specific or particular. Facts in issue are generic in nature, and will be established through the proof of specific operative facts. Evidential facts are those proved before the court determining the case. Of most

[6] See p 3 and pp 25–27 (pp 18–20 of (1913) 23 *Yale Law Journal* 16).

[7] See p x which recounts a student rebellion at Yale sparked by Hohfeld's demands on the students.

[8] The series of four articles on the liability of corporate shareholders is an example of this: (1909) 9 *Columbia Law Review* 285, and 492; (1910) 10 *Columbia Law Revie*w 283 and 520. The articles started out as an examination of the treatment of the sovereign power of California to impose liability upon the shareholders of companies registered outside of the state that incur liability within the state by the conflict of laws. Hohfeld found it necessary to deconstruct the limited company into its component parts in order to address the issue. The articles are fascinating but hardly well focussed.

interest in this passage on facts is Hohfeld's treatment of such terms as ''possession'' and ''domicile''. He describes such terms as sets of operative facts that have a legal effect, one might say patterns of operative facts that produce some legal effect. With this exercise in discrimination complete Hohfeld has provided clear indications of the nature of ''jural'' things, and he starts his explanation of ''fundamental jural relations''.

Hohfeld was trying to establish the identities of the most basic of legal relations, from which all complex legal relationships must be constructed. To use a philosophical and scientific analogy, he sought the identity and nature of the atomic particles that are combined to make legal substance. Obviously, this enterprise rests upon a number of assumptions, and it is as well to quickly note a few of them. First, it rests upon the assumption that legal relations exist; that it makes sense to speak of a person having a claim over another person who has a duty to comply. That duty and claim are meaningful words that describe something in the real world. Second, it rests upon the assumption that legal relations have generic qualities; that a claim has features that it shares with other claims. That claims and duties with different substantive content share some significant features because each is a claim, and each is associated with a correlative duty. Third, it rests upon the assumption that the structure of legal relationships is atomic in nature, rather than organic or emergent. This assumption, that complex legal relationships are made up of simpler elements, and it is in the combination and arrangement of these simpler relations that complex legal relationships are built up, is essential to the validity of Hohfeldian analysis. In short, the search for fundamental legal relations only makes sense in a legal world that accepts the utility of speaking of legal entities (reductionism not appropriate) that have characteristics that are generic (generalisation is appropriate) and can be analysed into component basic parts (reductionism is appropriate). Hohfeld derived his level of analysis (he identified when one should reduce terms down to simpler terms) and his working assumptions (of generality and independent existence) from legal practice, probably intuitively. This explains his anxious and consistent justification of his analysis through the citation and analysis of judgments.

We can notice the sort of benefits that Hohfeld hoped could be derived from the use of his analysis. First, if the fundamental terms are truly fundamental then they provide an interpretive tool of great potential power. Apparently dissimilar areas of law can be linked, through identification of shared characteristics at this fundamental level. In effect the analysis provides a lowest common denominator, one that allows for a simplified and transparent comparison of different legal situations, without the loss of useful information or distortion of the situation. Use of this common denominator is able to reveal connections, and suggest the applicability of common solutions to common problems. Second, if the fundamental terms are generally adopted then common verbal disagreements can be resolved. It is no small matter in law to avoid discourse that is barren because the vocabularies of each party do not correspond. Hohfeld hoped he was supplying a universally acceptable terminological framework. Finally, by stripping law of metaphor and colourful characterisation, and reducing matters to their constituent parts, it might be easier to make necessary value choices consciously and deliberately, rather than as the result of a rhetorical packaging of description, and analysis, with value choices. It is often the classification of a legal problem that determines the result of litigation. There is a risk of becoming committed to a particular solution at an early stage of argument, and without a clear apprehension of the alternatives. Reduction of the opposing claims into their fundamental components should make this sort of pre-judging less likely to occur.

Hohfeld did not try to define his fundamental legal relations. This was surely an inspired methodological decision. Instead of attempting definitions Hohfeld described

the legal relations and their inter-relationships, and gave examples of them from legal practice. He was thus able to develop his analytical framework from the social practice of the courts and jurists. It is justified not by any *a priori* justification, but as a reflection and refinement of law as it actually exists. This enabled him to achieve several ends without getting mired in arguments about definitions. He was able to give a convincing account of his eight component relations, producing his famous tables of opposites and correlatives. The schema is compelling because it does give a logically coherent and complete account.[9] He was able to produce examples of each of his legal relations from judgments that proved that each existed in the corpus of positive law. He was able to produce a technical vocabulary that demonstrably allowed for greater discrimination than the vocabulary used in legal practice. He could demonstrate that with his proposed terminology it was possible to say everything that the old vocabulary allowed, and in addition it was possible to make more precise discriminations. He was able to demonstrate that his new terminology allowed for a more complete and precise description of the law than the technical terminology in general use. In other words, he established that his fundamental conceptions were not jargon (words coined for rhetorical effect or deliberate obscurity) but genuinely a technical vocabulary (a specialist vocabulary required to describe a technically complex area of activity). As has been noted all of this was possible by using description supported by authoritative example from judicial reasoning, a method that allowed the analysis to be established on a foundation of legal practice.

Hohfeld did not think he had finished when he introduced and explained his eight fundamental jural relations. He had established an adequate technical vocabulary that would enable him to start his analysis. The issue he was concerned to analyse was the relationship between law and equity. In order to carry out this analysis he needed to consider what was meant by rights (privileges, powers *etc*) and actions *in rem* and *in personam*. Hohfeld suggested that greater clarity could be obtained by dividing rights (privileges, powers *etc*) into those that were enforceable against one or a few people, rights he described as paucital (rights enforceable against individuals); and rights (privileges, powers *etc*) that were enforceable against a large number of people, rights that he described as multital (rights good against the world at large). Of multital rights some arose and existed in reference to property, and these were what might be termed property rights. Thus, in Hohfeld's terms when jurists used the expression: "*in rem*" they often intended "multital rights (powers *etc*) existing in relation to some item of property". Any right (power *etc*) must have some individual person who was subject to the correlative duty (liability *etc*), and multital rights were no different in this respect to any other rights, there were no such legal relations as rights (powers) enforceable against a large and indefinite group, the law simply reiterated the same right duty many times. Also, the nature of a right (power *etc*) was not determined by the form of proceedings or remedies available for its enforcement. Thus, a multital right relating to a chattel was no less a property right because specific recovery of the chattel might not be available in vindication of the right. The remedial right would invariably be paucital in nature, but the secondary right (power *etc*) should not be confused with the primary right (power *etc*) it vindicated. Hohfeld did not have space to proceed with his analyses

[9] His eight relations are right, privilege, power, immunity, duty, no-right, liability, and disability. They effectively form two groups of four linked concepts: right, no-right, privilege (no duty), duty; and power, disability (no power), immunity (no liability) and liability. Within each group of four relations for each relation there is a correlative *ie*. right duty, and there is an opposite *ie*. privilege duty. Hohfeld basically explores the implications of "correlative" (*ie* right and duty), "correlative" means that each is the necessary and sufficient condition for the existence of the other and they are not identical. So: if right then duty, if no duty (privilege) then no-right; similarly, if power then liability, if no power (disability) then no liability (immunity). Once we accept "correlative" then everything else follows inexorably.

any further, and in particular did not manage to deal with common and special relations; or, consensual and constructive (imposed by law) relations; or, substantive and adjectival relations; although, as noted, he touched on this subject; or, perfect and imperfect relations (which it must be confessed remain a puzzle); or, concurrent and exclusive relations (which were at the heart of his analysis of the relationship between the law and equity).

At the end of the short book (or the two articles) the reader is aware of several things. First, that Hohfeld could elaborate a problem apparently indefinitely. Second, that in the process of elaboration numerous false arguments were exposed as absurd. Third, that the task of elaboration invited a whole new range of errors of classification. In short, it is easy to understand why Hohfeld's methodology has not been generally adopted. His rebellious students had a valid objection to subjecting the whole corpus of law to his analysis. However, those students who later reported that the time they had spent under Hohfeld had been the most useful of their academic careers were also right.[10] The ability to break down a complex legal situation into its constituent legal parts, the fundamental legal conceptions of Hohfeld, does reveal absurd errors of reasoning. It can also reveal the possibility of alternative solutions when it is argued that choice is limited to one path or another, for example that either personal or property rights are in issue (either *in personam* or *in rem*). Consider, obviously it is not contradictory to allow a right to a claimant whilst denying a power to the same claimant; nor is it contradictory to allow a right to have multital effects but be ineffective with regard to a sub-group; nor is it contradictory to allow a paucital (personal) remedy for the violation of a multital (property) right. Familiarity with Hohfeld allows one to deconstruct legal relations, and examine them without distracting preconceptions created by linguistic choice: he provides a universal terminology adequate to any legal relationship.

Hohfeld has survived for the best part of 100 years. He has been influential in the common law world, and has informed later jurists who have been able to break out of an undifferentiated world of rights in things or against people. He has provided a vocabulary adequate to the description of the common law legal relations. However, his terminology has never achieved the level of usage that would make it the *lingua franca* of the legal world. It is too precise, too difficult to apply, too verbose. Reading this little book remains worthwhile today; it is short and stunningly disciplined in its approach to language. It is shorter than most government consultation documents, and far more likely to repay the time spent reading it. Re-reading it was valuable, one forgets just how much of Hohfeld becomes part of the mental context in which legal problems are considered, and how much was missed or neglected on first reading. Hohfeld knew that his analytical framework could not solve legal problems. It was meant to allow legal problems to be seen clearly. His analysis is most useful in two distinct situations: when one senses an error in reasoning but struggles to locate it; and when one cannot apprehend clearly the available legal responses to a problem. When one needs the precision in analysis and ability to discriminate that Hohfeld supplies then nothing else will serve.

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[10] On at least one occasion the same student: see p xi.

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NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

This edition's Nottingham Matters takes the form of the text of a seminar given by Andrew Alonzi at Nottingham Law School, as part of its Research Seminar Series on 6 December 2008.

THE MENTAL CAPACITY ACT 2005 AND THE CODE OF PRACTICE: AN INTRODUCTION

INTRODUCTION

The Mental Capacity Act 2005 (MCA 2005) was fully implemented in England and Wales on 1 October 2007, having arrived in two stages. In April 2007, the new Code of Practice (Code) was made available (the Code supports the framework of the MCA 2005); the Independent Mental Capacity Advocate (IMCA) service began in England; the new test for assessing capacity, the five key principles and the best interests test were all introduced (only for the purpose of the new IMCA service) and there was a new criminal offence of ill treatment or wilful neglect.

The remainder of the MCA 2005 came into force in October 2007. For example, the new assessment of capacity test and best interests' principle were extended for all other purposes and there were new statutory provisions for advance decisions to refuse medical treatment.

CODE OF PRACTICE

The new Code was published in April 2007 (a little after the introduction of the first parts of the MCA 2005). The Code sets out good practice in caring for and treating those in need and covers an extensive range of roles, circumstances and decisions. Anyone who owes a legal duty of care to a person who lacks capacity is placed under a statutory duty to have regard to the Code when proposing to make a decision or to act (for example, this will include doctors, nurses, social workers, paid care assistants, IMCAs, Court of Protection deputies, attorneys).

The Code can be found at http://www.justice.gov.uk/guidance/mca-code-of-practice.htm. Practitioners need to be able to demonstrate familiarity with the Code and be able to show they have followed its guidance (or show good reasons why they departed from the guidance). Whilst there is no sanction for non-compliance in the

Code, evidence of non-compliance by a person under a legal duty of care towards the person who lacks capacity may be used in evidence in civil or criminal proceedings before a court or tribunal.

PURPOSE BEHIND THE MCA 2005

The MCA 2005 empowers and provides statutory protection for vulnerable people aged 16 years and over who fulfil the statutory criteria under section 2(1) (the new test for assessing capacity).

The Code suggests that the people who are likely to receive protection from the MCA 2005 are people with dementia; significant learning disabilities; loss of consciousness; stroke; concussion following head injury; long-term effects of brain damage and so on.

The MCA 2005 makes clear who can take those decisions; when and how. It covers a range of decisions made or actions taken on behalf of a person who lacks capacity, from day to day decisions about personal welfare to decisions about healthcare, medical treatment and the management of property and financial affairs. So, the MCA 2005 is relevant to anyone who has to deal with issues around a person's lack of capacity (for example, doctors, nurses, solicitors, social workers, carers).

The Act also makes clear how people can plan ahead for a time when they may lose capacity (advance decisions and non-binding written statements of feelings and wishes).

Decisions to treat or involving consent to treatment for a mental disorder under the Mental Health Act 1983, where the person is liable to (and should) be detained for treatment of that mental disorder, are excluded, as are decisions about family relationships (includes consent to marriage and civil partnership).

FIVE STATUTORY PRINCIPLES

There are five statutory principles that underpin the MCA 2005.[1] In relation to those who lack capacity to make decisions, their purpose is to protect and to encourage their participation in the decisions that are intended to help them.

1. A person must be assumed to have capacity unless it is established that he or she lacks capacity (see the Code, 2.3 to 2.5). This supports the idea that every adult has the right to make his or her own decisions if he or she has capacity. Remember, however, that a person may have capacity to make decisions about certain issues but not others. Likewise, a person who needs help to make or communicate a decision may still have the capacity to make that decision.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success (Code, 2.6 to 2.9). This has two obvious benefits. It avoids people being too quickly labelled as lacking capacity to make the decision in question and it helps to prevent unnecessary interventions into a person's life (enhancing empowerment). The Code asks practitioners (as the situation may dictate) to consider using different forms of communication (non-verbal, visual); treating the underlying medical condition which may be affecting capacity; helping a person with learning disabilities to learn new skills (a long term approach) and presenting information clearly and factually to a person, perhaps explaining the advantages and disadvantages of making particular choices (or no choice at all).

[1] See the Code, Chapter 2 and the MCA 2005, s 1(2) to (6) for the five statutory principles.

3. A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision (Code, 2.10 and 2.11). The practitioner must consider whether unwise decisions are being made repeatedly: perhaps the decision in question is very irrational or out of character for that person (this could indicate an underlying problem).
4. An act done, or decision made, for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests (Code, 2.12 and 2.13). There is no definition of "best interests" in the Code. This is because a person's best interests will vary from case to case. There is a best interests checklist in section 4 of the MCA 2005, and further guidance is contained in the Code, paragraphs 5.13 *et seq*.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedoms (Code, 2.14 to 2.16). A practitioner may consider whether there is a need to act or decide at all. Assuming that there is, the final decision must always allow the original purpose of the decision or act to be achieved.[2]

LACKING CAPACITY

Anyone making a decision on behalf of a person thought to lack capacity must remember that he or she is being asked to determine whether the person has capacity to make a particular decision at the material time (the time it needs to be made) (Code, 4.13). It is not based on his or her ability to make decisions in general (Code, 4.4).

There is a new, two-stage test for determining whether a person lacks capacity:

1. Does the person have an impairment, or a disturbance in the functioning, of his or her mind or brain? (Code, 4.11 and 4.12). If he or she does not, then he or she has capacity and no further assessment is needed. If he or she does, then he or she *may* lack capacity and the practitioner must move onto stage two.
2. Does the impairment or disturbance mean that the person is unable to make a specific decision when he or she needs to (remembering that the test is decision and time specific and the person has to have been given all practicable help and support, which failed (see chapter 3)?[3]

An inability to make a decision means that the person cannot understand or retain (in his or her mind) information relevant to a decision, to use or weigh up that information as part of the decision-making process, or to communicate that decision by any means.[4] If a person is unable to communicate a decision by any means at all (for example, he or she may be unconscious or in a coma), the Act says that he or she should be treated as if unable to make that decision.[5] Communication by simple muscle movements can show that a person is able to communicate and may have capacity to make a decision. If this is so, then the Code guides practitioners to consider the first three stages (understand, retain, use or weigh up).[6]

By way of example, to determine whether a person is unable to retain information, the person only has to be able to hold information in his or her mind *long enough* to use it to make a decision. Under section 3(3) of the MCA 2005, a person who can only hold information for a short time must not be assumed to lack capacity. It depends on what is necessary for the decision in question.

[2] See the Code, paragraph 2.3 to 2.16.

[3] See generally the Code, Chapter 4 (available at www.justice.gov.uk) and ss 2(1) to 2(3) and 3(1) of the MCA 2005. See the Code of Practice, paragraphs 4.11 to 4.13.

[4] See the Code, paragraphs 4.14 to 4.25.

[5] See the Code, paragraph 4.23.

[6] See the Code, paragraph 4.25.

For the purpose of assessing capacity, it does not matter if the incapacity is fluctuating or temporary (although this will be relevant when deciding whether the decision can be postponed).[7] What is important is the person's ability to carry out the process in making a decision (with or without encouragement and help); not the outcome (whether the practitioner agrees with the decision).

A person's lack of capacity cannot be established merely by reference to a person's age, appearance, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about their capacity.

When a person's capacity is being assessed, the Code provides guidance on the circumstances and approach. The practitioner needs to consider whether capacity is being assessed in the best environment for the person; is he or she in the best state for an assessment; is the need to make a decision urgent, or can the assessment be postponed (by which stage the person may be better able to make his or her own decision) (Code, 4.46).

The practitioner needs to take reasonable steps to establish that the person lacks capacity to decide or consent to an act of treatment at that time (Code, 4.44). Taking reasonable steps gives the practitioner a reasonable belief that the person lacks capacity to agree to the decision or act and should protect the practitioner from liability (Code, 4.39, 4.44).

It may be necessary to share information about the person's circumstances when assessing his or her capacity (the practitioner needs to have accurate information relevant to the decision in question) (Code, 4.56). It is important to try to get the person to agree to the practitioner sharing relevant information with others, after explaining to the person why the practitioner wishes to share that information and the risks and consequences of revealing and not revealing information.

It goes without saying that an assessment of capacity under the MCA 2005 should be recorded. If the practitioner's decision is ever challenged, the Code guides the challenger to request reasons showing how the practitioner formed a reasonable belief and objective evidence in support of that belief. Therefore, it is essential to carry out a proper assessment of a person's capacity to make a particular decision or consent to a particular act of care or treatment, and record those findings.

BEST INTERESTS

This principle is one of the five key principles. Any decision made on behalf of, or any act done for, a person who lacks capacity to make the decision or consent to acts concerned with his or her care or treatment must be made or done in the person's best interests before acting.[8]

As long as the person who acts or makes the decision has taken all practicable steps to help and support the vulnerable person to make his or her own decisions, without success; reasonably believes that the person lacks capacity in relation to the particular decisions and has done everything they can to work out the person's best interests, the practitioner should be protected from legal liability.

The approach to determining a person's best interests is holistic. So, to determine what is in a person's best interests, the practitioner should:

1. encourage the person's participation in the decision-making process (the theme of empowerment);

[7] See generally the Code, paragraphs 4.26 to 4.27 and s 2(2) MCA 2005.

[8] See the Code, Chapter 5 and s 1(5) MCA 2005.

2. try to identify all the things that the person would take into account if he or she was making the decision or acting for him- or herself;
3. try to identify the views and issues which would have influenced him or her if he or she had capacity and made the decision him- or herself (such as evidence of his or her past and present wishes and feelings, religious, cultural, political, moral beliefs and values);
4. avoid assumptions about best interests based upon his or her age, appearance (physical appearance, characteristics and dress, including religious dress), condition (including physical disabilities, learning difficulties and disabilities, illnesses relating to age and temporary conditions) or behaviour; and
5. consider whether he or she is likely to regain capacity following a positive response to medical treatment (implying that the decision may be postponed until then).

Practitioners who are bound to have regard to the Code (for example, healthcare workers) are under a duty to consult others for their views about the person's best interests and to see if they have any relevant information about his or her wishes and feelings, beliefs and values which could help to determine what is in the person's best interests.[9] For example, the practitioner may need to consult carers, near relatives, friends or anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues. Practitioners should be careful not to breach confidentiality in so doing and should only disclose information about the person that is reasonably necessary to determine his or her best interests.[10]

If the practitioner does not speak to a particular person, it would be good practice to record reasons why (Code, 5.51). The Code makes it plain that everybody's views are equally important. Ultimately, it is the responsibility of the decision-maker to consult appropriately and then make a decision. It is worth thinking creatively: for example, a person's financial attorney may still have useful information about a person's beliefs and values which could assist a doctor or carer making a best interests decision.

Whatever the practitioner decides must also be the least restrictive option available to the person, in terms of his or her rights and freedoms.[11] This will usually involve practitioners exploring various options to determine which is the least restrictive or will allow the greatest freedom for the person. However, it is very important that the final decision allows the original purpose to be achieved.

It is also vital to keep a written record of how the best interests decision was reached (for example, the reasons, who was consulted and what special factors were considered).[12] This is not only good practice, but will help to meet any subsequent challenge suggesting that the decision was not in the best interests of the person.

PROTECTION FROM LIABILITY

There is protection from civil or criminal liability when performing acts in connection with the care and treatment of a person who lacks capacity, in that person's best interests.[13] By providing protection from liability, the MCA 2005 allows necessary acts of care and treatment to take place as if the person, who lacks capacity to consent, had consented to them.

[9] See the Code, Chapter 5, paragraph 5.49.

[10] The Code provides some guidance about balancing the person's privacy with the need to consult others for their views when trying to determine what is in the best interests of the person who lacks capacity (see the Code, Chapter 16).

[11] See the Code, Chapter 2, paragraph 2.15 and s 1(6) MCA 2005.

[12] See the Code, Chapter 5, paragraph 5.15.

[13] See the Code, Chapter 6, and s 5 MCA 2005.

Acts of care and treatment may include diagnostic examinations; providing medical treatment and nursing care; arranging admission to hospital for treatment; tests; giving medication; taking blood samples; therapies; emergency care (Code, 6.5). In order to gain statutory protection for acts in connection with care and treatment, the practitioner must reasonably believe that the person lacks capacity to give consent for the proposed act (Code, 6.6; 4.11 *et seq*). If the person has capacity, he or she must consent. The proposed act must also be in that person's best interests (Code, chapter 5) and must be the least intrusive option in terms of the person's rights and freedoms (Code, 2.14 to 2.16).

So, an example is the civil tort of battery in relation to any action that involves physical contact with the person, where the person is unable to consent to the action. To receive protection, the action must be in connection with care or treatment; the practitioner must reasonably believe (having taken reasonable steps to establish) that the person lacks capacity to give permission for the physical action being proposed, which must also be in the person's best interests.[14] The reasons for this belief should be clearly recorded in the person's case notes. Remember however that this statutory protection does not provide a defence to a claim in negligence.

Restraint is another area covered by the MCA 2005 and the Code. Any action intended to restrain a person who lacks capacity will not attract protection from liability unless the practitioner reasonably believes that restraint is necessary (viewed objectively) to prevent harm to the person who lacks capacity and the amount or type of restraint used and the amount of time it lasts is a proportionate (least intrusive) response to the likelihood and seriousness of harm.[15]

ADVANCE DECISIONS[16]

Advance decisions are about a person's choice to refuse particular medical treatment in future circumstances when that person lacks the capacity to do so at the time the decision needs to be made. A valid, applicable, advance decision has the same effect as if it were a contemporaneous refusal of medical treatment by a person who had capacity.

Advance decisions are different from non-binding written statements of feelings and wishes (which do not bind, but which are relevant to determining the person's best interests). People can only make advance decisions to *refuse* treatment. To make an advance decision, the person must be at least 18 years of age and have capacity to make it (which is an exception to the general rule that the MCA 2005 applies to people who are 16 years of age and over).[17]

An advance decision has to be three things: it must exist, be valid (for example, there is no evidence that it has been withdrawn when the person still had capacity) and applicable to the situation in question and the proposed treatment.[18] If all three are met and the person now lacks capacity to consent to the same treatment, the medical staff must follow the person's advance decision (in this respect, the decision may be an exception to the best interests principle).

[14] See the Code, Chapter 6, paragraphs 6.4 and 6.22.

[15] See the Code, Chapter 6, paragraphs 6.40 and 6.41.

[16] See generally the Code, Chapter 9.

[17] See the Code, paragraph 9.1.

[18] See the Code, paragraphs 9.38 to 9.44.

Medical staff would be protected from liability in the following alternative circumstances:

a) they stopped or withheld treatment because they reasonably believed that an advance decision existed, was valid and applicable to the circumstances (under which is was being considered);
b) they took all practical and appropriate steps to find out if the person had made an advance decision and either (1) were not aware that the person had made an advance decision or (2) were not satisfied that a valid, applicable advance decision existed (Code, 9.58);
c) they still treated the person because they were aware of reasonable grounds to doubt the person had capacity to make the advance decision at the time it was made (Code, 9.8).

In most cases, the advance decision can (and may) be communicated orally (the exception being advance decisions to refuse life-sustaining medical treatment, which must be in writing and follow certain formalities).[19] In many cases, a person who has capacity will discuss his or her wish to make an advance decision with their doctor. If a person (who has capacity) communicates an oral advance decision to refuse medical treatment, steps should be taken to record this clearly in the person's records to avoid uncertainty later. This will assist healthcare staff who have to determine whether a valid, applicable advance decision to refuse treatment exists.

Where the treatment being refused is designed to sustain life, the decision to refuse treatment must (Code, 9.24):

a) be in writing (this can be written by someone else or recorded in the healthcare notes);
b) be signed by the person making it;
c) be witnessed by another person; and
d) contain an express statement that the specific treatment is to be refused "*even if life is at risk*" (if this is in a separate document, this must also be signed and witnessed [by the person making it]).

There may be a number of areas of risk associated with advance decisions. It may be difficult to identify a withdrawal of, or change to, the decision (Code, 9.40). A personal welfare Lasting Power of Attorney made after an advance decision may confer upon the attorney the ability to make decisions about the same treatment covered in the advance decision (Code, 9.33). The person who made the advance decision may have behaved in ways "clearly inconsistent" with the advance decision since it was made (this could indicate a change of mind) (Code, 9.40). The advance decision may not apply to the current circumstances (Code, 9.41) or the proposed treatment may not be that specified in the advance decision. Medical staff may also perceive there to be reasonable grounds to believe that the patient did not anticipate circumstances that now exist, when he or she made the advance decision (such as advances in medical treatment which may have influenced his or her original decision had those advances been known) (Code, 9.42).

Even if an advance decision is not valid or applicable to the particular circumstances in question when the person lacks capacity and requires medical treatment, it still represents a non-binding expression of the person's wishes and feelings. This means that it must be considered by healthcare staff as an expression of previous wishes when working out the person's best interests.[20] For this reason, it is important that a clear record of a person's wishes is kept and can easily be made available to healthcare staff.

[19] See the Code, paragraphs 9.24 to 9.28.

[20] See generally the Code, Chapter 9, paragraph 9.53 (treating a person according to his or her best interests).

CHILDREN AND YOUNG PEOPLE

The MCA 2005 does not generally apply to children under the age of 16 (save for Court of Protection decisions about a child's property and finances and child victims of the new offence of ill treatment or wilful neglect).[21]

Most of the Act applies to young people aged 16 to 17 who may lack the capacity (within the statutory definition under section 2(1) of the MCA 2005) to make specific decisions. Remember, however, that only those aged 18 and over can make a Lasting Power of Attorney or an advance decision to refuse medical treatment.[22]

INDEPENDENT MENTAL CAPACITY ADVOCATE

The new IMCA service was created to work within the statutory framework of the MCA 2005. An IMCA will be appointed to support a person who lacks capacity but who has no-one else (other than paid staff) to support or represent him or her. An IMCA who is appointed is therefore a very important part of the decision-making process.

The IMCA must be independent and must comply with the Code. In the healthcare sphere, an IMCA must be instructed (by the NHS organisation as the "responsible body") and consulted for decisions about providing, withholding or stopping serious medical treatment (Code, 10.42 *et seq*) or about transferring the person to hospital for a period exceeding 28 days (Code, 10.52).

IMCAs will make representations and highlight important information on behalf of the person who lacks capacity and have the right to challenge the decision-maker in relation to the person's capacity and best interests.

ILL TREATMENT OR WILFUL NEGLECT

Since April 2007, there has been a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity (within the scope of the test under section 2(1) of the MCA 2005). This offence applies to anyone caring for a person who lacks capacity (*eg* family carers, healthcare staff in hospital), but is not limited to those under a legal duty of care towards the person who lacks capacity.

The offence of ill treatment or wilful neglect of a person who lacks capacity can also apply to victims younger than 16 years of age. The penalty is a maximum gaol sentence of five years and/or a fine.

CONCLUSION

The MCA 2005 and the Code aim to empower and protect vulnerable people who lack capacity to make decisions for themselves. Compliance with the Code (which involves taking a careful, evidence-based approach to assessing capacity and determining best interests) should help to ensure that vulnerable people are empowered and protected.

The emphasis upon one's ability to make decisions about healthcare treatment in advance (advance decisions) is particularly welcome: there is now a clear statutory

[21] See the Code, paragraphs 12.1 to 12.5.

[22] See the Code, paragraphs 12.6 to 12.10.

framework which allows individuals who currently have capacity, but who may lose capacity at a future time, to reflect on the treatments they would wish to refuse and empowers them to state this refusal in advance in terms that will be binding on medical staff.

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