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NOTTINGHAM LAW JOURNAL

EDITORIAL

The *Nottingham Law Journal* was first published in 1977, under the title *The Trent Law Journal*. Since then, it has been fortunate to feature contributions from distinguished practitioners, judges and public figures, as well as from academic writers. In 1992, the *Journal* adopted its present name, reflecting the change of name of our Law School. The *Journal* is distributed widely in the United States, to several Commonwealth countries and to every University law school in the United Kingdom. It is peer-reviewed, articles considered for publication being refereed by academics from other universities, both here and abroad. I should like to thank our external referees for their invaluable help in connection with this issue. I would also like to thank John Snape, Secretary to the *Journal*, for his herculean efforts in compiling the tables of cases, statutes, index, *etc.* and generally for seeing this issue to press.

An innovation this year, reflecting the success of recent editions, is our move to publishing two issues each year, the second issue of 1995 to be published in the Winter. This extra space allows me to re-iterate with particular warmth our invitation to colleagues elsewhere in the United Kingdom and abroad to contribute material. It also allows the most up-to-date commentary on recent caselaw, especially in view of the relatively short "lead-in" time of the *Journal*.

As a glance through this issue will show, the *Journal* is general in scope, though themes will no doubt emerge in the balance of its content from time to time. The *Journal* is not wedded to any particular doctrine, bias or perspective in its approach and it is hoped that its defining characteristic will continue simply to be the scholarship of the work published and its contribution to the wider debate about the law.

PETER KUNZLIK, Editor.

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EDITORIAL

When the last issue of this *Journal* was distributed, we mentioned that we hoped that the next issue would contain the text of the 1995 *Nottingham Law Journal* Lecture, entitled "Procedural Fairness in the Scott Report" to be given by Christopher Muttukumaru, Secretary of the Scott Inquiry. In fact the publication of the Scott Report was further delayed so that the Lecture had to be postponed. For obvious reasons it was not felt appropriate that an inquiry official should speak before its report was published, especially since the Lecture is to deal with fairness in the conduct of inquiries. We now expect the Lecture to take place in early March 1996 and, if that is the case, the text will be published in the next issue of the *Journal.*

On a more domestic note, I should like to thank James Slater, Secretary to the Editorial Board and Rosanne Rieley (who has taken over as administrative assistant with responsibility for the *Journal*) for their considerable efforts in helping to produce this issue. John Snape becomes Assistant Editor. We hope you find this issue interesting.

PETER KUNZLIK, Editor.

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ARTICLES

The address for submission of articles is given at the beginning of this issue.

THE RECURRENCE OF THE SHORT, SHARP SHOCK: AN APPRAISAL OF HOME OFFICE PLANS TO INTRODUCE "BOOT CAMPS" FOR YOUNG OFFENDERS

*Stephen J. Fay**

INTRODUCTION

IN FEBRUARY 1995, A DRAFT COPY OF the Prison Service's annual corporate plan was leaked to the British press. Contained in the plan was a proposal to establish a pilot scheme of tough regimes in young offender institutions, modelled on US militaristic "boot camps" or "shock incarceration programmes".[1] The proposal is controversial for three principal reasons. First, it is reminiscent of earlier British attempts to instil military-style discipline in young offenders, the most recent of which - the "short, sharp shock" detention centre regimes introduced by former Conservative Home Secretary, William Whitelaw, in 1979 - has been described as "the most clear-cut failure in recent British penal policy".[2] Secondly, in adopting the US model of boot camps as the basis for tougher regimes for young offenders, the proposal appears to ignore a corpus of academic research from the USA which calls into question both the propriety of the imposition of military methods of discipline on non-

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1 See, e.g., "Howard to try 'boot camps' for offenders", *The Guardian*, 6 February 1995.

2 Penal Affairs Consortium, quoted in "Boot camps condemned as failures by report", *The Daily Telegraph*, 28 March 1995.

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ARTICLES

The address for submission of articles is given at the beginning of this issue.

HEDLEY BYRNE – A NEW SACRED COW?

*John Hodgson**

I. INTRODUCTION

THE HOUSE OF LORDS HAS BEEN BUSY reassessing the status and scope of the principle of professional liability for negligent advice regardless of contract. This has occurred in four cases decided in the last year. In chronological order of decision, these are *Spring* v. *Guardian Assurance,*[1] *Henderson* v. *Merrett Syndicates Ltd.,*[2] *White* v. *Jones*[3] and *X* v. *Bedfordshire County Council.*[4] The factual backgrounds are very disparate. The cases respectively concern references given by an employer to an employee covered by the Lautro rules; the duties of agents to Lloyd's Names, the liability of a solicitor to disappointed beneficiaries, and the obligations of child care and educational special needs professionals. All however raise professional liability in some form, and the first three rely heavily on the principle in *Hedley Byrne & Co.* v. *Heller & Partners.*[5] This case is however not mentioned in *Bedfordshire*, although *Henderson* and *White* are referred to with approval. Indeed the whole approach in this case is very orthodox, relying on traditional doctrine on the extent of breach of statutory duty and common law duties based on reliance rather than, as in

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1 [1994] 3 All E.R. 129 (hereafter *Spring*).

2 [1994] 3 All E.R. 506, reported with *Arbuthnott* v. *Feltrim* (hereafter *Henderson*).

3 [1995] 1 All E.R. 691 (hereafter *White*).

4 29 June 1995, at the time of writing unreported (a group of five appeals heard together, hereafter *Bedfordshire*).

5 [1964] A.C. 465 (hereafter *Hedley Byrne*).

the other cases, on an assumption of responsibility. It is however not merely a case of "the dog that didn't bark",[6] although the change of tone is striking.[7] Perhaps the key feature is that there was no contractual *nexus* in this case, whereas in both *Spring* and *Henderson* there were alternative claims in contract, while in *White* a lot of the debate was on why there was *not* one. There is little need to dissect the principal speech (of Lord Browne-Wilkinson) precisely because it is so orthodox. The tendency in the other cases is to extend and exalt the role of the assumption of responsibility. This was largely the work of Lord Goff, who delivered speeches to this effect in all three cases.[8]

The main purpose of this article is to question the reasoning in *White* and to draw attention to inconsistencies between that case and earlier cases, which appear to raise at least the possibility of a wholesale destabilisation of the parameters of liability for economic loss in tort. It is however also intended to draw attention to the imposition of apparently mutually inconsistent duties, contrary to reason and public policy, by the use of the assumption of responsibility doctrine in *Spring*. The subsidiary point is considered first in order to maintain a primarily chronological treatment of the first three cases. *Bedfordshire* was decided after this article was first drafted and is therefore discussed in the context of the light which it throws on the other cases only.

II. *SPRING:* REFEREES CAUGHT BETWEEN TWO STOOLS?

A. The case and the issues

In *Spring* the plaintiff was aggrieved that the reference he had received from an ex-employer and which was a mandatory requirement for his continued work in a capacity regulated by Lautro under the Financial Services Act 1986, was unsatisfactory and, more pertinently, allegedly inaccurate. The obvious causes of action were in defamation and malicious falsehood, but equally obviously the defence was qualified privilege in respect of the defamation, and a denial that the plaintiff could prove malice

[6] See Sir Arthur Conan Doyle, "Silver Blaze", in *The Complete Sherlock Holmes Short Stories,* John Murray, Jonathan Cape, London, 1980, p. 331.

[7] The Committees were (dissentients asterisked): *Spring:* Lord Keith,* Lord Goff, Lord Lowry, Lord Slynn, Lord Woolf; *Henderson:* Lord Keith, Lord Goff, Lord Browne-Wilkinson, Lord Mustill, Lord Nolan; *White:* Lord Keith,* Lord Goff, Lord Browne-Wilkinson, Lord Mustill,* Lord Nolan; *Bedfordshire:* Lord Jauncey, Lord Lane, Lord Ackner, Lord Browne-Wilkinson, Lord Nolan.

[8] It may be significant that of some 189 pages of speeches in the four cases, all quintessentially common law based, 125 were delivered by law lords with a Chancery background (Lords Goff and Browne-Wilkinson) and only 64 by those with a common law, Scots or Northern Irish background, of which 28 pages were *dissentiente*, and 32 further pages were in *Spring*.

in respect of the falsehood. These defences succeeded on the facts at first instance. The plaintiff was thus relegated to secondary allegations of negligence and breach of an implied term in his contract of employment. It is with the former that we are concerned at present.[9] Their Lordships were conscious that, it having been decided below that there was no remedy under the torts primarily protecting reputation, any upholding of liability in some other tort could be seen as undermining the public policy which afforded the defence of qualified privilege when giving a reference. Lord Goff states the issues as being:[10]

> (1) Whether the person who provided the reference *prima facie* owes a duty of care, in contract or tort, to the other in relation to the preparation of the reference.
>
> (2) If so, whether the existence of such a duty of care will nevertheless be negatived because it would, if recognised, *pro tanto* undermine the policy underlying the defence of qualified privilege in the law of defamation.

Interestingly this echoes, in its content, and not merely the bipartite structure, the once celebrated and now reviled two-stage test proposed by Lord Wilberforce in *Anns* v. *Merton London Borough Council.*[11] We have a wide *prima facie* duty qualified by policy considerations. The key difference is that, as Lord Goff goes on to make clear, the governing principle is not the neighbour one of proximity and foreseeability, but the *Hedley Byrne* principle of "assumption of responsibility by the [employers] to the [employee] in respect of the reference, and reliance by the [employee] upon the exercise by them of due care and skill in respect of its preparation."[12] The case was not put by counsel on this basis, but Lord Goff thought it was essential to the plaintiff's case. After discussing the well known *dicta* in *Hedley Byrne* which describe its ambit, his Lordship goes on to bring this case within that principle. First he points out that, although that case itself concerned advice in the narrow sense, the ruling clearly extended to all forms of professional services rendered to the "client". The first key issue is whether the relationship of employer and employee can be equated to the professional relationships with which *Hedley Byrne* has been traditionally associated. His Lordship considers that it can:[13]

9 The contractual issue was treated very much as a pendant by their Lordships.
10 [1994] 3 All E.R. 129, 143.
11 [1978] A.C. 728.
12 [1994] 3 All E.R. 129, 143h.
13 [1994] 3 All E.R. 146g-147a.

> The employer is possessed of special knowledge, derived from his experience of the employee's character, skill and diligence in the performance of his duties while working for the employer. Moreover, when the employer provides a reference to a third party in respect of his employee, he does so not only for the assistance of the third party, but also, for what it is worth, for the assistance of the employee [since the reference is essential to enable him to secure the new post] ... The provision of such references is a service regularly provided by employers to their employees: indeed, references are part of the currency of the modern employment market. Furthermore, when such a reference is provided by an employer, it is plain that the employee relies on him to exercise due care and skill in the preparation of the reference.

This can be cross-referred to remarks of Lord Nolan in *White*. He talked in terms of road users relying on each other to use proper care. In this sense "reliance" is far wider than in the traditional *Hedley Byrne* sense, which requires reliance on the product of the professional activity, not the process. Lord Goff appears to be moving towards a wider formulation which, in truth, is part of the test for a neighbour duty. The consequences of this extension are further discussed below. Somewhat surprisingly his Lordship goes on to say that it does not necessarily follow that a duty of care is also owed to the recipient of the reference. This will depend on the nature of their relationship. His Lordship then considers the policy considerations, and concludes that the principles of defamation are not of any relevance. This being so there is nothing to prevent the imposition of the duty.[14] The only adverse consequence may be greater caution on the part of referees. This is not seen as a problem, despite the fact that this reference was given under Rule 3.5(2) of the Lautro Rules which provides that references must be taken up, and that a Lautro member "shall make full and frank disclosure of all relevant matters which are believed to be true".

B. What other duties/obligations exist?

With respect, giving priority to the asserted duty to the employee fails to have regard to the whole commercial, and public, context. The Rules are there for a clear public purpose, namely to assist in excluding from the financial services industry persons who are not fit and proper. There is a specific statutory obligation of disclosure. This is rightly, and expressly,

[14] It has been argued by others that this conclusion is nothing less than a destabilisation of the rationale of defamation. There is much to commend this view, but an analysis of this issue is beyond the scope of this article.

limited by a requirement of honesty, or truthfulness. A dishonest or wilfully untruthful reference is open to attack in defamation and the defence of qualified privilege ought not to succeed. A reference which is honest, but based on incorrect facts because insufficient care or skill was deployed in collecting or analysing the facts before preparing the reference, is in a different category. On the one hand, it can be said that only competent candid remarks deserve protection, on the other that it is a new departure to impose a duty to show that conscientious research has been undertaken. It moves this defence much closer to that of justification. The Lautro rules require that what is believed to be true be stated. They do not, in terms, require that the referee undertakes a full investigation, which may be time-consuming, costly and burdensome. Yet it may be difficult to prove "due diligence" in preparing the report without doing so. At all events there is a potential for incompatibility. To impose a countervailing and paramount duty to the subject of the reference may thus require the employer to serve two masters in a manner which is unfair and unreasonable. It has always been accepted that any duty owed under *Hedley Byrne* is subject to any duty owed to a retained client. So in the case of a solicitor, he or she generally owes a duty of care (contractual or tortious) only to his or her client, not to other parties to the transaction, whether the transaction is contentious[15] or non contentious.[16] This was reiterated in *Bedfordshire*. The position of child care professionals preparing reports for their employing authority and who owed no duty to the subjects of the reports was contrasted with that of educational psychologists who had undertaken treatment following the preparation of an assessment of special needs, and who did owe a duty:

> The position of the psychologists in the education cases is quite different from that of the doctor and social worker in the child abuse cases. There is no potential conflict of interest between the professional's duties to the plaintiff and his duty to the educational authority . . . If, at trial,[17] it emerges that there are such conflicts, then the trial judge may have to limit or exclude any duty of care owed by the professional to the plaintiff.[18]

The reason for this is clear. The duties are inconsistent and incompatible *ratione materiae.*

[15] *Al-Kandari* v. *J. R. Brown & Co.* [1988] 1 All E.R. 833.
[16] *Gran Gelato Ltd.* v. *Richcliff (Group) Ltd.* [1992] 1 All E.R. 865 (seller's solicitor owes no duty to buyer).
[17] The cases were heard on a motion to strike out the statements of claim.
[18] *Per* Lord Browne-Wilkinson, not yet reported (see above).

Further support for this approach can be derived from the decision of the New Zealand Court of Appeal in the associated cases of *South Pacific Manufacturing Co. Ltd.* v. *New Zealand Security Consultants & Investigations Ltd.* and *Mortensen* v. *Laing*.[19] Actions were brought in negligence against loss adjusters by the victims of fire in relation to reports to the insurer which led in one case to the claim being disallowed and in the other to a prosecution for arson. Sir Robin Cooke P. acknowledged that there were weighty considerations in favour of allowing an action, since the actions of the loss adjusters, at least in the *Laing* case,[20] had directly affected the property owners. There was a lengthy review of a range of authorities ranging from United States cases on the liability of loss adjusters through a full consideration of the principles on which a duty of care should arise. The case was treated as essentially a neighbour one, where the existence of a duty of care rested on issues of proximity, development by analogy and policy. It was recognised that the *Hedley Byrne* principle might apply, but little stress was laid on it. However, the court concluded that the countervailing policy arguments prevailed. "The suggested cause of action in negligence would therefore impose a greater restriction on freedom of speech than exists under the law worked out over many years to cover freedom of speech and its limitations."[21]

This argument proved decisive for Lord Keith in his dissent. Lord Goff put the case to one side because "in neither case was any question of assumption of responsibility to the plaintiffs before the court".[22] It is true that *Hedley Byrne* itself was only briefly mentioned, but there was a long discussion of the basis on which responsibility might be assigned, so the dismissal of the whole reasoning seems somewhat cavalier. Lord Lowry agrees with Lord Goff on the applicability of *Hedley Byrne.* Lord Slynn says that *"Hedley Byrne* does not decide the present case".[23] Unfortunately, although he reiterates points also made by Lord Goff and Lord Lowry that negligence and defamation are separate torts, he does not articulate exactly what the basis is, in his view, for imposing liability. He refers to the general acceptance of liability for loss caused by negligent statement and appears to infer that the present case is one to which this duty should be applied by analogy. He also concentrates entirely on the effect on the plaintiff of an inaccurate reference, without recognising the public interest in full

[19] [1992] 2 N.Z.L.R. 282.
[20] Mrs. Laing had been prosecuted for arson. In the other case the plaintiffs were only indirectly concerned as creditors of the company whose claim was disallowed, and were outside the necessary relationship of proximity.
[21] [1992] 2 N.Z.L.R. 282, 301-302.
[22] [1994] 3 All E.R. 129, 150j.
[23] [1994] 3 All E.R. 129, 161h-j.

disclosure or the conflict of interest of the employer in this context. Lord Woolf applies *Hedley Byrne* to the present situation by analogy in much the same way as Lord Goff. He is the only one of their Lordships who expressly recognises that "the duty imposed by the Lautro Rules is not for the benefit of employees. It is for the protection of the public".[24] He does this however in the context of asserting the importance of references and the fact that they need to be "full, frank and, by implication, accurate".[25] He takes the general majority line on the overlap of negligence and defamation and the public policy issue.

This decision was a major departure. The earlier acceptance at first instance in *Lawton* v. *BOC Transhield Ltd.*[26] that there might be a duty of care in this area (a neighbour duty, be it noted) aroused heated controversy.[27] The New Zealand courts, and the Court of Appeal in *Spring,*[28] upheld traditional orthodoxy, on the grounds that the contrary view would lead to adverse consequences. Argument was not addressed to the specific issue of conflict of interest, because it only arises if a quasi-professional duty is asserted, and the cases were argued as neighbour ones, but it is implicit in all the decisions before that of the House of Lords that the whole rationale of the defence of qualified privilege in this field was to resolve that conflict by balancing candour and honesty. Particularly where there is a statutory duty to give a reference, the imposition of a duty of care of the kind in question here[29] is unfair and unjust and, to the extent that it produces anodyne references, contrary to the specific public interest asserted by the statute and the Lautro Rules.

C. Subsequent consideration of Spring

The Court of Appeal has considered *Spring* on two occasions, and has not shown any enthusiasm for applying it either time. In *Elguzouli-Daf* v. *Commissioner of Police for the Metropolis*[30] the issue was whether the Crown Prosecution Service owed any duty to a defendant in respect of alleged delay in undertaking forensic tests which in the event exonerated him and led to the discontinuance of proceedings. The principal basis of the decision was that such a duty was excluded on public policy grounds, on the analogy of *Hill* v. *Chief Constable of West Yorkshire.*[31] *Spring* was

[24] [1994] 3 All E.R. 129, 171f-g.
[25] [1994] 3 All E.R. 129, 171g.
[26] [1987] 2 All E.R. 608.
[27] *e.g.* Lewis (1988) I.L.J. 108; Demopoulos (1988) 104 L.Q.R. 191.
[28] [1993] 2 All E.R. 273.
[29] *i.e.* as explained above, one which is owed to someone with a contrary interest to that of the recipient.
[30] [1995] 2 W.L.R. 173.
[31] [1989] A.C. 53.

mentioned only in passing, but it was clear that any duty should not be extended in the absence of anything recognisable as proximity in law. The consideration of *Spring* in *West Wiltshire District Council* v. *Garland*[32] is a little more detailed. A district auditor, acting under statutory powers and guidance which provided that he was not to be "deflected from making a report because its subject matter is critical or unwelcome if he considers it in the public interest to do so", made a report which officers of the Council considered reflected badly on them and was negligent. It was held that a duty derived from *Spring* could not exist here because of the statutory duty on the auditor. There was a positive policy allowing criticism in good faith without liability in negligence. In those circumstances it was impossible to argue that it was "fair, just and reasonable" to impose a duty of care, or, which was said to be the same thing, there was no proximity in law. A different result might be reached in the absence of the statutory duty. With respect, while the public nature of the district auditor service is more evident, it is clear that the overt policy behind this immunity is closely analogous to the public policy behind the Lautro Rules. The two cases are not readily distinguishable, but the argument of the Court of Appeal is distinctly more persuasive.

III. PROFESSIONAL LIABILITY: CONTRACTUAL OR TORTIOUS?

A. The general context

Having got off, in *Spring,* to what, it is suggested, is a pretty poor start, the House has also recently revisited the issue of the legal basis of the duty owed by a professional to a client or quasi-client (by which is meant one who does not retain or engage the professional directly and contractually) on two occasions. The first, *Henderson,* centred on whether Lloyd's agents owed a duty in tort to their "Names" in addition to the one which they undoubtedly owed in contract. The second, *White,* concerned the liability of a solicitor to the potential beneficiary of a will which the solicitor was instructed to draft, but which was not drafted before the intending testator died. This was fairly clearly a tortious liability, if any liability existed. The only relevant contract was with the intending testator. The case was seen as analogous with *Ross* v. *Caunters*,[33] where liability in tort was held to exist in favour of the intended beneficiary of a will which was defectively executed so that the bequest to the beneficiary did not take effect, although

[32] [1995] 2 W.L.R. 439.
[33] [1980] Ch. 297.

the House of Lords rejected the reasoning in the latter case. These cases, and *Spring*, were linked by the principle established in *Hedley Byrne*, but based on principles stated in *Nocton* v. *Lord Ashburton*,[34] namely liability arising from a voluntary assumption of responsibility. The same law lords heard both cases. *White* was argued first, but *Henderson* was then argued and speeches delivered as it was a critical element in the overall Lloyd's Names litigation.

B. The issues in Henderson

As a result of the subject matter much of the argument concentrates on issues specific to the insurance market. The general issue was not a particularly controversial one, since it now seems to be common orthodoxy that there is concurrent liability of professionals.[35] The case did however clarify and confirm the law. The issue of general importance was framed in the following terms by Lord Goff:[36]

> The first issue ... is concerned with the question whether managing agents, who were not also members' agents, owed to indirect Names a duty of care in tort to carry out their underwriting functions with reasonable care and skill. The second issue is concerned with the question whether managing agents, which were also members' agents, owed such a duty to direct Names.

The distinction is that in the first case there was no contract, so the question was whether there was a relevant tortious liability, while in the second there was a contract and the question was whether there was a concurrent tortious liability, and if so, what its scope was. The main reason for seeking to establish the dual liability was that the limitation period in tort is more advantageous. In both contract and tort the limitation period under the Limitation Act 1980 is six years,[37] but in contract this is counted from the date when the contract was broken (in these cases, when the bad advice was given), while in tort it is counted from the date when damage occurs, which is usually later. This is of course subject to the provisions of the Latent Damage Act 1986.[38] These provide for an extended time limit for a non-personal injury action in tort, which is the later of six years from the date the cause of action actually accrued, *i.e.* the plaintiff's position was

[34] [1914] A.C. 932.
[35] The point was re-confirmed without fuss in *Bedfordshire*.
[36] [1994] 3 All E.R. 506, 514h-j.
[37] Section 2 (tort); section 5 (contract). There are different rules for personal injury cases.
[38] Incorporated into the Limitation Act 1980 as sections 14A and 14B.

rendered less favourable[39] or three years from the date the plaintiff had knowledge of the material facts[40] about the damage complained of, the causal link between the defendant's activities and the damage and the identity of the defendant. This is subject to an overall cut off point of 15 years from the date of the last act alleged to constitute negligence.[41]

The managing agents argued that the contract should be the sole and exclusive mechanism governing the agents and the direct Names, and that so far as the indirect Names were concerned, regard should be had to the existence of a network of contracts, with the agents linked to the Names by contractual intermediaries. There should be no scope for side-stepping these contractual arrangements and the protection they conferred. This was similar to the argument which succeeded in relation to the supply of unsatisfactory goods by a sub-contractor in *Simaan General Contracting Co.* v. *Pilkington Glass Ltd.*[42] The argument received short shrift. It seems now entirely settled that liability is concurrent. That being so it is necessary to define the extent of the liability.

C. The Hedley Byrne *principle*

The first issue is the scope of the duty owed under the *Hedley Byrne* principle. This derives from dicta in *Nocton* v. *Lord Ashburton*,[43] which was actually a case of a fiduciary relationship.[44] Viscount Haldane L.C. said:[45]

> Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice ... Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.

[39] *Moore (D.W.) & Co. Ltd.* v. *Ferrier* [1988] 1 W.L.R. 267; *Bell* v. *Peter Browne & Co.* [1990] 3 All E.R. 124.

[40] *i.e.* That it was serious enough to justify commencing proceedings against a solvent defendant where there was no dispute on liability: section 14A(7), Limitation Act 1980.

[41] J. Hodgson, "The Dual Nature of Professional Liability" (1992) 11 Structural Survey 195.

[42] [1988] Q.B. 758.

[43] [1914] A.C. 932.

[44] *i.e.* a relationship based on utmost good faith because of the relationship of the parties as, for instance, principal and agent, insurer and insured or solicitor and client. As Lord Goff put it in *White:* "The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A , has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, *pro tanto,* for B's affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care".

[45] [1914] A.C. 932, 948.

Lord Haldane clarified this point in *Robinson* v. *National Bank of Scotland Ltd.*,[46] making it clear that he was referring to fiduciary duties, express and implied contracts and also "other special relationships, which the Courts may find to exist in particular cases."[47] This principle was developed in *Hedley Byrne* to the point where Lord Morris stated:[48]

> I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise ... Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill, or upon his ability to make careful enquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

Lord Devlin reaches a similar conclusion, although he refers to a dictum of Lord Shaw in *Nocton* that the special relationship should be "equivalent to contract" which Lord Devlin interprets as "an assumption of responsibility in circumstances in which but for the absence of consideration, there would be a contract".[49] He goes on to say that such responsibility must either be expressly assumed, or it must be a reasonable inference from the circumstances that, although there is no express assumption, one is to be implied. The principle has been applied to all kinds of professionals in relation to activities which either were not covered by a specific contract, as in *Hedley Byrne* itself, which concerned the liability of a bank for a negligent reference about a customer to a third party, or where the person relying was not the other party to the contract, as in *Smith* v. *Eric S. Bush*,[50] where a mortgage valuation given to and paid for by the lender was relied on by the borrower. As we have seen, it was extended to the giving of references by employers in *Spring*. Lord Goff confirmed his acceptance of this fairly broad concept of liability. He considered it self-evident that it applied, as ordinary negligence liability does not, to pure economic loss:[51]

[46] (1916) S.C. (H.L.) 154, 157.
[47] (1916) S.C. (H.L.) 154, 157.
[48] [1964] A.C. 465, 502-03.
[49] [1964] A.C. 465, 529.
[50] [1990] 1 A.C. 831.
[51] [1994] 3 All E.R. 506, 521c.

> [T]he concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss: for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages [to] that other in respect of economic loss which flows from the negligent performance of those services.

The assumption of liability may carry with it a duty to act, so that there will be liability for omissions.[52] This again contrasts with the usual position in tort, where there is usually liability only for positive acts of misfeasance (doing something badly), not for nonfeasance (omission to act).

The only limitation on the operation of this doctrine appears to be the need for a quasi-professional or professional context. Advice which is purely social or informal does not lead to the conclusion of an assumption of responsibility. There is one case where a friend who advised on the purchase of a car was held liable, although he was not an expert mechanic.[53] However the defendant's counsel conceded that there was a special relationship, so this point was not argued or determined by the judge. It is probably an aberrant case.

An alternative phrase, not used by the judges, but which perhaps sums up the nature of the special relationship accurately, is that it arises whenever the professional responsibility of the adviser is engaged.

IV. A *BYRNE* TOO FAR? THE MUTUALITY CONCEPT AND THE REASONING IN *WHITE*

A. A matrix for assumption of responsibility

The next question which arose was whether there must be a mutuality in this relationship. This was the issue in *White*. Logically there are four possibilities. If X is the "professional" and Y the "pseudo-client":

A. X advises Y directly. There is full mutuality. X's responsibility is engaged and Y demonstrates reliance: *Hedley Byrne, Esso Petroleum Co. Ltd.* v. *Mardon*.[54]

B. X advises Z, knowing that Y may become aware of and act on that advice. This is indirect mutuality. X and Y may not be aware of each other's identity, but are aware that this is a responsibility/reliance situation: *Smith* v. *Eric S. Bush*.

[52] *Midland Bank plc.* v. *Hett, Stubbs and Kemp (a firm)* [1979] Ch. 384.
[53] *Chaudhry* v. *Prabhakar* [1989] 1 W.L.R. 29.
[54] [1976] Q.B. 801.

C. X advises Z for the benefit of Y, although Y is unconscious of Z's intention to benefit him. There is responsibility but no reliance: a solicitor instructed to draw a will in favour of a beneficiary *(e.g.* a charity) which is unaware that it is the object of the testator's generosity.

D. X issues public advice. Y acts on it. Here as a matter of policy the law hesitates to ascribe either responsibility or reliance, except where the advice, though publicly available, is specifically addressed to a target audience.[55] There will be liability to them in respect of use of the information, but only where they are within the targeted purposes. This creates a reasonable context for responsibility and reliance: *Caparo Industries plc.* v. *Dickman,*[56] *Morgan Crucible Co. plc.* v. *Hill Samuel Bank Ltd.*[57]

None of these covers the position in *Spring.* The relationship of the employer and the recipient of the reference is Case A. It could be argued that the case comes within Case A if the word "advises" is replaced by a phrase such as "exerts himself or herself professionally". It is still a strained construction. In truth the state of affairs in *Spring* is far removed from the typical *Hedley Byrne* case. In Cases A, B and D there is reliance on the actual advice given. In Case C there is at most an expectation that the professional will act professionally, and *Spring* can perhaps be brought into this category.

B. The facts and issues

White of course concerned, and resolved, Case C above. The actual facts were slightly different, in that the disappointed beneficiaries were family members, and had in fact been instrumental in instructing the solicitor, but the argument proceeded on the basis of what Lord Mustill called "the most generalised case. This posits that there was no personal contact[58] between the solicitor and the intended beneficiary".[59] It caused their Lordships great difficulty. Lord Mustill, supported by Lord Keith, opposed the imposition of liability. They could not construct any basis for contractual liability. So far as *Hedley Byrne* was concerned, Lord Mustill saw it as based on "four themes, which I will label 'mutuality', 'special relationship', 'reliance' and 'undertaking of responsibility'".[60] He later states that "I believe that the

[55] *c.f. De La Bere* v. *Pearson Ltd.* [1908] 1 K.B. 280.
[56] [1990] 2 A.C. 605.
[57] [1991] Ch. 295.
[58] The All E.R. has "contract" which is a clear error. The W.L.R. has "contact".
[59] [1995] 1 All E.R. 691, 722g-h.
[60] [1995] 1 All E.R. 691, 725f-g.

element of what I have called mutuality was central to the decision".[61] He regards *Henderson* as an application of that liability based on mutuality. He does not discuss Case B cases, but considers that there should be no liability in Case C because of the absence of mutuality.

The majority took a different line. There was lengthy discussion of possible contractual solutions, both in English and in German law. The final (unanimous) conclusion was that English common law generally rejects third party rights under a contract. There is a small, specialised group of cases where a party to a contract may sue, claiming for a loss which he might have suffered, but which was in fact suffered by someone else because the contracting party has assigned his rights to them. The plaintiff is obliged to pass the damages over on receipt.[62] It is not possible to approach the problem from the other end, and allow the victim of the loss an action in tort for pure economic loss.[63] These cases do not apply here, because the harm suffered by the beneficiaries was not a harm which could ever have fallen on the testator or his estate. The only "loss" they could suffer is distress that the bequest has gone to the wrong person.

While the Lords shied away from creating a contractual solution, the speeches all betray impatience with the peculiar rules of English contract law which prevent third parties receiving a benefit even if it is clear that both parties intended them to, or it is patently fair and reasonable to allow them to. There was approval for what was done in *Linden Gardens Trust Ltd.* v. *Lenesta Sludge Disposal Ltd.*[64] The defendant did work for the plaintiffs under a contract which prevented the plaintiff assigning the benefit without consent. The work proved defective, but the damage was sustained by a third party to whom the plaintiff had in the meantime assigned the benefit of the contract without consent. The plaintiff was nevertheless allowed to recover substantial damages for the benefit of the third party. Ultimately the argument of substance, that the defendant had undertaken to do this work, and to pay compensation if it was done badly overcame technical arguments of title to claim. This reflects a growing interest in concepts of restitutionary justice, or the avoidance of unjust enrichment. In this case, if the defendant had "got away" with it, he would have been unjustly enriched (to the extent of the cost of the remedial work) as against the owner of the defective property. The Law Commission have tabled proposals for the amendment, and substantial abandonment of the

[61] [1995] 1 All E.R. 691, 729h.
[62] *The Albazero, Albacruz (Owners)* v. *Albazero (Owners)* [1977] A.C. 774, *Linden Gardens Trust Ltd.* v. *Lenesta Sludge Disposal Ltd.* [1994] 1 A.C. 85.
[63] *Leigh and Sillavan Ltd.* v. *Aliakmon Shipping Co. Ltd., The Aliakmon* [1986] A.C. 785.
[64] [1994] 1 A.C. 85.

rules of privity of contract, at least so far as they affect third party beneficiaries.[65] The interest in foreign legal systems clearly evident in Lord Goff's speech reflects the fact that these systems have developed more flexible rules. Hedley[66] has persuasively suggested that the lengthy discussion of these more flexible civil law (and United States common law)[67] rules is intended to provide a basis for argument in future cases if the current proposals for statutory reform meet the fate of their predecessors in the 1930s. In other words, if Parliament will not legislate to remove these increasingly anomalous and restrictive rules, the judges will take it upon themselves to do so.

C. The tortious solution

This left the question of tortious liability. The majority law lords were aware that they were dealing with a case which raised serious conceptual difficulties:

(1) The solicitor, as we have seen, generally owes a duty of care (contractual or tortious) only to his or her client, not to other parties to the transaction, whether the transaction is contentious[68] or non-contentious.[69] Similarly there is no duty to a beneficiary under an existing will when advising the client on other matters.[70] Also, as we have seen, there is a good and valid reason for this. The solicitor, as a fiduciary, owes an unconditional duty to the client to act in his or her best interests so long as this is lawful. In many cases any duty of the kind suggested would create a clear risk of conflict.

(2) The beneficiary is not within an area of tortious liability. His or her loss is economic and he or she does not have a close and direct relationship of proximity, to make him or her a neighbour in law in the sense of *Donoghue* v. *Stevenson.*[71] This is a claim which arises only in contract and the beneficiary is not (as we have seen) party to any such contract.

(3) That any liability cannot be accurately defined; it may extend to wide, ill-defined classes of potential beneficiary.

(4) That liability for not preparing a will is liability for an omission.

65 *Privity of Contract: Contracts for the Benefit of Third Parties* (Consultation Paper No. 121 (1991)). Similar proposals were made as long ago as 1937 by the Law Revision Committee (Sixth Interim Report, Cmnd. 5449), but were never acted on.

66 [1995] 1 Web Journal of Contemporary Legal Issues.

67 Restatement of Contract, 2d , §302.

68 *Al-Kandari* v. *J. R. Brown & Co.*, above.

69 *Gran Gelato Ltd.* v. *Richcliff (Group) Ltd.* (seller's solicitor owes no duty to buyer, above).

70 *Clarke* v. *Bruce Lance & Co.* [1988] 1 All E.R. 364.

71 [1932] A.C. 562.

It was also recognised that there is "an impulse to do practical justice". This really means little more than "I feel in my water that the beneficiary should have a remedy from the solicitor". We are in deep waters here. There is a perceived unfairness, namely that someone who was intended to receive a benefit is not doing so through the clearly culpable neglect of another. When the judge's sympathy is engaged, and he wishes to bring the case within the scope of a remedy, this response is "doing practical justice". When it is not, phrases such as "hard cases make bad law" are deployed instead to justify the denial of a remedy. There is, as Lord Denning managed to remind us on numerous occasions, always a tension in any legal system between compensating someone who has been badly used in a particular case, and having a consistent, coherent and above all predictable set of rules of general application. The minority did not feel any great compulsion to restore the gratuitous benefit which the beneficiaries failed to obtain in the orthodox way. They might have lost it anyway through a further change of mind, and would have been just as effectively deprived if the testator had walked under a bus while on his way to execute a timeously drafted will. There is also the small point of the gratuitous enrichment of the original beneficiaries.

Lord Goff squares the circle in this particular case by recourse to the law of tort. He expressly rejects the solution reached by Megarry V.-C. in *Ross* v. *Caunters*.[72] In this case a beneficiary lost the legacy intended for him under a will because of an error in execution of the will. This was held to be orthodox negligence on the neighbour principle, but, according to his Lordship, this failed to have regard to the conceptual problems set out above. Instead, his Lordship proposed that the *Hedley Byrne* principle be extended. He stressed that solicitors were professionals, and it was their professional responsibility to produce a will giving effect to the testator's wishes. He does not consider the issue of mutuality; it is more a question of finding a convenient mechanism to do justice to the disappointed beneficiary, without also doing violence to the established principles identified above. The passages in the speech which reach this conclusion are very brief, and are not argued with the compelling logic of the passages refusing a contractual remedy.

This may seem somewhat odd. Traditionally, it has been regarded as axiomatic that the relationship required for the *Hedley Byrne* principle to apply is a very close one, while neighbour principle negligence rests on broader concepts of objective proximity and the whole nature of the relationship. To find the former applying where the latter does not is more

[72] [1980] Ch. 297.

than a little surprising.

Lord Browne-Wilkinson and Lord Nolan come to a similar conclusion, namely that the *Hedley Byrne* principle provides a remedy. They do so in a slightly different way from Lord Goff. Lord Browne-Wilkinson emphasises that the key feature is a conscious assumption of responsibility for the task rather than a conscious assumption of legal liability to the plaintiff for its careful performance.[73] This of course explicitly shifts the emphasis away from reliance towards a concentration only on the nature of the defendant's activities, and could apply equally well to *Spring*.[74] He clearly accepts that the present case falls outside established categories. There is no fiduciary relationship, and although the solicitor "has assumed to act in a matter closely touching the economic well-being of the intended beneficiary, the intended beneficiary will often be ignorant of that fact and cannot therefore have relied upon the solicitor".[75] So, by reference to the typology above, he recognises that this is a Case C not a Case B case. The modern orthodoxy is that categories of liability should be extended, if at all, incrementally and by analogy with established categories, not on the basis of broad principle.[76] His Lordship considers that Case C is analogous to Case B for the following reasons:

(1) There is a clear assumption of responsibility. The solicitor is (or ought to be) fully aware that it is entirely dependent on the outcome of his endeavours whether the beneficiary receives the intended benefit.

(2) It is fair just and reasonable to impose liability. Although this beneficiary may not have relied on this solicitor, society at large relies on the solicitor's profession in the vast majority of cases to ensure "the proper transmission of property from one generation to the next. ... To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of testators and beneficiaries generally could be defeated by the negligent actions of solicitors without there being any redress".[77]

(3) Wills differ from other transactions. In the latter negligence can be, and usually is, discovered while there is still time either for it to be rectified or for the client to recover compensation. By their nature wills tend to be put away until the testator dies, by which time it is too late to rectify matters.

[73] See [1995] 1 All E.R. 691, 715-716.

[74] Lord Browne-Wilkinson was not a member of that Committee.

[75] [1995] 1 All E.R. 717e-f.

[76] *Caparo Industries plc.* v. *Dickman* [1990] 2 A.C. 605; *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1.

[77] [1995] 1 All E.R. 691, 718b-d.

This still echoes Lord Goff's approach, although by recognising the distinction between Case B and Case C, it at least puts explicit arguments forward in relation to the extension which is being proposed for these to be approved or rejected. Lord Nolan seems to go further still. In a very short speech he considers the scope of potential tortious liability in very general terms: "The responsibility is assumed by the defendant embarking upon a potentially harmful activity and is defined by the general law. If the defendant drives his car on the highway, he implicitly assumes a responsibility towards other road users, and they in turn implicitly rely on him to discharge that responsibility. By taking his car on to the road, he holds himself out as a reasonably careful driver".[78] This appears to be Case D in our typology, with one key confusion. It has not been the practice to extend liability in this category to economic loss, as opposed to physical harm. Furthermore, it has never been suggested that the road user or other casual tortfeasor is purporting to exercise a profession or anything like it or that there is specific reliance, as opposed to the inevitable assumption that all will, in the broadest terms, act as good neighbours and take care not to harm us. This conflation of the two quite distinct concepts of reliance, and the unusual use of *Hedley Byrne* language in the context of an orthodox neighbourhood-based duty situation will no doubt be the basis for hopeful plaintiff arguments to extend liability in the future. This is, from the context, clearly not just an ill-advised form of words or unfortunate analogy. Although it is said in the context of a discussion of the dual nature of professional liability in contract and in tort, Lord Nolan makes his position clear by going on to approve a dictum of Windeyer J. in *Voli* v. *Inglewood Shire Council,*[79] a case concerning the liability of an architect to visitors to his building injured by a design defect:[80]

> It is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence.

Lord Nolan, while acknowledging that this is a physical harm case, uses it to support the wider proposition that "a professional man or an artisan who undertakes to use his skill in a manner which, to his knowledge, may cause loss to others if carelessly performed, may thereby implicitly assume

[78] [1995] 1 All E.R. 691, 735f.
[79] (1963) 110 C.L.R. 74.
[80] (1963) 110 C.L.R. 74, 84.

a legal responsibility towards them". He is accordingly prepared to bring our Case C fully within tortious liability on this general basis, which is capable of substantial extension.

Lord Nolan goes on to stress that in this case there was close proximity with the actual disappointed beneficiaries, and that they actually did rely on the solicitor, but makes it clear that he is not thereby excluding a claim by other beneficiaries within Lord Mustill's general case.

The net result is perhaps the least satisfactory form of decision. All of their Lordships identify (in Lord Goff's case only implicitly) that the key issue is whether the *Hedley Byrne* principle applies to our Case C. Two say firmly that it does not. Three say that it does, but for a variety of reasons. This gives little guidance for the future, and in particular does not clearly identify the likely scope of incremental extension.

In *Henderson* Lord Goff briefly discussed whether the *Hedley Byrne* principle affected other business arrangements beyond professional and quasi-professional ones. He concluded that in most cases there will not be the necessary degree of reliance to create a direct liability cutting across the chain of contracts. *Simaan General Contracting Co.* v. *Pilkington Glass Ltd.* and similar cases are therefore rightly decided. Again it is odd that the key explicit reason for not opening out a liability in negligence is the absence of reliance, but in *White* this absence is wholly immaterial to the majority, although it remains essential to the minority who would on that ground alone have refused a remedy. In *Spring* also, the nature of the reliance found to exist is somewhat problematic.

D. Future developments?

There is certainly scope to use the new approach which stresses the nature of the defendant's activity over the plaintiff's attitude with respect to him or her to reconsider and possibly extend liability in wider professional contexts than will-making. Take the example of a conversion of a Victorian warehouse or factory to form residential, commercial or retail units. It is inevitable that structural surveyors, and other professionals such as engineers and architects, will have been involved in the work, from initial feasibility studies through to final completion, employed by the developers, and also by their banks and by the main contractor. That is what the public, and in particular prospective purchasers or tenants, will know to be the case. To paraphrase Lord Browne-Wilkinson:

> Although this [tenant] may not have relied on this [surveyor], society at large relies on the [surveying] profession in the vast majority of cases to ensure 'the proper [stability and durability] of

> property [being acquired from the restorer of a building] . . . To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of [tenants and purchasers] generally could be defeated by the negligent actions of [surveyors] without there being any redress.

It will be necessary to decide where it is fair and reasonable to rely on the surveyor to the project, rather than one's own survey, and the assumption in *Smith* v. *Eric S. Bush* that the purchaser is expected to get his or her own survey unless it is a modest domestic property may not apply in this new context. On the other hand it may be argued that the expectation in any commercial context is that all parties will be separately represented and place reliance only on their own advisers. This will no doubt be strongly argued by the professionals concerned. What, however, is the position if the problem, although affecting this purchaser's unit, is actually detectable only in another unit, to which the purchaser's surveyor has no access? Surely there is a strong case for saying that the purchaser is relying on the developer's professional team, who have had access to the whole building throughout the development process, in this respect.

The law lords recognise that any professional will seek to define his responsibilities by contract, and that the inapplicability of these limitations to third party claims in tort may work injustice. They discuss in vague terms how a contractual scheme may indirectly determine the scope of tortious liability, but it is clear that any exclusion of liability in negligence must meet the requirement of reasonableness set out in section 2 of the Unfair Contract Terms Act 1977. *Smith* v. *Eric S. Bush* also makes it clear that the existence of such terms will not avail where the general expectation is that liability will rest on the professional. It is possible that *White* will in fact be treated as relevant only to its own factual situation, an anomalous judicial response to an anomalous situation.[81] If this is so, the emphasis will still be on buying an assurance that a building is sound *etc.*, either from the vendor or from one's own surveyor, rather than getting a "free ride" on the professional responsibilities owed to a third party, but this is by no means certain.

A further limitation emerges from *Bedfordshire.* One basis for denying the liability of the child care professionals was that the content of the duty to the subjects of their reports (and their relatives) was not the same as[82]

[81] This is one reading of the speech of Lord Browne-Wilkinson.

[82] This is cognate with, but not, it seems, identical to, the question of mutual incompatibility of the duties. However the question is one of interpretation of two passages in different sections of the speech.

that owed to the primary client.[83] This is said to be essential for those cases in our Cases B and C. Lord Browne-Wilkinson expressly distinguishes *Smith* v. *Eric S. Bush* on this precise ground, and goes on to assert that *Henderson* and *White* could only be decided as they were because the duties in each case were congruent. Lord Nolan, who of course gave the broadest basis for liability in *White,* dissented on this specific issue.[84] His Lordship does not articulate his reasons, but it may be surmised that he saw the necessary proximity, and saw no objection in principle to overlapping liabilities.

Lord Browne-Wilkinson presupposes that the plaintiffs were alleging an indirect duty, *i.e.* that in reporting to the authority the plaintiff's interests would be regarded. It is not at all clear that they were. The point made about congruence of the duty may well be correct, but it may not be relevant to the issue in *Bedfordshire*. This is however a question of the obligation of a professional preparing a report to treat the subject of the report as a patient or client by virtue of this commission. This is a whole new area, and beyond the scope of this article.

B. Hedley Byrne *and contract cases*

The second issue in *Henderson* was whether there could be concurrent liability in contract and tort between a professional and his client. Lord Goff has reiterated that there is concurrent liability, although the root of the tortious aspect of the liability is to be found in the *Hedley Byrne* principle. This indeed is elevated to a general attribute of professional activity.[85] Lord Goff adopts the judgment of Oliver J. in *Midland Bank plc.* v. *Hett, Stubbs & Kemp (a firm)*[86] and expressly states that it applies both to physical and economic loss. The main stumbling block is the fact that in *Hedley Byrne* the House of Lords were concerned with a non-contractual relationship, and so discussed only such relationships. They were not asked if the relationship they found to exist also existed where there was a contract. Usually the question will not arise. Where there is a contract this provides a nexus for any action. Lord Goff thought it implicit, if not explicit, in *Hedley Byrne* that such concurrent liability existed, but he also said:[87]

[83] There is a symmetry here with the "transferred loss" cases in contract discussed above, although this is not articulated.

[84] The dissent covers also the issue of the inconsistency of the two duties.

[85] In *Spring* this principle was relied on to found a duty on an employer to an ex-employee to use reasonable care in writing a reference, which perhaps goes beyond professional responsibilities as such.

[86] [1979] Ch. 384.

[87] [1994] 3 All E.R. 506, 532d-e, 533c-d.

> [T]his House should now, if necessary, develop the principle of assumption of responsibility as stated in *Hedley Byrne* to its logical conclusion so as to make it clear that a tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract.
>
> [I]n the present case liability can, and in my opinion should, be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with concomitant reliance[88] may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him for doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.

The general contractual duty is to use reasonable care and skill[89] and in general it is probably correct that the scope of the two duties is the same.[90] The advantage to the plaintiff is essentially procedural. Not only does the cause of action in tort only arise when damage accrues, but the plaintiff has the advantage of the provisions of the Latent Damage Act 1986. The defendant on the other hand can take advantage of any provisions in the contract which define, qualify, limit or exclude his liability. This benefit is of course subject to compliance with the requirement of reasonableness under the Unfair Contract Terms Act 1977, the provisions of section 3 of that act relating to exclusion clauses, the provisions of the Unfair Contract Terms Directive[91] and the regulations made thereunder in the case of a consumer contract, and the general law on exclusion clauses which requires them to be clearly incorporated into a contract, and subjects them to restrictive construction.

This brings us back to the world beyond professional activity. Does dual liability apply here? It would seem not, as discussed above, and of course the contractual and tortious liabilities are here owed to different persons (although that is not a problem with Type B or, on the authority of *Spring* and *White*, with Type C either). It might be thought that the situation in

[88] Lord Goff here regards reliance as an essential element, but abandons it without comment in *White* as we have seen.

[89] Section 13, Supply of Goods and Services Act 1982.

[90] *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* [1986] A.C. 80; *Heatley* v. *William H. Brown* [1992] 11 Structural Survey 63.

[91] EEC 93/13, S.I. 1994/3159.

Junior Books Ltd. v. *Veitchi Co. Ltd.*[92] was squarely within this reinterpretation of *Hedley Byrne*. In that case a sub-contractor was nominated as a result of his particular skills, experience and capacity. The owner relied on these. All the ingredients of a special relationship "falling little short of contract" were present. Lord Goff denied that a sub-contractor would ordinarily be liable: "For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility."[93] *Junior Books* is said have created "some difficulty" in this connection. Bringing *White* into the equation may create some more. The mutual reliance which was essential in *Henderson* and *Hedley Byrne* is now ignored by Lord Goff and disapplied by Lord Browne-Wilkinson and Lord Nolan. If we again paraphrase Lord Browne-Wilkinson:

> Although this [building owner] may not have relied on this [sub-contractor], society at large relies on [those who supply components and perform specialised work] in the vast majority of cases to ensure [that the building is erected safely and durably] . . . To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of [building owners and users] generally could be defeated by the negligent actions of [sub-contractors] without there being any redress.

This can be compared with Lord Roskill's list of characteristics which were present in *Junior Books* and were of "crucial importance" in establishing the requisite degree of proximity to satisfy the test for a duty of care (which was Lord Devlin's version of the *Hedley Byrne* test), so his Lordship clearly had responsibility and reliance well in mind:[94]

(1) the appellants were nominated sub-contractors;
(2) the appellants were specialists in flooring;
(3) the appellants knew what products were required by the respondents and their main contractors and specialised in the production of those products;
(4) the appellants alone were responsible for the composition and construction of the flooring;
(5) the respondents relied on the appellants' skill and experience;

[92] [1983] 1 A.C. 520.
[93] *c.f. Simaan General Contracting Co.* v. *Pilkington Glass Ltd.*
[94] [1982] 3 All E.R. 201, 213-214.

(6) the appellants as nominated sub-contractors must have known that the respondents relied on their skill and experience;
(7) the relationship between the parties was as close as it could be short of actual privity of contract;
(8) the appellants must be taken to have known that if they did the work negligently ... the resulting defects would at some time require remedying by the respondents ... as a consequence of which the respondents would suffer financial or economic loss.

The inference must be that the exclusion of this class of relationships from the scope of *Henderson* is at least called into question by *White.* It is fashionable to decry *Junior Books* as being a significant and unwarranted extension of tort into the field of contract, and to seek to limit it to its own facts. The present writer suggested in 1992[95] that it, although not the *Simaan* -type case where there was no reliance or responsibility, did fall within the special relationship cases, and this assertion can be repeated in 1995 with the force of the logic, such as it is, of the three recent cases behind it, and despite the somewhat perfunctory and dismissive disclaimers of Lord Goff.

V. CONCLUSION

Where does this leave us? Three things are clear. The first two derive largely from *Henderson*, the third from *Spring* and *White:*

(1) A professional who assumes responsibility for a professional task owes a duty to the person for whose benefit that task is being performed where that person is relying on the professional to perform.
(2) A professional owes a concurrent duty of care to his client in contract and tort. The scope of the duty is in principle the same, but may be modified by the terms of the contract so far as the law allows.
(3) A professional owes a duty of care to anyone who is intended to benefit from professional work which he undertakes, whether or not that person relies on him, provided it is just and reasonable to impose such a duty. This duty will prevail over other considerations. In *Spring* these were the conflict of interest and free speech policy objections, in *White* the conceptual problems and the previous requirement of mutuality or reliance. However the duty to the primary client and the secondary beneficiary must be congruent: *Bedfordshire.*

[95] "*Jackson* v. *Horizon Holidays* - A case of mistaken identity?" [1992] Nott. L.J. 27.

The propositions at (1) and (2) are not surprising. They restate with greater clarity and authority what was in any event thought to be the law. In so far as (3) is applied to the facts of *White* it is probably right in the sense that the decision is in accordance with general notions of justice. It may be hoped that it will be seen as applicable only to its actual facts.

The problem, which only time will unravel, is to reconcile (1) and (3) in other situations. If (3) is broadly interpreted, as Lord Nolan at least implies it may be, from the scope of the examples he gives, it may re-open some potential areas of indirect liability, in the sense of the liability of the professional who failed to see and warn against the negligent acts of a third party. This applies with particular force in relation to deficient supervision of building operations, where it was understood liability had been closed off by *Murphy* v. *Brentwood District Council.*[96] While the surveyor who failed to spot the design or other defect may no longer be liable on ordinary negligence principles for failing to prevent the economic loss of the third party tenant or purchaser, it will now be necessary to establish whether his assumption of responsibility for his professional tasks is to render him liable to all those affected. The actual author of the problem, at least if he is a sub-contractor, appears still to be able to shelter behind the contractual chain, which will give him a fortuitous advantage if someone further up the chain is insolvent and not worth pursuing.

Confirmation of concurrent liability to the client is less of a surprise. It will be less significant in the future as claims in tort will be subject to the more restrictive limitation rules introduced by the 1986 Latent Damage Act, and certainly seems unlikely to expand the content or standard of the duty owed.

There does seem to be a tendency, especially on the part of Lord Goff, to erect the *Hedley Byrne* principle into a virtual panacea for professional failings. It is clearly a broad principle, but is it right to draw such a sharp distinction between the responsibilities implicitly assumed by the professional otherwise than under an express retainer and those of other manufacturers or tradesmen? When traditional requirements of reliance are abandoned, and the principle overweighs long-established categorisations, are we not in danger of unleashing another overarching general principle as broad as that in *Anns,* as open to the charge that it "has been elevated to a degree of importance greater than it merits,"[97] and as capable of opening the floodgates to a host of inappropriate claims? The majority decisions in both *Spring* and *White* create this very real risk, especially if the broadest formulations are adopted.

[96] [1990] 2 All E.R. 908

[97] *Yuen Kun Yeu* v. *Attorney-General of Hong Kong* [1988] A.C. 175.

NON-USER OF EASEMENTS OF WAY

*Kathleen Shorrock**

I. INTRODUCTION

MOST CONVEYANCERS FROM TIME TO TIME ENCOUNTER cases where the title documents to property reveal the existence of a right of way, but there is evidence to suggest that the right has not been exercised for many years. An easement which has not been extinguished by Act of Parliament,[1] by express release[2] or by unity of possession and ownership,[3] may have been impliedly released by the dominant owner. The difficulties encountered by the servient owner in establishing an *implied* release should not be underestimated. The fact that the dominant owner has not exercised a right of way for a substantial period does not necessarily mean that he or she has abandoned the right. In recent years, Court of Appeal decisions have highlighted the difficulty in establishing an intention to abandon. There is also judicial reluctance to hold that an easement has been extinguished on the ground that it no longer accommodates the dominant tenement. Such reluctance justifiably emanates from the fact that easements are valuable proprietary rights which should not be expunged with ease.

Furthermore, if there has been no implied release, despite a long period of non-user, there is the major problem for the servient owner that no judicial body has statutory jurisdiction to order a modification or discharge of the easement on the grounds of obsolescence or obstruction.[4] The absence of such a statutory jurisdiction is not just a question of academic debate, since it has consequences of a serious practical nature. The development of land may be severely curtailed by an easement which gives little or no practical benefit to the dominant owner but who could

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1 See Housing Act 1985, s. 295 and Town and Country Planning Act 1990, s. 236 for examples of statutory provisions extinguishing private rights of way. For a review of the law relating to extinguishment of public rights of way, see *Garner's Rights of Way,* 6th ed., Longman, London, 1993, pp. 75-83.

2 An express release at law must be by deed: Co. Litt. 246b; *Lovell* v. *Smith* (1857) 3 C.B. (N.S.) 120, 127; *Davis* v. *Marshall* (1861) 10 C.B. (N.S.) 697, 710, Erle C.J. An informal release to a right of light would be recognised in equity if the dominant owner acquiesced and consented to the building of the obstruction by the sevient owner. See also *Waterlow* v. *Bacon* (1866) L.R. 2 Eq. 514.

3 *Buckby* v. *Coles* (1814) 5 Taunt. 311.

4 See Law of Property Act 1925, s. 84 for jurisdiction to modify or discharge restrictive covenants. Similar machinery is available in Northern Ireland, Scotland and some Commonwealth jurisdictions in relation to easements, *e.g.* Property (N.I.) Order 1978, Part II and the Conveyancing and Feudal Reform (Scotland) Act 1970, ss. 1-2 and Sched. 1.

nevertheless be adequately compensated for the discharge or modification of his or her interest if the machinery was available. Parliament's failure to provide such machinery has undoubtedly accentuated not only the problems associated with non-user of easements of way but also the burden of proof in any proceedings relating thereto.

II. ABANDONMENT[5]

It has been long established that mere proof of non-user is insufficient to establish that the right has been abandoned.[6] In order to succeed in a claim that an easement is no longer enforceable, because it has been released by implication, there must be evidence of the dominant owner's intention to abandon.[7] Alderson B. in *Ward* v. *Ward*[8] said: "[t]he presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption".[9] The Court of Appeal in *Benn* v. *Harding*[10] after reviewing the law relating to abandonment, reaffirmed this principle, when it held there was no abandonment, despite non-user of an easement of way for 175 years.

Although a right of way may not be of practical importance to a dominant owner at a particular point in time, it may still be "a piece of property of latent value ... [A]bandonment ... should not be lightly inferred since it might be of significant importance in the future".[11] Its importance may materialise in the event of a sale of the dominant tenement or part thereof or if an alternative access becomes inconvenient or unavailable. As Hughes C.J.N.B. said in *Re Kileel and Kingswood Realty Ltd.*: "[i]t is no more necessary that he make actual use of the easement than that he should make actual use of the land to which it is appurtenant in order to retain title thereto".[12]

5 Abandonment is not relevant to an "inchoate" right not yet established by action under the Prescription Act 1832 but non-user may be relevant in determining whether a right has been acquired at all. See *Hyman* v. *van Den Bergh* [1908] 1 Ch. 167, 171 (Cozens-Hardy M.R.) (easement of light); C. Sara, *Boundaries and Easements,* Sweet and Maxwell, London, 1991, at p. 285 and *Gale on Easements,* 15th ed., Sweet and Maxwell, London, 1986, at p. 381; *c.f. Halsbury's Laws of England,* 4th ed., volume 14, paragraphs 119 and 121. Abandonment may be relevant if the easement is claimed under the doctrine of lost modern grant: *Mills* v. *Silver* [1991] 1 All E.R. 449, 453 (Dillon L.J.).

6 *Seaman* v. *Vaudrey* (1810) 16 Ves. 390.

7 *Snell & Prideaux Ltd.* v. *Dutton Mirrors Ltd.* (1994) Lexis transcript, 22 April (Stuart-Smith L.J.). A partial abandonment of the full extent of an easement is possible.

8 (1852) 7 Ex. 838.

9 (1852) 7 Ex. 838, 839.

10 (1992) 66 P. & C.R. 246.

11 (1992) 66 P. & C.R. 246, 262 (Hirst L.J.).

12 (1980) 108 D.L.R. (3d.) 562, 567.

(a) Intention

Sir Edward Fry in *James* v. *Stevenson*[13] said that "it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it".[14] If the dominant owner is not aware of his right to the easement, the intention to abandon cannot be inferred.[15] The existence of an intention to abandon is one of fact, to be determined from all the circumstances of the case.[16] The nature of the act of the dominant owner and the intention that act indicates, is more material than the duration of any non-user.[17] In *Gotobed* v. *Pridmore*,[18] Buckley L.J. said that, to establish abandonment, "the conduct of the dominant owner must . . . have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement".[19] Although non-user is not conclusive, it is often the main evidence of abandonment and a factor to be considered in the context of the surrounding circumstances.[20]

It has been suggested that the courts may be more reluctant to find abandonment of a right which is contained in a deed than one which is established by long user.[21] If this is correct, then it is suggested that there is no justification for this distinction since, if the title to the easement is established, its origin should have no bearing on the issue of abandonment.[22]

(b) Consideration of circumstances other than non-user

There may be many reasons why the right has not been exercised other than abandonment. Non-user of a vehicular right of way may have occurred because until recently the dominant owner did not own a vehicle[23] or due to

13 [1893] A.C. 162.

14 [1893] A.C. 162, 168.

15 *Armstrong* v. *Sheppard & Short Ltd.* [1959] 2 All E.R. 651, 656 (Lord Evershed M.R.) and *Skelmerdine* v. *Ringen Pty. Ltd.* [1993] 1 V.R. 315. See also *Obadia* v. *Morris* (1974) 232 E.G. 333 - a mistaken belief that the merger of a lease with the freehold destroyed the right of way was inconsistent with the intention to abandon the right.

16 An implied release given by the current owner in possession, the duration of whose interest is not as extensive as the duration of the easement, will not bind his successors (see Settled Land Act 1925, s. 58(1)-(2)). Any implied release by the dominant owner cannot prejudice the mortgagee.

17 See *R.* v. *Chorley* (1848) 12 Q.B. 515, 519 (Lord Denman C.J.); *Crossley & Sons Ltd.* v. *Lightowler* (1867) 2 Ch. App. 478, 482 (Lord Chelmsford L.C.)(prescriptive right to foul a stream).

18 (1971) 217 E.G. 759.

19 (1971) 217 E.G. 759, 760. See also *Tehidy Minerals Ltd.* v. *Norman* [1971] 2 All E.R. 475, 492 (Buckley L.J.) (profit) and *Huckvale* v. *Aegean Hotels Ltd.* (1989) 58 P. & C.R. 163, 167 (Nourse L.J.).

20 *Swan* v. *Sinclair* [1924] 1 Ch. 254, 266 (Sir Ernest Pollock M.R.).

21 C. Sara, *op. cit.*, at p. 286.

22 Consider the view of Parke B. in *Proctor* v. *Hodgson* (1855) 10 Ex. 824, 828, in relation to an easement of necessity: "I should have thought it meant as much a grant for ever as if expressly inserted in a deed".

23 *Obadia* v. *Morris.*

his or her ill-health.[24] The dominant and servient owners may have come to an agreement for temporary suspension of user.[25] Furthermore, it has been held that an abandonment does not arise merely because the position of a right of way is varied by compromise or acquiesence.[26] A dominant owner may not have used the right for a period because of a legal impediment restricting the exercise of the right. In *Re Yateley Common, Hampshire*,[27] rights of common were not abandoned merely because the land was requisitioned for use as an aerodrome.

Other factors, which may have varying degrees of significance in an abandonment claim, include the existence of an alternative access and a physical impediment erected by either the servient or the dominant owner.

(i) An alternative access

Non-user may be explained by the existence of another more convenient means of access. In *Ward* v. *Ward*,[28] there was no abandonment when a dominant owner did not use a right of way for more than 34 years, during which period he had a more convenient access. In *Benn* v. *Harding*, a vehicular right of way over a track had been granted in 1818 but there was virtually no evidence that the plaintiff or his predecessors had used the track or a gateway leading from the track to the plaintiff's land. The dilapidated gateway was overgrown and there was a ditch between the gateway and the track. The explanation for the non-user was an alternative access; the right of way became material when part of the alternative access became waterlogged. The Court of Appeal held that there had been no abandonment, merely non-user.

A distinction was drawn by Walsh J., in his dissenting judgment in *Treweeke* v. *36 Wolseley Road Pty. Ltd.*,[29] between an alternative access of a precarious nature and an access over which the dominant owner has secure enjoyment. But even if there is secure enjoyment, the alternative access may not always remain convenient to use.

However, in *Williams* v. *Usherwood*,[30] a case primarily dealing with

24 See *Barton* v. *Raine* (1981) 114 D.L.R. (3d.) 702, 710 (Thorson J.A.).

25 *Payne* v. *Shedden* (1834) 1 Mood. & R. 382, 383. See *Bosomworth* v. *Faber* [1992] N.P.C. 155 - A prescriptive right to take water was abandoned when the dominant owner accepted a licence for the supply of water and a new tank and system was installed, the old tank being demolished.

26 This point is particularly important in relation to rights sought to be acquired by prescription - for this purpose, "the original way and the substituted way should be considered as one": *Davis* v. *Whitby* [1974] 1 Ch. 186, 192 (Lord Denning M.R.). See also *Payne* v. *Shedden* (Patteson J.).

27 [1977] 1 All E.R. 505. *Mann* v. *R.C. Eayrs* (1974) 231 E.G. 843, it was held that there was no claim to the use of an alternate way given in consequence of requisitioning, since subsequent to the requisition period, the claimant could not establish a claim by prescription.

28 (1852) 7 Ex. 838. See Pollock C.B., 839.

29 (1972-73) 128 C.L.R. 274, 294.

30 (1983) 45 P. & C.R. 235.

adverse possession, the Court of Appeal held that a vehicular right of way between two houses granted in 1934 but which had not been exercised, had been abandoned in 1937. The existence of an alternative access with secure enjoyment was a major factor in determining an intention to abandon. The court took the view that, once that alternative access had been laid out, the dominant owner intended to abandon the right of way. But what if the alternative driveway in *Williams* v. *Usherwood* had become unusable or inconvenient to use shortly after 1937 because of some physical defect in the land? Can this situation be distinguished from *Benn* v. *Harding* where there was no abandonment? There is clearly a distinction between the type and size of property involved, it being residential in *Williams* v. *Usherwood* and agricultural in *Benn* v. *Harding*. In *McIntyre* v. *Porter*,[31] Anderson J. appears to suggest that a distinction may be made between a right of way relating to agricultural land and one relating to town land.[32] Although the location of the dominant tenement is a factor to be considered, it is suggested it would be undesirable for a general principle to emerge, which would have the effect of making it potentially easier to establish abandonment in relation to town as opposed to agricultural land. The writer also has reservations as to whether the court in *Williams* v. *Usherwood* would have reached the conclusion of abandonment if the case had been heard in 1937 without knowledge of the subsequent conduct of the parties.[33]

Despite some doubts raised in *Williams* v. *Usherwood* and, following *Benn* v. *Harding*, it appears that proof of non-user during a period in which there was an alternative access will not be sufficient to establish abandonment. Furthermore, due to social changes in recent decades, the words of Hutley J.A. in *Pieper* v. *Edwards*[34] are of increasing significance in relation to the value of the dominant tenement, namely, "Two entrances in the days of multi-vehicle families are always better than one".[35]

(ii) Physical impediments erected by the servient owner

A permission, given by the dominant owner to the servient owner, to erect a permanent obstruction, followed by the erection of the obstruction

31 [1983] 2 V.R. 439.
32 [1983] 2 V.R. 439, 446.
33 (1983) 45 P. & C.R. 235, 257: "[Mrs. Williams's] acquiescence in the building of the wall ... and Mr. [Williams's] nailing up of the gate ... are facts that confirm beyond a peradventure an abandonment that had taken place 15 years earlier".
34 [1982] 1 N.S.W.L.R. 336.
35 [1982] 1 N.S.W.L.R. 336, 341.

on the faith of the permission, will usually result in extinguishment.[36] But what if the dominant owner is passive to the alterations made by the servient owner? The existence of a physical impediment to user may in certain circumstances give rise to the inference of abandonment in the event of the passivity of the dominant owner. In *Swan* v. *Sinclair,* [37] houses were sold off in lots in 1871 on terms that a strip of land, which ran at the rear of the lots, should be made into a roadway over which each lot owner would have a right of way. Since 1871, walls or fences lay across the site of the proposed roadway, incorporating the strips into the gardens of the properties. In 1883, the tenant of lot 1 levelled up part of his site, causing a six foot drop between lots 1 and 2 and no objection was made. The majority[38] of the Court of Appeal held that sufficient intention to abandon the right was shown because of the continued existence of the fencing and the raising of the level of lot 1 without objection.

In the event of an adverse act by the servient owner, should passivity by the dominant owner be treated in the same manner as his or her acquiescence? In *R.* v. *Chorley,*[39] Lord Denman C.J. refers to an "adverse act acquiesced in by [the dominant owner]"[40] but, when considering this passage, Sargant L.J. in *Swan* v. *Sinclair* took the view that the term "acquiesced in" in this context may be satisfied by "quiescence without active protest or assertion of right".[41]

However, it is clear from *Gotobed* v. *Pridmore*[42] that the erection of fences by the servient owner without protest by the dominant owner, may not result in an inference of abandonment. In that case, a right of way was not abandoned, even though the servient land had been fenced since 1948 and used for rearing chickens and grazing. For a period it had also been ploughed. Buckley L.J., giving the judgment of the court, took the view that the fence was an insubstantial structure, which could be easily removed, and the failure of the dominant owner to object to it "would be very slight ground for inferring any intention to abandon the right of way. The use of the . . . land to keep chickens . . . could be discontinued without expense

36 Note 2 and consider *Armstrong* v. *Sheppard & Short Ltd.,* 658 (Lord Evershed M.R.); *Liggins* v. *Inge* (1831) 7 Bing. 682, 693 (Tindal C.J.); M. Cullity, "The Executed Licence" (1965) Conv. (N.S.) 19, 26.

37 [1924] 1 Ch. 254.

38 Compare the dissenting judgment of Pollock M.R., 267 - passivity amounted to a decision not to assert a right, at that time, and the acts of the adjoining owner were not fatal to building the roadway in the future. The House of Lords affirmed the majority decision ([1925] A.C. 227) on the ground that a right of way had not come into existence.

39 (1848) 12 Q.B. 515.

40 (1848) 12 Q.B. 515, 519.

41 [1924] 1 Ch. 254, 275.

42 (1971) 217 E.G. 759.

and without trouble at any time".[43] His Lordship also pointed out that the ploughing and subsequent cultivation was an interference with the easement but, since it was mostly during wartime, it would have been unneighbourly and perhaps unpatriotic to have objected at a time when the servient owner had no need to use the way. Furthermore, a dyke lay between the dominant owner's land and the right of way and the court took the view that, if there had been no earthbridge, one could have been built with no complication and at no great expense. So it appears that, if a physical impediment is erected by the servient owner and that impediment can be removed with relative ease and without disproportionate expense, the failure of the dominant owner to object will not give rise to an inference of abandonment.

The neighbourliness issue was also raised by the Court of Appeal in the recent case referred to already, *Snell & Prideaux Ltd.* v. *Dutton Mirrors Ltd.*[44] Both Stuart-Smith and Hoffmann LJ.J. took the view that neighbourly acts should not be discouraged in that if, for example, a dominant owner does not currently need to exercise his right and it is convenient for the servient owner to store materials or erect machinery on the relevant property, it would be undesirable for the dominant owner to have to object to this, merely because he thought he would lose his right. It is, however, a question of degree and Stuart-Smith L.J. distinguished this situation from one where a substantial and permanent building was erected. His Lordship said that this would defeat the right, if acquiesced in by the dominant owner, since it would be a clear indication of abandonment. Stuart-Smith L.J. qualified this, however, by saying that "if the obstruction can be removed, albeit at some inconvenience and expense to the servient owner, the court should . . . be slow to infer that acquiescence in its existence is sufficient to amount to evidence of intention to abandon". Hoffmann L.J. also distinguished "neighbourly acts" from cases where the servient owner is induced to incur substantial expense, relying on the apparent abandonment by the dominant owner. The fence and gates that had been erected and the materials and machines stored in the passageway by the servient owner could easily be removed. The brick pier, erected on the servient tenement in the middle of the passageway more than twenty years earlier, which helped to support on overhead room, was of a more substantial nature and obstructed vehicular access. Its demolition and the provision of alternative support would have been inconvenient and

[43] (1971) 217 E.G. 759, 760.

[44] For many years, the dominant owners had virtually made no use of the passageway, using an alternative access. In the 1970s and 1980s, the dominant tenement had been valued with reference to the right of way, which was also referred to in sale particulars.

expensive. Nevertheless, the Court of Appeal did not hold that the dominant owners must be deemed to have intended never to use the right again. The court was not satisfied that the servient owner had established the obstruction could only be removed with disproportionate expense and difficulty.

It must also be remembered that, unless the relevant grant provides otherwise, a grant of a right of way does not in itself impose an obligation on the servient owner to make the way passable[45] and therefore a distinction should be made between obstructions existing at the time of the grant and obstructions which are subsequently erected by the servient owner. In *Treweeke* v. *36 Wolseley Road Pty. Ltd.*, there clearly was no obligation on the owner of the servient tenement to make the way passable in relation to vertical rock faces which existed at the date of the grant.

Although it is easy to express the view that failure to object to a temporary impediment should never amount to abandonment, but failure to object to the erection of a known impediment of a permanent nature, which would be disproportionately expensive and difficult to remove, may amount to abandonment,[46] the distinction is not easy to apply in practice. Advances in engineering and building skills may mean that what *prima facie* appears to be a permanent obstruction, may be easily dismantled. Following the restrictive approach in *Snell & Prideaux Ltd.* v. *Dutton Mirrors Ltd.*, in relation to the brick pier, the courts may be increasingly reluctant to infer abandonment, even in the event of the erection of what may appear to be a reasonably substantial physical impediment on the servient land.

(iii) Physical impediments erected by the dominant owner[47]

What if the dominant owner participated in the erection of an

[45] See *Jones* v. *Pritchard* [1908-10] All E.R. Rep. 80, 83 (Parker J.) and *Kasch* v. *Goyan* (1992) 87 D.L.R. (4th.) 123, 126 (Harvey J.).

[46] *Bower* v. *Hill* (1835) 1 Bing. (N.C.) 549, 555 (Tindal C.J.).

[47] The writer argues that the rules determining abandonment should apply equally to both discontinuous easements *(e.g.* a right of way) and continuous easements *(e.g.* a right to light). However, there is some uncertainty as to the guiding principles in relation to easements of light. In *Moore* v. *Rawson* (1824) 3 B. & C. 332, for 17 years a blank wall stood on the site of a former wall which had incorporated windows. There was abandonment because the plaintiff, the dominant owner, when he erected the blank wall, had not shown an intention to resume enjoyment of the right within a "reaonable time". Three years prior to the action the defendant had erected a building in front of the blank wall but the *dicta* suggest that in the absence of the defendant's action, the plaintiff would still have abandoned his right. See *Stokoe* v. *Singers* (1857) 3 E. & B. 31 - the blocking up of windows for nearly 20 years did not result in abandonment, because the conduct of the dominant owner was not such as to lead the servient owner to incur expense or loss in the reasonable belief that the right had been permanently abandoned, nor did the conduct manifest an intention of permanently abandoning the right. See also *Ecclesiastical Commissioners for England* v. *Kino* (1880) 14 Ch. D. 213 - the act of pulling down a building which enjoyed a right to light was not sufficient to establish abandonment, if it was evident that there was an intention to erect a new building preserving the light. Difficulties also arise where a window has been the subject of alteration. For a detailed review of the problems associated with the abandonment of continuous easements, see Gale, *op. cit.*, pp. 353-371.

impediment? In *Treweeke* v. *36 Wolseley Road Pty. Ltd.*, in 1933, six years after the grant, a fence was erected and it obstructed reasonable access to the right of way. The erection of the fence and its subsequent renewal in 1967 was paid for by the owners of both tenements. There was no abandonment. The fence, adjacent to a steep incline, was an inexpensive temporary safety measure; it could easily be dismantled and a gate could have been inserted in the fence.[48] A more substantial impediment was under consideration in *Cook* v. *Corporation of Bath.*[49] The back door of the plaintiff's house had been bricked up for 36 years when the door was reopened. Subsequently, in 1867, the defendants began building works that would permanently obstruct access from a lane which gave access to the plaintiff's back door. There was no abandonment, merely non-user. It therefore appears that if the dominant owner erects a physical impediment to user, even of a substantial nature, then he or she may still be free to remove that impediment and re-commence user. But such freedom of action will not always be available. Malins V.-C. in *Cook* v. *Corporation of Bath* said that, if the defendants had commenced building before the door was re-opened, he would have been of the opinion that "the plaintiff had, by allowing it to remain so closed, led them into incurring expense, and therefore could not prevent their acting on the impression that he intended to abandon his right".[50] If these circumstances arose today, it may be possible to argue that an estoppel operates against the dominant owner.

(c) Estoppel[51]

Although the point was not fully argued, Megarry J. in *Costagliola* v. *English*[52] was of opinion that, despite there being undoubted similarities between abandonment and proprietary estoppel, counsel for the dominant owner was wrong in equating them. It is submitted that his Lordship is correct. In *Snell & Prideaux Ltd.* v. *Dutton Mirrors Ltd.*, Hoffman L.J. stated that "while the proof of abandonment in itself is extremely difficult, the position might be different if the [servient owner were] able to show some form of proprietary estoppel".[53] The courts have not attempted

48 See also *Gotobed* v. *Pridmore* - the installation of a post-and-rails fence by the dominant owner was not sufficient to infer abandonment.

49 (1868) L.R. 6 Eq. 177.

50 (1868) L.R. 6 Eq. 177, 179. See also reference to Abbott C.J.'s judgment in *Moore* v. *Rawson* (1824) 3 B. & C. 332 (easement of light). Consider also *Gotobed* v. *Pridmore*, 760 (Buckley L.J.).

51 Contrast now approach in *Taylors Fashions* v. *Liverpool Victoria Trustees Co.* [1982] Q.B. 133 with that in *Matharu* v. *Matharu* (1994) 68 P.&C.R. 93.

52 (1969) 210 E.G. 1425.

53 On the facts, proprietary estoppel was not pleaded or proved. Hoffman L.J. thought that, if it were necessary, it would not be unjust to require the servient owner to remove the obstructing brick pier and substitute a steel joist.

expressly to use the vehicle of proprietary estoppel as we know it today,[54] to alleviate the position of the servient owner who is claiming that the easement is unenforceable. Abandonment may of course occur in the absence of detrimental reliance, where there is sufficient evidence of intention to abandon. There may also be difficulty in establishing the requisite knowledge and reliance if a claim is based on estoppel. For an estoppel to arise, however, there is no need to establish an intention to abandon. If the dominant owner, say, erected a substantial physical impediment and subsequently did not exercise the right of way, that conduct may be such that it engendered in the servient owner an expectation that his land would no longer be subject to the easement. If, in reliance thereon, and with the knowledge of the dominant owner, the servient owner has changed his position, such that it would be to his or her detriment if the dominant owner was subsequently entitled to enforce his or her right, it is submitted that the right should cease to be enforceable. Should such a conclusion be based on abandonment or estoppel? It may be argued that the dominant owner's original conduct of erecting the impediment and his subsequent passivity when the servient owner changed his position could, together, be sufficient to infer an intention to abandon. However, if the requisite elements of estoppel are established, the enforcement of the right being unconscionable, there would be no need to establish such an intention. It is admitted that in some cases, there will be sufficient evidence of intention to abandon, but nevertheless, if the issue of estoppel is raised, then the analysis of the criteria for abandonment and the criteria for estoppel should not be confused. Some *dicta* however do little to clarify the distinction. In *Gotobed* v. *Pridmore*, Buckley L.J.,[55] when referring to *Cook* v. *Corporation of Bath,* said that "the circumstances might of course be such that he was estopped from denying such an intention" to abandon. Dillon L.J. in *Benn* v. *Harding* also said that, on the facts, the dominant owner could not be said to have been "estopped from denying that he had no intention ever to use the way again".[56]

In *Costagliola* v. *English,* the servient owner did not plead abandonment but relied on proprietary estoppel. In that case, acquiescence by the dominant owner could not be assumed merely because the servient owner had expended money on the servient tenement in the mistaken belief that

[54] But see Note 2 above. For a consideration of the inherent difficulties and uncertainties associated with proprietary estoppel, see K. Gray, *Elements of Land Law,* 2nd ed., Butterworths, London, 1993, at pp. 312-68; *Halsbury's Laws of England,* 4th ed., volume 14, paragraph 1072; S. Goo, "Satisfying Proprietary Estoppel" (1993) Conv. 173 and M. Halliwell, "Estoppel: Unconscionability as a Cause of Action" (1994) 14 L.S. 15.

[55] (1971) 217 E.G. 759, 760.

[56] (1992) 66 P. & C.R. 246, 259.

there was no vehicular right of way over a contiguous lane. There had merely been non-user for more than 11 years and Megarry J. held that, even if the dominant owner had been aware of the improvements, there was no evidence that she was aware that the servient owner was making the improvements in reliance on there being no right of way. The servient owner had merely improved a house in need of improvement, the acts not being referable to the right claimed. The plea of estoppel failed. Clearly this *scenario* can be distinguished from the situation where the dominant owner has taken some positive action which, for the time being, physically prevents his enjoyment of the right and subsequently knowingly stands by whilst the servient owner erects an impediment to user of a permanent (as opposed to a temporary) nature. It is submitted that, with regard to extinguishment of easements, both abandonment and estoppel have independent roles to play. However, we still await a judgment where, on the facts, an easement is unenforceable on the basis of an estoppel.

(d) Abandonment, non-user and the burden of proof

In *Re Yateley Common, Hampshire,* it was held that the burden of proof falls on the party who asserts that the right has been abandoned. However, the position is not as clear as it first appears. The view that a long period of non-user should never raise a conclusive presumption of abandonment and that abandonment should not be lightly inferred is undoubtedly correct. Nevertheless, once the servient owner has established non-user for a long period, should this give rise to a rebuttable presumption in favour of the servient owner or should the burden of proof remain with the servient owner? It could be argued that, since an easement can be acquired in the passage of time by prescription, a rebuttable presumption of abandonment should arise in the event of a long period of non-user,[57] such a loss to the dominant owner, if established, clearly being a corresponding "acquisition" in favour of the servient owner. In order to acquire a prescriptive right of way, adverse steps are required on the part of the dominant owner, whereas the conduct of the servient owner in the event of voluntary non-user by the dominant owner is passive and not adverse. In *Ward* v. *Ward,* Alderson B. said: "The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user".[58] This

[57] See *Doe d. Putland* v. *Hilder* (1819) 2 B. & Ald. 782, 791 (Abbott C.J.) and *Moore* v. *Rawson,* 339 (Littledale J.) (easement of light). This view was rejected in *Ward* v. *Ward.*

[58] (1852) 7 Ex. 838, 839 (approved in *Swan* v. *Sinclair).* But note that in *Swan,* Sargant L.J., at 274, referred with approval to *Goddard on Easements,* 8th ed., p. 521, which stated, "Non-user is not by itself conclusive evidence that the right is abandoned, for it may be explained by . . . the surrounding circumstances".

suggests that there must be sufficient *positive* conduct on the part of the dominant owner or similar conduct on the part of the servient owner, which has been acquiesced in by the dominant owner and from which can be inferred an intention to abandon, before any presumption will arise.

In a number of subsequent cases judges have, however, created a degree of uncertainty as to whether in fact a rebuttable presumption of abandonment should arise after a long period of non-user, placing the burden of proof on the dominant owner to establish the intent of preserving the right. Furthermore, in 1966 the Law Reform Committee stated, in relation to the existing law: "[I]f the period of non-user is very long, it may perhaps of itself raise a sufficient presumption of an intention to abandon the easement to cast upon the dominant owner the burden of establishing the contrary".[59] In *Crossley & Sons Ltd.* v. *Lightowler*, Lord Chelmsford expressed the view that "a long continued suspension may render it necessary for a person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it".[60] A similar view had been expressed in *Moore* v. *Rawson* by Bayley J.[61]

It is submitted that, in the event of mere voluntary non-user of an easement of way and in the absence of any other relevant conduct on the part of the dominant owner, it should not be necessary to give such an indication of preservation during the period of non-user. Furthermore, even if there has been conduct on the part of the dominant owner which appears to prevent the use of the way in the immediate future, the *dicta* of Bayley J. and Lord Chelmsford in relation to conduct evidencing an intention to preserve the right should only have any potential application where the servient owner has acted to his or her detriment subsequent to the dominant owner's conduct, and it would otherwise be inequitable to allow the dominant owner to resume the exercise of the right. However, this does not detract from the suggestion that, after a long period of non-user, the onus should be on the dominant owner "to explain". It is one thing to say that a dominant owner should be under no obligation expressly to reserve his or her rights during a long period of non-user. It is another to say that he should not be under an obligation to rebut an inference of abandonment

[59] (1966) Cmnd. 3100 (Acquisition of Easements and Profits by Prescription), paragraph 29. The Committee favoured the view that a conclusive presumption of abandonment should arise after 12 years' non-user (paragraphs 81 and 99(6)(xxii)). In 1971, the Law Commission Working Paper No. 36 "Transfer of Land: Appurtenant Rights" proposed that a prescriptive right not used for twelve years should be extinguished (proposition 10). It is submitted however that rules governing extinguishment should not vary depending upon the method of creation and no period of non-user should give rise to a conclusive presumption in view of the potential catalogue of reasons as to why user has not occurred.

[60] (1867) 2 Ch. App. 478, 482 (prescriptive right to foul a stream).

[61] (1824) 3 B. & C. 332, 337 (right to light).

after such a period. In *Swan* v. *Sinclair*, Pollock M.R. said "[N]on-user is not by itself conclusive evidence . . . [T]he non-user must be considered with, and may be explained by, the surrounding circumstances".[62] His Lordship went on to say, however, that "it appears clear that something more than non-user, some more definite indication of a release is required". This was a view echoed by Buckley L.J. in *Gotobed* v. *Pridmore*.[63]

More recently in *Benn* v. *Harding*, Hirst L.J. said that the *dictum* of Lord Chelmsford L.C. in *Crossley & Sons Ltd.* v. *Lightowler* should not undermine the long established principle, as stated by Alderson B. in *Ward* v. *Ward*, namely that the presumption of abandonment cannot be made from the mere fact of non-user. His Lordship went on express the view that "if there were any onus upon the [dominant owner] to explain the non-user - which in my judgment there is not in the present case - then he could readily do so".[64] In *Benn* v. *Harding*, the court did not appear to take the view that a long period of non-user in itself raises a rebuttable presumption against the dominant owner, Dillon L.J. stating that "it is not possible to say in any categoric way, as seems to be suggested from the passage in Megarry and Wade, that 20 Years of non-user will usually suffice".[65] Nevertheless, his Lordship also said that "[i]t seems to have been established by *Ward* v. *Ward* and *Swan* v. *Sinclair* that mere non-user, *which can be explained by having no need to use, if so explained*, is not enough to amount to abandonment".[66] It is clear that the dominant owner had given evidence in that case. However, if there are no relevant circumstances other than non-user and the burden of proof remains with the servient owner, irrespective of the period of cesser, why should the non-user have to be explained in the manner suggested in some of the judgments?

The argument in favour of a rebuttable presumption arising must largely rest on the fact that, during the period in question, it is the dominant owner and possibly his or her predecessors who have not required user and he or she is more likely to be cognisant of the reasons for non-user than the servient owner. Even if this were accepted, there would still be the uncertainty as to at what point the burden of proof should be reversed.

A slightly different approach has been taken in the State of Victoria, Australia. Section 73(3) of the Transfer of Land Act 1958 provides that proof that an easement has not been used or enjoyed for a period of not less that thirty years shall constitute sufficient evidence that the easement has

[62] [1924] 1 Ch. 254, 266.
[63] (1971) 217 E.G. 759, 760.
[64] (1992) 66 P. & C.R. 246, 261.
[65] (1992) 66 P. & C.R. 246, 260.
[66] [1992] 66 P & C.R. 246, 257.

been abandoned for the purpose of rectifying the register. Under section 73, the register will be rectified unless evidence is brought to the registrar's notice, which indicates that the easement has not been abandoned.[67]

In most cases, the dominant owner will be only too willing to proffer an explanation. Nevertheless, the uncertainty in relation to the burden of proof should be eliminated. It could be removed by a recognition that non-user for an acknowledged specified period would give rise to a rebuttable presumption, the burden of proof then falling on the dominant owner to establish that abandonment has not occurred. However, the likelihood of that recognition, by either the judiciary or by way of statutory intervention, is extremely remote. Considering the potential latent value of the right, it must be recognized that where the burden falls and any obligation that there may be to "explain" would be of greater significance if both tenements have recently acquired new owners, who are not in full possession of the facts surrounding the non-user. In such a situation justice may not be served by the reversal of the burden of proof. The preferred solution of the writer is a future common judicial approach that, in the event of mere non-user, there is no obligation on the dominant owner to "explain". The burden to remain with the servient owner at all times. This would not place any new dominant owner in the invidious position of having positively to defend his or her interest without full knowledge of the facts.

III. THE EASEMENT NO LONGER ACCOMMODATES THE DOMINANT TENEMENT

The issue as to whether easements of way can be extinguished because they no longer accommodate the dominant tenement was considered by the Court of Appeal in *Huckvale* v. *Aegean Hotels Ltd.*[68] The owners of the dominant tenement had reserved legal rights of way over land which they sold and the contract of sale had also provided for the grant of complimentary rights of way over adjoining land already owned by the

[67] See *Wolfe* v. *Freijah's Holdings Pty. Ltd.* [1988] V.R. 1017.

[68] (1989) 58 P. & C.R. 161, 168 (Nourse L.J.) - consideration of *Holmes* v. *Goring* (1824) 2 Bing. 76 and *National Guaranteed Manure Company Ltd.* v. *Donald* (1859) 4 H. & N. 8. *Holmes* has been cited in *Gale on Easements*, at p. 343 as authority for the proposition that an easement of necessity is extinguished when the necessity ceases. The correctness of *Holmes* has been doubted (see *Maude* v. *Thornton* [1929] I.R. 454, 458 (Meredith J.)); *Proctor* v. *Hodgson* (1855) 10 Exch. 824, 828 (Parke and Alderson BB.); *Huckvale* v. *Aegean Hotels Ltd.*, 169 (Nourse L.J., who also took the view that *National Guaranteed Manure Company Ltd.* v. *Donald* (easement to take water to supply a canal) was a case where the dominant tenement had ceased to exist because it had been converetd into something different (a canal to a railway)). See also G. Kodiliyne, "Easements Ceasing to Accommodate the Dominant tenement" (1990) Conv. 292.

buyer. In order to obtain access to the highway from the rear of the retained land, the dominant owner needed firstly to use the legal rights of way and secondly the complimentary rights. The complimentary rights were void against the defendants, the new owners of the servient tenement, because of non-registration. The defendants also contended that the legal easements had been extinguished as they no longer accommodated the dominant tenement, since the complimentary rights, with associated access to the highway, were unenforceable. The Court of Appeal held that, although it was unnecessary to decide the point and although the proposition was a novel one, it might be possible for an easement to be extinguished in circumstances where there was no longer any practical possibility of the easement ever again benefiting the dominant tenement. Slade L.J. referred to the possibility of circumstances changing drastically since the grant "(for example by supervening illegality) [so] that it would offend common sense and reality for the court to hold that an easement still subsisted. Nevertheless I think the court could only properly so hold in a very clear case".[69] In their Lordships' view, the lack of current use of the easement did not amount to extinguishment. Nourse L.J. said that "it cannot be said that the rights of way . . . have ceased to accommodate the plaintiff's property. It is certainly not possible to say either that they have ceased to confer a real and practical benefit on it or that they might not be reasonably necessary for its better enjoyment in the future".[70] His Lordship made the point that, if the circumstances altered, the plaintiffs may be able to obtain a re-grant of the complimentary easements, so that the legal easements could be enjoyed to the full with associated access to the highway.

We still await a decision in which a court is prepared to acknowledge that an easement has been extinguished because it has ceased to accommodate the dominant tenement, the change being so acute that there is no practical possibility that the easement could in the future benefit the dominant tenement in the manner contemplated by the grant. Slade L.J. expressed the need for the court to exercise caution and to "be slow to hold that an easement has been extinguished by frustration". With the exception of a change involving a supervening illegality and without statutory intervention, it is perhaps very unlikely a court will make a decision on this ground.[71]

[69] (1989) 58 P. & C.R. 163, 173.
[70] (1989) 58 P. & C.R. 163, 170.
[71] C. Sara, *op. cit.*, p. 292, "there is no separate doctrine of extinguishment due to a change in the character of the dominant tenement". He suggests that such changes, together with non-user, may be important in determining the question of abandonment.

IV. CONCLUSIONS

The inherent difficulties relating to the foundation of a claim for the extinguishment of an easement of way on the basis of non-user have been considered above in some detail. However, in conclusion, it is appropriate to make the following general observations:

(a) The longevity of non-user of an easement of way is insufficient to warrant a finding of abandonment. There must be evidence of an intention to abandon the right. It is essential that the law safeguards valuable, albeit latent, property rights from inadvertent destruction.

(b) Non-user must be considered in the light of the surrounding circumstances. It has, however, become increasingly apparent that the task of proving the dominant owner intended to abandon the easement is an onerous one, even in circumstances where physical impediments of varying durability may have precluded user for a considerable period of time.

(c) The burden of proof in a case involving an extended period of non-user merits further consideration by the judiciary. The writer advocates a clear statement that, in an abandonment case, the burden remains with the servient owner irrespective of the period of non-user.

(d) The potential role of estoppel in relation to a servient owner's claim that the easement is no longer enforceable requires further elaboration by the courts, specifically in relation to the basis on which an estoppel could be raised.

(e) The justifiable reticence of the judiciary to declare that an easement of way is not enforceable on the grounds of abandonment or because it no longer accommodates the dominant tenement should, however, be tempered by the introduction of a statutory discretionary jurisdiction to discharge or modify easements, similar to the jurisdiction relating to restrictive covenants contained in section 84, Law of Property Act 1925. The advent of such a jurisdiction would prevent the potential sterilisation of land and, if available, the need to obtain indemnity insurance. Furthermore, it could prevent the perpetration of a "fraud" upon the servient owner, in the form of an extortionate "ransom demand" in exchange for an express release. Any provisions creating such a discretion would clearly have to be drafted to ensure that the rights of individuals could not be unreasonably overridden and, in cases where an order for discharge or modification is appropriate, there should be jurisdiction to attach conditions to the order (including, in a proper case, the payment of compensation). The servient owner in England or Wales appears to be at a serious disadvantage when compared to his or her Scottish and Northern Irish counterparts, who have the right to make an application to the relevant Lands Tribunal for the

modification or discharge of an easement.

(f) In order to try to alleviate the current position where there has been a change of circumstance, it has been suggested by Professor Gray that "[i]n the absence of such interventionist legislation there seems to be a strong argument in favour of recognizing at least a limited form of 'change of circumstance' doctrine under which the courts could modify or terminate obsolete forms of servitude".[72] It is agreed that such an initiative would be desirable but, due to the difficulties in defining and applying such a doctrine, it is unlikely,[73] in the absence of a statutory framework, that any real progress will be made to alleviate a servient owner's position in circumstances of prolonged non-user, where the court is not prepared to make a finding of abandonment.

[72] K. Gray, *op. cit.*, at p. 1121.
[73] See the discussion above of *Huckvale* v. *Aegean Hotels Ltd.*

ESTABLISHING A SHARE IN ONE'S HOME – THE PURCHASING TENANT AND BENEFICIAL OWNERSHIP

*Dr. Sylvia Hargreaves**

INTRODUCTION

THE LAW COMMISSION'S CURRENT REVIEW of the property rights of non-marital cohabitants on the break-up of a relationship[1] will intensify an already lively debate. This article seeks to contribute to that debate by considering a small but significant group of claimants to an ownership share in the family home.

Since the enactment of the Housing Act 1980, now consolidated in the Housing Act 1985, the dream of home ownership has become a reality for many public sector tenants.[2] Under the statutory provisions, a secure tenant[3] has the right, subject to certain limitations and exceptions,[4] to acquire the freehold of a house or the lease of a flat, provided he or she has been a secure tenant for at least two years.[5] A person exercising this "right to buy" is entitled to a discount[6] on the open market value of the property[7] (calculated in accordance with the duration of the secure tenancy), which may represent a substantial sum of money. In the private rented sector, though this is not covered by the statutory "right to buy" provisions, it is not uncommon for landlords to dispose of rented property to protected tenants at a price below market value. Here, the discounted price reflects the fact of occupation by a sitting tenant which detracts from the marketability of the property.

Frequently a secure or protected tenant wishing to take advantage of the favourable sale terms available under statute or offered by the private landlord has insufficient resources to provide cash or to secure mortgage finance. Assistance might be obtained from a third party – perhaps a cohabiting partner or a relative who may or may not be living in the property – who is able to provide funds, join in a mortgage of the property, or assume sole liability under the mortgage. Commonly, the conveyance or transfer contains no declaration of trust stating the shares in which the

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1 The review encompasses the property rights of both quasi-marital partners and other kinds of cohabitant (Law Commission press release, May 1994).

2 By the end of 1992, some 1.5 million local authority and new town tenants had bought their homes under the statutory "right to buy" scheme: (1994) 24 Social Trends, p. 110 (Chart 8.4).

3 As defined in the Housing Act 1985, ss. 79-81.

4 Housing Act 1985, ss. 120, 121.

5 Housing Act 1985, s. 119(1).

6 Housing Act 1985, s. 129.

7 Housing Act 1985, s. 127 sets out the criteria for valuation.

parties are to hold the property beneficially.

This causes little difficulty as long as relations between the parties remain harmonious but if relationships break down, the former tenant and the contributing partner or relative may well come to the court seeking determination of the respective shares. The former tenant will claim that the discount on the purchase price attributable to the pre-existing tenancy constituted his or her contribution to the acquisition; that such contribution gives rise to an entitlement to a share; and that in quantification of the share, the amount of the discount, together with any other contributions, should be taken into account.

In view of the number of public sector tenants who have now exercised their "right to buy", together with those private sitting tenants who have bought their homes at a discounted price, it is not surprising that these kinds of claim occur with some frequency. It is therefore desirable that a coherent and fair approach to such claims should be formulated. Sadly, recent decisions demonstrate a divergence of judicial opinion on the doctrinal basis of proprietary claims in discount cases, a development which signals both uncertainty and potential for injustice. This article examines judicial approaches to discount cases since the 1970s, when the first cases appeared before the courts, and considers indicators for the future of this area of the law.

THE RESULTING TRUST ANALYSIS

The depth of the analysis

Judicial analysis of equitable entitlement in discount cases is predominanty founded, explicitly or implicitly, in resulting trust doctrine. In almost all cases,[8] the courts have recognised the tenant's entitlement to a beneficial interest and have taken the discount into account in quantifying the respective shares. Nevertheless, the way in which the discount is characterised as a component element of a resulting trust differs greatly from case to case. On occasions, the tenant's claim has succeeded without detailed analysis,[9] or any analysis,[10] of the precise legal character of the

[8] A notable exception is *Binmatt* v. *Ali,* unreported (Court of Appeal, 6 October 1981) where the Court of Appeal declined to consider the impact of the tenant's discount on beneficial ownership of a former council house since the issue had not been raised at first instance.

[9] See for instance *Springette* v. *Defoe* [1992] 2 F.L.R. 388. It should be pointed out that, since this issue went to press, *Springette* v. *Defoe* has been considered by the Court of Appeal in *Midland Bank* v. *Cooke, The Times,* 13 July 1995.

[10] See for instance *Charlton* v. *Lester* (1976) 238 E.G. 115; *Burrows and Burrows* v. *Sharp* (1991) 23 H.L.R. 82.

discount. In other cases, acknowledgement that the discount constitutes an element of the acquisition sufficient to establish a beneficial share is supported by detailed consideration of the nature of the discount within the context of trust law.[11]

The differing approaches are partly explained by the varied permutations of legal, financial and domestic arrangements which give rise to proprietary claims. The impact of the discount upon ownership interests is rarely considered in isolation, being inextricably bound up with other factors (such as ownership of the legal title, financial contribution in various forms to the acquisition, or informal arrangements between the parties as to occupation of the property or its devolution on death). Title may be taken in the sole name of the tenant[12] or in the joint names of all or some of the parties.[13] Contributions consisting, for instance, in cash sums, loan moneys, mortgage instalments and mortgage liability may be shared unequally between the parties or perhaps borne solely by persons other than the tenant. Typically, the financial arrangements are part of wider family arrangements in which the occupation of the property is an important feature. The former tenant typically expects to remain in occupation, often with the quasi-marital partner who has provided funds. Sometimes, in return for financial assistance or, to allow such assistance to become available, a contributing relative may give up his or her own home and move in with the former tenant. Indeed, the impractical nature of many such arrangements is frequently the root cause of the breakdown in relationships giving rise to the proprietary claim: the couple with two children moving into a two-bedroomed house with the secure tenant and her handicapped daughter;[14] the son-in-law, his pregnant wife and two children living "through and through"[15] in the former council house acquired in the name of the former tenant, a widow of 71 years of age. Here, despite the potential for family conflict, the prospect of a purchase on favourable terms is sufficient inducement for the parties to proceed with the most unsatisfactory of domestic arrangements.

More significantly, the lack of analytical precision is a further manifestation of the uncertainty which besets the law concerning acquisition of beneficial interests, particularly in the area of family

[11] See for instance *Marsh* v. *von Sternberg* [1986] 1 F.L.R. 526; *Evans* v. *Hayward,* unreported (Court of Appeal, 23 June 1992).

[12] See for instance *Binmatt* v. *Ali; Potter* v. *Gyles* (Unreported, Court of Appeal, 10 October 1986); *Burrows and Burrows* v. *Sharpe.*

[13] See for instance *Charlton* v. *Lester; Marsh* v. *von Sternberg; Springette* v. *Defoe; Evans* v. *Hayward; Savill* v. *Goodall* (1993) 25 H.L.R. 588.

[14] *Burrows and Burrows* v. *Sharp.*

[15] *Binmatt* v. *Ali* (Watkins L.J.).

property. The "right to buy" discount and the private tenant's discount fit uneasily into classic resulting trust doctrine. Difficulty arises from the preoccupation of this *species* of trust with payments of money, together with a pronounced reluctance to acknowledge other kinds of contribution. Apparent willingness to extend the resulting trust beyond its orthodox boundaries may go some way to ease the difficulty. If it is legitimate, for instance, to regard the assumption of mortgage liability as a contribution to the purchase of property within resulting trust theory, then the case for a similar characterisation of the "right to buy" and the private tenant's discount is more easily made out.

The discount as an element of a resulting trust

Numerous cases reiterate the principle that the trust of a legal estate, irrespective of the names on the legal title, "results to the man who advances the purchase money"[16] at the time of acquisition. Uncertainty about the precise meaning of the term "purchase money" casts doubt upon the ability of certain kinds of contribution to raise a presumption of resulting trust. The use of mortgage-finance places this problem in sharp focus. Where the courts have taken a realistic view of the financing of home ownership by instalment mortgage, it has been possible to expand the meaning of the term "provision of the purchase money at the time of acquisition" to embrace the much wider concept of "contributions to the purchase price" or simply "contributions to the acquisition". Thus, forms of qualifying contribution may extend beyond direct financial contributions to the cash price,[17] to the initial deposit or to legal expenses at the time of purchase[18] so as to include not only the assumption of mortgage liability[19] but also the payment of mortgage instalments. Mortgage-generated contributions of cash may thus be viewed in the same way as the provision, at the time of acquisition, of loan moneys obtained independently of any mortgage arrangements. Payment of mortgage instalments, though clearly not made at acquisition, may provide evidence of the parties' intentions as to beneficial ownership at the time of acquisition sufficient to raise the presumption of resulting trust.[20]

Unlike the payment of mortgage instalments, the "right to buy" discount and private tenant's discount raise no difficulty of timing. By its very

16 *Dyer* v. *Dyer* (1788) 2 Cox. Eq. Cas. 92, 93.
17 *Burns* v. *Burns* [1984] Ch. 317, 326F (Fox L.J.).
18 *Gissing* v. *Gissing* [1971] A.C. 886, 907E.
19 See for instance *Springette* v. *Defoe.*
20 On one view, contributions of this kind are more properly regarded as giving rise to a constructive rather than a resulting trust.

nature, the discount is part of the purchase arrangement at the date of acquisition. However, its characterisation as "purchase money", or as a "contribution to the purchase price" or as a "contribution to the acquisition" is of more dubious validity. Can the discount be treated as a contribution at all, or is it no more than "a discount in arriving at the price which is to be paid"?[21] Notwithstanding such reservations, the courts have frequently awarded a beneficial share to the former tenant by virtue of the discount "contribution".

The nature of the discount "contribution"

The characterisation of the discount as a contribution has sometimes rested upon a broad view of what is "fair". Steyn J., for example, thought that it was "right in principle" that the tenant's discount should be seen as a direct contribution to the acquisition.[22] This approach was approved by Dillon L.J. in *Evans* v. *Hayward* and is implicit in other cases.[23] Closer scrutiny of the discount "contribution" is more common. The courts have distinguished a number of distinctive characteristics – the discount's financial value, the discount as a factor enabling the purchase and the nature of secure or protected tenancy status itself. Any one, or any combination, of these characteristics may support the view that the tenant's discount is capable of generating a beneficial share.

The case for the discount as a qualifying contribution is most cogently argued if that discount "contribution" can be said to have a financial value. This conclusion has sometimes been reached without any apparent difficulty. By virtue of the discount, a protected tenant made a contribution "worth" £3,200 to the purchase for £2,000 of a house valued at £5,200.[24] A precise financial value of £10,045 was placed upon a secure tenant's discount, described in the Court of Appeal as "attributable to" the tenancy.[25] Even where it was recognised that the situation of the protected tenant "only had a financial value in a given set of circumstances and did not have a market price in the world at large", the tenant's protected status together with the discount were nonetheless recognised as "a financial benefit".[26] Thus the discount, albeit an amount which does not actually have to be

21 *Evans* v. *Hayward* (Dillon L.J.).

22 *Springette* v. *Defoe* [1992] 2 F.L.R. 388, 395G.

23 See for instance *Charlton* v. *Lester*. Here, though the financial value of the discount was a relevant factor, there was an underlying recognition of the former tenant's moral entitlement to a beneficial share in "her home".

24 *Charlton* v. *Lester.*

25 *Springette* v. *Defoe* [1992] 2 F.L.R. 388, 391D. The point at issue was whether there was sufficient evidence to displace the presumption that the property was held on a resulting trust for the parties in the proportions in which they contributed the purchase money.

26 *Marsh* v. *von Sternberg* [1986] 1 F.L.R. 526, 531D.

27 *Evans* v. *Hayward* (Dillon L.J.).

paid, can be viewed as part of the "gross price" of the property.[27]

The financial value of a tenant's discount is perhaps more easily discernible in respect of private sector tenancies. Here, the landlord operates within a purely commercial environment, the discount figure reflecting his or her calculation of the difference between the open market value of the property if sold with a sitting tenant and its value if sold with vacant possession. The financial benefit to the tenant bears no relation to the length of the tenancy and the protected tenant is "bought out with a financial concession or discount".[28] In a similar way, market forces operate to place a precise financial value on the tenant's protected status in circumstances in which a private landlord offers a substantial cash sum in return for the tenant's quitting the premises. This figure represents the minimum sum which the tenant might be prepared to accept in return for giving up all rights in the home and the maximum sum which the landlord might be prepared to pay in return for obtaining vacant possession. By contrast, the public sector tenant's rights are not market-driven, the statutory "right to buy" being a creature of government policy on the sale of public housing stock and the calculation of the discount being based upon entitlement acquired through years of occupation and payment of rent.

On occasion it has been argued that, but for the availablity of the discount, the parties could not have afforded the purchase. Accordingly, the discount constitutes a contribution to the acquisition. This was endorsed in *Springette* v. *Defoe*. Here, property was taken in the joint names of the secure tenant, Miss Springette, and her quasi-marital partner, Mr. Defoe. Significantly, a parallel was drawn between the discount and the tenant's cash contribution :

> ... Mr. Defoe could not have bought the property without the benefit of the 41 per cent discount attributable to Miss Springette's having been a tenant of the London Borough of Ealing for 11 years or more and without the balance of £2500 or so provided by Miss Springette out of her savings to make up the purchase money.[29]

Also significant was the function ascribed to Mr. Defoe's concurrence in the building society mortgage. Without this, Miss Springette could not have bought the property. The discount was thus viewed as part of a "package" of balancing contributions, the overall result being weighted as to 75 per cent. made by Miss Springette (comprising the discount

[28] *Marsh* v. *von Sternberg* [1986] 1 F.L.R. 526, 531C.
[29] [1992] 2 F.L.R. 388, 390H-391A.

attributable to her tenancy, a cash contribution on acquisition and half the mortgage loan) and 25 per cent. by Mr. Defoe (half the mortgage loan plus a cash contribution on acquisition).

Similar reasoning may be applied to the benefit arising from the status of a secure or protected tenant. Apart from the implications of any discount, both the statutory "right to buy" and the offer for sale in the private sector constitute a purchasing opportunity which arises by virtue of that status. In the case of the secure tenant, statute confers the "right to buy". In the case of the protected tenant, the operation of the market dictates that a landlord who wishes to sell but cannot give vacant possession will, of necessity, often offer to sell the property to the sitting tenant. In this context, the tenant's contribution is twofold. It comprises not only the "pooling"[30] of a right or opportunity attaching uniquely to tenant status but also the the abandonment of a valuable proprietary right (security of tenure) in the tenant's home.[31]

The loss of secure or protected tenancy status is not easily quantifiable in financial terms but has nevertheless been recognised. In *Potter* v. *Gyles*, the fact that the tenant had given up her tenancy was seen as an essential contribution to the purchase.[32] Often, the purchasing tenant has no illusions about the implications of giving up security of tenure and proceeds only reluctantly, being won over by relatives with a personal interest in the purchase. A protected tenant who was persuaded to buy the freehold of her home by her daughter and son-in-law who wanted their own home and who were able to secure and service a mortgage on the property was "very lukewarm about buying the house, because she knew she was safe with a protected tenancy".[33] A secure tenant who chose to exercise the "right to buy" jointly with her cohabitee soon became acutely aware of her now precarious situation as far as occupation of the property was concerned.[34] The disadvantages inherent in loss of security of tenure may be consciously balanced by the tenant against advantageous consequences which he or she believes will flow from acquisition: the expectation of benefit to a stormy personal relationship,[35] or that a secure home will be provided for a

30 See *Potter* v. *Gyles*, where the tenant was said by Glidewell L.J. to have " ... as it were, put into the pool the advantage of the 20 per cent discount on the purchase price of the property".

31 Housing Act 1985, s. 139(2) expressly provides that on completion of a "right to buy" purchase, the secure tenancy is terminated.

32 *Potter* v. *Gyles* (Glidewell L.J.).

33 *Charlton* v. *Lester* (1976) 238 E.G. 115, 116.

34 *Savill* v. *Goodall* (1993) 25 H.L.R. 588. The woman claimed that, within months of the purchase, her partner was saying to her "This is my home. You can go".

35 *Savill* v. *Goodall.*

36 *Burrows and Burrows* v. *Sharp.*

handicapped daughter after the tenant's death.[36]

It is clearly possible to view the loss of secure or protected tenancy status as a significant part of the tenant's total contribution to the purchase of property which, together with the discount, gives rise to a beneficial share. Where the discount itself is recognised as a contribution, conceptual analysis of loss of security of tenure is unnecessary. However, the precise legal significance of the abandonment of residential security *qua* tenant could become a crucial issue if discount cases were to be considered within constructive rather than resulting trust doctrine. This is further considered below.

VALUATION AND ALLOCATION OF THE DISCOUNT

Recognition of the tenant's discount as a contribution to the purchase of property under a resulting trust leads on to consideration of its monetary value for purposes of quantification of the respective shares. Valuation is often straightforward. As far as secure tenancies are concerned, the basis of calculation of open market value and proportionate discount is regulated by the statutory provisions.[37] In the case of protected tenancies, all that is generally called for is a simple arithmetical calculation of the difference between the open market value and the discounted price. Nevertheless, valuation can sometimes pose potentially difficult questions.

Valuation: the significance of mutual understanding

The amount of the discount was disputed in *Marsh* v. *von Sternberg.* Here, when offering a flat for sale the private landlords had inflated its value and consequently the value of the discount (presumably to make their offer appear even more attractive to the prospective purchasers). In seeking to establish her share, the former protected tenant argued that the value of the discount should be calculated as the difference between the inflated property value and the actual purchase price, on the ground that both parties had believed the landlords' discount figure to be accurate at the time of acquisition. In the Court of Appeal, Bush J. had no hesitation in basing the calculation on the correct valuation. He took no account of what the parties might have "had in mind", declaring that "to take any other figure for arriving at a discount is to deal in unrealities".[38]

The conclusion is clear and the argument persuasive. However, Bush

[37] Housing Act 1985, ss. 127, 129.
[38] [1986] 1 F.L.R. 526, 529F-G.

J.'s refusal to take account of the parties' mutual understanding is difficult to reconcile with his readiness, later in the same judgment, to rely upon their inferred intention that the discount be treated as a contribution to the purchase. More recent decisions, considered below, have underlined the increasingly significant role of agreement. In future, disputes over valuation of the private tenant's discount in circumstances similar to those in *Marsh* v. *von Sternberg* may be decided on the basis of the parties' agreement or mutual understanding rather than upon a strictly "market" assessment of value.

Under the Housing Act 1985, agreement (or absence of agreement) between the parties plays no part in the valuation of the "right to buy" discount. The statutory formula is precise, being based upon current open market value, assessed according to the criteria set out in the Act, and the duration of the pre-existing secure tenancy.[39] There is also provision for the circumstance in which two or more persons are joint secure tenants of the same property but their respective periods of occupation are different in length. Here, the "right to buy" discount is generated by the longer of the two periods of occupation.[40] However, the Act does not provide for any allocation of the value of the discount as between the joint tenants themselves.

Allocation

The proportionate shares of the amount of the discount become a vital issue when beneficial interests fall to be determined. This problem was addressed in *Evans* v. *Hayward.* At the time of purchase of the council house in question, Mrs. Evans held a secure tenancy dating back some sixteen years.[41] Mr. Hayward, her cohabitee, had been in occupation for less than a year prior to the acquisition and had become joint tenant of the property shortly before the purchase. The parties had jointly exercised the "right to buy" and the house was conveyed into their joint names. In accordance with the statutory provisions, the discount was calculated on the basis of the duration of the woman's secure tenancy. On breakdown of their relationship, the parties sought a declaration as to beneficial shares. At first instance, Mrs. Evans was credited with the whole discount attributable to her occupation. Mr. Hayward appealed, claiming that as the tenancy had been transferred into joint names, the allowable discount belonged to both partners jointly and should be credited to them in equal shares. The appeal

[39] Housing Act 1985, ss. 127, 129.

[40] Housing Act 1985, s. 129(3).

[41] The tenancy, originally held by Mrs Evans' former husband, had been transferred to her on dissolution of their marriage.

was dismissed on the grounds that the fact of joint ownership of the right to buy at a discount had no bearing upon beneficial interests in the property acquired. Since Mr. Hayward could point to less than one year's occupation as a secure tenant, he had "no contribution to offer" in respect of the discount.[42] In similar circumstances in *Springette* v. *Defoe*, the entire discount of 41 per cent. attributable to the woman's 11-year secure tenancy of a council house was treated as her contribution to its acquisition.

The allocation of the amount of the discount between claimants may be more difficult if the parties can each offer a period of qualifying occupation. Staughton L.J. envisaged a case in which one partner has lived in a house as a secure tenant for 15 years and the other for seven and a half years. There are strong arguments of fairness in support of his conclusion that the discount should not be treated as a contribution by the partner whose period of occupation is the longer but should be divided between the parties "in the proportions which the court thought appropriate". Here, the correct result can be achieved through the flexible approach of treating the discount not as an imputed financial contribution but as a "factor capable of giving rise to an inference that [the parties] may have reached an agreement as to how it should be allocated between them".[43]

DEPARTURE FROM THE RESULTING TRUST ANALYSIS

It is submitted that the resulting trust analysis, though not free from difficulty, is capable of providing fair treatment for the former tenant through judicial recognition of his or her contribution to purchase of the home - be that contribution identified as the financial value of the discount, the pooling of the "right to buy", the protected tenant's unique purchasing opportunity or the abandonment of secure or protected tenancy status. This approach accords with a common sense of justice which admits the purchasing tenant's moral entitlement to an ownership share in his or her home. Sadly, despite the predominant resulting trust analysis, a change of judicial approach is becoming apparent. Increasingly, the judgments emphasise evidence of agreement as to beneficial ownership between the parties and indicate that at least an inferred agreement or arrangement may become essential. Indeed, developments in the general area of beneficial entitlement to family property suggest that even an inferred agreement as to shares will no longer be sufficient and that an express agreement between

[42] (Dillon L.J.).
[43] *Evans* v. *Hayward.*

the parties will be required. Such developments would place unacceptable evidential burdens upon the tenant claimant and ought to be resisted.

Requirement of agreement?

Two conflicting approaches to the discount "contribution" are emerging. These received detailed analysis in *Evans* v. *Hayward.* The first approach, already outlined above, allows the discount to qualify as a contribution without evidence of agreement. The second approach is more stringent and specific, requiring the inference of an agreement or arrangement between the parties that the discount be regarded as a contribution to the purchase. Bush J. summarised this position in *Marsh* v. *von Sternberg* when seeking to identify qualifying contibutions:

> Though the respondent's situation only had a financial value in a given set of circumstances and did not have a market price in the world at large, it is possible to infer, and I do infer, that as part of their agreement or arrangement the parties regarded the realization of that financial benefit by way of discount as a contribution by the respondent to the purchase of the flat.[44]

These two distinctive approaches were considered both by Dillon L.J. and Staughton L.J. in *Evans* v. *Hayward.* Whilst the former felt it unnecessary, for the purposes of that case, to differentiate between them, Staughton L.J. approved Bush J.'s approach. In deciding whether the discount could be treated as a contribution, he expressed difficulty in regarding the discount as "purchase money". However, he considered that "the facts as to the existence of a discount and the source from which it is derived must be taken into account, and are capable of leading to the inference that the parties have reached an agreement as to how the purchase price is provided".[45]

The result is intriguing. According to the view expressed by Bush J. and Staughton L.J., the secure or protected tenant's entitlement, by virtue of the discount, to a beneficial share in formerly-rented property may depend upon an inferred agreement between the tenant and the other party or parties that the discount be treated as a contribution to the purchase price. Where such an agreement can be inferred, the discount will qualify as a contribution under the resulting trust.

The logic may be impeccable, if tortuous, but the abandonment of Steyn

[44] *Marsh* v. *von Sternberg* [1986] 1 F.L.R. 526, 531D. See also *Potter* v. *Gyles* (Glidewell L.J.).
[45] Unreported (Court of Appeal, 23 June 1992).

L.J.'s argument of principle indicates a dangerous departure from an approach which has to date achieved fairness and justice to the tenant. In particular, it should be noted that Staughton L.J. speaks of the discount and its source as facts "capable of" leading to the inference of an agreement as to the provision of the purchase price. By implication, the fact of the discount and its source may not always raise this inference. However, precisely when the inference might be drawn remains unclear. Sadly, Staughton L.J.'s statement imports into discount cases all the diverse, confusing and conflicting *dicta* on express, inferred and imputed agreement and intention which have produced widespread uncertainty and inconsistency in the area of acquisition of beneficial entitlement to residential property.

Establishing the existence of an agreement

At present it seems clear, on Staughton L.J.'s approach, that if an arrangement or agreement as to the qualifying status of the discount under a resulting trust is to be required, this can be inferred from the existence of the discount and its source. Similarly, the relinquishment of secure or protected tenancy status by the tenant may be capable of raising the inference of an agreement as to intended beneficial ownership. The fact that the tenant in *Potter* v. *Gyles* had given up her security of tenure was referred to by Glidewell L.J. as creating an inference that there was no joint intention that the woman's quasi-marital partner should be the sole beneficiary under a resulting trust.

However, developments in the general area of acquisition of beneficial entitlement to family property may in future raise grave doubts as to the sufficiency of inferred agreement. In relation to an agreement, arrangement or understanding between the parties to the effect that a property was to be shared beneficially, Lord Bridge observed in the House of Lords in *Lloyds Bank plc.* v. *Rosset* that "The finding of an agreement or arrangement to share in this sense can only ... be based on evidence of express discussions between the partners . . .".[46]

This requirement is not confined to agreements relating to the generation of the trust. In *Springette* v. *Defoe,* it was applied to an agreement which, it was claimed, displaced a presumption of resulting trust of a property acquired pursuant to the statutory "right to buy". The Court of Appeal held that, since there had been no discussion between the cohabitees about their respective beneficial interests, the presumption of resulting trust was not rebutted and, accordingly, they were beneficially entitled in

[46] [1991] 1 A.C. 107, 132F.

proportion to their contributions – 75 per cent. to the woman and 25 per cent. to the man. Referring to the *dicta* of Lord Bridge in *Rosset,* Steyn L.J. declared that the law "must concentrate on manifested and communicated intentions"[47] and that "our trust law does not allow property rights to be affected by telepathy".[48]

Clearly, any requirement of express discussions between the parties about the discount and its impact upon their respective beneficial shares would place significant, perhaps insurmountable, evidential obstacles in the way of the tenant claimant. As in the general context of disputes over beneficial ownership of family property, the discount cases amply demonstrate that arrangements for the purchase of property by family members rarely involve any express definition of the respective ownership interests. However, the circumstances of discount cases, in which the tenant relinquishes secure or protected tenancy status following years of occupation of his or her rented home and "pools" the advantage of the discount, surely call for the award of a share to the former tenant. Accordingly, any movement towards a requirement of express agreement ought to be resisted.

AGREEMENT AND DETRIMENT: THE APPLICATION OF CONSTRUCTIVE TRUST AND PROPRIETARY ESTOPPEL PRINCIPLES

Discount not characterised as a contribution to the purchase

Any doubt over the characterisation of the tenant's discount as "purchase money", as a "contribution to the purchase price" or as a "contribution to the acquisition" of property, whether that doubt arises from a rejection of Steyn L.J.'s argument of principle or from the absence of an express or inferred agreement between the parties, raises the question as to whether a former tenant might succeed in establishing a share by means other than the orthodox resulting trust. This is perhaps possible if the courts' habitual blurring of the boundary between resulting and constructive trusts[49] and the perceptible assimilation of the constructive trust and estoppel doctrines in certain of the family property cases[50] can

[47] [1992] 2 F.L.R. 388, 395D.
[48] [1992] 2 F.L.R. 388, 394H.
[49] See for instance *Gissing* v. *Gissing* [1971] A.C. 886, 898B (Lord Morris), 905B-D, G-H, 910F (Lord Diplock); *Burns* v. *Burns* [1984] Ch. 317, 336D-F; *Lloyds Bank plc.* v. *Rosset* [1991] 1 A.C. 107, 133A.
[50] See particularly *Grant* v. *Edwards* [1986] Ch. 638, 656 G-H, 657H; *Lloyds Bank plc.* v. *Rosset* [1991] 1 A.C. 107, 132G.

allow those doctrines, and in particular the concept of "detriment", to exert an influence upon discount cases. In fact, in their increased emphasis upon agreement, the judgments already indicate some movement towards constructive trust theory. However, continuation of this trend seems certain to diminish rather than to enhance the tenant's chances of success in a proprietary claim.

The usual arrangement of the legal title in discount cases takes these cases outside the normal scope of the constructive trust and proprietary estoppel. In such cases, the transfer is taken either by the tenant himself or herself or jointly by the tenant and the contributing party or parties. Here, constructive trust or estoppel doctrine may be inappropriate, since their concern is primarily to frustrate the unconscionable assertion of legal rights by an estate owner against a person who does not appear on the legal title. Nevertheless, it would not be too great a doctrinal leap to acknowledge that the "fraud" of the third party contributor in seeking to deny the tenant's beneficial entitlement is capable of generating a share of the property within the somewhat uncertain area of interface between the resulting and constructive trust or alternatively by virtue of a right analogous to an estoppel right.

There is a continuing debate on the operation of constructive trust principles and of the associated doctrine of proprietary estoppel, especially within the context of family property. The diversity of circumstances in numerous cases decided on the basis of constructive trust theory have called for analysis and interpretation of three integral elements: agreement or common intention, change of position constituting a detriment and unconscionable action on the part of the estate owner. It is outside the scope of this article to rehearse the general arguments relating to the generation of this *species* of trust, to the nature of its three component elements and to the shift to estoppel theory. However, it is appropriate to consider here the extent to which constructive trust and estoppel principles can influence judicial approaches to beneficial claims in discount cases.[51]

Agreement

The movement towards constructive trust theory is focused largely upon the increased significance of agreement, particularly express agreement, between the parties. The approach adopted by Bush J. and Staughton L.J. in *Marsh* v. *von Sternberg* and *Evans* v. *Hayward* respectively was pursued further more recently in *Savill* v. *Goodall.* Here,

[51] The extent to which the "common intention" constructive trust and the doctrine of proprietary estoppel are distinct may itself require further consideration following the decision of the Court of Appeal in *Matharu* v. *Matharu* (1994) 68 P. & C.R. 93.

the Court of Appeal showed a clear preference for a constructive trust analysis of the facts. A council house was transferred into the joint names of an unmarried couple, the "right to buy" being claimed both by the woman as secure tenant and by the man as a member of her family. The couple had occupied the house together for a number of years before the purchase and made substantially equal contributions to the rent and other outgoings. The discount of 42 per cent., attributable to the woman's occupation of the property, was calculated by reference to the date when her former husband first became a tenant of the council. The balance was funded by a building society mortgage and, until the couple finally separated, the man paid the instalments on the mortgage. Thereafter, the woman remained in the property, maintaining interest payments only. The transfer contained no declaration regarding the beneficial interests, which the parties sought to have established.

At first instance, the court found that the shares should be ascertained by reference to the parties' contributions in all the circumstances of the case. Since they had contributed roughly equally, it was held that the property should be held on trust for them in equal shares. This starting-point was, however, rejected in the Court of Appeal. Nourse L.J.[52] adopted a *Lloyds Bank plc.* v. *Rosset* analysis of the trust generated and treated the case as a "first category" case, requiring evidence of express agreement "independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs".[53] His Lordship found that before the acquisition the parties had expressly agreed that the property was to be owned jointly. As for quantification of the respective shares, he rejected the view that an intention that a home should be owned "jointly" could mean that it was to be owned in unequal shares, concluding that "if an ordinary, sensible couple, without more, declare an intention to own their home jointly, they can only be taken to intend that they shall own it equally".[54]

Nourse L.J.'s finding of an express agreement between Mrs. Goodall and Mr. Savill obviated the need for consideration of the status of the "right to buy" discount. However, it is clear that, had no agreement been established, "further enquiry"[55] would have been necessary as to whether the facts fell into Lord Bridge's "second category" of case. Here, implied agreement between the parties is sufficient to establish shared beneficial ownership but, although "direct contributions to the purchase price ... will

52 (1993) 25 H.L.R. 588, 591-592.
53 *Lloyds Bank plc.* v. *Rosset* [1991] 1 A.C. 107, 132E-F.
54 (1993) 25 H.L.R. 588, 593.
55 (1993) 25 H.L.R. 588, 592.

readily justify the inference necessary to the creation of the constructive trust", it is "at least extremely doubtful whether anything less will do".[56] In *Savill* v. *Goodall*, Nourse L.J. appeared to restrict the range of qualifying contributions even further, stating that "the necessary common intention can only be inferred from the conduct of the parties, usually from the expenditure incurred by them respectively".[57] He thus suggested that the tenant's discount could be insufficient to generate a share.

Whatever the merits of the *Rosset* formulation of the constructive trust in the generality of claims to beneficial entitlement to family property, the former tenant's claim is a special kind of case. A strict *Rosset* analysis is not only inappropriate but is also capable of producing gross injustice to the tenant. *Savill* v. *Goodall* challenges the resulting trust analysis of discount cases and imposes unjustifiable evidential obstacles in the way of the tenant who may then have no alternative but to pursue a claim founded on express agreement.

Detriment

If the characterisation of the discount as a contribution under a strict resulting trust is rejected and the tenant has made no other contribution to the acquisition, then his or her abandonment of secure or protected tenancy status could assume crucial importance as the detriment necessary to establish a share founded upon an estoppel right or an interest under a constructive trust. It is submitted that, irrespective of legal ownership, the conjunction of the tenant's abandonment of security of tenure and either an express agreement as to shared beneficial ownership or an expectation of the tenant encouraged by the other party as to shared beneficial ownership, should give rise to the appropriate remedy to do justice, namely the award of a share to the tenant. Even if it is accepted, in principle, that this *species* of right or remedy is available, it may be contended that the "detriment" itself is insufficient.

It would be difficult to maintain with any conviction that the abandonment of secure or protected tenancy status does not constitute an actual or potential loss or disadvantage to the tenant. Some of the cases provide poignant reminders of the inherent risk: tenants who, following acquisition, faced the possibility of losing their home[58] or being turned out by an estranged partner,[59] threats which would not have arisen had they chosen to remain tenants. However, is that disadvantage capable of

[56] [1991] 1 A.C. 107, 133A.
[57] (1993) 25 H.L.R. 588, 592.
[58] *Charlton* v. *Lester*.
[59] *Savill* v. *Goodall*.

amounting to a "detriment" within constructive trust or proprietary estoppel doctrine? Unfortunately, such authority as exists on this point is inconclusive and relates to claims made by non-entitled parties against legal owners.

The Court of Appeal has implicitly approved the view that the abandonment of secure tenancy status can constitute at least a part of the detriment required to raise an estoppel against the owner of a legal estate. In *Baker* v. *Baker and Baker,*[60] the 75-year old plaintiff had moved in with his son and daughter-in-law who had purchased a house in Torquay. In the expectation of living there for the rest of his life, the plaintiff had given up a secure tenancy of a council house in Finchley. He had also contributed a substantial sum of money towards the purchase of the new home. Following allegations by his son that he had sexually molested the couple's daughter, the plaintiff left the property. He subsequently claimed a beneficial interest in the house on the basis of his financial contribution. This claim was unsuccessful, it being held that his payment of money constituted a gift. However, his alternative claim based on proprietary estoppel succeeded, though his interest in the property was held to be limited to a right to rent-free occupation for the rest of his life.[61]

Although the first instance formulation of the proprietary estoppel was not discussed directly by the Court of Appeal, its general basis was clearly approved and formed the starting point for consideration of appropriate relief. This formulation indentified two courses of action adopted by the plaintiff in reliance upon his relatives' promise that he could have use of the "granny room" at the house for the rest of his life. The first was his financial contribution to the acquisition; the second was his abandonment of the secure tenancy and his move to Torquay. The judge concluded that "it would be unjust . . . to allow [the defendants] to deny [the plaintiff] any relief in consequence of the detriment that he has suffered pursuant to their promise".[62]

By contrast, in *Burrows and Burrows* v. *Sharp,* a case in which Dillon L.J. considered it "unnecessary to explore [the] technicalities of the law" as to the difference between a proprietary estoppel right and a right by virtue of a constructive trust, his Lordship considered that, so far as satisfaction of the equity was concerned, giving up security of tenure of a council flat was not a significant factor. The respondents had sublet the flat to a friend, thereby relinquishing their own secure tenancy, in order to assist the

60 (1993) 25 H.L.R. 408.

61 Accordingly, the starting point for calculating the sum to be paid to the plaintiff was the value of that right.

62 (1993) 25 H.L.R. 408, 411.

appellant financially in the purchase of her council house.[63] Dillon L.J. took the view that loss of security of tenure was "not so dire" as had been suggested, adding that "[t]here must always, when these sort of arrangements have to be unscrambled, be some aspects for which it is not really appropriate to compensate".[64]

CONCLUSION

The increasing incidence of claims to beneficial entitlement to family property seems set to continue as growing numbers of unmarried partners and various kinds of family member seek recognition of contributions in cash or in kind to the acquisition of the home. The take-up of the statutory "right to buy" scheme since the enactment of the 1980 legislation suggests that the exercise of this right and the tenant's discount will feature in many of these cases. Similar considerations will continue to be relevant in claims by former private tenants who have bought their homes at a discounted price. There has been a developing doctrinal analysis of the tenant's discount, apparently moving away from resulting trust principles towards the infiltration of constructive trust theory and the requirement of agreement between the parties. Given the particular circumstances of discount cases, in which the tenant on acquisition of his or her home not only contributes the benefit of the amount of the discount but also abandons secure or protected tenant status, there are strong arguments of fairness to support the view that the discount should, as a matter of principle, qualify as a contribution sufficient to establish a share in the property. Even if the former tenant is able to call to his or her assistance constructive trust or proprietary estoppel doctrine, the evidential problems surrounding the requirement for agreement could lead to manifestly unjust results. Despite the implications of *Savill* v. *Goodall,* it is urged that the resulting trust analysis, incorporating a characterisation of the tenant's discount as a contribution to the acquisition of property, be retained.

[63] In return for accommodation at the house and for their inheriting the property after the appellant's death, the respondents undertook to look after the appellant's handicapped daughter for the rest of her life.
[64] (1991) 23 H.L.R. 82, 93.

OUTING: THE FAILURE OF UNITED STATES LAW TO PROTECT THE PRIVATE LIVES OF GAYS

*Benjamin Neil**

INTRODUCTION

AN ETHICAL ISSUE PERVADING both politics and the media is the intentional exposure of an individual's sexual orientation by others. *Outing,* as this involuntary exposure has been coined, has several legal ramifications, and individuals whose sexual orientation has been made public seek redress from the courts. The two most utilised causes of action in the United States, namely defamation and invasion of privacy, are often ineffectual. Outing is a term derived from the phrase "coming out of the closet", which signifies the act of publicly acknowledging one's homosexuality.[1] Outing is most frequently committed by either the media or the gay press, and most often results in the involuntary exposure of a public figure's homosexuality. Lately, however, private individuals have also been the victims of intentional outing.

At present, defamation and invasion of privacy are the only causes of action available to victims of the intentional exposure of their sexual orientation. Defamation addresses false statements that injure a person's reputation, and is adequate to handle cases where the allegation of homosexuality is patently false. A cause of action for defamation will not exist, however, when the publicised information is true. Nonetheless, courts may be willing to abandon truth as an absolute defence.

When the publicised information is true, the outed plaintiff must use the tort of invasion of privacy. The outed plaintiff seeking to recover in an action based on the private facts branch (one of four branches) of the invasion of privacy tort must prove that: (1) his or her sexual orientation is a "private fact"; (2) publicity of one's sexual orientation is "offensive to the reasonable person"; and (3) sexual orientation is of "no legitimate concern to the public".[2] This test (the "private facts" test) is unfair to private individuals and those in the public arena whose sexual orientation has previously been publicly disclosed and is therefore unworkable in the

* Assistant Professor, Towson State University, Maryland. The discussion in this article is solely by reference to the law of the United States. Specific attention is occasionally drawn in the text to the fact that it is United States law which is under discussion. Although the convention in the United States is for the dates of cases to appear at the end of case citations, the English practice has been adopted throughout of giving the date first.

1 *A Popular Guide To Words In The News* (S. Tulloch, ed.), Oxford University Press, Oxford, 1992, describes outing thus: "To expose the homosexuality of a prominent or famous person; to force someone to come 'out of the closet'; also as an action noun 'outing'; the practice or policy of making such a revelation, especially as a political move on the part of the gay rights activists".

2 Second Restatement of Torts, § 652D (hereafter *"Restatement"*).

context of outing. A strict interpretation of this three-pronged test disallows homosexuals the ability to disclose their sexual orientation when and to whom they choose. In addition, it ignores the reality that gay people still suffer discrimination and remain victims of hostility. Finally, outings of public figures are often protected by the First Amendment of the United States Constitution,[3] which places an unfair emphasis on the status of the plaintiff.

This work asserts first that all persons are private individuals for the purposes of their sexuality unless their sexuality directly affects a matter of legitimate public concern. Therefore, an individual's status, whether public or private, should be disregarded. Secondly, the three-pronged private facts test must be reinterpreted so that sexual orientation is always considered a private fact and that *publication* of homosexuality (as distinct from homosexuality itself) is recognised as being highly offensive to the reasonable person because of the actual harm it causes. Finally, the newsworthiness defence,[4] which addresses the third prong of the test, must also be revised. A revised standard of newsworthiness, which would be sensitive to the nature of the information involved and under which disclosure of a person's homosexuality would have to be relevant to a matter of legitimate public concern, in order to qualify for First Amendment protection, would also make the tort viable to outed plaintiffs.

LEGAL ISSUES IN OUTING CASES

There has always been constitutional protection for individuals against the public dissemination of sensitive personal information by the *government.* The government cannot publish false statements about individuals or true statements about persons where those true statements refer to personal matters. If the government is to disclose private facts, it must demonstrate a legitimate state interest which is found to outweigh the threat of the plaintiff's privacy interest.[5]

[3] One of the protections guaranteed by the First Amendment is "freedom of speech", a broad right which is frequently used by the media to allow them to publicise information about public figures. Defamation and invasion of privacy are two primary limitations on the First Amendment right of free speech, but public figures are generally less protected than private individuals.

[4] Newsworthiness is a defence to the publication of private facts which specifically addresses the requirement that a plaintiff's private matters must not be of legitimate public concern. If a private fact is considered newsworthy, it will not be actionable, no matter how much it may violate ordinary decencies. For example, in *Bremmer* v. *Journal Tribune Co.* (1956) 76 North Western Reporter, Second Series 762, the court held that the publication of a picture of the decomposed body of the plaintiff's child, who had been missing, was newsworthy and therefore not actionable as an invasion of privacy.

[5] (1990) 911 Federal Reporter, Second Series 1066.

Discussion of one's sexual orientation is rarely, if ever, a matter of legitimate public concern. The intention of someone publishing the fact of homosexuality is to embarrass, shock or harass. Often the disclosure is intended to produce sympathy for the homosexual community or to enlighten others about hypocritical policy. However, the individual's interest in avoiding disclosure of personal matters and his or her interest in maintaining control over when and how to make certain personal decisions should almost always override the public's right to know about his or her sexual orientation.

There has been little caselaw on the subject of outing. However, intentional exposure by others of one's homosexuality involves complicated legal issues because it pits two important constitutional rights against each other - the individual's right to privacy[6] and the media's First Amendment right to freedom of speech.[7] When privacy rights have come into conflict with legitimate First Amendment interests, the right to privacy has usually lost.[8] The "newsworthiness" defence available in both defamation and invasion of privacy actions has made it extremely difficult for public figures, both voluntary and involuntary, to prevail.[9] As unsatisfactory as defamation and invasion of privacy may be, however, outed plaintiffs currently have no other choices of causes of action.[10]

DEFAMATION IS INADEQUATE

A plaintiff in a defamation action must prove that the defendant has published a statement that tends to hold him or her up to "hatred, contempt, or ridicule, or causes him [or her] to be shunned or avoided".[11] A defendant who communicates a defamatory statement intrudes upon the plaintiff's interest in his or her reputation and good name. To create liability for

6 Described by L. Brandeis and S. Warren in "The Right to Privacy" as "the right to be left alone" (1890) 4 Harvard Law Review 193.

7 First Amendment to the United States Constitution.

8 J.P. Elwood, "Outing, Privacy and The First Amendment" (1992) 102 Yale Law Journal 747, 750.

9 J.P. Elwood, *op. cit.*, Note 8 above. A "voluntary" public figure is, *e.g.*, a sports personality, politician, *etc.* An "involuntary" public figure is *e.g.*, the parent of a kidnapped child, thrust into the media spotlight.

10 It would appear that a plaintiff would have a cause of action for intentional infliction of emotional distress. However, a plaintiff who brings a suit for defamation has no separate cause of action for emotional distress, because defamation engulfs it; the emotional distress claim is based only on the allegation underlying the defamation claim. The amount of distress experienced by the plaintiff is analysed in the context of the estimation of damages *(Dworkin* v. *Hustler* (1987) 668 Federal Supplement 1408).

11 W.P. Keeton *et al., Prosser and Keeton on Torts,* 5th ed., West Publishing Co., St. Paul Minnesota, 1984, p. 773 (hereafter *"Prosser and Keeton on Torts").*

defamation, however, the matter publicised must not only be defamatory but false.

Under the common law, truth constituted an absolute defence to a charge of defamation. However, United States courts have recently tried to balance the competing interests of the individual's reputational interest and the public's right to access to relevant information. Therefore courts have imposed a fault requirement with respect to truth or falsity. Without this fault requirement, the potential liability for inevitable mistakes in reporting what is believed to be true would unduly hinder important speech and would chill the press from publishing the disparaging truth for fear of being unable to prove it.[12]

In the 1964 case of *New York Times* v. *Sullivan,*[13] the Supreme Court brought defamation law within the scope of the First Amendment. In *Sullivan,* the Police Commissioner of Montgomery, Alabama, brought a libel action against *The New York Times* and four Alabama clergymen for a full-page advertisement taken out to raise funds for the civil rights efforts of Martin Luther King, Jr. Police Commissioner Sullivan argued the advertisement was defamatory because it alleged police mistreatment of Martin Luther King and protesting students and was factually incorrect. The court held that the First Amendment prohibits a public official from recovering damages for a defamatory statement relating to his or her official conduct unless the official proves that the statement was made with actual malice. The court defined actual malice as "knowledge that [the statements] were false or reckless disregard by the defendant of the truth of the statements".[14] The *Sullivan* court found that the proof of actual malice was not of "convincing clarity", that *The New York Times'* failure to check the facts in the allegedly defamatory advertisement did not constitute actual malice and that the alleged attack on Sullivan was too abstract to be "of and concerning" him because he was not identified by name.[15]

Although the court extended the *Sullivan* actual malice standard established for public officials to public figures, the court has refused to extend it to private individuals. In *Gertz* v. *Robert Welch, Inc.*,[16] the court held that a publisher or broadcaster of defamatory falsehoods about a private individual *(i.e.* someone not a public figure or a public official) could not claim the *New York Times* protection against liability on the

[12] *Prosser and Keeton on Torts,* p. 771.
[13] (1964) 376 United States Supreme Court Reports 254. (This series of reports is hereafter referred to by the initials "U.S.".)
[14] (1964) 376 U.S. 254, 279-80.
[15] (1964) 376 U.S. 254, 285-91.
[16] (1974) 418 U.S. 323

ground that the defamatory statements concerned an issue of public or general interest and that a private individual need only show that the defendant acted with negligence as to the truth or falsity of the statement. In 1976, *Time, Inc.* v. *Firestone*[17] further clarified the definition of who is a public figure by holding that a Florida socialite who had been through a public and bitter divorce was nevertheless not a public figure and that the press was not free from liability for negligently publishing false defamatory statements about her sexual misconduct. The court's holding stems from its view that gossip about the rich and famous is not a matter of legitimate public interest.

Time, Inc. v. *Firestone* is helpful to outing victims because it suggests that all persons, famous and obscure alike, are private figures for the purposes of their marital status. The argument can then be extended to say that all persons are also private figures in relation to their sexuality. The holding is supported by the *Restatement's* comment that "there may be some intimate details . . . such as sexual relations, which even the actress is entitled to keep to herself".[18]

Courts have consistently held that false accusations of homosexuality would be the basis of a defamation action. As recently as 1981, a New York court held that a letter which appeared in a state university student newspaper falsely identifying the supposed authors as members of the gay community was a "libel *per se*" because the publication of the letter caused "an unsavory opinion of the claimants to settle in the minds of a substantial number of persons in the University community".[19] At the time the letter was published, "deviant sexual practices" were crimes in the State of New York. Those in the University community who did not personally know the plaintiffs would conclude that they were homosexual and thus would assume that they engaged in illegal homosexual acts. Therefore the court concluded that the plaintiffs were libelled *per se*.[20]

Regardless of the truthfulness of the allegations of homosexuality, defamation would be a cause of action available to outing victims. Courts

17 (1976) 424 U.S. 448.

18 *Restatement*, § 652D, Comment h.

19 *Mazart* v. *New York* (1981) New York Supplement, Second Series 600. Something which is libellous *per se* consists of written or printed words of such a nature that when applied to a person they will necessarily cause injury to that person in his or her personal, social, official or business relations, so that legal injury may be presumed from the bare fact of publication. The term also covers the situation where the words are so obviously hurtful to the person aggrieved by them that no explanation of their meaning and no proof that they are injurious is required to make them actionable.

20 See also *Matherson* v. *Machello* (1984) 473 New York State Reporter 998, where a husband and wife brought a defamation action against a record company for statements which falsely alleged that the husband was a homosexual. Also *Dally* v. *Orange County Publications* (1986) 497 New York Supplement, Second Series 947, 948, where a deputy sheriff was mistakenly listed as the contact person for a gay community centre in an advertisement placed in a local newspaper.

should abandon the common law defence of truth in defamation actions, when the fact at issue relates to sexual orientation. A defamation action seeks redress for harm to the plaintiff's reputation; a truthful allegation of homosexuality causes reputational harm to the plaintiff, who has chosen not to disclose his or her sexual orientation to the entire world.

In addition, the courts will repeatedly find that it is impossible to judge the truth or falseness of allegations of homosexuality. It is impossible to state that a certain number of sexual experiences with a member of the same sex would positively classify someone as being gay. Short of a public declaration, it is often difficult to categorise another's sexuality or sexual preference. Furthermore, sexuality is not the same as sexual activity. The distinction is the difference between what someone *is* and what someone *does*. Since an outing is a disclosure of what someone is and not what someone does, it does not fit into the traditional scheme used by courts to determine truth or falsehood in defamation cases.

Despite the problems involved in bringing an action for defamation, outing victims repeatedly use the tort to seek legal redress. Perhaps the victim is actually heterosexual or perhaps he or she did not want his or her true sexual orientation known. However, outing victims who characterise their homosexuality as a "private fact" will lay the foundation for a cause of action within invasion of privacy.

INVASION OF PRIVACY AS A SATISFACTORY REMEDY

The basis of the right to privacy is the individual's right to be left alone. The common law tort of invasion of privacy is different from the Constitutional right of privacy.[21] Whereas both privacy rights preserve the individual's "inviolate personality" and both require the balancing of private facts against the public's legitimate concern for knowledge, common law invasion of privacy seeks redress against private individuals. The Constitutional right limits wrongs by a government entity.[22]

An invasion of privacy has been likened to "an appropriation of interest in personalty"[23] and the right to privacy has been included as "part of the right to liberty and the pursuit of happiness".[24] Both invasion of privacy and

[21] See *Griswold* v. *Connecticut* (1965) 381 U.S. 479 as the pre-eminent case espousing the constitutional right to privacy, holding that marital relationships lie within a constitutionally protected zone of privacy.

[22] J.P. Elwood, *op. cit.*, 751.

[23] *Barber* v. *Time, Inc.* (1942) Missouri Supreme Court Reports 1199, 1205, citing Green, "The Right of Privacy", 27 Illinois Law Review 237.

[24] *Barber* v. *Time, Inc.* (1942) Missouri Supreme Court Reports 1199, 1205. The right to liberty and the pursuit of happiness are fundamental rights guaranteed to all United States citizens by the United States Constitution and bill of rights.

defamation address the harms to an individual's dignitary interests. In a defamation case, however, the harm is to the individual's reputation. In an invasion of privacy claim, the primary damage is the mental distress that the individual suffers from, having been exposed to the public view.[25] Invasion of privacy can also result in harm to one's reputation. This harm is therefore considered when determining damages caused by the exposure.

The invasion of privacy tort, as stated in the *Restatement,* includes four branches.[26] Each branch, however, is not an exclusive cause of action. Because privacy may be invaded by the same act or by a series of acts in two or more of the ways stated in the *Restatement,* the plaintiff may maintain an action for invasion of privacy upon any of the four grounds.[27] Of the four grounds, publicity given to private matters (also known as the "private facts" tort) seems the most appropriate for outing victims. As previously noted, the three requirements for recovery under this cause of action are: (1) the publication (public disclosure) of private facts (not previously disclosed); (2) which are highly offensive and objectionable to the reasonable person; and (3) which are of no legitimate concern to the public.[28] Courts have long struggled with attempting to define what is encompassed by privacy and what may be known by the public. Some aspects of life are necessarily open to the public gaze and the law will not protect those individuals who are hypersensitive.[29] A 1985 Alabama court in *Logan* v. *Sears, Roebuck & Co.*[30] depended on the "offensiveness" prong of the invasion of privacy/private facts tort, when it addressed the issue of whether a derogatory allegation of homosexuality constituted an invasion of privacy. The plaintiff sued Sears for both the tort of outrage and the tort of invasion of privacy, when he overheard a Sears employee state that "this guy is queer as a three dollar bill". The court did not believe that the intrusion upon this plaintiff's seclusion was "so extreme or outrageous as to offend the sensibilities of an ordinary person similarly situated". In its

25 *Time, Inc.* v. *Hill* (1967) 385 U.S. 374, 386.

26 *Restatement:* intrusion upon seclusion (§652B); appropriation of name or likeness (§652C); publicity given to private life (§652D); and publicity placing person in a false light (§652E).

27 *Restatement,* § 652A, Comment d.

28 *Prosser and Keeton on Torts,* § 117.

29 See *Sidis* v. *F-R. Publishing Co.* (Second Circuit 1940) 113 Federal Reporter, Second Series 806, where a magazine which published a story about a former child mathematical prodigy, now a recluse, was held not to have invaded the individual's privacy; and *Melvin* v. *Reid* (California Court of Appeals, 1931) 297 Pacific Reporter 91, in which the defendant had produced a film based on the life of the plaintiff who, eight years earlier, had been a prostitute tried and acquitted of murder and where the disclosure had been held to be offensive, since not enough time had passed since the trial; and *Cason* v. *Baskin* (Florida, 1944) 20 Southern Reporter, Second Series 243, where the court acknowledged that "even a flattering portrait, if it contains highly personal characteristics or conduct, could constitute an invasion of privacy".

30 (Alabama, 1985) 466 Southern Reporter, Second Series 121.

reasoning, the court assumed that the ordinary person similarly situated is not gay. The court noted that the plaintiff had no objection to being called homosexual or gay but simply objected to the word "queer".[31] While the court admitted that the ordinary gay person might find the epithet "queer" highly offensive when applied to homosexuals, it was not a term which the ordinary (straight) person would find highly offensive.

The third requirement of the private facts tort is that the public must not have a legitimate interest in having the information made available.[32] A zone of privacy exists even within a matter that is of legitimate public interest or concern. In *Virgil* v. *Time, Inc.*,[33] the court made a two-part inquiry to determine whether a *Sports Illustrated* article published private facts without the plaintiff's consent. First, it ascertained whether the information was generally known and whether the disclosure was made to the public at large.[34] It then considered whether the facts were of a legitimate interest to the public which, if so, would give them the protection of the First Amendment.

The court used the following standard for determining what is a matter of legitimate public interest and therefore newsworthy:[35]

> [A]ccount must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into public lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.

This test needs revision because of the emphasis on community mores, which suggests that just because the community is not shocked by the revelations of homosexuality, it somehow deserves to have access to that information. It also blurs the distinction between a disclosure that is offensive and objectionable and one that is protected as newsworthy. The

31 (Alabama, 1985) 466 Southern Reporter, Second Series 121, 123.
32 *Restatement*, § 652D.
33 (Ninth Circuit, 1975) 527 Federal Reporter, Second Series 1122.
34 (Ninth Circuit, 1975) 527 Federal Reporter, Second Series 1122, 1126.
35 (Ninth Circuit, 1975) 527 Federal Reporter, Second Series 1122, 1129.

requirement that a disclosure be "offensive and objectionable" should be viewed primarily as a means to separate disclosures that are particularly violative of a plaintiff's privacy from those that are merely inconvenient or embarrassing which are not protected by the private facts tort. The courts should have no problem finding a disclosure of homosexuality highly offensive because it exposes an individual to hatred, prejudice and discrimination.

The other reported cases, *Sipple* v. *Chronicle Publishing Co.*[36] and *Diaz* v. *Oakland Tribune, Inc.*[37] directly involve claims of invasion of privacy with respect to sexual orientation or identity. *Sipple* involves an actual case of outing and *Diaz* involves the public exposure of an individual who had gone through a sex-change operation.

The court in *Sipple* addressed the issue of whether sexual orientation constituted a private fact within the meaning of the tort.[38] Sipple, a gay ex-marine, was inadvertently thrust into the public spotlight when he struck Sarah Jane Moore in the arm as she attempted to assassinate President Gerald Ford. An article was published, which alluded to the fact that Sipple was gay. At the time, Sipple had not disclosed his sexual orientation to his family. He sued several columnists and newspapers for invasion of privacy, claiming that the defendants had published private facts without his authorisation and consent.

The California Court of Appeals, First Appellate District, held that Sipple's homosexuality was not a private fact. The court said that Sipple's homosexuality and participation in gay community activities was well-known by "hundreds of people in a variety of cities, including New York, Dallas, Houston, San Diego, Los Angeles and San Francisco".[39] The *Sipple* court did not, however, hold that sexual orientation could *never,* under any circumstances, be deemed a private fact within the meaning of the tort. Rather, the court maintained that when a person's sexual orientation is held as "open to the public eye", as was Sipple's, it ceases to be private.

One may ponder, then, that if one's sexual orientation is widely known, the public disclosure of one's homosexuality ceases to fall under the definition of outing. Sipple disclosed his homosexuality to the gay community and to certain other select groups of people. However, he never intended to disclose his homosexuality to the general public or in other areas of his life. By declaring that Sipple's sexual orientation was no longer a "private fact", the court took away Sipple's right to choose when, how and

36 (Court of Appeals, 1984) 201 California Reporter 665.
37 (Court of Appeals, 1983) 188 California Reporter 762.
38 (1984) 201 California Reporter 665, 666.
39 (1984) 201 California Reporter 665, 669.

to whom he identified himself as a gay person. Yet the court also failed to offer a determination of *when (i.e.* at what level of disclosure) sexual orientation should cease being considered a private fact. Because Sipple participated in numerous activities in the gay community, the court decided that Sipple had forfeited his right of privacy.

The court's decision that Sipple's homosexuality was not a private fact eliminated the need to reach a decision regarding the second prong of the *Restatement's* test, *i.e.* whether a public disclosure would be "highly objectionable to the reasonable person". However, given San Francisco's large and politically active gay population, it is highly probable that, even if the court had held that Sipple's sexual orientation was a private fact, it would have used a local standard rather than a nationwide standard for reasonableness and would have held that the publication of his homosexuality would not be objectionable or offensive to the reasonable citizen of San Francisco. This part of the test potentially discounts the actual harm suffered by the outing victim, in spite of his or her own community's acceptance and tolerance of homosexuality.

The *Sipple* court also held that publication was newsworthy.[40] The court used the newsworthiness test formulated by the Ninth Circuit[41] in *Virgil* v. *Time, Inc.* The court reasoned that the local community had known of Sipple's orientation and that the community itself, with its large gay population, would not be so offended as for its notions of decency to be shocked. Using such a local as opposed to a nationwide standard of reasonableness in a determination of what is highly objectionable to a reasonable person creates a non-standard due to the great variance between communities. According to the *Virgil* court's reasoning, every community's notion of decency will be a determining factor of what is reasonable in that community. However, the very vagueness of the conditions upon which this community standard is set *(e.g.* decency) seems to make it useless, a non-standard. The use of a community or a local standard has, however, been successfully applied in Supreme Court obscenity cases.

The *Sipple* court also believed that newspapers were not motivated by a prurient interest in Sipple's private life but rather by a sincere desire to "dispel the false public opinion that gays were timid, weak, and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory bias against homosexuals". The latter argument for newsworthiness is far more convincing, since the issue of Sipple's homosexuality can then be seen as

[40] (1984) 201 California Reporter 665, 669.

[41] In the United States, the Federal Appellate Courts are divided into circuits according to area of the country; there are nine Circuit Courts in total.

directly affecting a matter of legitimate public concern.

The second case, *Diaz* v. *Oakland Tribune, Inc.*, is not an outing case but is extremely helpful to outing victims in its analysis of sexuality and privacy. The case involved a newspaper columnist's revelation that Toni Diaz, the first female student body president of a California college, had been born a male named Antonio Diaz and had undergone a sex-change operation.[42] The disclosure of Diaz's transsexuality was irrelevant to the matter reported by the newspaper and was thus unnewsworthy. The court explained that "[t]he fact that she is a transsexual does not adversely reflect on her honesty or judgment. Nor does the fact that she was the first woman student body president, in itself, warrant that her entire private life be open to public inspection".[43] The court refused to believe that the disclosure was published for any reason other than shock value. Using the *Restatement's* test for newsworthiness, the court saw the story as a "morbid and sensational prying into private lives for its own sake".[44] Significantly the court further stated that "[p]ublic figures more celebrated than she are entitled to keep some information of their domestic activities and sexual relations private".[45] This last comment shows the court's acknowledgement that sexuality and sexual relationships are a private matter and leads one to believe that, despite the different factual situation, *Diaz* is ultimately more helpful to an outing victim than *Sipple.*

The court's comments about the nature of the sexual identity of a private individual and the relevance of sexual identity to matters of public concern may serve as a guideline to other courts, especially in a situation where the plaintiff is a private individual whose outing has not taken place within any kind of newsworthy context.

CONSTITUTIONAL LIMITATIONS ON INVASION OF PRIVACY ACTIONS

The constitutional limitations that are guaranteed to the press in defamation actions are also imposed upon invasion of privacy claims. In *Time, Inc.* v. *Hill,* a family who had been held captive in their home by escaped convicts brought an invasion of privacy suit against a writer who had

42 (1983) 188 California Reporter 762, 765.
43 (1983) 188 California Reporter 762, 773.
44 (1983) 188 California Reporter 762, 767.
45 (1983) 188 California Reporter 762, 773.

written a play about the crime and against *Life Magazine,* which had run an article about the play with pictures detailing the true incident. The court recognised the existence of a private sphere that warranted protection.[46]

The Supreme Court has never ruled directly on the constitutionality of the private facts tort. However, four decisions[47] in the last twenty years illustrate the Supreme Court's reluctance to protect information about private individuals from the reach of the First Amendment. In each of these cases, the court focused on the fact that the information made public by the press was already in the public domain by being a matter of public record. The court, however, had deliberately left *open* the question of whether the publication of truthful speech can ever invade one's privacy. The most recent invasion of privacy case, *Florida Star* v. *B.J.F.,* dealt with a conflict between a state law and a federal constitutional requirement. A Florida statute prohibited publication of the names of sexual assault victims in public documents, including police reports.[48] Police disclosed a rape victim's name in a report that was later mistakenly placed in the press room. Ignoring the law and its own internal policy, *The Florida Star* published the name of the victim. The court held that the newspaper was not liable, relying on the rule articulated in *Daily Mail:* "If a newspaper lawfully obtains truthful information about a matter of public significance, then State officials may not constitutionally punish publication of the information, absent a need to further a State interest of the highest order".[49] Whilst recognising that protecting the privacy and the physical safety of rape victims, along with the goal of encouraging victims to report rapes without fear of exposure, were certainly important State interests, the Supreme Court held that imposing liability was not a narrowly-tailored enough means of achieving those goals.[50] Instead, the court blamed the police department, which should have had a procedure in place for preventing this type of leakage of information and suggested that perhaps the victim should seek restitution from the government for her loss of privacy.[51]

In *Florida Star* and its three immediate predecessors, the court applied

46 (1967) 385 U.S. 374, 383, note 7: "Revelations may be so intimate and ... unwarranted in view of the victim's position as to outrage the community's notions of decency".

47 *Florida Star* v. *B.J.F.* (1989) 491 U.S. 524; *Smith* v. *Daily Mail Publishing Co.* (1979) 443 U.S. 97; *Oklahoma Publishing Co.* v. *District Court* (1979) 430 U.S. 308; and *Cox Broadcasting Corporation* v. *Cohn* (1975) 420 U.S. 469.

48 (1989) 491 U.S. 524, 528.

49 (1989) 491 U.S. 524, 533, citing 443 U.S., 103.

50 (1989) 491 U.S. 524, 536.

51 (1989) 491 U.S. 524, 538.

a balancing test, weighing the individual's right to privacy against the press's right to print information that was already public. By focusing narrowly on the facts of each case and confining its holdings to those facts, the Supreme Court has created a "public records exception" and has further implied that the press is not always accorded absolute protection under the First Amendment for truthful disclosures. Thus clearly the court has not constitutionally *prohibited* the possibility of an invasion of privacy suit in all cases where the information is truthful.

CONCLUSION

Current defamation law does not clearly protect the reputational interests of the outed plaintiff under its existing legal categories. It is extremely difficult to define the term "gay". In addition, there is a problem of verification. Thus, courts cannot easily pigeon-hole homosexuality into the rigid categories of truth and falsehood. A defamation action might be viable in an outing situation if courts did not require that the defamatory statement be false and instead concentrated on the damage to the plaintiff's reputation which, at common law and prior to the Supreme Court's imposition of First Amendment limitations on liability for media defendants, was presumed.[52] Abandonment of a common law defence, however, would be a radical change for United States courts and is therefore not likely to occur.

A reinterpretation of the private facts tort is a more workable solution in that it does not represent a radical change, especially if one considers the views of Brandeis and Warren, Prosser, not to mention the authors of the *Restatement,* all of whom considered sexual relations to be a private matter. Currently, invasion of privacy lawsuits will be unsuccessful for all but the most closeted private individuals, unless courts take the emphasis away from the status of the plaintiff and instead focus on the content and context of the outing speech. They must also distinguish sexual activity from sexual orientation. They must hold that while sexual activity may sometimes fall into the public realm, sexual orientation falls into a truly private, internal realm that the Supreme Court has not precluded from protection.[53] Following this premise means that public figures would still face the same problems of overcoming newsworthiness but might prevail if they were able

[52] *Prosser and Keeton on Torts,* §112.

[53] "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press . . ." *(Florida Star* v. *B.J.F.,* 541.).

to prove that their sexual orientation had no legitimate connection with their status in society or to the public matter or controversy in which they were involved. A reinterpretation that recognises that sexual orientation is, *per se,* a private fact would allow most gay people who are ordinary citizens, to live normally. It would allow them to associate freely with other gay people and yet retain their autonomy with respect to those to whom they choose to disclose their sexual orientation. At present, the law does not allow them to do that.

DESIGN AND BUILD: THE LEGAL PRACTICE COURSE AT NOTTINGHAM LAW SCHOOL

Scott Slorach and Stephen Nathanson***

I. INTRODUCTION

IN 1990, THE LAW SOCIETY OF ENGLAND AND WALES started a revolution in legal education. It decided to replace The Law Society Final Examination ("LSF") with a new course, the Legal Practice Course ("LPC"), which would include the teaching of legal skills, and which would soon render the Law Society-controlled, knowledge-based LSF a distant memory.

The LPC's mandate to teach legal skills was in itself unremarkable. Several other post-LL.B, pre-admission courses around the world, including the English Bar Finals Course, had already developed sophisticated skills-teaching methods.[1] Much more significant, however, was The Law Society's decision to devolve much of the responsibility for professional legal education onto individual teaching institutions, who would be required to design their own LPCs based on a set of predetermined objectives, apply to The Law Society for validation, deliver their own courses, and assess their own students, subject to regular Law Society monitoring.[2]

This decision unleashed the creative energies of hundreds of law teachers and lawyers around the country. They did research, studied methods developed abroad, held conferences and workshops, experimented and innovated, learned to use new concepts and a new vocabulary, and wrote thousands of pages of books and teaching materials. The LPC was launched in autumn 1993, and by the end of the first year an entirely new legal-education culture had taken root. In the space of just three years, new teaching institutions sprang up and old ones were transformed.

This article is about the process of transformation of Nottingham Law School, in which a team of law teachers – *designers* – took on the job of designing and developing the Nottingham Law School LPC. We called this job a "design and build" project, the architectural analogy being apt not only because of the new building Nottingham constructed to house its LPC,

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1 For an overview of professional skills teaching and how it has influenced professional legal education, see generally N. Gold, "Learning Lawyers' Skills: Research, Development and Evaluation" in *Future Prospectus in Learning Lawyers' Skills"*, N. Gold, K. Mackie, W. Twining, eds., London, 1989, p. 317.

2 See generally, "Training Tomorrow's Solicitors", 17 May 1990, The Law Society, London, especially pp. 39-41.

but also because of the enormous design complexities of the project as a whole. Many different elements – curriculum, materials, financial plans, physical plant, library, pastoral care facilities, administrative procedures, teacher training, printing facilities - had to be fitted together into a complex whole that would effectively prepare students for practice.

II. THE EVOLUTION OF THE LPC

In a way the LPC is an outgrowth of, and a response to, an educational system dominated by the LSF. Building on the old six month "Part 2" course and introduced in 1979, the LSF was a critical step in the "vocational" stage of students" legal education. After the first, "academic" stage of a law degree, or non-law degree topped up with the Common Professional Examination (CPE), students went on to do a full-time course of approximately thirty-five weeks leading to the LSF. On successful completion of the LSF, students could enter into articles with a firm of solicitors for two years, after which they were eligible to apply for admission as solicitors.

By the mid-1980s the limitations of a system based on centrally designed and administered written examinations were evident to many of those involved in the LSF. In 1990 The Law Society cited several of these limitations in a Consultation Paper authored by its Training Committee,[3] and in a set of final proposals approved by The Council of The Law Society on 17 May.[4]

The most significant of these limitations from The Law Society's viewpoint was that the LSF course focused too strongly on written examination preparation and in effect became a memory test of legal knowledge. The Law Society felt that students should learn legal skills but that these could not be learned or tested in an environment dominated by centrally-set written examinations.[5] It identified "a need to restore the balance by giving proper emphasis to the development of practical skills as well as to the acquisition of legal knowledge"[6] and proposed that, whilst there should continue to be a core syllabus, determination of syllabus detail and examinations should be decentralised. (The Law Society would, however, monitor syllabi and examinations through a combination of

3 "Training Tomorrow's Solicitors: Proposals To Changes To The Education and Training of Trainee Solicitors", February 1990, The Law Society, London.
4 Note 2 above.
5 Note 2 above, p. 22.
6 Note 3 above, p. 2.

external examiners and an annual monitoring visit to each provider.)

Following extensive consultations with the legal profession and teaching institutions, the decision was taken to introduce the new Legal Practice Course,[7] which would place a greater emphasis on practical skills required by solicitors, whilst retaining the teaching of core subject areas. In addition, in recognition of increasing specialisation in practice, institutions could offer optional subjects – a change from the rigid format of the LSF, in which every subject was compulsory.

The Law Society determined the content of the LPC, and drew up general course aims and objectives. It prescribed four compulsory core subjects: business law and practice, conveyancing, probate, and litigation (civil and criminal). Another four subjects were to be introduced into the curriculum wherever relevant: they were to "pervade" the curriculum, coming up at strategic points. These "pervasives", as they were subsequently termed, are professional conduct and ethics, revenue, European Union law, and financial services. The Law Society also identified five core skills:[8] advocacy, interviewing and advising, writing and drafting, negotiation, and research. As for optional subjects, institutions could choose which ones to offer, with The Law Society's approval.

Using this general framework and the more specific objectives deriving from it,[9] institutions could design an LPC and apply to The Society for validation. Validation documentation had to include particulars of every aspect of the proposed courses, from course content, structure and methods of assessment, to available resources such as accommodation, library, information technology, and pastoral care facilities.

III. LAYING THE GROUNDWORK

Nottingham Law School had run the LSF course since it began, with an annual intake of around 150 students. Work began on the development of the LPC in mid-1990. Nottingham viewed the new course as an opportunity to expand its provision of professional legal education by increasing the number of full-time students and also offering the LPC on a part-time basis.

To lay the groundwork, the designers studied existing professional skills courses, especially the PLTC in British Columbia and the PCLL at Hong

7 Note 2 above.

8 Much of the research in the process of identifying appropriate elements of the curriculum to teach was performed by Kim Economides and Jeff Smallcombe. See "Preparatory Skills Training For Trainee Solicitors", Research Study No. 7, Research and Policy Planning Unit, The Law Society, London, 1991.

9 The Law Society commissioned Phil Jones to do the drafting of the objectives, which are detailed below in Note 13.

Kong University, visiting these institutions and receiving assistance with the staff development programme. Their approach was both conservative, seeking to build on accumulated LSF experience, yet self-consciously open to new ideas, absorbing and adapting a variety of curriculum-design and skills-teaching methods successfully developed by others.

Because of the planned increase in student numbers and the need for special facilities, it was soon realised that this was a major commercial undertaking generating many resource issues. The need to plan the project in a systematic and professional manner led to the formation of Nottingham Law School Limited, a private limited company through which Nottingham professional courses are run.[10]

Nottingham Law School Limited produced a business plan to support the development of the course, and this included the provision of purpose-built facilities for the LPC and other professional courses. The new building has a state-of-the-art lecture theatre, seminar rooms equipped to support practical, interactive large and small-group session work, a library, designed more as a practical than an academic facility, and a computer resource room, with word-processing and legal research IT facilities, including on-line databases.

Nottingham's full-time LPC was validated in Spring 1992, followed later that year by the two modes of the part-time LPC.[11] After much hard work, accomplished at a hectic pace, the Nottingham LPC commenced in September 1993.[12]

IV. DESIGN PHILOSOPHY

The aims and objectives of the Nottingham LPC, of course, correspond

[10] Nottingham Law School Limited has a board of directors consisting of members of the Nottingham Law School managements team, representatives of the Nottingham Trent University directorate and senior practitioners. Its existence puts the Nottingham LPC in a unique position, since the course is accountable not only to The Law Society and the Nottingham Trent University but also to Nottingham Law School Limited.

[11] In addition, from September 1994, three other institutions were validated to deliver the Nottingham LPC, under joint venture agreements: BPP Law Courses Ltd., Bournemouth University and Liverpool John Moores University. Prior to their commencing delivery of the course, teachers at these institutions (called "Joint Venture Partners" or "JVPs") attended staff development workshops at Nottingham and observed teachers conducting classes. Communication and monitoring systems have been developed: course and subject leaders liaise on provision of materials, teaching methods and assessment and Nottingham staff make regular visits to observe classes, enabling staff development needs to be assessed and relevant staff training put in place.

[12] It should be noted that, because of resource limitations, the designers put the course together without giving up their duties as teachers on the LSF.

with The Law Society's written objectives.[13] However, the designers felt it would be helpful to both the development and delivery of the course to simplify these objectives, directing student and teacher attention to what the Nottingham LPC would try to achieve, in the broadest possible terms.

For example, the first five objectives ((i) to (v)) and the eighth ((viii)) deal with the ability to perform legal skills and transactions required to solve clients' problems, whereas objectives (vi), (vii) and (ix) deal with the ability to learn from experience and to develop awareness of competence limits, which the designers interpreted as the development of professional attitudes, in particular, attitudes professionals should have in their approaches to learning. Thus The Law Society objectives could be "boiled down" to an easily understood two-part aim, which became the theme round which the course was designed: to enable students to prepare for practice by learning (a) how to solve clients' legal problems; and (b) to adopt attitudes which encourage professionalism.

The design of the curriculum around the theme of legal problem-solving had considerable theoretical support. Stewart came up with the idea in Australia in 1979,[14] and in 1989 Nathanson advocated the notion that, since solving problems is the essence of legal practice, legal problem-solving should be the primary goal of legal education and all knowledge and skills in the curriculum should be connected to that goal.[15] In 1992, the American Bar Association's MacCrate Report, after conducting extensive research, identified problem solving as the most fundamental of all legal skills.[16]

The Nottingham designers identified three basic ingredients of problem-solving ability: *knowledge* (of procedural and substantive law as well as

[13] The Law Society's general course aims and objectives were as follows:
"Aims of the course: (a) to prepare the student for general practice; (b) to provide a general foundation for subsequent practice. The student should be able to: (i) perform, with understanding, the skills and tasks required to complete transactions, in a manner which effectively achieves the client's and solicitor's objectives; (ii) identify the client's objectives and different means of achieving those objectives; (iii) identify the steps and decisions that need to be taken to implement those objectives; (iv) identify any difficulties that may arise in implementing those steps and procedures; (v) perform the skills and tasks under the supervision normally and properly accorded to the trainee; (vi) make the most of the experience which follows and gain the confidence necessary for competence in practice; (vii) from the experience of the course and from future practice; (viii) transfer skills learnt in one context to another; and (ix) demonstrate an awareness of the limits of their own competence and know when to ask for assistance".

[14] R. Stewart, *Curriculum Development For The Practical Legal Training Course*, Sydney, 1979.

[15] S. Nathanson, "The Role of Problem Solving in Legal Education" (1989) 39 The Journal of Legal Education 167, 183.

[16] "Legal Education and Professional Development - An Educational Continuum", Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 138, Chicago, 1992 ("The MacCrate Report").

transactional knowledge)[17] relevant *skills*,[18] and *attitudes*. For example, a claim for damages arising from a road traffic accident would require knowledge of the law of negligence; knowledge of relevant court procedures; skills such as interviewing, drafting, negotiation and advocacy; and professional attitudes in order to deal with ethical and interpersonal issues.

Whilst the designers accepted that the distinctions between such concepts as *legal problem-solving, legal knowledge, procedural* and *transactional knowledge, legal skills*, and *attitudes* are often blurred, they appreciated the usefulness of this conceptual vocabulary. It enabled them to break down *legal problem-solving* into teachable parts and to select appropriate teaching methods for each part: lectures, prescribed readings and discussions for knowledge; and practical activities or "learning by doing" for skills. Since issues of professional ethics pervade the curriculum, these and other attitudinal objectives would be met in a variety of ways.[19]

This theoretical vocabulary, especially the differentiation between *legal skills* and *legal knowledge*, facilitated thinking about how students would learn to transfer legal skills from one knowledge context to another. Nonetheless the designers realised that this differentiation is an artificial device used for educational purposes. Legal skills and knowledge are inextricably linked: one cannot learn legal skills without legal knowledge, and one can certainly enhance legal knowledge by learning it in practical, realistic contexts, that is, by manipulating it with skills.

One of the difficulties, then, for the designers, was to arrange core subjects and skills in order to integrate knowledge and skills elements, yet keep them separate so that students could transfer skills among different knowledge contexts in ways that propelled them toward the problem-solving goal. Their response to this challenge is considered in detail. First, however, we shall describe the basic structure of the course. This had to be developed to meet the logistical challenge of physically managing large quantities of students and materials so as to meet the course objectives. The problems which such logistics can raise are considered in our conclusion.

[17] "Knowledge" includes not only legal knowledge but the entire array of knowledge that may be necessary to solve clients' problems. Included, for example, are "practice tips" necessary to carry out transactions or knowledge of how to estimate probabilities if one is advising a client about possible trial outcomes.

[18] These include not only legal skills such as interviewing or advocacy but a wide variety of intellectual skills that may be part of, or applied apart from those skills.

[19] These are briefly discussed in section VII of this article which deals with assessment.

V. COURSE STRUCTURE

The course is delivered in three modes: full-time, part-time (evenings) and part-time (block). The part-time modes each take two years to complete, and the course content, teaching methods and assessment are the same as on the full-time course.

The full-time course has an intake of 504 students, who are divided into two cohorts of 252 for the purpose of large-group sessions and timetabling. In turn, each cohort is divided into 14 classes of 18 for small-group session work. Each group of 18 remains together for the first two terms of the course (October to March). This small-group continuity has substantial benefits, for students are able not only to build strong friendships within the group but also to enhance their group-learning skills.[20]

The course comprises three terms of 14, 11 and 8 weeks. It commences with a two-week introduction, during which specific instruction is given on the pervasive subjects of revenue, European Union law, professional conduct, and financial services. In addition, students are introduced to skills, with an emphasis on research skills. For the remainder of the first term and all of the second, all students cover the compulsory elements of the course in two distinct blocks: two core subjects and two connected skills each term. In the first term, cohort A covers business and conveyancing, and the connected skills of negotiation and writing and drafting, while cohort B covers litigation and probate, and the connected skills of advocacy and interviewing. In the second term the sequence is reversed.[21]

During the third term, students select two subjects from the following options: corporate finance, commercial law, advanced litigation, employment, commercial leases, family, and client in the community. Although students are asked to indicate likely options prior to commencing the course, they are not required to make a final selection until the second term. This preliminary indication is to enable the administration to enrol students in the cohort most appropriate to their choice of options. For example, those selecting business-oriented options would be enrolled in cohort B, which does business and related skills in the second term, immediately prior to commencing their business options.

[20] As one student wrote in the end-of-year evaluation, "Putting us into groups of 18 is brilliant in that we obtain an identity and make friends easily who are then able to help with any problems connected with the work".

[21] A similar sequence was used at New South Wales College of Law; see generally A. Blunden and L. Handler, "A New Course at the New South Wales College of Law" (1987) 1 Journal of Professional Legal Education 42.

The course structure for each cohort is illustrated in diagram form below:

COHORT A	COHORT B
Term 1 *Introductory two week period:* Pervasive subjects Research skills *Compulsory subjects:* Business Law and Practice Conveyancing *Connected skills:* Negotiation Writing and drafting *Term 2* *Compulsory subjects:* Litigation (civil and criminal) Probate *Connected skills:* Interviewing Advocacy *Term 3* Options	*Term 1* *Introductory two week period:* Pervasive subjects Research skills *Compulsory subjects:* Litigation (civil and criminal) Probate *Connected skills:* Interviewing Advocacy *Term 2* *Compulsory subjects:* Business Law and Practice Conveyancing *Connected skills:* Negotiation Writing and drafting *Term 3* Options

A standard teaching day for a student comprises a one-hour large-group session and a 90-minute small group session, both usually relating to the same subject or skill. The bulk of the substantive and procedural information required by students is available in the form of independently-published LPC course guides, augmented by Nottingham-published additional materials. The curriculum places considerable reliance on these written materials for the dissemination of information.

Consequently, large-group sessions are not merely lectures in law, but are organised in a variety of formats. They are often used to elaborate or demonstrate substantive or procedural points in transactional contexts, linking legal knowledge to legal skills, and are supported by practical

exercises in small-group sessions. For example, in litigation, a demonstration of how specific Supreme Court Rules are applicable in the conduct of a summary judgment hearing would be followed up by small-group sessions in which students would prepare and deliver an oral argument at a mock summary judgement hearing, using relevant Supreme Court Rules.

Large-group sessions are also used to elaborate skills theories and to demonstrate skills such as interviewing in order to provide students with models prior to skills practice, and as venues for practising low-level problem-solving skills, where students work on focused problems on handouts and get immediate feedback from the teacher or through answer sheets.

Small-group sessions help to consolidate knowledge and to promote more complex skills. The materials for each session, which students receive in advance, have a standardised format setting out the *objectives, preparation*, and a *description of the learning activities* involved.

These sessions generally focus on either core subjects or skills, but the need for integration causes some overlapping. For example, small-group learning in core subjects helps deepen knowledge, particularly in those areas needed for immediate application to specific transactions; at the same time students are developing skills in these transactional contexts.

The curriculum employs a variety of small-group learning activities, many of which engage students in simulating lawyers' activities. Core subject sessions, for example, tend to elicit skills associated with practical problem-solving – issue-identification, interpretation and application of regulations, document analysis, analysing and selecting options, and advising. Activities are generally carried out in twos or threes, with direct simulation a frequent feature. Teachers give feedback on an individual basis, and to the group as a whole.

Peer feedback is another important learning activity, especially in oral skills sessions. Students receive instruction in providing feedback in a helpful and constructive way. Skills are performed in realistic transactional contexts, each skills module being designed so that a student plays the role of solicitor, client (if appropriate) and observer. Playing several roles encourages sharing of responsibility and promotes co-operative learning, as well as providing students with a variety of perspectives and insights into each skill.

In order to keep students interested and motivated in the skills programme, designers have tried to link learning activities with assessment. For instance, in each of the oral skills, students carry out at least one "mock" assessment exercise, using the same format as in the assessment.

Tutors observe and provide individual feedback, supported by a videotaped record of the student's performance. Such activities help students both to improve performance and to prepare for assessment.

VI. INTEGRATING LEGAL KNOWLEDGE AND LEGAL SKILLS

The integration of knowledge and skills in the curriculum proved less problematic in actual implementation than the designers had anticipated in the planning stages. They concerned themselves initially with what learning sequences to follow so that knowledge and skills could be brought together, yet still remain conceptually differentiated, and eventually realised the usefulness of two powerful, if obvious, principles: that legal knowledge and skills *should* be integrated no matter what sequences the learning follows, and that theory should usually be followed by practice. This second principle determined how the process of integration should start.

For example, in large-group sessions at the beginning of the course, students are provided with a theoretical framework for each of the skills. Each framework comes in the form of a skills guide which sets out the criteria for the successful performance of each skill, giving students an idea of how their competence will be assessed. Explanations and videotaped or live demonstrations, augmented by reading material, illustrate applications of theory. Although the basic, theoretical elements of each skill are provided in this skeletal framework, students are given opportunities to flesh out the skill through practical applications to real-life contexts, thus requiring a variety of legal knowledge and increasingly more complex skills.

The core subjects provide the contexts into which the skills are integrated. Designers decided to pair certain skills with selected core subjects: writing and drafting and negotiation with business and conveyancing, and advocacy and interviewing with litigation and probate. Small-group sessions in business, therefore include such activities as writing letters of advice, drafting elements of business contracts, and negotiating a financing and security package for a company.

The designers were aware that a skill such as writing and drafting is crucial to all core subjects; the pairings chosen were seen as most suitable for formal teaching and assessment purposes. They do not, of course, preclude, for example, exercises involving writing and drafting forming part of a litigation or probate small-group session. Students carry out practical skills exercises related to at least two core subjects; for example, they do negotiation exercises in the context of both conveyancing and

business transactions. By performing a skill in a variety of transactions, students are encouraged to transfer that skill from transaction to transaction, thus broadening and deepening it. At the same time, they learn legal knowledge required to support the skill. In having to apply this knowledge to practical work, rather than merely learning it in isolation, students are probably better able to acquire a deeper understanding of it.[22]

Successful integration of knowledge and skills is thus mutually enhancing: skills enhance and deepen knowledge by enabling students to manipulate that knowledge for specific purposes; and knowledge enhances skills by enabling students to practise those skills in a variety of realistic contexts. Some researchers argue that the successful integration of knowledge and skills learned through realistic problems – using a problem-based, rather than a subject-based curriculum – is more likely to encourage students to use "deep" approaches to learning rather than "surface" approaches.[23] A deep, as opposed to a surface, approach to learning, explains John Biggs, an expert on learning, is based on interest in the subject-matter of the task, from which flows the student's need to deepen understanding so that curiosity is satisfied. The student focuses on underlying meaning rather than on literal or surface aspects and task components are integrated with each other and with other tasks. The student develops a need to see and understand relationships between different tasks and other knowledge.[24]

Deep approaches to learning and the problem-solving goal of the curriculum are connected: students are unlikely to be able to grasp realistic problems without an approach to learning that focuses on underlying meaning and integrates a variety of skills and knowledge.[25] Looking at this connection another way, since both knowledge and skills are necessary in solving clients' problems, it can be argued that the integration of knowledge and skills in a series of purposive transactions helps the curriculum to achieve its problem-solving goal.

VII. ASSESSMENT

Designers wanted to keep assessment strategies simple and to ensure that assessment did not dominate the course at the expense of new learning,

[22] This is one of the basic assertions of those who advocate "contextual" learning. See, for example, N. Eizenberg "Approaches to Learning Anatomy" in *Improving Learning: New Perspectives*, P. Ramsden (ed.), London, 1988, pp. 178, 194-95.

[23] *e.g.* P. Ramsden, *Learning to Teach in Higher Education*, London, 1992, pp. 81, 149.

[24] J. Biggs, "Student Learning in the Context of School", in *Teaching For Learning: The View From Cognitive Psychology*, J. Biggs (ed.), Hawthorn, 1991, pp. 7, 18.

[25] Note 24 above.

as happens in some professional legal education courses. For assessing core subjects, then, both compulsory and optional, just two devices are used: a practical exercise ("PE"), carried out during the term, and a final written assessment ("FWA") at the end of term. Students carry out the PE, which mirrors some or all of the FWA format in that subject, as a piece of assessed coursework; PE marks are noted, but they do not count towards the final mark. Thus the purpose of the PE is to allow students and teachers to gauge development of knowledge and skills prior to the FWA.

The end-of-term FWA consists of a piece of coursework and an examination. Its aim is to provide a summative assessment of a student's ability to solve clients' legal problems using knowledge and skills acquired during the LPC. Students are informed at the beginning of term of the criteria on which they will be assessed. Examinations are open-book, to the extent that LPC course guides and specified legislation may be referred to, but unlimited use of text-books and lecture notes is not permitted.

Skills assessment is based on the criteria set out in the skills guides. Students are assessed as being "competent" or "not yet competent"; students assessed as "not yet competent" receive specific feedback from a tutor and are required to undertake a further assessment.

Methods of assessment for skills are consistent with learning methods: interviewing and advocacy are assessed on oral performance, whereas writing, drafting, research and negotiation are assessed by reference to written work. This may seem anomalous with regard to negotiation, which is performed orally and is assessed in writing; nevertheless as it is such a complex and creative skill, it covers objectives wider than merely achieving favourable negotiation outcomes.

In particular, negotiation focuses on the ability to learn from experience, one of the explicit LPC objectives.[26] For instance, comparison of negotiation outcomes within small groups working with the same scenarios provides immediate feedback in a form which motivates students to learn from experience. This can lead to self-questioning as well as to powerful insights into an individual's own knowledge and skills in the negotiation. The assessment, therefore, does not focus on the actual outcomes but on how effectively students are learning from experience, and hence assessment comes in written form. Students prepare a written negotiation plan and, following the implementation of the plan in a negotiation, they are required to do a written analysis of the negotiation, including details of how the actual negotiation was consistent with, or deviated from, the plan.

[26] See Law Society objective (vii), the ability to "learn from experience of the course and from future practice".

In addition to these formal assessments, each student has a "narrative assessment", compiled by tutors during the course, detailing attendance and participation in small-group sessions, performance in assessed PEs, and any other matters considered relevant (for example, late submission of exercises). It is intended to reflect a student's attitudes towards the LPC learning experience and, by extension, his or her development of the professional attitudes necessary for practice.

The relevance of the narrative in assessing professional attitudes has, of course, not yet been substantiated by empirical study, but the designers needed to find some way to encourage and assess these attitudes during the course. Testing students' ethical responses while doing simulated exercises did not seem appropriate, since the designers wanted simulations to be opportunities for students to make mistakes in client-free environments, not to be penalised for "unethical" decisions. Instead, following the argument that an essential ingredient of professionalism is an open, positive and conscientious attitude toward *learning* how to become a better professional, the narrative assessment seemed the simplest and, perhaps, most reliable way of assessing attitude. Whilst it is not a precise assessment instrument and, by itself, is not decisive as to whether a student passes or fails, it may be used for assessing overall performance for a borderline candidate.

VIII. CONCLUSION

Behind the scenes, the sheer organisational and administrative complexity of delivering the LPC must not be overlooked. This is no mere logistics issue; it has a substantial impact on how efficiently the course is delivered and how effectively course aims are met.

For example, the processing and distribution of course documents – large-group session handouts, small-group session materials, case studies, precedent documents, skills guides – requires meticulous planning and execution. Over 3 million pages were copied during the first year of the course (more than the industrial-size photocopier was intended to process during its working life) and to a strict timetable: students might have to receive a fact pattern several days in advance of a session but receive confidential information or simulation instructions in the session itself.

Skills assessments require careful planning to maximise utilisation of materials, staff and accommodation. For example, the negotiation assessment called for 252 students to plan, carry out and analyse a negotiation on a specific fact pattern, all on the same day. This was achieved by strict marshalling of students from "planning rooms" to "negotiation

rooms" and careful timing of each negotiation performance.

Logistics also has a less visible but more profound impact in that it can sometimes distract teachers from the principal course aim, that is, to teach students how to solve practical legal problems. Focusing on logistics and "getting students through the tasks", together with the image of students being frogmarched from room to room, might suggest a regimented style of instruction that professional educators seek to avoid. This is reinforced by the use of devices such as discrete skills assessments. Since these rely on a specific set of criteria, students may be tempted to adhere rigidly to the criteria, using a lockstep approach rather than to learn to solve clients' problems holistically, with a variety of skills and knowledge, as in real life.[27]

Learning legal practice, it has been correctly argued, involves "higher-order concepts and skills,"[28] not just learning how to run through routine procedures. Legal education must be designed, therefore, to encourage reflection and the deep approaches to learning that are compatible with learning how to solve realistic problems.

It could be said that competing forces are at work in LPC courses: regimented instruction and assessment against holistic legal practice and deep learning. Sometimes, so many demands are made on resources that teachers and students find themselves running breathlessly from one task to the next without having time to think, let alone think deeply.

Nottingham seeks to reconcile the tendency to regimentation with the need for deep learning through simple pragmatism: where logistics become a preoccupation, improve them; where skills criteria are inappropriate or rigid, refine them; where learning activities are unrealistic, rewrite them to enhance realism; where students are not thinking deeply enough, redesign teaching materials, methods or assessment.[29]

Given the limits on resources and keeping in mind the profession's requirements articulated in the LPC objectives, the Nottingham designers believe that by constantly evaluating and improving all aspects of the course, they can continue to build on what is already a solid foundation.[30]

27 H. Brayne, "LPC Skills Assessments - A Year's Experience" (1994) 3 The Law Teacher 227, 238-241.

28 J. Nelson, *New Directions for Practical Legal Training in the Nineties*, Sydney, 1988, 193.

29 The lynchpin for promoting deep learning may well be in the "messages students receive" and the main source of those messages is assessment. Assessment must be designed to encourage deep learning. See Biggs, note 24 above, p. 26.

30 Evaluation of the Nottingham LPC started with the setting up of staff/student liaison committees: student feedback was received throughout the course. This led to certain immediate improvements. A more systematic and wide-ranging, independent evaluation was conducted towards the end of the course. The student response rate to the questionnaire was 40 per cent. – considered a more than satisfactory response rate for this type of survey. In relation to the core subjects, 89 per cent. gave a positive response as to the likely benefit in practice provided by small-group sessions. A similar number

(87 per cent.) stated the same for small-group sessions on skills. Although the students expressed a wide variety of concerns, their response to the final, and decisive, survey question was encouraging: "Overall, do you feel that the course has prepared you for practice?" Over 94 per cent. of students replied in the affirmative. To open-ended questions, students provided a great deal of helpful feedback, with one comment in particular eliciting a contemplative response from some teachers: "I have found the LPC to be a very thorough and enjoyable course. The facilities at Nottingham Law School are exemplary, and I have found the support staff and lecturers to be approachable, extremely courteous, and very well dressed".

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CASENOTES

The address for submission of casenotes is given at the beginning of this issue.

FACCINI DORI: HELPFUL RESTATEMENT OR MISSED OPPORTUNITY?

Paola Faccini Dori v. Recreb Srl.
Case C-91/92 [1994] E.C.R. I-3325

A recent case in the European Court, *Paola Faccini Dori* v. *Recreb Srl.*[1] is notable not only for the ruling handed down by the Court, confirming its decisions in *Marleasing* v. *La Comercial Internacional De Alimentacion S.A.*[2] and *Francovich and Bonifaci* v. *Italian Republic,*[3] but also for the Opinion of Advocate-General Lenz which the Court rejected.

Miss Faccini Dori contracted with Interdiffusion Srl. for the supply of an English language correspondence course. The contract was concluded, not at the business premises of the latter, but at the Central Railway Station in Milan, without any prior approach having been made by Miss Faccini Dori to Interdiffusion. Four days later, Miss Faccini Dori wrote to Interdiffusion, cancelling the contract. Interdiffusion subsequently assigned its claim to Recreb Srl., which sued Miss Faccini Dori in the Italian courts for payment of the contract sum.

Miss Faccini Dori sought to rely on Directive 85/577/EEC, which Italy had failed to implement before the deadline for transposition. The Directive applies to contracts between a trader (defined as a natural or legal person acting within his commercial or professional capacity) and a consumer (defined as a natural person acting outside his trade or profession), which are concluded either during an excursion organised by the trader away from his business premises or during a visit to the consumer's home or

1 Case C-91/92 [1994] I-3325.
2 Case C-106/89 [1990] E.C.R. I-4135
3 Case C-6/90 [1991] E.C.R. I-5403

workplace, unless that visit is at the consumer's express request. At the conclusion of such a contract, the trader must give the consumer written notice of his cancellation rights, which must include the right to cancel the contract within a specified period of not less than seven days from being informed of his rights.

The Italian court referred to the Court the question of whether the Directive was sufficiently precise and unconditional to be enforceable without implementing legislation, and whether it took effect as between individuals and the State *(i.e.* with vertical direct effect) and as between individuals themselves *(i.e.* with horizontal direct effect).

Referring to the recent cases of *Foster* v. *British Gas*[4] and *Marleasing,* Advocate-General Lenz highlighted the way in which the Court had endeavoured to mitigate the problems posed by its refusal to recognise the existence of horizontal direct effect. In *Foster,* the Court had defined "an emanation of the State" widely to include entities that might not otherwise be considered to be part of the State, thus broadening the scope of application of vertical direct effect. In *Marleasing,* the application of indirect effect to all national legislation, not merely that designed to implement the directive in question, similarly broadened the ambit of the doctrine of indirect effect. The Advocate-General considered that a ruling which recognised the existence of horizontal direct effect was a logical development in the light of these judgments.

The arguments that the Advocate-General put forward in favour of such a ruling in this case were that the Directive was intended to benefit all relevant consumers, and not merely those dealing with the State; that the requirements of the Single Market meant that consumers should be equally protected in all Member States, including those which had failed to transpose the Directive; and that to restrict the direct effect of a Directive which had not been transposed to actions against State entities would be contrary to the fundamental principles of equality and non-discrimination. The Advocate-General rejected the argument that the concept of horizontal direct effect was contrary to the nature of Directives, which were binding only as to their result. The discretion remaining was for the benefit of Member States when transposing the measure into national law, and once the deadline date had passed, only those elements of the Directive that were clear and unconditional could have direct effect.

The Advocate-General also refuted the argument that the imposition of liability on individuals would impose an unacceptable burden on them. Provisions of the Treaty on European Union specifying that Directives must

[4] Case C-188/89 [1990] E.C.R. I-3313

be published in the *Official Journal* meant that individuals were now able to ascertain the details of any directive that might be relevant to them and to act accordingly. Indeed, in the Advocate General's view, it would be contrary to the principles of legitimate expectation and legal certainty if directives which a Member State had failed to transpose could not be enforced against individuals in that Member State.

The Court ruled that although the Directive left a certain discretion to the Member State (such as the possibility of increasing the cancellation period beyond seven days), a minimum level of consumer protection was clearly, precisely and unconditionally established. According to the Court's own previous caselaw,[5] the Directive itself was therefore capable of producing direct effects in national courts. However, despite the recommendations of the Advocate-General, the Court went on to state that it was well established that a Directive could not of itself impose obligations on an individual, and could not therefore be relied upon directly against an individual such as Recreb.

Having disposed of the argument as to direct effect, the Court next considered the possibility that Miss Faccini Dori could rely on the indirect effect of the Directive. In particular, it cited its judgment in *Marleasing* that a national court must, "as far as possible", interpret national law in the light of the Directive, to achieve the result laid down by the Directive. It is noteworthy that the Court reiterated the *caveat* ("as far as possible") which it had made, but then appeared to have itself ignored, in *Marleasing*.

Marleasing involved a conflict between the grounds given by Spanish law on which a company could be declared a nullity, which included "lack of cause", and the exhaustive list of grounds given in a Directive (which Spain had failed to transpose) which did not include "lack of cause". The Court ruled that the national legislation must, "as far as possible", be construed in accordance with the Directive. Although it would not seem "possible" on the facts to carry out this task, the Court ruled that the national law must be construed as excluding any grounds not listed in the Directive (despite their express inclusion in that national law). To distort the clear meaning of national legislation in this way sits uneasily with the Court's own acknowledgement that the task of consistent interpretation need only be carried out "as far as possible". It may be that in repeating this acknowledgement, the Court intended to emphasise it to national courts. This would presumably meet with approval in English courts, which have been reluctant to apply indirect effect where to do so would require them to "distort" the meaning of national law.[6] In the present case, the Court simply

5 Case 152/84 *Marshall* v. *Southampton and South West Area Health Authority (No. 1)* [1986] E.C.R. 723.
6 *Duke* v. *GEC Reliance Ltd.* [1988] A.C. 618; *Webb* v. *EMO Air Cargo (UK) Ltd.* [1992] 4 All E.R. 929.

indicated that the Italian court was obliged to interpret national law in the light of the wording and objective of the Directive.

The Court finally turned to the third string in the bow of an applicant seeking to rely on an unimplemented Directive; the decision in *Francovich.* In that case, the Court had ruled that a Member State must make good the damage caused to individuals through its failure to transpose a Directive, where the Directive involved the grant of rights to individuals; the content of these rights was identifiable from the Directive; and there was a causal link between the failure to transpose the Directive and the damage caused to the applicant. The Court confirmed that the first two conditions were fulfilled by the Directive but implicitly left the question of causation for the national court, noting only that it was for that court to provide the consumer with a remedy.

Given the persuasive reasoning of the Advocate-General, it can be argued that the Court missed a clear opportunity to address the inequality between litigants against the State, and those against private parties. No doubt Miss Faccini Dori would subscribe to this point of view. However, the judgment could equally be seen as providing a useful confirmation, not only of the remedies available under *Marleasing* and *Francovich*, but of the distinction under Article 189 of the Treaty of Rome between Regulations, which are binding on all, and Directives, which are binding only on Member States, and which should not therefore be capable of direct effect against private parties.

ELSPETH DEARDS*

CAPITAL GAINS TAX RETIREMENT RELIEF

Jarmin (Inspector of Taxes) v. *Rawlings*
[1994] S.T.C. 1005

This case involved an appeal by a farmer against an assessment to capital gains tax following the sale of part of his farmland and buildings. The farmer claimed he was entitled to relief as the disposal satisfied the relieving provisions found in the Finance Act 1985, s. 69. (This has now been re-enacted in similar form in the Taxation of Chargeable Gains Act 1992, s. 163.) In order to qualify for retirement relief the taxpayer must be

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aged 55 or over or retire earlier due to ill health. Relief is given, *inter alia,* on the disposal of a business or part of a business and on the disposal of assets on the cessation of the business. The issue in this case was whether the disposal of the land and buildings was a disposal of part of a business, for which relief was available or whether the disposal was one of assets used in the business for which relief would not be available.[1] All other conditions for relief were satisfied by the farmer. Briefly, the facts were as follows.

The farmer sold at auction a milking parlour, yard, storage barn and small pasture which represented approximately 2 per cent. of his landholding. He also disposed of his dairy herd, some cattle being sold after auction but prior to completion and the remainder, having been transferred to an adjoining farm, were sold during the following year. The farmer retained his milk quota which was leased to a third party. After completion the farmer continued to farm on the retained land by rearing and finishing store cattle. However, the dairy side of the business ceased.

The courts have considered the application of retirement relief in relation to farmers on several occasions and in each case the farmers have been unsuccessful in obtaining relief. In the leading case of *McGregor* v. *Adcock,*[2] a farmer disposed of 4.8 acres out of 35 acres of farmland. Both before and after the sale he carried out mixed farming. The court, as a preliminary point, confirmed that neither farming nor land are in any special position in relation to the application of retirement relief. It had been argued that farming involved the occupation of land with a view to making a profit, and accordingly *any* disposal of farmland amounted to a disposal of part of a business. In rejecting this submission, Fox J. said:[3]

> A business connotes a distinct entity which is separate from its parts . . . there is thus a clear distinction between the business and the individual assets used in the business. *Prima facie,* therefore, it is wrong to assert that the mere sale of farmland is a disposal of part of the farm business . . . As regards the proposition that the statutory trade of farming is the occupation of land with a view to making a profit out of it, I do not think that this really assists the resolution of the matter. The fact is that there was here a busines. A business involves activity by the person conducting it. Here occupation of land is not enough.

1 The disposal was not associated with a cessation of business activities by the farmer.
2 [1977] 1 W.L.R. 864.
3 [1977] 1 W.L.R. 864, 867.

He went on to formulate what has been described as the "interference test":[4]

> It must be a question of fact in each case whether there has been such an interference with the whole complex of activities and assets as can be said to amount to a diposal of the business or part of the business.

It was held that the disposal did not constitute a disposal of part of the business as the nature of the business, that of mixed farming, was exactly the same both before and after the sale. The scale of the business was not seriously altered after the sale. Accordingly, relief was denied.

The test was applied, albeit reluctantly, by Peter Gibson J. in *Atkinson* (Inspector of Taxes) v. *Dancer*[5] who felt that the test did not add anything to the wording of the section. Nevertheless he felt bound to apply the test and added that the court was required to compare the position before sale with that after sale when deciding whether there had been a material interference with the business activities. Any changes in the farmer's activities which were not as a result of the sale should not be taken into account. He also stated that where there were two separate disposals which were not part of the same transaction, they could be viewed as one. The issue arose again in *Pepper* (Inspector of Taxes) v. *Daffurn*[6] in respect of a covered cattle yard. Two years previously the farmer had sold 83 acres out of a landholding of 113 acres. Prior to the sale, the farmer reared beef cattle and sheep. After the sale of the cattle yard, the farmer grazed cattle but no longer reared them. Jonathan Parker J. in the High Court took the view that the fundamental change in the farmer's business from rearing to grazing cattle was not caused by the disposal of the covered yard for which relief was claimed but by the earlier sale of land. Again the interference test was applied and relief denied.

In *Jarmin* (Inspector of Taxes) v. *Rawlings,* Knox J. considered the earlier authorities and confirmed that each case mut be decided on its own facts. He said:[7]

> It must in any particular case be a matter of judgment whether on the facts found the business or part of a business have been disposed of . . . The critical factor in my view is that a business connotes an activity . . . The activity here was the production and sale of milk . . .

4 [1977] 1 W.L.R. 864, 867.
5 [1988] S.T.C. 758
6 [1993] S.T.C. 466.
7 [1994] S.T.C. 1005, 1015.

> The sale of the milking parlour was a vital ingredient in that cessation so far as to make it possible to say that the sale caused such an interference with the whole complex of activities and assets as to amount to a disposal of part of a business . . .

However, in applying the test, Knox J. went on to say that a "broader" view could be taken:[8]

> ... [T]he sale by auction and completion of that sale of the milking parlour and yard coupled with the cessation at completion of all milking operations for the taxpayer's benefit amounted to a disposal by him of his dairy farming business.

In deciding which facts could properly be taken into account Knox J. took the view that it was incorrect to consider only what happended at the time of the contract as to do so would give a highly artificial view. sales which took place after the contract were relevant if they were part of, or had sufficient connection with, the relevant disposal. Thus the sale of cattle which had taken place after the auction but prior to completion was relevant. The sales of cattle after completion did not have sufficient connection with the relevant disposal and therefore were not relevant. The fact that the cattle were sold under different contracts and to different parties was irrelevant.

From the judgment, we can establish three things. Firstly, the interference test was affirmed and perhaps extended to cover a broader view of the facts which should be considered in each case. Secondly, it is permissible to consider events or acts subsequent to the date of the relevant disposal so long as they have sufficient connection with the relevant disposal in that they can be considered part of the same transaction. Thirdly, a number of simultaneous disposals of different assets effected under different contracts and to different purchasers, if when viewed as a whole can be considered a single transaction by the vendor, can amount to the sale of a business or part of a business. As a final point, Knox J. confirmed it was not necessary for all the assets used in connection nwith the business to be disposed of. The fact that the farmer retained his milk quota and some grazing land did not alter the finding that there had been a disposal of his dairy business.

[8] [1994] S.T.C 1005, 1015.

The case is of particular interest as although the proportion of land disposed of was extremely small in relation to the total landholding, nevertheless, on the proper application of the interference test and, taking a broad view of events as a whole, the farmer was successful in his claim for relief. Where there is a disposal and cessation of a distinct and separate business activity, relief should be granted.

JULIETTE GRANT*

REAL PROPERTY: EQUITABLE MORTGAGES

United Bank of Kuwait plc. v. *Sahib and Others*
[1995] 2 W.L.R. 94

This case provides an answer to the question of how section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 has affected the creation of equitable mortgages. Section 2 was passed to answer a specific problem, namely what was and what was not an effective contract for the sale of land. The previous legislation was the Law of Property Act 1925, section 40. A series of cases[1] had so widened the meaning of the phrase "agreement or some memorandum or note thereof" that there was a real danger that people dealing with land might unwittingly involve themselves or their clients in a binding contract by writing a letter or signing a deposit receipt. Therefore section 2 of the 1989 Act provided:

> (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
> (3) The document incorporating the terms . . . must be signed by or on behalf of each party to the contract.

As soon as the Act was passed it was realised that section 2 could affect the creation of equitable mortgages.

It had been accepted since the case of *Russel* v. *Russel*[2] that the deposit of title deeds to land by a borrower with a lender created an equitable

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1 *e.g. Law* v. *Jones* [1974] Ch. 112; *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146.
2 (1783) 1 Bro. C.C. 269.

mortgage and gave to the lender an immediate equitable interest in the land concerned. No writing was needed. The deposit of the deeds was a sufficent act of part-performance, provided that the surrounding circumstances showed that the deposit was to secure a loan.

Most mortgages are legal mortgages created by deed – for instance all building society mortgages take this form. Banks also use legal mortgages by deed for long term loans. However it was and still is practice on the part of some banks to use informal mortgages created by deposit of deeds to secure temporary overdrafts. The informal mortgage, being equitable, has some disadvantages, but these are outweighed by the fact that it is so simple to create.

So, did the 1989 Act have the effect of upsetting this long established practice by requiring a written contract to be made when the deeds were deposited? The wording of section 2 seemed to cover this situation "A contract for the sale *or other disposition* of land". Considerable academic discussion followed, with the majority maintaining that section 2 did have this effect. Others argued that equitable mortgages by deposit of deeds always had been an exception to the rules requiring contracts affecting land to be in writing and that the new Act had not affected the position.[3] In *United Bank of Kuwait* v. *Sahib* the point came before the courts for the first time.

The facts were complicated but can be simplified as follows. Mr. Sahib and Mrs. Hashim, the first and second defendants, were husband and wife. They owned 37c Fitzjohn's Avenue, Hampstead, London NW3. The title was registered in their joint names as joint tenants in equity. Mr. Sahib had an overdrawn account with Société Générale Alsacienne de Banque S.A. ("Sogenal"), the third defendant, who wanted security for his debt. On 3 August 1990 Mr. Sahib's solicitors wrote to Sogenal stating that they were holding the Land Certificate of 37c Fitzjohn's Avenue to Sogenal's order to cover Mr. Sahib's debt of £133,055. The case proceeded on the basis that the solicitors' letter (and other similar letters) constituted a deposit of deeds to secure the debt. Prior to the 1989 Act such a deposit would have created an equitable mortgage.[4]

Mr. Sahib also owed £229,815 to United Bank of Kuwait, the plaintiff. This debt was originally unsecured, but the plaintiff successfully sued the first defendant for the sum and on 12 October 1992 obtained a charging order upon the same property.[5] Mr. Sahib failed to pay either bank, and by

3 J. Howell, "Informal Conveyances and Section 2 Law of Property (Miscellaneous Provisions) Act 1989" (1990) Conv. 441; G. Hill, "Law of Property (Miscellaneous Provisions) Act 1989, Section 2" (1990) 106 L.Q.R. 396.

4 Under the principle in *Lloyd* v. *Attwood* (1859) 3 De G. & J. 614, 44 E.R. 1405.

5 The Charging Orders Act 1979, section 3(4) states that a charge imposed by a charging order shall have the like effect "as an equitable charge created by the debtor by writing under his hand".

the time the case reached court the only active protagonists were the two banks. In the first part of his judgement Chadwick J. held that if Sogenal had a valid charge, it would have priority over the charging order obtained by the plaintiff bank. But *did Sogenal have a valid charge?*

Sogenal could not produce a written contract signed by both parties so they were forced to argue that section 2 of the 1989 Act did not apply. Their counsel adopted the argument that equitable mortgages by deposit of deeds were in a class by themselves and were not affected by the new Act. But Chadwick J. analysed cases from *Russel* onwards that governed equitable mortgages by deposit of deeds. He stated that the true basis for the rule was that the deposit of deeds *implied* that there was a contract for a loan and security between borrower and lender. It was that contract which created the equitable charge and not the deposit of deeds. It followed that section 2 now meant that that contract had to be in writing. As the contract here was not in writing it had never existed and was therefore unenforceable.

The judge went on to hold that Sogenal's claim failed on two other grounds. Firstly, Mr. Sahib did not solely own 37c Fitzjohn's Avenue. He held it jointly with Mrs. Hashim. She had not been involved in any of these transactions. She had not given authority for the solicitors to hold the Land Certificate to the order of Sogenal and so could at any time ask for it to be returned to her.[6] The third reason why Sogenal's claim failed flowed from the second. Mr. Sahib and Mrs. Hashim were joint trustees of the legal estate in the property and Mr. Sahib could not charge it by himself. Acting by himself he could only charge his equitable interest in the property. Independently of the 1989 Act, the Law of Property Act 1925, s. 53(1)(c) requires that "a disposition of an equitable interest . . . must be in writing signed by the person disposing of the same". Again, Sogenal could not produce anything in writing signed by Mr. Sahib.

The significance of this case can be seen in the fact that the Chief Land Registrar has altered the Land Registration Rules. When the current land registration system was set up in 1925 it was felt that there should be an equivalent for registered land to creating a mortgage by deposit of deeds. So the Land Registration Act 1925, s. 66, provided:

> The proprietor of any registered land . . . may create a lien on the registered land by deposit of the land certificate and such lien shall . . . be equivalent to a lien created in the case of unregistered land by deposit of documents of title.[7]

6 For a similar set of circumstances, see *Thames Guaranty Ltd.* v. *Campbell* [1985] Q.B. 210.

7 The fact that section 66 expressly recognised the creation of liens/charges by simple deposit of the Land Certificate had been put forward to support the argument that such charges were *sui generis* and outside section 2 of the 1989 Act.

Although section 66 uses the word "lien", it is generally treated as if it had used the word "charge". Section 66 was supplemented by Land Registration Rules 1925, Rules 239 to 246, which specified forms to be completed by the lender and sent to H.M. Land Registry to register the lien or charge.[8]

Surprisingly and without warning, these Rules and Forms were abolished from 3 April this year. In an explanatory article in The Law Society's *Gazette,*[9] the Chief Land Registrar has said that this case had made the former Rules and Forms "positively misleading". Presumably this is because they referred simply to deposit of the land certificate and not to *an agreement* supplemented by deposit of a land certificate. Such agreements are in the future to be protected by ordinary notices and cautions.

The following conclusions can be drawn. First, *United Bank of Kuwait* relates to registered land but its principle is equally applicable to unregistered land. Lenders who wish to take an equitable mortgage of unregistered land will have to be careful to obtain a written contract of loan signed by both borrower and lender as required by the 1989 Act, section 2, as well as the deeds. Lenders who wish to take an equitable mortgage of registered land must obtain a written contract signed by both borrower and lender and the Land Certificate. It is understood that the major banks revised their procedure from 1990 onwards to cover this point. Secondly, a solicitor's undertaking cannot of itself create an equitable mortgage. The deposit of the deeds with the solicitor, and the solicitor agreeing to hold them as the lender's agent (as was done in this case), will not suffice. A written contract between borrower and lender will be needed too. The client's written authority to the solicitor to give the undertaking will not suffice as section 2(1) requires that all the terms of the contract are in one document and the client's authority to the solicitor will presumably not include the express financial terms agreed with the lender. Nor will it be signed by the lender as required by section 2(3) of the 1989 Act.

Incidentally, this case is a further illustration of how differently legal and equitable interests are treated in registered land. The case was decided without looking at the register maintained by H.M. Land Registry. Neither bank appears to have entered on the register the equitable interest that they claimed in the property. No point was taken on this. Had Sogenal's charge been found valid, priority between the banks would have depended upon

[8] Forms 85A-C.
[9] 29 March 1995, p. 22.

the centuries old equitable rule "He who is first in time prevails".[10] This is in complete contrast to legal interests in registered land. The Land Registration Act 1925, sections 19, 22, 26 and 29 make it clear that a legal estate is not validly transferred to a new proprietor until it is registered, and that priorities between legal charges depend upon the order in which they appear on the register. The equitable interests claimed were (or would have been) valid without registration. This case is another example of how the courts are continuing to develop and apply equitable interests in land quite independently of the land registration system.

ANGELA LATHAM*

HOMICIDE: RAISING ISSUES ON SELF-DEFENCE

R. v. *Clegg*
[1995] 2 W.L.R. 80

Due to media attention, the facts of *R* v. *Clegg* have become relatively well known. Private Clegg was on patrol near Belfast with two other soldiers and an officer. He fired four shots into a stolen car being driven rapidly towards them. Karen Reilly, a passenger in the back seat, was killed. Clegg claimed that all four shots were fired in self-defence, in the belief that the life of one of the soldiers was in danger, though scientific evidence later established that the fourth shot, the fatal shot, was fired after the car had gone past the patrol and was 50 feet along the road heading towards Belfast. Thus it became a finding of fact[1] that this shot was not actually fired in self-defence.[2]

Despite the fact that self-defence was not raised on the facts of the case, the House (Lord Lloyd giving the only speech, with whom Lords Keith, Browne-Wilkinson, Slynn and Nicholls concurred) went on to consider the following four questions: (1) Does the existing law allow a verdict of manslaughter instead of murder where the force used in self-defence is

[10] [1995] 2 W.L.R. 94, 104E.

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1 Private Clegg was convicted in Northern Ireland by trial without a jury before Campbell J. Such trials take place in what are commonly known as "Diplock Courts" and deal with certain offences commonly committed by terrorists (murder, other serious offences against the person, aggravated burglary). It is the judge who comes to the finding of fact.

2 [1995] 2 W.L.R. 80, 85. Lord Lloyd: " Since the danger had already passed when Private Clegg fired his fourth shot, there could be no question of self-defence, and therefore no question of excessive force in self-defence".

excessive ? (2) Is the position the same where the excessive force is used in prevention of crime or in effecting or assisting in the lawful arrest of offenders? (3) Is there any difference between the position of a soldier or police officer acting in the course of his duty, on the one hand, and an ordinary member of the public on the other? (4) If a verdict of manslaughter is not available under the existing law in any of the above cases, is it open to this House to change the law?[3]

With regard to question (1), which asks whether excessive force within self-defence can reduce murder to manslaughter, Lord Lloyd answered "No". The possibility of reducing murder to manslaughter through excessive force in self-defence is generally termed the "partial defence" and would operate in the same way as provocation, *i.e.* acknowledging the *mens rea* for murder but reducing the offence to manslaughter given the extenuating circumstance. Lord Lloyd, however, considered the defence to be all or nothing: either it succeeds (because the force is not excessive) or it fails completely (because the force is considered excessive). This answer was achieved without a detailed analysis of the relevant case law both in England and Australia. Lord Lloyd seemed less concerned with the relative merits/demerits of the partial defence, and, as a consequence, the rationale behind the decisions than with the fact that the latest authorities in both jurisdictions have rejected the defence. In Australia, the partial defence had been accepted by the High Court in the seminal case of *R* v. *Howe*[4] after extensive review of the relevant authorities. This was subsequently confirmed by a bare majority in *Viro* v. *The Queen.*[5] However, the High Court finally rejected the partial defence in *Zecevic* v. *D.P.P.* (Victoria),[6] declining to follow *Howe* and *Viro* and preferring the law as stated by the Privy Council in *Palmer* v. *The Queen*[7] (an appeal from the Supreme Court of Jamaica) and the Court of Appeal in *R* v. *McInnes,*[8] which both reject the partial defence.[9] Lord Lloyd accepted *Palmer, McInnes* and *Zecevic* as representing the law.

Question (2) concerns section 3(1) of the Criminal Law Act 1967, which states:

3 [1995] 2 W.L.R. 80, 85.
4 (1958) 100 C.L.R. 448.
5 (1978) 141 C.L.R. 88.
6 (1987) 162 C.L.R. 645.
7 (1971) A.C. 814.
8 (1971) 1 W.L.R. 1600.
9 The Privy Council in *Palmer* rejected the partial defence for two key reasons: firstly, that previous caselaw did not recognise it (see page 826 E to F), and, secondly, that it was over complex (see page 831 F to G). In *Zecevic,* the High Court of Australia agreed with the Privy Council on the issue of complexity and also justified reversing the position in *Howe* and *Viro* in order to achieve conformity with the UK.

> A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

Though section 3 had not been argued by counsel for the defence, the trial judge considered it but concluded that there was insufficient evidence to raise it on the facts of the case. The Court of Appeal disagreed, holding that there was sufficient evidence to raise it on the facts, but that Clegg was merely arresting a member of the public and therefore the use of lethal force to effect that arrest was "grossly disproportionate to the mischief to be prevented" and therefore unreasonable. As a result, arguments under section 3 would have failed. In answer to question (2) Lord Lloyd concluded that there was no difference between section 3 of the Criminal Law Act and common law self-defence: " . . . the degree of permissible force should be the same in both cases. So also should the consequences of excessive force".[10]

The answer to question (3) was also "No", though Lord Lloyd interestingly acknowledged that soldiers are faced with an all or nothing dilemma: they either fire, involving a high risk of death or serious injury, or they do nothing. However Lord Lloyd did not explore how this impacts on the concept of excessive force.

Finally, in answer to question (4), Lord Lloyd made clear that the creation of a new defence was beyond the province of the House of Lords.

Lord Lloyd's answers to questions (1) to (4) raise a number of issues that cannot all be addressed in this casenote. I propose to deal with an issue raised by his Lordship's answers to question (1) and, indirectly, question (4) by arguing that the partial defence does not necessarily involve a dramatic change in the law.

The Privy Council in *Palmer* summarised the partial defence as follows: (1) Was more force used than a reasonable man would consider necessary? (2) If so, did the accused nevertheless honestly believe that such excessive force was necessary?[11] If the answer to both questions is in the affirmative, then the verdict of manslaughter is justified.

What illustrates very well the merit of the partial defence is an irony that may exist in the operation of common law self-defence as it currently stands. As a result of the decision of the Court of Appeal in *R.* v. *Williams (Gladstone)*[12] a person will be treated as acting in self-defence if he uses force which is reasonable and necessary in the circumstances as he,

[10] [1995] 2 W.L.R. 80, 85.
[11] (1971) A.C. 814, 828.
[12] (1984) 78 Cr.App. R. 276.

reasonably or unreasonably, believes them to be. If the defendant uses force which is excessive *(i.e* not reasonable and necessary) for the actual or perceived circumstances, then the defence will fail completely. The proposed partial defence in the context of murder tempers the effect of this all or nothing approach by allowing an honest belief in the necessity of excessive force to reduce the offence to manslaughter.

It is useful at this stage to define the meaning of reasonable and necessary within the context of self-defence. These two words have traditionally been held to lay down an objective standard over the permissible response to an actual or perceived threat. It is generally accepted that reasonable refers to the test of proportionality, *i.e.* that the degree of force used by the accused is proportional to the threat faced or perceived to be faced. Necessity is governed by the idea of whether defensive action was required at all, and is influenced by concepts such as the duty to retreat and the imminence of the attack. Unfortunately, the distinction between the two words is often blurred into a general requirement of reasonable response.[13] This casenote is not concerned with the validity of the distinction though it can be argued that if force is not necessary, it cannot, by definition, be reasonable. Nevertheless, the following analysis must accept that the distinction is not well articulated in the relevant authorities and that the partial defence, in the cases in which it is discussed, would appear to accept that an honest belief in the proportionality and necessity of defensive action, when objectively it is considered not proportional or necessary, reduces the offence of murder to manslaughter.

However, the validity of rejecting the partial defence may partly depend on what the law considers reasonable and necessary force and this is where a potential irony emerges. In *Palmer* v. *The Queen,* Lord Morris, speaking on evidential matters, stated that if the accused "in a moment of unexpected anguish ... had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."[14] Lord Morris drew a distinction between actions that are essentially defensive in character as opposed to those that are essentially offensive, and the tenor of his speech acknowledges that it is the former that can lead to a successful plea of self-defence. The idea that the accused's belief in the reasonableness and necessity of his reaction governs the objective concept of reasonable and necessary defensive action

[13] See Clarkson and Keating, *Criminal Law: Text and Materials,* 3rd ed. p. 313 and also David Lanham "Death of a Qualified Defence" (1988) L.Q.R. 239, 242 to 245.

[14] (1971) A.C. 814, 832.

was further developed by Ormrod L.J. in *R.* v. *Shannon*[15] where Lord Morris's distinction between defensive as opposed to offensive acts was approved. Ormrod L.J. went on to say: " . . . if the jury came to the conclusion that the stabbing was the act of a desperate man in extreme difficulties . . . they should consider very carefully before concluding that the stabbing was an offensive and not a defensive act, *albeit it went beyond what what an onlooker would regard as reasonably necessary*"[16] [my emphasis]. This would appear to acknowledge the possibility that it is the accused's belief in the reasonableness and necessity of his reaction that governs the permissible response to a given attack, even if that belief is unreasonable.[17] The above developments appear to have been taken to their logical conclusion by the Court of Appeal in *R.* v. *Scarlett.*[18] Though the case is open to a more orthodox interpretation,[19] it is certainly possible to conclude from Beldam L.J.'s judgment that the accused's honest belief in the extent of his response now governs what is a permissible response to an actual or perceived threat. Beldam L.J. approaches the question by stating that there is no logical distinction between "a person who objectively is not justified in using force at all but mistakenly believes he is and another who is in fact justified in using force but mistakenly believes that the circumstances call for the degree of force objectively regarded as unnecessary".[20] He continues: "[a jury] ought not to convict [the accused] unless they are satisfied that the degree of force was plainly more than was called for by the circumstances as he believed them to be and provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable".[21] If Beldam L.J. was creating an entirely subjective test regarding the permissible amount of force that may be used in self-defence, and his Lordship's words suggest that he is, this represents a dramatic change in the law for it enables such an honest belief to result in an acquittal. However, if the partial defence is applied, an honest belief in the necessity of a certain amount of force, if it exceeds what is objectively necessary, merely reduces the offence to manslaughter. Therefore the "change" represented by the partial defence may have already occurred, but it results in an acquittal, not a manslaughter verdict.

15 (1980) 71 Cr.App.R. 192.
16 (1980) 71 Cr. App. R. 192, 196.
17 Glanville Williams has argued that *Shannon* represents "a radical change in the law" for this reason: see G. Williams, *Textbook on Criminal Law* (2nd ed., 1983), p. 507. (See *Clarkson and Keating, loc. cit.).*
18 [1993] 4 All E.R. 629, (1994) Crim. L. R. 288.
19 See the opinion of Professor Griew (Archbold News), as summarised by Professor J.C. Smith in his commentary to *Scarlett* in the Criminal Law Review.
20 [1993] 4 All E.R. 629, 636d.
21 [1993] 4 All E.R. 629, 636f-g.

It remains to be seen whether the courts will appreciate that there is indeed a conflict between the rejection of the partial defence in *Clegg* and the acceptance in *Scarlett* that in certain circumstances a defendant who uses excessive force may still successfully raise self-defence. On the other hand, the courts may be content to apply *Scarlett* (while paying lip-service to the requirement of an objectively judged response) or alternatively reverse the development in the law outlined above.[22]

JAMES SLATER*

ADOPTION OF EMPLOYMENT CONTRACTS BY COMPANY ADMINISTRATORS AND ADMINISTRATIVE RECEIVERS

Powdrill and Another v. *Watson and Another (Paramount Airways Ltd.), Re Leyland DAF Ltd. (No. 2), Re Ferranti Plc.* [1995] 1 B.C.L.C. 386

The *Paramount* affair was, in a manner of speaking at least, resolved by the House of Lords on 16 March 1995. Save in certain minor respects, and in a spirit of considerable regret, a unanimous House of Lords endorsed the approach taken by the Court of Appeal.[1] The administrators' appeal to their Lordships was consolidated with appeals by the administrative receivers[2] of Leyland DAF Ltd. and Ferranti plc. who were appealing direct from the High Court.[3] Two key issues fell to be determined: (1) whether, on the true construction of the Insolvency Act 1986, sections 19 and 44, the administrators and receivers had adopted the employment contracts of the litigant ex-employees prior to their dismissal; and (2) if so, whether the ex-employees were entitled to receive payment in full, with priority over other creditors, in respect of *all* liabilities under their employment contracts (including contractual termination payments and holiday pay accruing due

22 Readers should note that, since this casenote was written, *R.* v. *Owino* (1995) Crim. L. R. 743 has effectively restored the law to the position in *R.* v. *Williams (Gladstone)* by interpreting Beldam L. J.'s words in *Scarlett*, "if properly understood" (see p.744), as not removing the requirement of an objectively-judged reasonable response to an actual or perceived threat. Professor Smith, in his commentary to *Owino*, states: "It seems we must now take it that *Scarlett* added nothing to the law as stated in *Gladstone Williams* and is best not referred to in future, as far as this aspect of the decision is concerned" (see p.744). This interpretation of *Scarlett* has probably severely dented the development of the law outlined in this casenote and, at the very least, removed the tension between the rejection of the partial defence and *Scarlett*.

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1 [1994] 2 B.C.L.C. 118.

2 In this casenote, administrative receivers/hip is referred to for convenience as receivers/hip.

3 [1994] 2 B.C.L.C. 760 (Lightman J.).

prior to the appointment of the relevant insolvency practitioner). Alternatively, whether the employees should only be entitled to receive payment in priority for services actually rendered post-appointment.[4]

The House of Lords held that an employee's contract is "adopted" if his or her employment continues *de facto* for more than 14 days following the appointment of an administrator or receiver. The main consequence of adoption is that priority should be given only to liabilities which fell due *following* appointment of the insolvency practitioner. Thus, while the ex-employees were unable to claim holiday pay accruing due before the appointment, they were entitled to full priority in respect of contractual termination payments.

The ruling applies only to employment contracts adopted before 15 March 1994, being the date on which Insolvency Act 1994 ("the 1994 Act") came into force. The genesis of this legislation is considered further below. Nevertheless, the main result is that any employee whose employment contract was "adopted" (within the meaning ascribed to the term by the House of Lords) by administrators or receivers before 15 March 1994 has a potential claim for, *inter alia,* a termination payment where he or she was subsequently dismissed.

The reaction of the Society of Practitioners of Insolvency ("SPI") to the ruling was swift.[5] The aim of what follows is to provide an account of the background to the litigation and a brief appraisal of the ruling. In conclusion, some unanswered questions are posed with a view to assessing SPI's claims that a potentially indeterminate "black hole" of liability between 1986 and 1994 has been created.

The *Paramount* problem owes its origins to the decision in *Nicoll* v. *Cutts*.[6] Here, a claim by a company director under a service contract for post-appointment salary was rejected although the receiver had used the employee's services. Parliament responded swiftly to remedy the effect of this decision. Late amendments were introduced to the Insolvency Bill then before Parliament which were brought into force as the Insolvency Act 1986, sections 19 (administrations) and 44 (receiverships).

The effect of section 19 is that "any sums payable in respect of debts or liabilities incurred while [the appointee] was administrator" under employment contracts which have been adopted are given "super priority" and are charged on the company's assets available when the administrator

[4] "Appointment" throughout denotes appointment *of the insolvency practitioner* rather than appointment of employees.

[5] Mr. Gordon Stewart of Allen & Overy, solicitors, echoing Abraham Lincoln's response to electoral defeat, wrote that he was "too big to cry but it hurts too much to laugh ..." (*Insolvency Practitioner,* April 1995, p.12).

[6] [1985] B.C.L.C. 322 (Court of Appeal).

leaves office. Liabilities under adopted employment contracts thus have priority over other administration expenses including administrators' remuneration.[7] The position is broadly similar under section 44. Here a receiver is "personally liable . . . on any contract of employment adopted by him . . .". As he is deemed to be the company's agent, this liability is co-extensive with that of the company. As such, he is entitled to a statutory indemnity out of the assets of the company in respect of any personal liability which arises. Under section 45, this latter right is protected by a charge over the company's assets available when he leaves office. This takes priority over the appointor's security.

In both cases an insolvency practitioner is not deemed to have adopted an employment contract by reason of any act or omission within a 14 day grace-period following appointment. These enactments thus conferred a degree of *priority* on adopted employees. If *Nicoll* v. *Cutts* had remained the law, any sums due to these employees would have been treated broadly as unsecured claims. It was, however, not clear precisely what was meant by "any sums payable". Did this mean that priority should be given to *all* sums owing under adopted employment contracts, whether falling due before or following the appointment, or was it more circumscribed?

In an attempt to exclude the operation of the sections, it became established practice for newly-appointed administrators and receivers to write to employees informing them that while they continued to be employed by *the company,* their employment contracts were not being "adopted" by the insolvency practitioner. This practice was seemingly approved by Harman J. in *Re Specialised Mouldings Ltd.*[8]

The Court of Appeal decision in *Paramount*, followed by Lightman J. in *Leyland DAF* and *Ferranti*, proved therefore to be something of a rude awakening. *Specialised Mouldings* letters were held to be nothing more than a "ritual incantation" having no legal effect. By allowing the company to continue to employ the *Paramount* pilots beyond the initial grace-period, the administrators had adopted their contracts. All liabilities (including termination payments and accrued holiday pay) incurred while the administrators were in office had "super priority". The position for receivers was even worse. As section 44, unlike section 19, contained no express limitation, Lightman J. felt able to hold that receivers' liability under adopted contracts extended to *all liabilities including those incurred before appointment.*

These rulings sent shock waves through the ranks of the insolvency profession and threatened the hallowed position of administrators and

7 Hence the reference to "super priority".
8 13 February 1987 (unreported).

receivers as acolytes of the "rescue culture". As Lord Browne-Wilkinson put it:[9]

> The result of . . . [these decisions] was to make it extremely hazardous for administrators [and receivers] to keep on the employees necessary to enable the company's business to continue.

In effect, the insolvency practitioner had a fortnight to decide whether to keep the company's business going in some form or break it up.

As a result of intensive lobbying by SPI, the 1994 Act was brought into force. From 15 March 1994 only "qualifying liabilities" referable to services rendered by adopted employees during administration or receivership obtain priority. Termination payments on dismissal and liabilities accruing due prior to appointment are not "qualifying liabilities". It should be noted, however, that the *Paramount* ruling will continue to apply to Law of Property Act receiverships which are not within the 1994 Act's ambit.

The 1994 Act is not retrospective and *Paramount* thus reached the Lords. After considerable vacillation[10] their Lordships found broadly in favour of the ex-employees. A holistic approach to the construction of sections 19 and 44 was appropriate as opposed to either a strictly literal or purely purposive approach. The significant difference was that their Lordships were prepared to read the temporal limitation in section 19(5) ("liabilities incurred while he was administrator") into section 44. Otherwise Lightman J.'s literal reading, so they reasoned, placed adopted employees in receiverships in an absurdly better position than unadopted employees. Beyond this, they confirmed that employment contracts can be adopted by conduct and that it is not open to an insolvency practitioner unilaterally to determine which liabilities thereunder will be given priority. Reliance on *Specialised Mouldings* had been unwise. The adopted employees of any company to which an administrator or receiver was appointed before 15 March 1994 were therefore entitled to priority in respect of all post-appointment liabilities under their employment contracts.

This holistic approach is nothing more than judicial sleight of hand. To uphold Lightman J.'s perfectly justifiable literal view of section 44 would have spelled disaster for the insolvency profession. A purposive approach

9 [1995] 1 B.C.L.C. 386, 398.

10 See [1995] 1 B. C. L. C. 386, 405, where Lord Browne-Wilkinson confessed that his views had varied. This did not prevent their Lordships from ordering that the appellants pay the respondents' costs on an indemnity basis.

emphasising the mischief of *Nicoll* v. *Cutts*, while infinitely preferable, would have produced the same outcome as the 1994 Act amendments. That approach would have been perceived as anti-employee. As yet, further lobbying by SPI with a view to the re-enactment of the 1994 Act with retrospective effect has proved unsuccessful.

An exhaustive account of the questions left unanswered by *Paramount* is beyond the scope of this note. What follows is an attempt to identify some of the problems and possibilities:

(1) Is there a duty on insolvency practitioners actively to canvas for Paramount *claims*? The SPI view appears broadly to be that an administrator who may have adopted employment contracts before 15 March 1994 and is still in office is bound, as an officer of the court, to canvass for claims. The position in the case of receivers (who are not officers of the court) and of administrators who have already obtained their release is unclear.

(2) Where an administrator has already obtained his release or a receiver has vacated office are they immune from Paramount *claims?* An administrator's release (Insolvency Act 1986, s. 20) confers full immunity save in respect of possible misfeasance claims under Insolvency Act 1986, s. 212. Such claims are only available where a company is in liquidation and it is the liquidator who has *locus standi*. Insolvency practitioners are therefore likely to call an amnesty. In any event, an ex-administrator faced with section 212 proceedings may, as an officer of the company, be relieved from liability under Companies Act 1985, s. 727 if he has "acted honestly and reasonably" and "ought fairly to be excused".

There is no equivalent of section 20 for receivers and they could face *Paramount* claims after vacating office. Furthermore, a receiver is not "an officer" for the purposes of section 727.[11]

(3) Will the Limitation Act 1980 provide any protection? The consensus appears to be that any *Paramount* claim brought outside the primary limitation period of six years (12 years for contracts under seal or which are expressed to be deeds) will be time-barred. This may discount the majority of possible claims referable to the period up to (roughly) 1989 but there has been a lengthy recession since then.

(4) What about the duty of employees to mitigate their loss? This will apply, and like limitation, it may have a discounting effect.

(5) Do statutory indemnities give any protection? Insolvency Act 1986, sections 19 and 45, will protect insolvency practitioners in extant administrations and receiverships providing *Paramount* liabilities are

[11] *Re Johnson & Co. (Builders) Ltd.* [1955] Ch. 364.

recognised and quantified. Once the administration or receivership is over the position is as in (2) above. Where receivers have accounted to their appointor for realisations subject to a *contractual* indemnity this may provide protection depending on its terms. It is highly debatable whether an action for recovery of realisations paid over under a mistake of *law* would succeed.

(6) Will the Transfer of Undertakings (Protection of Employment) Regulations 1981 have any impact? Where the insolvency practitioner is able to sell all or part of the company's business as a going concern, employment contracts subsisting "immediately" before completion of the sale transfer automatically to the purchaser. The purchaser therefore generally picks up all liabilities under employment contracts (save for those in respect of any occupational pension scheme). It is possible that this may include *Paramount* claims. Even where employees have been dismissed before completion, a *Paramount* claim may still lie against the purchaser under *Litster* v. *Forth Dry Dock & Engineering Co. Ltd.*[12]

In conclusion, the position of administrators, not least because of section 20, looks more favourable than that of receivers. Overall, however, while certain of the matters mentioned above may have an ameliorating effect, expect to see *Paramount* claims topping £400 million. Not without cause, the insolvency profession is preparing for the long haul.[13]

ADRIAN WALTERS*

ACCESSORY LIABILITY FOR BREACH OF TRUST

Royal Brunei Airlines Sdn.Bhd. v. *Philip Tan Kok Ming* [1995] 3 W.L.R. 64

Occasionally a judgment is passed down from a higher court which at once changes everything and yet changes nothing. The advice of the Judicial Committee of the Privy Council in *Royal Brunei Airlines* v. *Tan* is such a judgment.

The defendant, Mr.Tan, was the principal director and shareholder in Borneo Leisure Travel ("BLT"), a Brunei-incorporated travel agency.

[12] [1989] I.R.L.R. 161.

[13] For anecdotal evidence as to the level of anticipated claims, see "Ghosts of Past Insolvencies", *The Financial Times*, 4 May 1995.

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Unfortunately, BLT went insolvent when owing the plaintiff airline the proceeds of certain ticket sales. According to a standard form of agreement, BLT held that money on trust for the airline. However, in spite of the trust, it was BLT's usual practice to pay some of the money into its own bank account under a standing order, and to use that money for its own business purposes.

The Judicial Committee of the Privy Council, in an advice delivered by Lord Nicholls of Birkenhead, held Mr.Tan liable as a constructive trustee for the airline of the money wrongly paid into BLT's private account. The basis of this liability was that Mr.Tan had dishonestly procured or assisted in BLT's breach of trust. In formulating this basis of liability Lord Nicholls departed from and disapproved of the long-standing view that accessory liability for a breach of trust should be based upon knowing assistance in a dishonest or fraudulent design. That was the big change introduced by the Privy Council's decision. In this note it is intended to examine the detail of this change in relation to the previous law; to suggest that the change, though dramatic, might be limited to particular commercial and corporate contexts; and to highlight those significant questions which remain unresolved by the decision.

Over one hundred years ago, Lord Selborne L.C., sitting in the Court of Appeal in *Barnes* v. *Addy*[1] stated that a third party "stranger" to a trust could be made liable as a constructive trustee if they assist with knowledge in a dishonest and fraudulent design on the part of trustees. Lord Nicholls has critically observed that, since then, there has been a marked "tendency to cite and interpret and apply Lord Selborne's formulation as though it were a statute" with the result that accessory liability for a breach of trust has been forced into a "*Barnes* v. *Addy* straitjacket". This criticism is borne out in the approach of Peter Gibson J. in *Baden, Delvaux and Lecuit* v. *Société Général S.A.*[2] There he laid down four pre-requistes for establishing liability for "knowing assistance". First, it must be shown that a trust existed, for which an informal fiduciary relationship would suffice; secondly, the trustee or fiduciary must have been party to a dishonest or fraudulent design, involving something more than a mere misfeasance or breach of trust; thirdly, it has to be shown that there had been assistance in the dishonest design, which is a straightforward question of fact; finally, it must be shown that the stranger to the trust had the requisite degree of knowledge. To satisfy the last requirement, the plaintiff must prove that the stranger had knowledge of the existence, though not necessarily the terms

1 (1874) L.R. Ch. App. 244.
2 [1983] B.C.L.C. 325.

of, the trust. Likewise, it must be shown that the stranger knew of the existence of the fraudulent design, though not necessarily of its detail, and that, as a matter of fact, he knew that he had assisted in that design. In the same case Peter Gibson J. held that the degree of "knowledge" which must be shown in order to establish liability for "knowing assistance" may be one of five types. Namely, actual knowledge; wilfully shutting ones eyes to the obvious; wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; knowledge of circumstances which would indicate the facts to an honest and reasonable man; or, knowledge of circumstances which would put an honest and reasonable man on enquiry. In the recent history of this area of law the courts have entertained the particularly vexed question of whether the last two categories, the so-called "constructive knowledge" types, are sufficient to base liability for knowing assistance in a dishonest or fraudulent design. In *Baden* itself those categories were only included in the formulation due to a concession made by counsel, and the best view since then has been that the concession was wrongly made. Even before *Royal Brunei* it was generally accepted that "want of probity", which is synonymous with "dishonesty", needed to be shown in order to establish liability. Accordingly, it was generally felt that only categories one to three, the so-called "naughty knowledge" types, would be sufficient. As Millett J. stated in *Agip (Africa) Ltd.* v. *Jackson,*[3] "constructive notice of the fraud is not enough ... There is no sense in requiring dishonesty on the part of the principal while accepting negligence as sufficient for his assistant". Vinelott J. in *Eagle Trust plc.* v. *SBC Securities Ltd.*[4] was of like mind and his approach was approved by Scott L.J. in *Polly Peck International plc.* v. *Nadir (No.2).*[5] It is against this background that the recent decision in *Royal Brunei* must now be placed.

Taking each of Peter Gibson J.'s four *probanda* in turn, the following changes are evident:

(1) The existence of a trust or fiduciary relationship: This requirement appears to be unchanged.

(2) A dishonest or fraudulent design on the part of the trustee or fiduciary: In the Court of Appeal of Brunei Darussalam, counsel for Mr.Tan conceded that there had been a breach of trust in which Mr.Tan had assisted with actual knowledge. The court found "a sorry tale of mismanagement and broken promises" on the part of BLT, but held that it had not been established that BLT had been guilty of fraud or dishonesty. Fuad P. stated

3 [1989] 3 W. L. R. 1367.
4 [1992] 4 All E. R. 488.
5 [1992] 4 All E. R. 769.
6 [1995] 3 W. L. R. 64, 68C-D.

that: "[a]s long standing and high authority shows, conduct which may amount to a breach of trust, however morally reprehensible, will not render a person who has knowingly assisted in the breach of trust liable as a constructive trustee, if that conduct falls short of dishonesty".[6] Accordingly, in the Privy Council, "the issue" was "whether the breach of trust which is pre-requiste to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee".[7] To that question, the answer of the Judicial Committee was a decisive "no"!

Lord Nicholls considered the hypothetical, and rather different, case of a dishonest solicitor who had induced a trustee to misapply trust property in a manner which the trustee honestly believed to be permitted by the terms of his trust, but which the solicitor was fully aware constituted a breach of trust. "It cannot be right", says his Lordship, "that in such a case the accessory liability principle would be inapplicable because of the innocence of the trustee".[8] The error has been, he says, to make the principal's state of mind a pre-requisite to the accessory's liability. The better view is to establish the accessory's "fault-based"[9] liability on the basis of the accessory's own state of mind. All that need be shown on the part of the principal is a breach of trust. It is no longer necessary to show a dishonest or fraudulent design; one result of this being that a dishonest accessory might be liable for a breach of trust in circumstances where the principal trustee is wholly relieved from liability because they have acted "honestly and reasonably and ought fairly to be excused".[10] The accessory's liability is clearly established as independent of that of the principal, a point to which we shall return when considering the tort of procuring a breach of trust, below.

In *Royal Brunei* the principal, BLT, had deliberately and blatantly breached the terms of an express trust. Although the Court of Appeal of Brunei had been unable to establish dishonesty on the part of BLT, the Judicial Committee of the Privy Council was happy to impute Mr.Tan's dishonesty to the company of which he was principal shareholder and managing director.[11]

(3) The fact of assistance: This requirement appears to be unchanged. Whether or not there has been assistance is a straightforward question of fact, to be answered according to the evidence in the particular case.

7 [1995] 3 W. L. R. 64, 68F-G.
8 [1995] 3 W. L. R. 64, 68H.
9 [1995] 3 W. L. R. 64, 69D-E.
10 Trustee Act 1925, s. 61. It is, of course, quite clear that the relief afforded by this section will not be available to a person who is liable as a constructive trustee under Lord Nicholls' "dishonesty"-based test.
11 [1995] 3 W. L. R. 64, 76H.

(4) The knowledge of the accessory: Here their Lordships introduced another significant change. Approving previous judicial *dicta*[12] and academic opinion,[13] they substituted for the "knowledge" requirement, a requirement that the accessory be shown to have been "dishonest".[14] As Lord Nicholls stated "their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient . . . 'knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden* scale of knowledge is best forgotten".[15]

The test of "dishonesty" adopted by Lord Nicholls is, he says, "an objective standard",[16] if a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour". Having said that, later on in Lord Nicholls' judgment, subjective considerations enter into this "objective test". He says that, "when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did".[17] The test of dishonesty applied in the context of the criminal offence of theft[18] is subtly different. A person will not be dishonest for the purposes of establishing theft if they did not believe that any reasonable person would have considered their actions to have been dishonest. There is thus a truly subjective element to the test of dishonesty in that context, one which takes into account evidence of the defendant's subjective opinion as to whether his or her acts were honest or dishonest.[19] Nevertheless, although his Lordship declined to adopt the test of dishonesty used to determine theft, the blend of subjective and objective considerations used in that context is at least superficially comparable to the test employed by Lord Nicholls in the context of accessory liability for a breach of trust. In particular, Lord Nicholls' attention to the defendant's "reason why he

12 Notably, Sir Robert Megarry V.-C. in *Re Montague's Settlement Trusts* [1987] Ch. 264; Millett J. in *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265; *Eagle Trust plc.* v. *S.B.C. Securities Ltd.* [1993] 1 W. L. R. 484; and Scott L.J. in *Polly Peck International plc.* v. *Nadir (No. 2)* [1992] 4 All E. R. 769.

13 His Lordship made particular reference to the following: P. Birks (1989) L.M.C.L.Q. 296; M.J. Brindle and R.J. Hooley 61 A. L. J. 281; C. Harpum 102 L. Q. R. 114; P. Loughlan 9 O. J. L. S. 260; Parker and Mellows, *Modern Law of Trusts,* 6th ed., p. 253; Pettit, *Equity and the Law of Trusts,* 7th ed., p. 172; P. Sales 49 C. L. J. 491; Snell's *Equity,* 29th ed., p. 194 and Underhill and Hayton, *The Law Relating to Trusts and Trustees.*

14 [1995] 3 W.L.R. 64, 73.

15 [1995] 3 W.L.R. 64, 76E-F.

16 [1995] 3 W.L.R. 64, 73B-C.

17 [1995] 3 W.L.R. 74-75.

18 [1995] 3 W.L.R. 64, 73B-C.

19 *R.* v. *Ghosh* [1982] 1 Q.B. 1053.

acted as he did" does appear to introduce a genuinely subjective element into his supposedly "objective" test.

Another matter left somewhat unresolved by the replacement of "knowledge" with "dishonesty" is the precise role that knowledge will now play in determining dishonesty. It is one thing to ignore the five *Baden* categories, it is quite another to work out the proper relation between knowledge and dishonesty. Lord Nicholls states that "[i]n most situations there is little difficulty in identifying how an honest person would behave . . . an honest person does not participate in a transaction if he *knows* it involves a misapplication of trust assets . . . Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not *know*. . ."[emphasis added].[20] These descriptions of what is "dishonest" bear an uncanny resemblance to the *Baden* knowledge-types. Counsel in future cases will have the unenviable task of disputing "dishonesty" on the basis of the defendant's conduct, and the state of mind evidenced by that conduct, whilst seeking to place no reliance on, nor drawing aid from, *Baden*-like categories of knowledge. Lord Nicholls' dictum shows how difficult this is likely to be.

We now move on to consider possible contextual limitations which might be placed on the changes enshrined in *Royal Brunei.* The tenor of Lord Nicholls' judgment is reform without revolution, changing the particular without changing the general. The advice of the Judicial Committee is, in one sense, dramatic only because the authority of *Barnes* v. *Addy* had been accorded the status of a statute by lower courts for over a century, and the effect of *Royal Brunei* has been to repeal that "statute", at least in part. Lord Nicholls' underlying criticism is that *Barnes* v. *Addy* has been applied without regard to the context in which Lord Selborne had been speaking. Elsewhere in his judgment Lord Nicholls seeks to prevent his own words from being similarly taken out of context. He resists the temptation, for example, to add to the jumble of judicial *obiter dicta* relating to liability for "knowing receipt", instead he points out that "[t]he issue on this appeal concerns only the accessory liability principle. Different considerations apply to the two heads of liability. Recipient liability is restitution-based, accessory liability is not".[21] In a similar vein he states that "in the context" of accessory liability "the *Baden* scale of knowledge is best forgotten",[22] but he leaves open the question whether it

[20] [1995] 3 W.L.R. 64, 73E-G.
[21] [1995] 3 W.L.R. 64, 70G-H.
[22] [1995] 3 W.L.R. 64, 76F.

should or should not apply to cases of "knowing receipt". Further, when invited to base accessory liability on a general equitable notion of "unconscionability", he categorically refuses to do so, "the term", he says, is "better avoided in this context".[23] His Lordship's careful contextual approach to the question of accessory liability for a breach of trust should invite us to shun the alternative approach which is to see this type of liability as necessarily applying in precisely the same form in every context. So what contextual limitations might realistically be placed on Lord Nicholls' analysis? Lord Nicholls' analysis might be limited to the particular context of commercial transactions. The opening words of his judgment suggest as much: "The proper role of equity in commercial transactions is a topical question".[24] Later, when considering the nature of dishonesty he approved of "Knox J. . . . in a case with a commercial setting, when he referred to a person who is 'guilty of commercially unacceptable conduct in the particular context involved'".[25] Similarly, Vinelott J. in *Eagle Trust plc.* v. *SBC Securities Ltd.*[26] treated commercial transactions as a special class and concluded that liability for "knowing assistance" on the basis of constructive knowledge would not be appropriate in a commercial context.[27] It is notable that Lord Nicholls, Knox J. and Vinelott J. leave open the possibility that different principles might apply in non-commercial contexts. Very recent support for a basic distinction between commercial and non-commercial contexts was provided by the House of Lords in *Target Holdings Ltd.* v. *Redferns (a firm).*[28] In that case Lord Browne-Wilkinson stated that it was "wrong to lift wholesale the detailed rules developed in traditional trusts and then seek to apply them to trusts of a quite different kind. In the modern world the trust has become a valuable device in commercial and financial dealings". However, is such a distinction justified in principle? Is there a legally-relevant distinction between commercial and non-commercial settings when considering accessory liability for a breach of trust?

Before *Royal Brunei*, when liability for "knowing assistance" still revolved around the *Baden* categories of knowledge, it was possible to say that knowledge types four and five, the so-called "constructive" forms of knowledge, were appropriate only to non-commercial situations. The

[23] [1995] 3 W.L.R. 64, 76D.
[24] [1995] 3 W.L.R. 64, 66D.
[25] [1995] 3 W.L.R. 64, 74F.
[26] [1992] 4 All E.R. 488, 507.
[27] For a different view, see *Macmillan, Inc.* v. *Bishopsgate Trust (No. 3)* [1995] 1 W.L.R. 978, 1000-1001, where Millett J. has recently stated, *obiter,* that "constructive notice in its wider meaning cannot depend on whether the transaction is 'commercial'".
[28] *The Times,* 21 July 1995.

strength in that argument is that commercial transactions would presumably slow dramatically if banks and other commercial agencies had to carry out detective investigations as to the source of all monies in their accounts. This would inevitably lead to higher transaction costs and ultimately higher bank charges for the consumer. It might be asked, in such circumstances, why the consumer should act as insurer of the bank's risk. On the other hand, liability based on constructive knowledge might be quite appropriate to smaller, private trusts, where the relatively low complexity of the transactions would not place too onerous a burden on the stranger to the trust. After *Royal Brunei* the transactional differences remain, but without the *Baden* scale it is difficult to formulate adequately a legal means of distinguishing liability in commercial and non-commercial settings. This leads us inextricably to one of two conclusions. Either *Royal Brunei* should be limited to commercial situations, or the test of liability it puts forward should be developed in a way which is sensitive, not only to the stranger's intelligence and experience, but also to the general nature, be it commercial or non-commercial, of the context in which he or she was operating. Lord Nicholls' test of dishonesty acknowledges that we must look at "all the circumstances known to the third party at the time".[29] It is hoped that this concession to subjective perception will take into account the public policy demand, if we accept that there is one, for a basic distinction between commercial and non-commercial settings. There are certain continuing questions.

(1) Knowing receipt: The precise implications of the decision in *Royal Brunei* for constructive trustee liability based on "knowing receipt" are unclear. If we take Lord Nicholls at his word, and in keeping with the carefully contextual spirit of his word, we ought to conclude that nothing in *Royal Brunei* has changed anything in relation to "knowing receipt". That may be, but it seems certain that when next a higher court considers a case of recipient liability, the approach taken in *Royal Brunei* will necessarily loom large. Liability for "knowing receipt" has, just like accessory liability, donned a "*Barnes* v. *Addy* straightjacket", to which has been securely fastened the "*Baden*-lock". Recently, however, Scott L.J. in *Polly Peck International plc.* v. *Nadir (No.2)* picked at that lock when considering "recipient" liability. The *Baden* categories, he stated, are not "rigid categories with clear and precise boundaries. One category may merge imperceptibly into another". For Scott L.J. the real question is whether the stranger should have been suspicious.[30] Whether this "suspicion" test,

[29] [1995] 3 W.L.R. 64, 74H.
[30] [1992] 4 All E.R. 769, 778b-c.

which still has its basis in knowledge, will give way in the future to a "dishonesty" test appropriate to this context, remains to be seen.

There are theoretical objections to assimilating the law relating to accessory liability with that relating to recipient liability. As Hoffman L.J. stated, in *Polly Peck*, "although both knowing assistance and knowing receipt give rise to the equitable remedy of accountability as a constructive trustee, the two causes of action are very different. Liability for knowing assistance is based on wrongful conduct. . . . Its common law analogy is conspiracy to defraud. Liability for knowing receipt is restitutionary . . . The nearest common law analogy is money had and received". In that case Hoffman L.J. did not consider the possibility of replacing accessory liability as a constructive trustee, at least in cases of procuring a breach of trust, with a common law tort of procurement of a breach of trust, although recently he has come close to advocating such a development. To this we now turn.

(2) The tort of procurement of a breach of trust: When formulating his test of accessory liability as a constructive trustee for procurement or assistance in a breach of trust Lord Nicholls stated that "[t]he underlying rationale is the same" as that which gives rise to liability where "[a] person knowingly interferes with the due performance of a contract".[31] What Lord Nicholls neglected to mention was that where such liability is established in relation to the procurement of breaches of contract, it is founded in tort. The tort of procuring a breach of contract is well-established.[32] The question necessarily arises, why did Lord Nicholls choose not to entertain the possibility that procurement of a breach of trust could be regulated in tort also? An obvious and apparently compelling response to that question is to point out that whereas the common law acknowledges breaches of contract it remains blind to trusts.

The Court of Appeal was in fact asked to consider the possible existence of just such a tort in the very recent case of *Crawley Borough Council* v. *Ure*.[33] In the event the Court declined to comment on counsel's detailed submissions in that regard, but did note[34] the following passage of Slade L.J. in *Metall und Rohstoff A.G.* v. *Donaldson Lufkin & Jenrette Inc.*[35]

> The principles of the law of trusts, in particular those expounded by Lord Selborne L.C. in *Barnes* v *Addy* (1874) L.R. 9 Ch. App. 244,

[31] [1995] 3 W.L.R. 64, 71D-E.
[32] *Lumley* v. *Gye* [1843-60] All E.R. Rep. 208.
[33] [1995] 3 W.L.R. 95.
[34] [1995] 3 W.L.R. 95, 103E.
[35] [1990] 1 Q.B. 391, 481.

> are quite sufficient to deal with those persons who incite a breach of trust. We know of no authority supporting the existence of the alleged tort and can see no sufficient justification for the introduction of a new tort of this nature.

However, this *dictum* can be criticised on two levels. First, Slade L.J. seemed to be unaware of authorities based upon *Lumley* v. *Gye* when he stated that there was no authority supporting the existence of the tort. Secondly, there are arguments of principle and practice which might support the imposition of tortious rather than trustee liability in this context.

That there are authorities supporting the existence of the tort is evident from the following dictum of Hoffman L.J. in *Law Debenture Corp.* v. *Ural Caspian Ltd.*[36] Referring to the long-standing authority of *Lumley* v. *Gye*, his Lordship quoted Erle J. who said,[37] "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong". Though it might be argued that equity does not grant "rights", Hoffman L.J. goes on to point out that "the rights capable of being violated have been held to include rights conferred by statute . . . and fiduciary obligations imposed in equity, such as a company director's duty of fidelity to the company . . . or an agent's duty of confidence".[38]

Most pertinent to the present discussion is his Lordship's observation that the Court of Appeal in *Metall und Rohstoff* refused to extend *Lumley* v. *Gye* to create a tort of inducing a breach of trust "*only* because the ground was adequately covered by the equitable doctrine of knowing assistance as formulated in *Barnes* v. *Addy* (1874) L.R. 9 Ch. App. 244" [emphasis added]. In other words, if it can be shown that *Barnes* v. *Addy* no longer adequately covers the ground, it should be possible to extend *Lumley* v. *Gye* to the creation of a tort of procuring a breach of trust. It should also, in principle, be possible to extend *Lumley* v. *Gye* in this context to cover, not just the procurement of breaches of trust, but also assistance in breaches of trust. Similar extensions of *Lumley* v. *Gye* have occurred in the context of third party interference in contracts.[39] It is interesting, also, that in *Royal Brunei* Lord Nicholls made the point that "the position would be the same if, instead of *procuring* the breach, the third-party dishonestly *assisted* in the breach".[40]

36 [1993] 2 All E.R. 355.
37 [1843-60] All E.R. Rep. 208, 214.
38 It may be noteworthy also that the Civil Liability (Contribution) Act 1978, s. 6 expressly equates liability based on tort, contract and breach of trust.
39 *e.g.* Jenkins L.J. in *D.C. Thomson & Co. Ltd.* v. *Deakin* [1952] Ch. 646.
40 [1995] 3 W.L.R. 64, 69A-B.

Obviously, "knowing assistance" now no longer exists, and the "straightjacket" of *Barnes* v. *Addy* has been shrugged off in this context, all of which suggests that it might now be possible to create the tort. *Royal Brunei* makes it clear that *Barnes* v. *Addy* should no longer be accorded the "status of a statute", a status which the Court of Appeal in *Metall und Rohstoff*, together with many modern courts, appear to have taken for granted. However, it might be argued that *Royal Brunei* now adequately covers this area, and that there is no need for a new tort. There are, nevertheless, arguments of principle which suggest that *Barnes* v. *Addy*, as it has been interpreted, never did adequately cover this area of liability and that its conceptual weaknesses were not corrected by *Royal Brunei.* To these arguments of principle we now turn.

First, it has already been observed that accessory liability for breach of trust is now established as existing independently of any consideration of the principal's state of mind. It is independent also, it would seem, of considerations as to the nature and severity of the primary breach of trust. We have also observed that accessory liability is theoretically quite independent of "recipient" liability. Lord Nicholls points out that, unlike recipient liability, accessory liability is neither "restitution-based", nor "property-based". We have also noted Hoffman L.J.'s suggestion, in *Polly Peck*, that accessory liability is based on conduct, whereas recipient liability is based on restitution. On this analysis, accessory and tortious liability would appear to have a great deal in common. Essentially, they both seek to address civil wrongs.

Secondly, it is conceptually more appropriate to regulate accessory liability for breaches of trust by means of a tort than by the imposition of constructive trusteeship. It is fundamental to the nature of a trust that there is a relationship between trustee and beneficiary,[41] as Lord Nicholls expressly acknowledged in his judgment, but there must also be some property which is held in trust.[42] This requirement is satisfied in the case of recipient liability, and *trusteeship de son tort*, where the stranger has deliberately assumed the role of trustee. However, in the case of dishonest assistance or procurement of a breach of trust (where the stranger has not received property for its own benefit), whereas the accessory has a moral responsibility to the beneficiaries of the trust, it is artificial to attach any duty, in equity, to the trust fund held by the principal trustee. The wrong is a direct wrong against the beneficiaries, and it might result in a loss of value to the trust fund, but it is linguistically and logically extreme to describe the

[41] G. Watt, "Relational Theory and the Trust Concept" [1994] Nott. L. J. 56.

[42] [1995] 3 W.L.R. 64, 71: "Stated in its simplest terms, a trust is a relationship which exists when one person holds property on behalf of another".

accessory, who never has control of trust property, as a trustee. A trustee must, by definition, hold the legal title to the trust fund, or else have assumed control of trust property.[43] Whereas a recipient or a *trustee de son tort* will have assumed control of property, the accessory-type constructive "trustee" will not.[44] To fix liability as a constructive trustee on an accessory involves the artificial assumption that the accessory has control of some property. But how can the accessory be said to have control of property which is held by the principal trustee? Surely the accessory could only be said to "control" the property if they also "control" the property holder. It is true that, on the peculiar facts of *Royal Brunei* it would be accurate to describe the company as being under the "control" of Mr.Tan (who was, after all, the principal shareholder and controlling director). However, in most situations, for example Lord Nicholls' hypothetical case of the dishonest solicitor who acts as adviser to a trust, the artificiality of treating the constructive trustee *(i.e.* the solicitor) as having control over the trust property is patent. The latter is the servant of the trust, not its master. Hence the preferred approach, in order to avoid such an illogical result, is to treat the accessory as liable for an independent tort.

Quite apart from the compelling arguments of principle which were overlooked, the erroneous assumption made in *Metall und Rohstoff* was that it would make no difference *in practice* whether a common law tort or *Barnes* v. *Addy* covered accessory liability for breach of trust. In fact, there are potentially a number of practical differences between the two forms of liability which may make tortious liability distinct, and arguably preferable. Consider the following examples.

First, in determining liability as a constructive trustee there is no sophisticated concept of "remoteness of damage", as one finds in the law of tort. Although the House of Lords[45] has recently stated that common law considerations of "causation" should be imported into equity, whether this will lead to an equitable test of "remoteness of damage" remains to be seen. Such a development would still appear to be a long way off. It seems natural to assume that, were the new tort to be created, a more rigorous test of remoteness of damage would apply in its operation than would presently apply in the case of trustees' liability. Certainly, where the principal trust is a "traditional trust", for example, of the sort "to A for life, and then to B in remainder", or some other trust, commercial or non-commercial, where the beneficiaries' interests can only be protected by making restitution to the

[43] K. Gray, "Property in Thin Air" [1991] C.L.J. 252, where he states that "'property' resides not in the consumption of benefits but in *control* over benefits" [emphasis added].

[44] *Selangor United Rubber Estates* v. *Cradock (No. 3)* [1968] 1 W.L.R. 1555.

[45] *Target Holdings Ltd.* v. *Redferns (a firm) and others.*

trust fund (as opposed to making direct compensation to the individual beneficiaries) it is probably still true that "the obligation of a trustee who is held liable for a breach of trust is fundamentally different from the obligation of a . . . tortious wrongdoer".[46] So, for example, even if the immediate cause of the loss is the dishonesty or failure of a third party, the constructive trustee will be liable to make good that loss to the trust estate if, but for the actions of the constructive trustee, such loss would not have occurred. In contrast, we would generally expect a court considering the new tort, on comparable facts, to treat the conduct of the third party as a *novus actus interveniens* or else to describe the damage as too remote and therefore not actionable. Further, whereas a tortious plaintiff must generally account for any benefits arising out of the commission of the tort before their damages are finally assessed, the same is generally not true of a trustee liable for a breach, at least in trusts of the sort we are here considering. The trustee must make restitution to the trust fund equivalent to any loss resulting from the breach, and the court will not *at that stage* set off benefits which the beneficiaries have received by virtue of the breach. An example of such a benefit would be the payment of tax by the trustees which the beneficiaries, but for the breach, would have had to pay.[47]

Secondly, whereas only simple interest will be awarded on an award of common law damages,[48] apart from in exceptional circumstances,[49] compound interest will often be awarded against a trustee.[50] Indeed, it will almost certainly be awarded against a constructive trustee, such as Lord Nicholls' accessory, whose liability is based upon their dishonesty. The effect of an award of compound interest is to make the defendant's liability, in the majority of cases, a good deal more grave than it would have been had the award been of simple interest only.

Even from these brief examples it is clear that liability as a constructive trustee is potentially, in certain practical respects, more onerous than liability in common law based upon the commission of a tort. The writer's hypothesis is that, in view of this "extraordinary" liability, and the arguments of principal detailed earlier, it may be preferable to regulate the liability of accessories to a breach of trust by means of the common law of tort. As things presently stand agents of, and professional advisers to, trusts, are too frequently made the target of litigation due to their assumed solvency and their legal liability indemnity insurance (banks and solicitors

46 *Bartlett* v. *Barclays Bank Trust Co. Ltd. (No. 1)* [1980] Ch. 515.
47 *Bartlett* v. *Barclays Bank Trust Co. Ltd.*
48 Law Reform (Miscellaneous Provisions) Act 1934, s. 3(1).
49 *e.g.* Where the imposition of compound interest had been agreed between the parties to the litigation.
50 *Wallensteiner* v. *Moir (No. 2)* [1975] Q.B. 373.

are prime examples of defendants in cases of this sort). Where a beneficiary has suffered a loss they will look first to recover from the principal trustee, but where that trustee is insolvent, or where that trustee's innocence is such that they ought fairly to be excused from liability,[51] the beneficiaries will inevitably seek to recover from agents and advisers to the principal trustee. It is true that under Lord Nicholls' formulation such third parties will not be liable unless they are proven, on the balance of probablilities, to have been "dishonest". However, the test of dishonesty which his Lordship has adopted makes no allowance for the defendant's genuinely held, albeit objectively mistaken, belief that his or her actions would not have been considered "dishonest" by any reasonable person. Lord Nicholls' test of dishonesty is still primarily an objective one, and whatever concessions it makes to the defendant's individual attributes and motives will surely be denied to professional, especially incorporated, agents. Lord Selborne, in *Barnes* v. *Addy*, was most anxious to avoid placing too onerous a burden on agents who work in the service of trusts. This is, perhaps, one strap of the "straightjacket" which we should endeavour to keep fastened.

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[51] Trustee Act 1925, s. 61.

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NOTTINGHAM LAW JOURNAL

BOOK REVIEWS

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

FRUSTRATION AND *FORCE MAJEURE*

Frustration And Force Majeure, by PROFESSOR G.H.TREITEL, Q.C., London, Sweet & Maxwell, 1994, 599 pp., Hardback, £89.00, ISBN 0421 40350 0

Frustration is a difficult, but fascinating topic, both for practitioners who have to give clients clear and definite advice, and for teachers of law, who have to instil the necessary principles in tomorrow's lawyers. The subject is difficult to teach, especially when students become bemused by the "juridical basis" of intervention. Professor Treitel's new work will provide admirable guidance to both. The context is a clash between two principles: one favouring upholding bargains; the other favouring a realistic accommodation between the parties where the very basis upon which the parties have contracted has collapsed. The author sets up this as an opposition between two Latin maxims, *pacta sunt servanda* and *rebus sic stantibus* on the very first page. What clearly emerges from Professor Treitel's meticulous historical survey in Chapter 2 is that the English approach to supervening events has got into a rut.

In the nineteenth century the starting point was the landmark case of *Taylor* v. *Caldwell*[1] where Blackburn J. synthesized the first statement of the doctrine of discharge, utilising diffuse exceptions to the doctrine of absolute contracts (having first sown some seeds in *Blackburn on Sale,* 1st ed., 1845, p. 152). Discharge has the advantage of splitting the "performance risk" and "payment (or counter-performance) risk" between the parties as a rough form of loss-splitting (pp. 39-40). In subsequent years doctrine grew, expanding in the first half of this century beyond central cases of impossible performance to cases usually termed "frustration of purpose" where performance remained possible but pointless. Of this category the famous "coronation cases" provide useful examples (see pp.

[1] (1863) 3 B. & S. 826, 122 E.R. 309.

286-296). In contrast the second half of the twentieth century has seen a hardening of the arteries. No further expansion has taken place. The House of Lords signalled this in *Davis Contractors Ltd.* v. *Fareham U.D.C.*[2] where labour shortages greatly increased the duration of a building contract for a fixed price. The contractors failed to prove frustration and therefore were not able to subvert the bargain by seeking a more generous restitutionary measure by way of *quantum meruit.* Late twentieth century paralysis is no better illustrated than by the "Suez Canal cases" when the canal was closed in 1956 and later in 1967. Both international sales *(Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.)*[3] and carriage contracts *(The Eugenia)*[4] where the vessel would normally have taken that route were held to remain on foot. The Cape of Good Hope was a perfectly possible route (see pp. 178-186). Less well-known than the Suez cases, but perhaps more fascinating as an example of an argument based on supervening events succeeding in recent years, are the "soyabean meal export prohibition cases" where string contracts of international sales were held to be discharged. Ordinarily the rule is that a *c.i.f.* seller must buy goods afloat, but an exception developed in these cases where requiring performance would send prices spiralling. The limits of this exception illustrate the courts' extreme reluctance to release parties from their bargains (see pp. 154-7, 440-449).

It is in signalling room for possible expansion that the book is most rewarding. The book like its predecessor, *Remedies for Breach of Contract,* has a comparative dimension. The author modestly states that it is not a full-scale comparative survey, but even such limited comparative ambitions are more than adequately fulfilled in the discussion of "impracticability" in Chapter 6. Whereas *Remedies* contained much on French and German law, here the focus is rightly across the Atlantic where United States judges starting with the same raw materials have been more expansive in their development of doctrine to bring it into line with everyday commercial expectations. There a test of "impracticability" is well-established. Impossibility in any event is a relative concept as the example suggested by *Corbin on Contracts* in 1962 suggests: "no one can go to the moon"[5] (but then again a substantial number of Americans still believe this to be the case!). The Second Restatement of Contracts, therefore, offers a definition of impracticability: "extreme and unreasonable difficulty, expense, injury or loss to one of the parties" (section 261, comment d). But it goes on to say a mere change in the degree of difficulty or amount of expense is insufficient. It seems that even with the broader touchstone of

2 [1956] A.C. 696.
3 [1962] A.C. 93.
4 [1964] 2 Q.B. 226.
5 Section 1325, vol. 6, p. 337.

"impracticability" arguments of discharge by supervening events rarely succeed in the States, especially where the market fluctuations are foreseeable.

The "energy crisis cases" significantly illustrate the contrasting approaches. In the United States discharge by impracticability was frequently argued (but not always successfully). Whereas in England the only contract case arising out of the crisis was *Sky Petroleum Ltd.* v. *V.I.P. Petroleum Ltd.*[6] where frustration was not argued and the only issue was as to the availability of specific performance. Perhaps the United States case which has gone furthest is *Aluminium Corporation of America* v. *Essex Group Inc.* (the "ALCOA case")[7] where a smelting contract with a flexible pricing formula for a duration of 16 or 21 years was varied by the courts. The formula did not envisage the steep rise in electricity prices after 1973 so a projected profit for ALCOA would have turned into a $60 million loss over the life of the contract. The court imposed a revised formula, but the result has been much criticised (see pp. 252-254). In contrast whereas it is not possible, as the author observes, to prove the negative proposition that impracticability is not a ground for discharge in English law, it is possible to marshal authority which illustrates the domestic preference for certainty over justice. An attempt by Denning L.J. to smuggle a doctrine similar to impracticability into English law was firmly condemned as heterodox by the House of Lords in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[8]

The point is not fully developed by the author but it seems the refusal to develop the law on supervening events, for example, by relying upon a test of "impracticability", has meant that other contractual doctrines have had to do the work. This emerged most clearly recently in *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.*[9] A building contractor who submitted an unrealistically low tender price and subsequently extracted a promise of extra money from the head contractor was permitted to enforce the promise by the Court of Appeal. Not only did this cock a snook at the ancient rule in *Stilk* v. *Myrick*[10] which insisted on fresh consideration (other than performance of the pre-existing contractual duty), it also thumbed the nose at the policy choice emphatically announced by the House of Lords in *Davis* v. *Fareham.* Rather it seems the Court of Appeal in *Williams* v. *Roffey* preferred accommodation between the parties to encouraging and upholding responsible tendering.[11] It can be seen that a restrictive approach

6 [1974] 1 W.L.R. 576.
7 499 Federal Supplement 53 (1980).
8 [1956] A.C. 166 reversing [1951] 1 K.B. 190, 200-202.
9 [1991] 1 Q.B. 1.
10 (1809) 2 Camp. 317, 170 E.R. 1168.
11 *c.f.* P. Birks, "The Travails of Duress" [1990] L.M.C.L.Q. 342, 344-347.

to supervening events inevitably has a knock-on effect in other spheres of contract law which the author does discuss. Therefore a promise by a water company to supply a hospital at a fixed price "at all times hereafter" made in 1919 was as a matter of *construction* held to be determinable by notice by a majority of the Court of Appeal in *Staffordshire Area Health Authority* v. *South Staffordshire Waterworks Co.*[12] Further an equitable approach was taken in *Patel* v. *Ali,*[13] where *specific enforcement* of an ordinary house purchase was refused. The vendor had a series of misfortunes after the contract was made: her husband became bankrupt and was imprisoned; she had two further children and her leg amputated after developing cancer. Therefore she was heavily dependent on her neighbours. Goulding J. said: "equitable relief may . . . be refused because of an unforeseen change of circumstances not amounting to legal frustration". Therefore other doctrines take the strain. Most importantly in the view of the author, the parties may allocate their own risks: see Chapter 12 devoted to analysis of *force majeure* clauses. Yet even here English judges restrictively interpret the scope of such clauses.

This is a magisterial survey of doctrine to date focusing attention on the detail of caselaw: including partial and temporary frustration, supervening illegality, prospective frustration, and self-induced frustration in addition to the topics already discussed here. All lawyers will be pleased to see the rather arid debate about the juridical nature of frustration sensibly and concisely confined to the final chapter. Treitel unsurprisingly concludes that this debate is of no practical significance whatsoever. The academic lawyer will find it easier to move discussion away from the implied term/construction/rule of law issue to the real questions surrounding the courts' insistence on keeping parties to their bargains. The practitioner will have encyclopaedic reference for his problems. The appearance of a Second Edition of *Force Majeure and Frustration of Contract* (Ewan McKendrick, ed., Lloyd's of London Press, 1995) provides further discussion of these hitherto somewhat neglected topics. It is to be hoped these volumes provide a spur for English judges to depart from religious adherence to certainty and sanctity of contract, and move towards a more sensitive regime for unexpected supervening events in contracts.

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[12] [1978] 1 W.L.R. 1387.
[13] [1984] Ch. 283, 288.
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SOCIAL SECURITY

Ogus, Barendt and Wikeley's The Law of Social Security (PROFESSOR A.I. OGUS and PROFESSOR N. WIKELEY, editors), London, Butterworths, 4th edition, 1995, xcvi + 748 pp., Paperback, £32.95

Some public lawyers have taken the view that the central focus of administrative law ought to be the law of social security. The subject is thought to be capable in itself of forming part of the syllabus for university degree courses. Others have argued that the law of social security comprises mainly detailed statutory regulations giving rise to occasional court cases. But the subject does not have sufficient academic content to warrant its incorporation into degree courses. The publication of the fourth edition of this book on social security law has heightened that debate.

The book was first published in 1978. Anthony Ogus and Eric Barendt were the original authors. Since then, a number of other contributors have joined in the venture. The Consultant Editor (A.I. Ogus) and the General Editor (N.J. Wikeley) are respectively a member of the Social Security Advisory Committee and the Chairman of the Social Security Appeal Tribunals. Consequently they are able to speak on the subject with authority. The book sets out the law with reference to statutory provisions and cases taking account of the European dimension. Its emphasis is not so much on the philosophy (although it does examine objectives and strategies), of social security as on the statement of the law. It looks at the principles of law critically, however, rather than taking a purely descriptive approach.

The book has eighteen chapters together with an appendix on social security benefit rates. It deals with aspects such as social security and social policy, contributions to non social security schemes, unemployment benefit, benefits for sickness and disability, retirement pensions, benefits for birth and death, industrial injury, war pensions, child benefits, income support, family credit, disability working allowance, housing benefit and council tax benefit, the social fund, administration of benefits, adjudication and finally European social security law. Two chapters are devoted to the examination of general provisions related to diverse topics.

Would the book be useful to the practitioners and specialists in the field? Certainly. Would it be of any value to the students attending degree courses at the universities? The answer to that question would depend on the extent to which the book succeeds in injecting academic content into the subject. An attempt has been made in this direction. However, this has been done by introducing common law concepts into this area. For instance, in the

context of industrial injury and war pensions, the question whether war injury arose "out of and in the course of employment", is pursued with reference to cases. It appears that the courts have not made a good job of it. Thus in war pension cases injuries occasioned by playing a game for the serviceman's own amusement are not attributable to service,[1] nor are injuries resulting from private fights between soldiers[2] or from assaults by third parties entirely unrelated to the military character of the victim.[3] But even if the initial injury is not attributable to service, negligent treatment in hospital will enable the claimant to be considered for a pension, if he went to that particular hospital because he was a serviceman, rather than merely because it was the nearest available.[4]

Referring to these decisions the authors state "It is difficult to detect any clear principle or policy running through these decisions . . . On the one hand, they have been concerned to award a pension when the service has any causal connection with the injury or disease, but on the other hand, they have carefully refrained from holding a claimant entitled merely because the service was a cause *(causa sine qua non)* of the disablement" (p. 358). But the question whether the authors have made a better job by pursuing a different line of enquiry is open to debate.

However, the academic content of the subject is being rapidly augmented by the impact of the law of the European Union on the domestic laws of the United Kingdom. Thus, until 1 July 1991 the normal retirement age was 65 for men and 60 for women. But the European Court of Justice ruled in *Barber* v. *Guardian Royal Exchange Assurance Group*[5] that such differentiation between male and female members of an occupational pension scheme was contrary to Article 119, EC. To comply with this ruling the retirement age was set at 65 for both sexes after 1 July 1990. The authors of the book have explored the implications of this ruling (pp. 261-263) which are being gradually worked out by the European Court of Justice.[6]

At the time it was thought that the state retirement pension was outside the precise scope of this ruling. However, the European Court has stated that the ruling in the *Barber* case and Article 119, EC apply to statutory pension schemes for civil servants.[7] The court's rulings are also indicative of the extent to which national rules relating to time limits for bringing

1 *Horsfall* v. *Minister of Pensions* (1944) 1 W.P.A.R. 7.
2 *Richards* v. *Minister of Pensions* (1956) 5 W.P.A.R. 631.
3 *Gaffney* v. *Minister of Pensions* (1952) 5 W.P.A.R. 97.
4 *Minister of Pensions* v. *Horsey* (1948) 2 K.B. 526.
5 [1990] 2 All E.R. 660, 702-703, 704.
6 Case C-408/92 *Smith* v. *Avdel Systems Ltd.* (1995) All E.R. (E.C.) 132.
7 Case C-7/93 *Bestuur van Het Algemeen Burgerlijk Pensioenfonds* v. *Beune* (1995) All E.R. (E.C.) 97.

actions based on community law rights to join occupational pension schemes[8] are applicable.

All in all, the current edition of the book has gone a long way towards establishing the appropriate level of academic content of the subject. The book is available at a time when the subject is going through a rapid pace of growth both in terms of case law and enactment of statutory provisions. The subject deserves recognition by university law courses in its own right.

M.A. FAZAL

8 Case C-57/93 *Vroege* v. *NCIV Instituut voor Volkhuisvesting B.V. and Stichting Pensioenfonds N.C.I.V.* (1995) All E.R. (E.C.) 193; Case C-410/92 *Johnson* v. *Chief Adjudication Officer* (1995) All E.R. (E.C.) 258.

military offenders, and the effectiveness of boot camps in terms of their impact upon recidivism. Thirdly, it has been revealed that the current British Home Secretary, Michael Howard, is advocating the establishment of British boot camps contrary to the advice of civil servants in the Prison Service who believe that there is "little point in devoting time and resources to an initiative which seems to have little to offer".[3] Accordingly, this article seeks both to review the evidence concerning the British experience of tough regimes in institutions for young offenders and the record of boot camps in the USA, and also considers the Government's motives for emulating the US boot camp model.

THE BRITISH EXPERIENCE

Early Predecessors

Although the Conservative Party's 1979 General Election manifesto promised a tougher regime in detention centres "as a short, sharp shock for young criminals",[4] the proposal was far from novel. Indeed, the Prevention of Crime Act 1908[5] established Borstal Institutions for young offenders aged 16-21 which were founded upon strict discipline and industrial training. Such institutions gained a reputation for brutality during the 1920s but adopted regimes during the 1930s which placed greater emphasis on the welfare and treatment of their charges.[6] The 1940s, however, brought a re-emphasis on punishment, exemplified by the post-war Labour Government's enactment of the Criminal Justice Act 1948 which established detention centres as a means of providing a short, punitive and deterrent alternative to prison for offenders aged between fourteen and twenty-one.[7] Chuter Ede, Labour's Home Secretary at the time, described detention centres as providing a means of dealing with the "type of offenders to whom it appears necessary to give a short but sharp reminder that he is getting into ways that will invariably land him in disaster".[8] Borstals, which provided longer periods of incarceration than the new

3 See "Howard defies boot camp advice", *The Daily Telegraph*, 20 March 1995.

4 Conservative Party, quoted in D. Thornton, L. Curran, D. Grayson and V. Holloway, *Tougher Regimes in Detention Centres: Report of an Evaluation by the Young Offender Psychology Unit* (HMSO 1984), at p. 1.

5 Prevention of Crime Act 1908, s. 4. For an outline of nineteenth century developments, see T. Newburn, *Crime and Criminal Justice Policy* (Longman 1995), at pp. 128-130.

6 See L. Gelsthorpe and A. Morris, "Juvenile justice 1945-1992", in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology* (Clarendon Press 1994), at p. 954.

7 Criminal Justice Act 1948, s. 18.

8 *House of Commons Debates*, 1947, vol. 44, col. 2138.

detention centres, would also be made more punitive during the early 1950s.[9]

The Criminal Justice Act 1948 and the First Detention Centres

The detention centre order provisions contained in section 18 of the Criminal Justice Act 1948 were both a response to a marked increase in recorded offences committed by 16-21 year-olds during the war years, and a politically expedient, punitive substitute for judicial corporal punishment which the same Act abolished.[10] Moreover, the wartime experience of military discipline is likely to have influenced official thinking as to the desirability of a "glasshouse"-type of short punishment.[11] The first junior detention centre opened for boys aged 14-16 years at Kidlington in Oxfordshire in 1952; the first senior centre, for 17-21 year-old males, was opened in 1954 at Cranbrook in Kent. The former's regime included kitchen and laundry work, gardening, physical training (PT) and formal education;[12] the latter's routine was of a similar nature, as a Home Office memorandum to the courts in 1954 revealed:

> There will be brisk activity under strict discipline and supervision beginning with early morning PT followed by domestic duties and work. In the evening there will be classes for further education, PT, gymnastic instruction and other activities. Particular attention will be given to the inculcation of personal standards of cleanliness, obedience and good manners.[13]

The Criminal Justice Act 1961 and The Growth in Use of Detention Centres

Two further detention centres were opened during the 1950s but a significant expansion did not occur until after the Criminal Justice Act of 1961[14] transformed the detention centre order into the standard custodial measure for young offenders. In consequence, the annual figure of fewer than 2,000 youths passing through detention centres in the late 1950s increased to 6,000 by the mid-1960s, and to more than 10,000 by the mid-1970s.[15] Such growth was not, however, based upon the success of the

9 See Gelsthorpe and Morris, *op. cit.*, at p. 955.

10 See H. Land, "Detention centres: the experiment which could not fail", in P. Hall, H. Land, R. Parker and A. Webb (eds.), *Change, Choice and Conflict in Social Policy* (Heinemann 1975), at pp. 318-320.

11 *Ibid,* at p. 320. The term "glasshouse" is British military slang for military prison, and derives its name from the former detention barracks at Aldershot, Hampshire, which had a glass roof.

12 *Ibid,* at pp. 331, 340.

13 Quoted in *ibid,* at p. 333.

14 Criminal Justice Act 1961, ss. 4-7.

15 See J. Muncie, "Failure never matters: detention centres and the politics of deterrence", *Critical Social Policy,* 1990, 10, at p. 58.

experimental detention centre schemes of the 1950s in terms of deterrence or rehabilitation, for by the end of 1960, over 45 per cent of youths released from senior detention centres in the previous four years had further convictions, and nearly 37 per cent of those released in 1959 were known to have offended again before the end of 1960.[16] Rather, the late 1950s experienced a significant increase in recorded indictable offences committed by young males aged under 21 (71,300 in 1959, compared with 43,900 in 1955),[17] and it was the public, media, and political reaction to this rise which generated support for the expansion of detention centre provision.[18] Moreover, the centres represented a "relatively cheap and quick method"[19] of dissipating pressure on prison places caused by the increase in recorded crime.

The 1970s: From Diversion to Custody

During the 1960s, the punitive emphasis on drill and physical training in detention centres was tempered by a greater stress on rehabilitative measures: the Criminal Justice Act 1961 had introduced compulsory aftercare for detainees,[20] and in 1970 the Home Office endorsed a shift from the "short, sharp shock" approach to one based more on "treatment".[21] The welfarism of the 1960s reached its apogee with the enactment of the Children and Young Persons Act 1969 which sought to prohibit criminal proceedings for offences by children under 14 except in cases of homicide,[22] and provided for the eventual abolition of the detention centre order and borstal training for juveniles.[23] However, such provisions were never implemented, for the Conservative Government elected in 1970 was fundamentally opposed to the 1969 Act's positivist assumption that juveniles were not responsible for the circumstances which had brought them to court.[24] Thus, the "social welfare ideology underlying the 1969 Act never came to fruition";[25] instead, the 1970s were a period when the use of detention centres "positively burgeoned",[26] so that by 1979, some 12 per cent of offenders aged 14-16 were being sent to a detention centre or borstal, compared with five per cent in 1970.[27] Moreover, only one-sixth of

16 See Land, *op. cit.*, at p. 367.
17 *Ibid,* at p. 329.
18 *Ibid,* at p. 367.
19 *Ibid,* at p. 370.
20 Criminal Justice Act 1961, s. 13 and sch. 1.
21 See Muncie, *op. cit.*, at p. 58.
22 Children and Young Persons Act 1969, s. 4.
23 Ibid, section 7.
24 See M. Cavadino and J. Dignan, *The Penal System: An Introduction* (Sage 1992), at pp. 203-205.
25 A. Morris and H. Giller, *Understanding Juvenile Justice* (Croom Helm 1987), at p. 91.
26 Muncie, *op. cit.*, at p. 58.
27 See Gelsthorpe and Morris, *op. cit.*, at p. 967.

this rise is explicable in terms of an increase or change in the nature of juvenile crime; indeed, recorded juvenile crime decreased during the second half of the 1970s.[28]

Thatcherism and the Return of the Short, Sharp Shock

The Conservative Government elected in 1979 under the leadership of Mrs. Thatcher successfully appropriated "law and order" as a party political issue.[29] An early expression of the Conservatives' "authoritarian populism"[30] was provided by William Whitelaw, the Thatcher Government's first Home Secretary, who in 1978 (whilst still in opposition) and 1979 proposed

> an experimental [detention centre] project with severe discipline providing short, sharp, shock treatment . . . to promote public confidence in our whole penal system by saying that we are prepared to try and deal with the small minority of young thugs who thumb their noses up at authority and laugh at all present arrangements.[31]

The new regime would be one where

> . . . life will be conducted at a brisk tempo. Much greater emphasis will be put on hard and constructive activities, on discipline and tidiness, on self-respect and respect for those in authority. We will introduce on a regular basis drill, parades and inspections. Offenders will have to earn their limited privileges by good behaviour . . . [T]hese will be no holiday camps and [it is hoped] that those who attend them will not ever want to go back.[32]

Whitelaw's proposal has been interpreted as a sop to those on the right of the Conservative Party, and intended by the Home Secretary as the *quid pro quo* for an early release scheme for adult offenders planned by him in the early 1980s,[33] just as the 1948 Act's creation of detention centres had been intended to appease those who opposed the abolition of judicial corporal punishment.

28 *Ibid.*

29 See D. Downes, *Law and Order: Theft of an Issue* (Fabian Society 1983), passim; and M. Brake and C. Hale, *Public Order and Private Lives: The Politics of Law and Order* (Routledge 1992), at pp. 15-16.

30 S. Hall, *Drifting into a Law and Order Society* (Cobden Trust 1980), at p. 4.

31 *Hansard,* vol. 95, 27 February 1978, col. 44-45.

32 W. Whitelaw, quoted in Thornton *et al., op. cit.,* at p. 1.

33 See S. Shaw, "Reflections on 'short, sharp shock'", *Youth and Policy,* 1985, 13, at pp. 2-3. Whitelaw was forced to abandon his early release plans in the wake of a hostile reception at the 1987 Conservative Party conference.

The New Tougher Regimes

The first tougher regimes were introduced in April 1980 at Send Junior Detention Centre, near Woking in Surrey, and at New Hall Senior Detention Centre, near Wetherby in West Yorkshire. The stated primary purpose of the project was "to assess whether spending a period of weeks in a detention centre with a more rigorous and demanding regime could effectively deter young offenders from committing further offences".[34]

The scheme was evaluated by the Home Office's Young Offender Psychology Unit, whose report was not published until 1984.[35] The Unit sought to determine both the general and individual deterrent effects, if any, of the new regimes. With regard to the former, no effect on recorded crime in the catchment areas of the projects was discernible;[36] regarding the latter, reconviction rates during a 12-month follow-up period for inmates who had been subjected to the tougher regimes were neither significantly different from those of inmates who had been at the same detention centres prior to the experiment, nor from rates for comparable inmates who had been held at other "ordinary" detention centres at broadly the same time. The reconviction rates for Send were 57 per cent under the old and new regimes; at New Hall the rate rose from 46 per cent to 48 per cent.[37] It appears that the changes made to the regimes were not regarded unfavourably by the inmates; rather, the increase in drill and physical exercise, together with a brisker pace of activities in general, served to relieve some of the tedium of institutional life:

> [T]he reduction in continuous monotony of tasks and the fragmentation brought about by the new timetable at least seems to have counter-balanced the attempts to make things stricter and more demanding. In some instances it actually led to a more varied existence in which time passed more quickly.[38]

The Predictability of Failure

That the short, sharp shock failed to reduce re-offending was not entirely unexpected. William Whitelaw himself, in the run-up to the 1979 General Election, admitted that he did not believe that the scheme would necessarily succeed;[39] and the authors of the evaluative report considered it reasonable to expect only "relatively small" advantages over ordinary

34 Thornton *et al.*, *op. cit.*, at p. 2.
35 *Ibid, passim.*
36 *Ibid,* at p. 231.
37 *Ibid,* at p. 216.
38 *Ibid,* at p. 122.
39 See Hansard, *op. cit.*

detention centre regimes, given the conclusion of a body of existing research findings that

> . . . although experimental regimes may sometimes affect the way inmates behave, this effect is limited to the period when the regime itself forms part of the inmate's current circumstances; unless the situation to which inmates return on release has been improved, there is no reason to expect any substantial reduction in reconviction rates.[40]

Such a recognition of the significance of factors beyond the regime was apposite: a "disproportionate" number of inmates at Send and New Hall were "temperamentally difficult and unhappy individuals"; nearly half of the juniors and a fifth of the seniors had had some contact with a psychiatrist or psychologist; some (11 per cent of juniors and 7 per cent of seniors) had a history of self-injury; about 10 per cent were illiterate; about half of the juniors and a quarter of seniors had experienced local authority care; and nearly half of the senior inmates had been unemployed at the time of conviction.[41] The short, sharp shock could offer little to ameliorate such debilitating characteristics.

Revision and Expansion

In the light of the failure of the experimental schemes to affect reconviction rates significantly, the Government might have decided to abandon the tougher approach. Instead, the tougher regime was modified in order to reduce the amount of drill and physical education but increase unpopular work such as floor scrubbing, and was extended to all detention centres, with effect from March 1985. In short, two of the defining features of the short, sharp shock - the "central elements around which the new [regime] had been built"[42] - were abandoned in favour of increased drudgery.

The Criminal Justice Act 1982 and the Decline of the Detention Order

It is recognised widely that the decision to extend the tougher regimes was "politically rather than penologically motivated".[43] Leon Brittan, Whitelaw's successor as Home Secretary, sought to justify the extension by claiming that the new regimes would inspire confidence among

40 Thornton et al., *op. cit.*, at p. 212.
41 *Ibid*, at pp. 24-25, 238-239.
42 *Ibid*, at p. 125.
43 C. Harding and L. Koffman, *Sentencing and the Penal System: Text and Materials*, 1st ed., (Sweet and Maxwell 1988), at p. 284. See also Muncie, *op. cit.*, at p. 61.

sentencers.[44] However, the Criminal Justice Act 1982 had shortened the maximum length of detention centre orders from six to four months,[45] and had introduced a power to impose a sentence of youth custody (replacing borstal training)[46] whose term would usually exceed four months, with a maximum of 12 months for offenders under 17.[47] Sentencers came to prefer the use of youth custody to that of detention orders, as Shaw notes:

> In their sentencing policy the courts ... clearly expressed a preference for a longer period of custodial "training" over a shorter period of parade-ground bombast. The stories of sentences of 4 months and one day are not apocryphal. Several hundred sentences of this length [were] imposed to ensure a place in youth custody rather than in a [detention centre].[48]

The resulting displacement of the detention centre order by "up-tariff" youth custody led to the closure or conversion of half of the detention centres (including New Hall and Send) in England and Wales by 1988.[49] That year's Criminal Justice Act replaced both measures with the new sentence of "detention in a young offender institution",[50] the existing youth custody centres being renamed for that purpose. Today, regimes in those young offender institutions to which young offenders aged under 21 are sent for short periods continue to bear "a strong resemblance"[51] to those created in the wake of the short, sharp shock experiment of the mid-1980s.

Conclusion

Thus, in proposing the establishment of a new pilot scheme of tough regimes in young offender institutions, the current Home Secretary appears to be willing to reintroduce an emphasis on drill and physical exercise which one of his predecessors, a fellow Conservative, removed a decade earlier in recognition of its popularity with inmates and consequent failure as a deterrent. However, it is possible that Mr. Howard believes that the American boot camp model of tough regimes has merits which the British short, sharp shock lacked. It is therefore to a consideration of the nature of

44 See L. Brittan, "A new sense of purpose", *Community Care*, 2 May 1985, at pp. 16-18.
45 Criminal Justice Act 1982, s. 4. The section applied to males aged 14-20.
46 Section 6 of the 1982 Act provided the power to impose a sentence of youth custody on offenders of either sex, aged 15-21. Borstal training was abolished by section 1(3) of the same Act.
47 Criminal Justice Act 1982, s. 7. For those offenders aged 17-21, the maximum term was the same as the maximum term of imprisonment that the court could impose for the offence.
48 Shaw, *op. cit.*, at p. 4.
49 See Muncie, *op. cit.*, at p. 63.
50 Criminal Justice Act 1988, s.123.
51 Cavadino and Dignan, *op. cit.*, at p. 209.

the effects of American boot camps that this paper now turns.

THE AMERICAN EXPERIENCE

The Growth of Boot Camps in the USA

Boot camp prisons, which provide the custodial element of "shock incarceration programmes",[52] have regimes which are broadly imitative of former methods of American military basic training. Inmates, usually adults aged under 25[53] or juveniles who have been convicted of non-violent offences, are required to spend between 90 and 180 days in a prison whose regimen is characterised by strict discipline, hard labour, militaristic drill and physical training, before being released under supervision in the community. The first of such programmes were established in Oklahoma and Georgia in 1983,[54] followed by a similar scheme in Mississippi in 1985; but it was not until 1987 that interest in shock incarceration increased significantly when boot camps were opened in three other southern states and in New York.[55] By March 1994, 36 states had boot camps operating within them,[56] some at county level, and in August 1994 President Clinton's Crime Bill was approved by Congress, permitting the spending of $30 billion on criminal justice measures including the construction of more prisons and boot camps for juveniles.[57] Thus, like another apparent criminal justice panacea which emerged in the USA during the 1980s - electronic monitoring of offenders[58] - shock incarceration has proliferated, notwithstanding the fact that "little is really known about the goals of the programmes and whether the boot camps are successful in achieving these goals".[59]

52 American spelling has been anglicised throughout this essay.

53 Some states have higher age limits or no age limits at all; the majority of programmes are open only to males: see D.L. MacKenzie and D. Parent, "Boot camp prisons for young offenders", in J. Byrne, H. Lurigio and J. Petersilia (eds.), *Smart Sentencing: The Emergence of Intermediate Sanctions* (Sage 1992), at p. 109.

54 Militaristic regimes had first been introduced in some US prisons during the nineteenth century: see M. Morash and L. Rucker, "A critical look at the idea of boot camp as a correctional reform", *Crime and Delinquency*, 1990, 36, at pp. 207-208.

55 See D. Parent, *Shock Incarceration: An Overview of Existing Programmes* (US Dept. of Justice 1989), at p. 2. The concentration of early schemes in southern and mid-USA may be attributable to links forged between legislators and departments of corrections' officials within the Southern States Correctional Association: see Parent, at p. 1.

56 See D.L. MacKenzie, "Results of a multisite study of boot camp prisons", *Federal Probation*, 1994, 58, at p. 60.

57 See "Clinton says 'generation of our children' at risk", Reuter News Service, 10 September 1994; and "Tough in the wrong places", *The Guardian*, 27 August 1994.

58 See S. Fay, "Electronically monitored justice: a consideration of recent evidence as to its effectiveness", *Anglo-American Law Review*, 1995, 24, at pp. 394-425.

59 MacKenzie, 1994, *op. cit.*, at p. 60.

Reasons for Growth

The impetus for such growth has come principally from judges and politicians rather than from departments of corrections' officials.[60] The multifaceted appeal of shock incarceration programmes was analysed by Parent in his 1989 overview of such schemes for the US Department of Justice.[61] Parent recognised that for the American public, boot camps have a visceral appeal, resonating with "popular desires for a quick fix to crime through harsh punishment".[62] Moreover, because millions of US citizens have undergone military basic training as a consequence of their country's combative foreign policy, it has been argued that

> [b]oot camps have a "face validity" ... that is absent in most corrections programmes ... Americans' wide exposure to military basic training promotes immediate, widespread, and uncritical public and political support for boot camp prisons.[63]

Among criminal justice officials questioned as part of Parent's study, the anticipated benefits of shock incarceration could be classified under three headings: improved resource management, the appeal of enhanced discipline, and improved effectiveness of correctional intervention.[64] With regard to improvements in resource management, the expectation of most state correctional officials was that boot camps might curb prison overcrowding or cut costs by reducing the average length of incarceration of inmates and/or by acting as a greater deterrent or rehabilitative measure than ordinary imprisonment. The promise of stricter discipline appealed to a large number of correctional personnel with military experience, and offered the prospect of the exercise of greater control over a more compliant, less volatile group of prisoners. Enhanced discipline was also regarded as a factor capable of bolstering the credibility of departments of corrections in the eyes of judges, legislators, prosecutors, and police. About 20 per cent of Parent's interviewees believed that shock incarceration would prove to be more effective than other sentences in rehabilitating offenders and deterring future crime.[65]

Examining the Effectiveness of Boot Camps

Similar expectations regarding shock incarceration have been identified

[60] See Parent *op. cit.*, at p. 1.
[61] *Ibid*, at pp. 1-3.
[62] *Ibid*, at p. 1.
[63] MacKenzie and Parent, 1992, *op. cit.*, at pp. 104-105.
[64] See Parent, *op. cit.*, at pp. 2-3.
[65] *Ibid.*

by other writers as being prevalent in the United States,[66] and a number of academic papers have been published evaluating some of the perceived advantages of the boot camp model. The remainder of this section of the article will review the evidence concerning the principal claims made for shock incarceration programmes, namely, that: (i) they can produce positive attitudinal changes among inmates; (ii) they can reduce the rates of re-offending among those who complete them; (iii) they can reduce prison overcrowding; and (iv) they can save departments of corrections (and therefore taxpayers) money. First, however, a brief consideration of the characteristics of boot camp regimes is necessary.

Boot Camp Characteristics

The expectation that the attitudes of participants in shock incarceration programmes can be changed for the better is an expectation that such programmes can have a rehabilitative effect. How such a change is to be effected is not entirely clear but some indication of the possible rehabilitative qualities of shock incarceration may lie in a graphic description of a "typical day in a boot camp" provided by MacKenzie and Parent, quoted here in full:

> [P]articipants arise before dawn, dress quickly and quietly, march in cadence to an exercise area, spend an hour or more doing callisthenics and running, and march back to their quarters. Following this, they march to breakfast, where they stand at parade rest when the serving line is not moving, and execute crisp military movements and turns when the line does move. Inmates are required to approach the table, stand at attention until commanded to sit, and eat without conversation. After breakfast they practise drill and ceremony. They then march to (or are transported to) a work site, where they perform six to eight hours of labour selected specifically to exact maximum physical effort from them. Upon completing the workday, they return to their living compound, where they face more exercises, drill and ceremony. After a quick evening meal, inmates may spend four to five hours in treatment or educational programmes before lights out. During their stay in the boot camp, they have no direct contact with regular prison inmates, strict rules govern all facets of their comportment and behaviour, and punishments for rule violations are summary, certain and often physical in nature (push-ups, running, and so on).[67]

[66] See, e.g., D. Sechrest, "Prison 'boot camps' do not measure up", *Federal Probation*, 1989, 53, at p. 16.
[67] MacKenzie and Parent, 1992, *op. cit.*, at pp. 103-104.

Whilst the rehabilitative potential of four or five hours of educational programmes or treatment (for example, for substance abuse) is apparent, and the value to health and fitness of callisthenics and running probably indisputable, it is not obvious how inmates are to benefit from the other ten or so hours of their daily routine. Indeed, critics of shock incarceration point to potentially harmful aspects of boot camp culture. Sechrest, for example, refers to the practice in Georgia of subjecting inmates to verbal abuse and taunts:

> A new "recruit" in Georgia ... is shouted at and referred to as a maggot, scumbag, boy, a fool, a nobody, and repeatedly threatened with transfer to the main facility where he may be sexually abused, he is told, if he fails the programme.[68]

It is clear from other surveys that such practices are far from uncommon:

> The methods used to effect changes are highly varied depending on the particular if not idiosyncratic view of the current correctional administration, as well as the level of expertise and training of the staff. [However,] frequently used methods include behaviour modification techniques, sustained psychological pressures through intimidation, and "encounter" sessions aimed frequently at verbal degradation of a particular individual.[69]

Examples of regimes involving humiliation (forcing inmates to push bars of soap along floors using their noses, or to wear baby bottles around their necks), dehumanisation (requiring hard or otherwise unpleasant or pointless labour, such as "cleaning latrines with a toothbrush") and the instilment of fear in inmates, have been celebrated in the American news media as methods of fostering self-discipline, self-control, a work ethic, and respect for authority among boot camp inmates.[70] Yet, as several commentators have noted, such practices, with their origins in former military methods of turning recruits into unquestioning combatants, appear to make little or no sense as a tool of rehabilitation. Morash and Rucker, for example, relying on the findings of US military-sponsored research and other empirical studies, argue forcefully that the boot camp concept as applied in a criminal justice context is

[68] Sechrest, *op. cit.*, at p. 16.

[69] R. Mathlas and J. Mathews, "The boot camp programme for offenders: does the shoe fit?", *International Journal of Offender Therapy and Comparative Criminology*, 1991, 35, at pp. 322-323.

[70] See Morash and Rucker, *op. cit.*, at pp. 206, 208.

> . . . often a simplification and exaggeration of an outdated system of military training that has been examined and rejected as unsatisfactory by many experts and scholars and by the military establishment itself.[71]

The authors point to evidence regarding the traditional military boot camp which reveals the problematic nature of many of its components, including: unpredictable, capricious, and unreasonable leadership leading to anger, disrespect and low self-esteem among trainees; "dysfunctional stress" caused by irrelevant or contrived work (like cleaning toilets with toothbrushes) which heightens tension and reduces the effectiveness of the training; and the employment of harsh and degrading techniques such as head shaving and forced marches in stiff footwear, leading to attempted suicides, psychiatric referrals, a high drop-out rate, and a bond of misery and despair among recruits.[72] Many of these characteristics are known to have been reproduced in boot camps run by departments of corrections.[73] Moreover, there may be a more fundamental trait imported from military basic training: an ethos of aggression and machismo. Mathlas and Mathews point to the dangers of a regime based upon authoritarian domination and the denigration of inmates:

> In numerous descriptions of boot camp programmes scant attention has been given to . . . personal interactions which are diametrically in conflict with goals of productive living in a democratic society. A boot camp programme which relies on dominance, degradation and demeaning of its prisoners runs counter to basic principles of learning and human behaviour. The person abused is likely to become an abuser, and given the opportunity may well use these tactics upon release to the community.[74]

Similarly, Morash and Rucker question the logic of the use of aggression as a means of inducing "prosocial" behaviour. They argue convincingly that boot camps "extol . . . the virtues that are often associated with both masculinity and aggression",[75] and highlight the irony that the aggressive stereotype of masculinity promoted in boot camps may be criminogenic.[76] In other words, programmes designed "to make men" out

[71] *Ibid*, at p. 210.
[72] *Ibid*, at pp. 210-212.
[73] *Ibid*, at p. 213.
[74] Mathlas and Mathews, *op. cit.*, at p. 325.
[75] Morash and Rucker, *op. cit.*, at p. 215.
[76] *Ibid*, at p. 216.

of inmates may induce anti-social behaviour and deviance.[77] Of course, the test of such dangers may lie in the recidivism rates of former boot camp inmates, which will be considered shortly. First, though, it is necessary to examine the evidence of empirical research concerning attitudinal change among boot camp inmates during their term of incarceration.

Boot Camps and Attitudinal Change among Inmates

In 1990 MacKenzie and Shaw published the findings of their research study comparing the attitudes of inmates in Louisiana's shock incarceration programme during 1987 and 1988 with those of inmates eligible for the programme but who were serving regular prison sentences in Louisiana during that period.[78] At the start of the study, the "shock" sample consisted of 90 offenders but this number dwindled to just 40 by the eighty-sixth day of the programme, as over 50 per cent of offenders dropped out and were sent to a regular prison to serve out their time (a factor whose significance will be discussed later). The "regular prison" sample consisted of 37 men. Questions designed to assess, inter alia, the personality, aggressiveness, attitudes, and anxiety of inmates were asked before the shock programme prison sentence began, a fortnight later, and 85 days later. The researchers found that those who had survived at least 85 days on the shock programme were less antisocial even before it started than were the dropouts and regular prisoners; and that after 85 days, the shock offenders who had not dropped out had become more prosocial but the regular prisoners had not changed. In addition, the inmates on the shock programme were found by the third month of their term to have become more positive about the staff and the programme itself, and more optimistic that their experience would lead to positive personal change. In contrast, the regular prisoners were less hopeful than they had been at the start of their term that their prison experience would lead to positive personal change, and had become more negative in their attitudes to staff and their sentence.[79] The authors conclude:

> The results of this research can be interpreted tentatively as showing positive changes for offenders who participate in shock incarceration. Those who complete shock incarceration have more positive attitudes in regard to their experience in prison, toward

77 The subjection of female inmates to the stereotype of aggressive masculinity is even more inappropriate: see Morash and Rucker, *ibid.*

78 See D.L. MacKenzie and J. Shaw, "Inmate adjustment and change during shock incarceration: the impact of correctional boot camp programmes", *Justice Quarterly*, 1990, 7, at pp. 125-147.

79 *Ibid*, at pp. 131, 143-144.

> society in general, and toward their ability to make positive personal change ... If more prosocial attitudes are associated with more positive adjustment in the community, as previous research has shown, it would appear that the shock offenders are leaving prison with a much better chance of being successful on parole.[80]

Assuming that the changes in the attitudes of the shock inmates would not have occurred had the inmates not participated in the programme,[81] there remains the possibility that such changes were transient,[82] or were the product of something other than rehabilitation. Indeed, regarding the latter, MacKenzie and Shaw concede that the difference in attitudes between the boot camp inmates and the regular prisoners may have been partly attributable to the fact that the former knew that their completion of the programme would guarantee them parole and a discount on the length of term they would have received had they gone to a regular prison; the regular prisoners were afforded no such certainty regarding parole.[83]

The most obvious limitations of MacKenzie and Shaw's study are undoubtedly its small sample size and its confinement to just one state's boot camp programme. As there is considerable variation among programmes in the USA,[84] even among those operating within the same state,[85] there is no guarantee that Louisiana's results are representative. Indeed, MacKenzie and Shaw acknowledge that the changes in the shock programme's inmates' attitudes may have been partly a function of the Louisiana programme's emphasis on rehabilitation, an emphasis not present in all other boot camp schemes.[86]

A more recent study of attitudinal change among boot camp inmates was carried out by Burton *et al.* on 389 participants in a programme run in Harris County, Houston, Texas.[87] It too found evidence of a positive change in attitude among those who completed the programme, which might "potentially shape the likelihood of future criminality".[88] However, like MacKenzie and Shaw's study, that of Burton *et al.* did not address the issue

[80] *Ibid,* at p. 146.
[81] MacKenzie and Shaw consider it likely that the shock incarceration "acted as a catalyst to accelerate the change": *ibid,* at p. 144.
[82] See Mathlas and Mathews, *op. cit.,* at p. 325.
[83] See MacKenzie and Shaw, *op. cit.,* at p. 145.
[84] See D.L. MacKenzie, "Boot camp prisons: components, evaluations, and empirical issues", *Federal Probation,* 1990, 54, at pp. 44-52.
[85] See, e.g., the analysis of Georgia's boot camps in J. Keenan, R. Ruback and J. Hadley, "Measuring the military atmosphere of boot camps", *Federal Probation,* 1994, 58, at pp. 67-71.
[86] See MacKenzie and Shaw, *op. cit.,* at p. 145.
[87] See V. Burton, J. Marquart, S. Cuvelier, L. Alarid and R. Hunter, "A study of attitudinal changes among boot camp participants", *Federal Probation,* 1993, 57, at pp. 46-52.
[88] *Ibid,* at p. 51.

of recidivism. Moreover, its concentration on one county-level programme obviously precludes assumptions as to the general application of its findings. Such limitations are, however, absent from MacKenzie's recent survey of a boot camp programme in each of eight US states: Florida, Georgia, Illinois, Louisiana, New York, Oklahoma, South Carolina, and Texas.[89] Once again, the researcher's findings suggested that boot camp inmates became less antisocial during their programme than they were before starting, and unlike offenders in conventional prisons, boot camp prisoners completed their sentences feeling "more positive about their experiences, their future, and how they ha[d] benefited from the programme".[90]

Significantly, MacKenzie found a positive change in attitude among boot camp inmates in all eight states, even among those whose programmes "did not have a focus on rehabilitation".[91] In consequence, MacKenzie concluded that the positive attitudinal changes did not result from the therapeutic or educational aspects of boot camps, although she believed it possible that positive attitudes were "conducive to improved performance and enthusiasm when rehabilitation programmes are offered".[92] Unfortunately, the research report does not identify those factors which appear to increase positive attitudes among boot camp inmates, nor does MacKenzie consider in her report the possibility that inmates may respond to questionnaires in accordance with their perception of what others expect of them. In other words, in an environment in which inmates must submit absolutely and unquestioningly to authority figures determined to "make men" out of them, those inmates might tell researchers what they think the researchers want to hear: that the boot camp experience is making law-abiding citizens out of "nobodies".[93]

Even if the positive and prosocial changes among boot camp inmates which MacKenzie and others have detected are genuine, it is necessary to reiterate that such changes may be ephemeral. As Morash and Rucker point out, the degree of supervision available to boot camp graduates in the community is unlikely to match the intensity and continuity of support available to military recruits on completion of their basic training: "post-release programmes are not designed to provide either the tightly knit structure or the guaranteed work that characterise military life".[94] Thus, the

89 See MacKenzie, 1994, *op. cit.*, at pp. 60-66.
90 *Ibid*, at p. 62.
91 *Ibid.*
92 *Ibid.*
93 "Nobody" is a term of abuse that has been used in Georgia's shock incarceration programme: see Sechrest, *op. cit.*, at p. 16.
94 Morash and Rucker, *op. cit.*, at p. 214.

released boot camp prisoner may fairly quickly revert to the values and attitudes which he or she had prior to the programme. Poverty, unemployment, and - particularly in relation to younger offenders -peer group pressure,[95] may undermine the positive attitudes identified among boot camp inmates. Evidence of the permanence of any significant positive effects of boot camps will lie in their impact upon recidivism among their released prisoners. Rates of re-offending or violations of supervision among such offenders may also provide an indication of the effectiveness of shock incarceration as a deterrent measure, an issue with which it is necessary to deal briefly.

Boot Camps and Deterrence

Any deterrent effect of shock incarceration on boot camp graduates is hardly likely to be reflected in inmates' positive attitudes towards their experience in prison, given that individual deterrence would require that experience to be "so unpleasant a memory that it will discourage the ex-prisoner from risking another term".[96] Nevertheless, boot camps have been promoted as a means of "shocking" young offenders out of crime by virtue of their rigour or the fear of summary punishment they induce among inmates. Such a view is encapsulated in the statement of a boot camp official in Georgia that

> . . . being scared is the point. You have to hit a mule between the eyes with a two-by-four to get his attention . . . and that's exactly what we're doing with this Programme.[97]

Though the official's statement is presumably not to be taken literally, its meaning is nonetheless apparent. The effectiveness of imprisonment as a deterrent is, however, less clear-cut. Whilst, for example, the "clang of the prison gates" principle, as expounded by Lawton L.J. in *Sargeant,*[98] holds that a short first term of imprisonment is likely to traumatise the offender but not allow him or her to acclimatise to the prison environment, its relevance as a justification for boot camps is limited: the principle does not require the degree of humiliation which appears to be a universal component of boot camp regimes; and although most shock incarceration

[95] See Mathlas and Mathews, *op. cit.*, at p. 325. A recent journalistic account of a boot camp for juvenile offenders in Mobile, Alabama, illustrates such pressure in the case of a 16-year-old former boot camp inmate who "walks a tightrope as other boys try to lure him back to the $300-a-day life of a drug dealer": "Hard times at boot camp", *The Times,* 8 February 1995.

[96] N. Walker, *Sentencing Theory, Law and Practice* (Butterworths 1985), at p. 145.

[97] Quoted in Morash and Rucker, *op. cit.*, at p. 206.

[98] (1974) 60 Cr. App. R. 74.

programmes are intended for first offenders, the wide interpretation of that category on the part of departments of corrections often permits the participation of offenders who have previously been jailed for misdemeanours or even felonies.[99]

Furthermore, the claims made for the deterrent effect of boot camps appear to be inconsistent with the British experience of tougher detention centre regimes (discussed earlier); with the expectations of labelling theory that "[h]arsher penalties...could help foster a tough, 'macho' criminal self-image in the young men who predominate in the criminal statistics";[100] and with the American experience of other "shock" initiatives introduced in recent times. Prominent among the latter are "Scared Straight" programmes which originated in New Jersey in the 1970s and which seek to steer juveniles from a life of crime by subjecting them to short visits to prisons for "lectures" by life prisoners on the futility of crime and brutality of prison life; "shock probation" programmes go further by incarcerating young offenders among the general prison population for between 90 and 120 days.[101] As Parent has noted, neither type of measure has been successful as a deterrent: "at best offenders exposed to them failed at rates similar to comparison groups. At worst, they failed at significantly higher rates".[102] How, then, have boot camps performed in terms of rehabilitation and deterrence?

Boot Camps and Recidivism

Rates of reconviction are not an unproblematic indication of the effectiveness of penal measures such as boot camps because, as Ashworth points out,

> [w]here a former prisoner is not reconvicted within two years, one cannot tell whether the explanation for that is the rehabilitative effect of custody, or its deterrent effect upon him, or a decision taken independently by the offender, or simply good luck in avoiding detection.[103]

Nevertheless, having assessed the effectiveness of the British experiment with tougher detention centre regimes largely in terms of the

[99] See MacKenzie and Parent, 1992, *op. cit.*, at p. 109.
[100] Cavadino and Dignan, *op. cit.*, at p. 34.
[101] See Parent, op. cit., at p. xii.
[102] *Ibid.* A discussion of the evaluative research that has been carried out on these and similar "shock" initiatives is to be found in Appendices A and B of Parent's study, which are written by W. Logan.
[103] A. Ashworth, *Sentencing and Criminal Justice*, 1st ed., (Weidenfeld & Nicolson 1992), at p. 215.

reconviction rates of their former inmates, it would be invidious to reject any assessment of boot camps which did a similar thing. To date, the only readily accessible, published evaluations of boot camps to provide empirical data concerning recidivism appear to be those of Doris Layton MacKenzie, the USA's leading academic expert in the field.

In 1991, MacKenzie published a report[104] of research that she had conducted in Louisiana which compared the parole performance of 74 offenders released after successful completion of the state's shock incarceration programme with the performance of 17 parolees who had dropped out of the camp and had to complete their custodial sentence in a regular prison, 74 offenders paroled following incarceration in a regular prison, and 108 offenders serving a sentence of probation. All subjects met the eligibility criteria of the shock incarceration programme.

Parole performance was monitored for a period of one year, and recidivism was measured in terms of arrests and failures on community supervision (the latter where the offender absconded, was jailed, or had his parole revoked).[105] At the end of one year of supervision, 37.8 per cent of the boot camp graduates and 35.3 per cent of the boot camp dropouts had been arrested at least once, whilst only 25.7 per cent of the parolees and 28.2 per cent of those on probation had been arrested. Over 21 per cent of "shock" offenders had been jailed, compared with only 13.5 per cent and 11.8 per cent of parolees and probationers, respectively.[106] However, when MacKenzie employed a statistical model which took into account the factors of age at first arrest, age at release, prior incarceration, and intensity of supervision, her results revealed no differences in the recidivism of the offender groups studied. In the light of her earlier findings of positive attitudinal change among boot camp prisoners during their programmes, MacKenzie suggested that such changes may be negated by the environmental circumstances confronting boot camp graduates upon release. She concluded:

> The shock programme may have an impact but it is not strong enough to carry the offenders through the difficulties of the return to the community . . . [I]t may be helpful to . . . incorporate additional aftercare components that focus on helping the offenders make the transition to the community or reinforce the behaviour that began in

[104] See D.L. MacKenzie, "The parole performance of offenders released from shock incarceration (boot camp prisons): a survival time analysis", *Journal of Quantitative Criminology*, 1991, 7, at pp. 213-236.
[105] Arrest did not necessarily result in revocation or jailing. All participants were male.
[106] See MacKenzie, 1991, *op. cit.*, at p. 227.

> prison. Offenders may also need skills useful for living in the community such as education or vocational training.[107]

Thus, the scepticism of writers such as Morash and Rucker,[108] Mathlas and Mathews,[109] and Sechrest[110] regarding the durability of any positive changes produced in those undergoing boot camp punishment appears to have been confirmed by MacKenzie's 1991 study.

More recently, another study published by MacKenzie, in conjunction with Shaw,[111] found that boot camp graduates in Louisiana who were drug offenders or substance abusers performed no better during their period of community supervision than did similar parolees or probationers who had not been subjected to shock incarceration. Paradoxically, although the Louisiana boot camp scheme offered supposedly rehabilitative "treatment programmes", including a substance abuse group, Shaw and McKenzie could find "no evidence to suggest that [the Louisiana] programme [was] particularly beneficial as a treatment modality in and of itself".[112]

Finally on this point, MacKenzie's 1994 report of her research concerning the boot camp programmes operating in eight US states (discussed above in relation to attitudinal change during incarceration)[113] found that in terms of recidivism, boot camp releasees in nearly all states performed as well as, but no better than, those offenders who had been subjected to other forms of punishment. Moreover, in the few cases where boot camp releasees did perform better, MacKenzie was unable to determine whether the positive impact was attributable to components of the incarceration or the post-release supervision. That said, the research suggested that the military atmosphere of boot camps on its own did not reduce recidivism.[114] MacKenzie's conclusion as to the need for caution and further research before committing ourselves to the expansion of shock incarceration is unequivocal:

> The current crime bill before the US Congress proposes an enormous increase in funding for boot camp prisons. The research

[107] *Ibid,* at p. 234. See the similar conclusions regarding the importance of aftercare in H. Polsky and J. Fast, "Boot camps, juvenile offenders, and culture shock", Child and Youth Care Forum, 1993, 22, at p. 414.

[108] See Morash and Rucker, *op. cit.,* at p. 214.

[109] See Mathlas and Mathews, *op. cit.,* at p. 325.

[110] See Sechrest, *op. cit.,* at p. 19.

[111] See J. Shaw and D.L. MacKenzie, "The one-year community supervision performance of drug offenders and Louisiana DOC-identified substance abusers graduating from shock incarceration", *Journal of Criminal Justice,* 1992, 20, at pp. 501-516.

[112] *Ibid,* at p. 512.

[113] See MacKenzie, 1994, *op. cit.*

[114] *Ibid,* at p. 66.

> reported here makes it obvious that to increase the number and types of boot camps without, at the same time, investigating their impact on the individuals involved and on the correctional systems would be irresponsible . . . Overall, the results of this research indicate that many of these boot camps are not achieving their goals.[115]

Just as MacKenzie's charge of irresponsibility went unheeded by President Clinton and the US Congress, so too it appears likely that Britain's Home Secretary cares little for findings which suggest strongly that boot camps offer little or nothing in terms of an impact upon offenders' rates of re-offending. Although the absence of a demonstrably significant deterrent or rehabilitative effect appears to limit the potential of boot camps to reduce prison overcrowding and/or custodial costs, it is nevertheless possible that such reductions could be achieved if the average length of incarceration of inmates were reduced sufficiently by shock incarceration. It is to this issue that we turn finally in this section of the article.

Shock Incarceration, Prison Overcrowding, and Costs

In the USA, intermediate sanctions such as shock incarceration and electronically monitored home confinement have had among their principal aims the reduction of prison overcrowding and the saving of custody costs.[116] The evidence available to date regarding electronic monitoring, however, suggests that it has not had a significant impact upon prison numbers or custodial costs, in that its adoption has not led to the closure of prisons or the forestalling of prison-building programmes.[117] Furthermore, it has become apparent that the use of electronic monitoring will necessitate additional expenditure if, as has been the case in some states, increased violations of parole conditions result in more monitorees than regular parolees being returned to prison;[118] or if it is employed in relation to offenders who would otherwise have been granted less restrictive parole; or if any additional capacity generated in the prison system by its use is regarded by sentencers as an invitation to send greater numbers to prison. The possibility of additional expenditure being incurred as a result of the imprisonment of monitorees who violate their parole conditions has clear parallels with the additional costs involved in re-sentencing boot camp

[115] *Ibid.*

[116] See J. Byrne, A. Lurigio and J. Petersilia, *op. cit., passim.*

[117] See M. Renzema, "Home confinement programmes: development, implementation, and impact", in Byrne, Lurigio and Petersilia, *op. cit.*, at p. 48.

[118] See, e.g., D. Palumbo, M. Clifford and Z. Snyder-Joy, "From net widening to intermediate sanctions: the transformation of alternatives to incarceration from benevolence to malevolence", in Byrne, Lurigio and Petersilia, *op. cit.*, at pp. 237-238.

dropouts, and boot camp graduates who re-offend or fail during their period of community supervision, to conventional prison. The other two possibilities are indicative of "net-widening", a process associated with intermediate sanctions whereby social control is intensified and broadened to encompass those offenders who previously would have been subjected to lesser sanctions, or to no sanctions at all.[119] That such a process has a bearing on shock incarceration has been recognised by MacKenzie and Parent,[120] and MacKenzie and Piquero[121] in two recent studies concerning the impact of boot camps on prison overcrowding in Louisiana, and in Louisiana and four other states, respectively.

MacKenzie and Parent's analysis of shock incarceration in Louisiana identified five factors affecting the impact of boot camps on prison bed space:

> (1) the size of the pool of eligible offenders
>
> (2) the probability that those offenders would be imprisoned if placement in the boot camp programme were not available
>
> (3) the rate at which those admitted to boot camps complete the programme
>
> (4) the difference between the offenders' regular prison terms and the duration of the boot camp programme
>
> (5) the rate at which boot camp graduates return to prison, either for violations of release conditions or for new criminal convictions.[122]

The researchers discovered that Louisiana's shock programme could save some 3,500 person-months of confinement or almost 300 prison beds per year if it operated at full capacity (instead of its then current half capacity resulting partly from its having a high proportion of dropouts).[123] In their study of the effect of boot camps in five states (Florida, Georgia,

[119] See S. Cohen, "The punitive city: notes on the dispersal of social control", *Contemporary Crises*, 1979, 3, at pp. 339-363; J. Austin and B. Krisberg, "Wider, stronger and different nets: the dialectics of criminal justice reform", *Journal of Research in Crime and Delinquency*, 1981, 18, at pp. 165-196; N. Morris and M. Tonry, *Between Prison and Probation* (Oxford University Press 1990), at pp. 224-229.

[120] See D.L. MacKenzie and D. Parent, "Shock incarceration and prison crowding in Louisiana", *Journal of Criminal Justice*, 1991, 19, at pp. 225-237.

[121] See D.L. MacKenzie and A. Piquero, "The impact of shock incarceration programmes on prison crowding", *Crime and Delinquency*, 1994, 2, at pp. 222-249.

[122] MacKenzie and Parent, 1992, *op. cit.*, at p. 111.

[123] See MacKenzie and Parent, 1991, *op. cit.*, at p. 233.

Louisiana, South Carolina, and New York) MacKenzie and Piquero found that the predominant factor affecting the need for prison beds was whether boot camps recruited inmates from among those offenders who were prison-bound or those who were probation-bound. As anticipated, the researchers found that as the percentage of prison-bound offenders in the boot camps increased, the need for prison beds declined, and vice versa. The writers were of the opinion that in all states except Florida, prison beds would be saved if boot camps recruited exclusively among the prison-bound. (Florida's boot camp programme suffered both from a high rate of dismissals among its participants, and from the fact that its boot camp graduates were incarcerated for only marginally shorter terms than were its non-boot camp prisoners.)[124] However, MacKenzie and Piquero's findings suggest that only in New York would shock incarceration have a very significant impact on prison overcrowding, because of that state's comparatively large (1,500 bed capacity) and lengthy (six months' duration) boot camp programme.[125] The authors conclude their study with a warning concerning the dangers of net-widening:

> The programmes have the potential for reducing prison crowding; *however, they also have the potential for substantially increasing the number of offenders in prison.* The major factor that will make the difference will be the degree to which the participants would otherwise have been imprisoned. The larger the programme, the more important this will be because even if 50% of the offenders were prison bound, the programme could result in the need for a considerable number of additional beds. If the goal of a boot camp prison is to reduce prison crowding, a jurisdiction designing a boot camp prison must ensure that offender-participants are those who would otherwise be sent to prison.[126] [Emphasis added].

Thus, boot camps appear to have the potential to reduce prison overcrowding provided a sufficient number of their participants are divertees from prison (rather than from non-custodial measures) and are released earlier than would have been the case had they served their sentence in a conventional prison; and provided that the number of boot camp programme dropouts is not so high as to prevent camps operating at anywhere near full capacity.

[124] See MacKenzie and Piquero, *op. cit.*, at p. 243.
[125] *Ibid.*
[126] *Ibid*, at p. 244.

With regard to costs, there appears to be a common assumption that boot camps are cheaper to run than conventional prisons.[127] However, research undertaken by several writers, including Parent and MacKenzie independently of each other, challenges this presumption:

> [P]rison boot camps cost as much as or more than regular prisons on a per inmate per day basis ... Boot camps that offer minimal programming and focus mostly on the military regime, exercise and hard work cost about the same as regular prison on a per inmate per day basis. Boot camps that offer an array of treatment programmes and services cost more than regular prisons on a per inmate per day basis ... Thus boot camps are less costly than regular prisons only if they shorten the duration of confinement for persons who otherwise would be imprisoned. Because boot camps cost much more than probation ..., if a large percentage of participants would have been on probation if boot camps had not been available, then boot camps increase total correctional costs. If prison durations are shortened only slightly, boot camps are unlikely to cost less.[128]

MacKenzie and Piquero's study of the impact of boot camps on prison overcrowding in five US states estimated that Florida, Louisiana and New York would save approximately $700,000, $3.3 million, and almost $10 million, respectively, per year by operating boot camp prisons. In contrast, South Carolina and Georgia, which at the time of the study were accepting as boot camp participants many divertees from probation, were thought likely to *incur costs* of over $900,000 and $500,000, respectively, per year as a result of their shock incarceration programmes.[129] Hence, if the potential for cost-saving were one of the reasons behind the introduction of a version of boot camps in Britain, the need for shorter sentences and the avoidance of net-widening would be paramount if such savings were to be effected. However, it seems likely that the cost of boot camp detention, and, indeed, its apparent ineffectiveness in reducing recidivism, are at best of secondary importance to the British Home Secretary, given the political context in which Mr. Howard and the Conservative Party have found themselves in recent years.

[127] See MacKenzie and Parent, 1992, *op. cit.*, at p. 112.
[128] *Ibid*, at pp. 112-113.
[129] See MacKenzie and Piquero, *op. cit.*, at p. 244.

THE CONTEXT OF THE BRITISH BOOT CAMP PROPOSALS

The Rise in Recorded Crime

The Conservatives' successful utilisation of "law and order" as a key issue in the British General Election of 1979 is well-documented[130] and requires no elaboration here. Subsequent developments have, however, undermined the Conservatives' credibility as the "party of law and order". For example, the level of recorded crime in England and Wales has more than doubled since the first of four successive Conservative Governments came to power in 1979: in that year 2.5 million notifiable offences were recorded; in 1994, 5.3 million.[131] Moreover, the clear-up rate for recorded notifiable offences has fallen from 41 per cent in 1979 to 26 per cent in 1994.[132] This has occurred despite an enormous increase in Government expenditure on law and order services, estimated in 1992 to be costing some £6 billion annually.[133] The problem is largely one of the Government's own making, as Lacey has noted:

> [A] Government which announces itself as committed to a tough stance on law and order is likely to be creating a major problem for itself in the longer term. This is particularly so where the Government is one which claims it can reduce the level of crime by means of financial investment in the criminal justice system, notably prisons and the police, at the same time as pursuing social and economic policies which are likely to generate high unemployment, poverty and an increase in social conflict.[134]

Choosing to disregard the mounting evidence of a connection between their free market policies and crime levels,[135] successive Conservative Governments have employed a variety of punitive measures intended to incapacitate, deter or exact retribution in respect of offenders who are considered to be entirely responsible for their own criminal behaviour,

130 See the works cited at note 29.

131 See Home Office, *Criminal Statistics, England and Wales, 1979* and *1994*. The latest British Crime Survey estimates that in 1993, 18 million offences were committed against individuals and their property (two-thirds of which were comparable with police-recorded figures): see P. Mayhew, C. Mirrlees-Black and N. Aye Maung, "Trends in crime: findings from the 1994 British Crime Survey", Home Office Research and Statistics Department Research Findings No. 14, 1994, at p. 2.

132 See Home Office, Statistical Bulletin, *Notifiable Offences England and Wales*, 1994, at pp. 11-14.

133 See B. Loveday, "Right agendas: law and order in England and Wales", *International Journal of the Sociology of Law*, 1992, 20, at p. 299.

134 N. Lacey, "Government as manager, citizen as consumer: the case of the Criminal Justice Act 1991", *Modern Law Review*, 1994, 57, at p. 540.

135 See, generally, *Criminal Justice Matters, Crime and the Economy*, 1994/95, 18, *passim;* and J. Wells, *Crime and Unemployment* (Employment Policy Institute 1995), *passim.*

regardless of their social and economic circumstances.[136] The proposals for boot camps may in one sense therefore be regarded as another measure in the Government's endeavour to reduce crime without addressing some of its major causes; a measure which nevertheless the Government hopes will help restore its tarnished image as an effective maintainer of law and order.

Mr. Howard's Agenda

The appointment of Michael Howard as Home Secretary in May 1993 has also had a significant effect on criminal justice policy. Howard's 27-point law and order programme,[137] announced at the Conservative Party annual conference in October 1993, and subsequently embodied in part in the Criminal Justice and Public Order Act 1994,[138] has been interpreted as the initiative of someone eager both to assert his authority as a radical, tough-minded, right-wing Home Secretary and to "reclaim [for the Conservative Party] the law and order high ground - lost during 14 years of spiralling crime".[139] The Conservatives' dwindling majority in the House of Commons and loss of ground on criminal justice issues to a rejuvenated Labour Party[140] are also likely to have precipitated Howard's tough stance on law and order: Conservative Party managers were reported in 1993 to have been "hopeful that their tough law and order package [would] damage the opposition parties and help restore [their] electoral fortunes";[141] and Government ministers were said to be "less concerned that the measures [would] almost certainly mean a return to severe prison overcrowding . . . than with being seen to be soft on crime".[142] Although neither the 27-point programme nor the 1994 Act provided for the establishment of boot camps, such a proposal is congruent with the illiberal and punitive general tenor of

[136] For example, in a public speech made in support of his Criminal Justice and Public Order Bill in November 1993, Mr. Howard rejected "trendy theories that try to explain away crime by blaming socio-economic factors", insisting that "criminals should be held to account for their actions and punished accordingly": quoted in M. Wasik and R. Taylor, *Blackstone's Guide to the Criminal Justice and Public Order Act 1994* (Blackstone Press 1995), at p. 1. Similar sentiments were expressed by Prime Minister John Major in his famous utterance that society should "condemn a little more and understand a little less": see "Tories vow to tackle child crime", *The Guardian,* 22 February 1993.

[137] For details, see J. Beynon, *Law and Order Review 1993* (Centre for the Study of Public Order 1994), at p. 12.

[138] The 1994 Act contains provisions relating to 19 of Mr. Howard's 27 "steps to law and order", including the abolition of the accused's right to silence without adverse inferences being drawn (s.34), but notably not Mr. Howard's promised establishment of a Criminal Cases Review Authority to investigate possible miscarriages of justice: see Wasik and Taylor, *op. cit.,* at p. 2.

[139] "Tough line on crime to unify Tories", *The Independent,* 2 October 1993.

[140] See, e.g., "Tories lose voters' law and order trust", *The Guardian,* 11 March 1993; "Hardline policies on crime fail to win public support", *The Guardian,* 12 January 1994; "PM takes on yob culture: Major tries to claw back Labour's law and order lead", *The Guardian,* 10 September 1994.

[141] "New look at electronic tagging for criminals", *The Daily Telegraph,* 15 October 1993.

[142] "Law and order U-turn planned", *The Independent,* 11 September 1993.

the programme and the Act,[143] and in particular with their provisions for tougher penalties (including the new custodial sentence of the secure training order) for young offenders.[144] Indeed, the boot camp proposals and the 1994 Act's provisions relating to young offenders have emerged during a period in which widespread fear of, and hostility towards, persistent and serious young offenders have prevailed in Britain.

Moral Panic

This "demonisation of young offenders"[145] is an important third contextual factor relevant to the proposals for boot camps, and is a manifestation of a "moral panic" concerning young offenders which re-emerged in 1991 after disturbances involving youths following police clampdowns on "joyriding" in Oxford, Cardiff and Tyneside.[146] The panic was given considerable impetus by the abduction and murder of two-year-old James Bulger by two ten-year-old boys on Merseyside in February 1993.[147] For those unfamiliar with the sociology of deviance, it was Stanley Cohen who was among the first writers to employ the notion of "moral panic", as an explanatory factor in the social reaction to the subcultures of "mods and rockers" during the 1960s:

> Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylised and stereotypical fashion by the mass media; the moral barricades are manned by bishops, politicians and other right-thinking people; ... ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible ... One of the most recurrent types of moral panic in Britain since the war has been associated with the emergence of various forms of youth culture ... whose behaviour is deviant or delinquent.[148]

[143] See M. Allen and S. Cooper, "Howard's way - a farewell to freedom?" (1995) 58 M.L.R., at pp. 364-389.

[144] See Part I of the Criminal Justice and Public Order Act 1994.

[145] The phrase was used recently by Roger Graef as the title of a presentation to the British Criminology Conference, University of Loughborough, 20 July 1995, and is derivative of Stanley Cohen's concept of the "folk devil" as a personification of evil: see S. Cohen, *Folk Devils and Moral Panics,* 2nd ed., (Martin Robertson 1980), *passim.*

[146] See B. Campbell, *Goliath: Britain's Dangerous Places,* 1993, at pp. 1-90.

[147] See M. Phillips and M. Kettle, "The murder of innocence", *The Guardian,* 16 February 1993.

[148] Cohen, *op. cit.,* at p. 9. Cohen's book was first published in 1972. A slightly earlier use of the concept of moral panic is to be found in Jock Young's "The role of the police as amplifiers of deviance, negotiators of reality and translators of fantasy", in S. Cohen (ed.), *Images of Deviance* (Penguin 1971), at pp. 27-61. See, generally, E. Goode and N. Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Blackwell 1994).

For Cohen and others who have used the concept of moral panic in subsequent studies,[149] the response of those gripped by such panic is invariably an overreaction to the perceived problem:

> To describe an expression of public and official anxiety as a "moral panic" suggests that the scale of this response is disproportionately greater than the scale of the problem. There may, indeed, be a problem, but it is one which, in a moral panic, becomes overblown by media exaggeration and hyperbole. Consistent with media hysteria, the official reaction tends to be more severe than it need be.[150]

It is contended that the Government's reaction to public and media anxiety concerning young offenders in the 1990s, a response which has produced the legislative provisions for secure training centres and Mr. Howard's proposals for boot camps, is indeed an overreaction to the problem posed by juvenile offenders in Britain. For, whilst it is impossible to overstate the tragedy of James Bulger's death, it is necessary to acknowledge that homicide committed by children is an extremely rare occurrence - it is believed that in the last 250 years there have been only 27 recorded cases in Britain of children under 14 killing other children[151] - and that the Bulger murder was not, contrary to the sentiment expressed in virtually every newspaper editorial at the time,[152] incontrovertible proof of the disintegration of the social order. Similarly, the problem posed by persistent young offenders has been enormously overstated in the news media during the 1990s: reports of "one-boy crime waves", often sensationalised by the journalistic use of epithets such as "Rat Boy", "Spider Boy" or "The Boy They Can't Cage",[153] have tended to ignore apparently less newsworthy evidence indicating that the number of known

[149] See, in particular, S. Hall, S. Critcher, T. Jefferson, J. Clarke and B. Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (Macmillan 1978).

[150] P. Waddington, "Mugging as a moral panic: a question of proportion", *British Journal of Sociology*, 1986, 37, at pp. 245-259.

[151] See G. Sereny, *The Case of Mary Bell*, 2nd ed., (Pimlico 1995), at p. xiii.

[152] For a typical editorial, see "The brutality of Britain", *The Sunday Times*, 21 February 1993; see further, C. Hay, "Mobilisation through interpellation: James Bulger, juvenile crime and the construction of a moral panic", *Social & Legal Studies*, 1995, 4, at pp. 197-223.

[153] See, e.g., "Police anger as Ratboy goes on the run after visit to parents", *The Guardian*, 9 August 1993; "One-boy crime wave sues over education", *The Sunday Times*, 16 October 1993; and "The boy they can't cage", *Nottingham Evening Post*, 28 June 1995.

persistent young offenders is low,[154] that such offending is usually transient and not of a serious nature,[155] that the number of offenders aged 10-16 found guilty of, or cautioned for, offences fell in England and Wales by almost 35 per cent between 1981 and 1992,[156] and that Britain has a lower rate of juvenile violence and vandalism than several other Western European countries, including Switzerland.[157]

None of this evidence sells newspapers or supports Mr. Howard's punitive posture towards young offenders; but acting tough in a political climate characterised by high general levels of recorded crime, acute Government unpopularity,[158] and media hysteria feeding public anxiety about young offenders, is a populist strategy which owes much more to desperation and political expedience than to penology.

CONCLUSION

This paper has examined the antecedents and context of current proposals to introduce to England and Wales a boot camp model of imprisonment for young offenders. Its analysis of earlier domestic initiatives aimed at providing a "short, sharp shock" for such offenders reveals a history of failure to effect a greater reduction in reconviction rates among releasees than that achieved by "non-shock" alternatives. Far from being based on evidence of effectiveness, "shock" initiatives, including the current proposals, have tended to be visceral and expedient responses to high levels of recorded crime or to media and public anxiety concerning young offenders.

This article has also examined evidence concerning the operation of boot camps in the United States. There, shock incarceration programmes have proliferated despite a paucity of evaluative research as to their effectiveness in achieving what are often ill-defined goals. Much of the

[154] In 1992 the Home Office asked police forces to identify offenders under 17 who were known or alleged to have committed ten or more offences between April and June of that year. Thirty-three forces replied, identifying a total of only 106 offenders. Among the ten forces which did not supply figures were the Metropolitan Police and the West Midlands force. See House of Commons Home Affairs Committee, *Sixth Report, 1992-93, Juvenile Offenders*, p. xiii, para. 18. Elsewhere, it has been suggested that the "real number" of persistent young offenders in England and Wales is "between 300 and 400": "Making a bad scene worse", *The Guardian*, 3 March 1993.

[155] See A. Hagell and T. Newburn, *Persistent Young Offenders* (Policy Studies Institute 1994), at pp. 127-131.

[156] See D. Fry, *Social Focus on Children* (HMSO 1994), at pp. 48-49: only part of this decrease is attributable to the demographic fall in the number of children during the period and the likely increase in the use of informal warnings (as distinct from formal cautions) by the police.

[157] See "Unpublished study shows fewer youth crimes", *The Guardian*, 6 July 1994.

[158] Findings of an NOP poll published in September 1995 gave the Labour Party a 26-point lead over the Conservatives: see "Labour holds on to lead in poll", *The Sunday Times*, 17 September 1995.

empirical research which has been undertaken on US boot camps has been the work of Doris Layton MacKenzie, who has found no evidence that shock incarceration is any more effective in reducing recidivism than are alternative punishments. Whilst the same author has found evidence of positive attitudinal change among boot camp inmates during the period of their incarceration, she suggests that the transitory nature of such change is attributable to the environmental (i.e., structural) circumstances which confront those released from boot camps. Although MacKenzie suggests that some US states which operate shock incarceration programmes have the potential thereby to reduce prison overcrowding and custody costs, she demonstrates that such benefits will not accrue - indeed, overcrowding and costs will increase - if net-widening is allowed to occur. Most, if not all, of the studies discussed in this article which address the issue of the harshness of boot camp regimes reject the brutal and degrading components of shock incarceration as gratuitous, anachronistic and ineffective. Those components can also be challenged on moral grounds as offending against the concept of "dignity in punishment".[159]

It is possible that the mounting evidence as to the limitations of the boot camp model of punishment has begun to stimulate in the United States a shift away from the punitive and retributive aspects of early shock incarceration programmes. A recently published paper[160] suggests that a "second generation" of "therapeutically oriented" regimes is emerging which eschews the militaristic components of earlier schemes in favour of an emphasis on drug abuse treatment, pre-release preparation, and aftercare. The authors point out, however, that "it remains to be seen whether the promise of shock incarceration programming is any greater than the failed legacy of correctional innovations of the past".[161]

Here in Britain, in the months following the leak of Government plans to adopt a boot camp model of imprisonment for young offenders it became evident that such proposals had the strong personal support of the Home Secretary. Indeed, it was disclosed in March 1995 that Mr. Howard was intent on introducing shock incarceration to Britain despite having been advised not to do so by Derek Lewis, who was then the Prison Service's director-general, the latter acting on the recommendations of a report

[159] See A. von Hirsch, "The ethics of community-based sanctions", *Crime and Delinquency,* 1990, 36, at pp. 166-168. The author makes specific reference to the practice of forcing prisoners to walk in lock step - a common component of shock incarceration programmes.

[160] See L. Gransky, T. Castellano and E. Cowles, "Is there a 'second generation' of shock incarceration facilities?: the evolving nature of goals, programme elements, and drug treatment services in boot camp programmes", in J. Smykla and W. Selke (eds.), *Intermediate Sanctions: Sentencing in the 1990s* (Anderson Publishing and Academy of Criminal Justice Sciences 1995), at pp. 89-111.

[161] *Ibid,* at p. 111.

produced by a team of his officials who had visited a number of boot camps in the USA during 1994.[162]

The officials' report is believed to have been suppressed by ministers because of its potential to embarrass the Government,[163] and remains unpublished. A copy of the report was, however, placed in the House of Commons library after an Opposition question was tabled as to its existence, and its conclusions are forthright:

> There is little point in devoting time and resources to considering an initiative which seems to have little to offer us . . . The views expressed and conclusions reached . . . represent the unanimous opinion of those who took part in the visit. Nothing we saw, whilst we were in the US, either in the establishments we visited or in the research we have read, leads us to believe that boot camps appear to be any more effective than traditional prison in preventing future crimes. The evidence is that most programmes that have monitored recidivism have found only marginal differences . . . which diminish over time.[164]

Mr. Howard's decision to ignore such advice would seem to confirm that his motivation for introducing boot camps is not a concern to achieve a reduction of re-offending among boot camp releasees. Rather, as the Home Office itself conceded in March 1995, the Home Secretary's endorsement of boot camps "was part of his determination to ensure that sentences for young offenders should be seen as punishment for their crimes",[165] a response to prevailing media hostility towards some rehabilitative components of local authority child care provision.[166] This is surely an example of knee-jerk criminal justice policy in which the affectation of toughness completely overrides considerations of effectiveness, despite the "managerialist" emphasis on efficiency which successive Conservative Governments have imported to criminal justice policy since the 1980s.[167]

[162] See "Boot camp report hidden", *The Independent on Sunday*, 19 March 1995.

[163] *Ibid.* There have been other recent allegations of the suppression of Home Office research studies whose findings were inconsistent with Mr. Howard's law and order clampdown: see "Ministers suppress research", *The Guardian*, 4 July 1994; and "Shooting the researcher", *The Guardian*, 5 July 1994.

[164] M. Brookes, I. Lockwood, M. Loughlin and M. Stevens, Boot Camps, *Report of a Visit to the United States* (1994 unpublished), quoted in S. Nathan, *Boot Camps: Return of the Short, Sharp Shock* (Prison Reform Trust 1995), para. 16.

[165] "Boot camp proposals unveiled by Howard", *The Daily Telegraph*, 10 March 1995.

[166] See, e.g., "Safari Boy: the making of a menace", *The Sunday Times*, 4 September 1994, concerning a youth sent on a tour of Africa. Mr. Howard's opposition to such measures is shared by the Prime Minister: see "'Airy-Fairy' crime theory attacked", *The Guardian*, 8 January 1994.

[167] See Lacey, *op. cit., passim.*

Such toughness was underlined in August 1995 when it was disclosed that Mr. Howard wants young offenders to be sent to the Ministry of Defence's Military Corrective Training Centre at Colchester, Essex.[168] This is the last surviving military prison (or "glasshouse")[169] in Britain to which military personnel who have offended under military law are sent for rigorous "punishment, drill, physical exercise and rifle practice".[170] The proposal, once again, smacks of political expedience: the Ministry of Defence is considering plans to privatise the Colchester centre as part of a wide-ranging cost-cutting exercise, and the Home Office's desire to use the contracted-out prison might facilitate such an economy.[171] Mr. Howard's proposal is also a hard-line response to an embarrassing disclosure that senior prison service officials wish to operate a "rehabilitative but disciplined" regime at the first boot camp due to open in Britain in 1996 - the under-used Thorn Cross Young Offenders' Institution near Warrington, Cheshire.[172] When the Home Secretary announced details of the proposed regime at Thorn Cross in September 1995, he stressed the punitive aspects of the pilot project: limited privileges; austere accommodation; "tough and demanding" 16-hour days involving kit inspection, parade ground drill, work, and physical education including circuit training and assault course; in all, a combination of "deterrents, discipline and training".[173] In fact, the 60 volunteers for the Thorn Cross pilot scheme will also receive basic education, coping and social responsibility skills, and anger management training.[174]

Such rehabilitative elements may be unpalatable to Mr. Howard and the "law and order" lobby within his party but the evidence reviewed in this paper suggests that without those elements and comprehensive aftercare, Britain's boot camp experiment is doomed to failure. Of course, even the presence of such components is unlikely to provide young offenders with a stake in the community and a viable alternative to a criminal lifestyle which a steady job, decent accommodation, etc., might offer. But those opportunities are the stuff of economic and social policy for which successive Conservative Governments since 1979 have largely eschewed responsibility.[175] Moreover, whilst the absence from Thorn Cross (but perhaps not from Colchester's glasshouse) of the brutal and dehumanising

[168] See "Howard wants to jail young thugs in Army glasshouse", *The Times*, 24 August 1995.
[169] For the origins of this term, see note 11.
[170] "Army jail plan for young offenders", *The Independent*, 24 August 1995.
[171] See "Ministry may privatise army 'glasshouse' earmarked for young civilian offenders", *The Guardian*, 25 August 1995.
[172] See "Voluntary boot camp sparks row", *The Guardian*, 10 August 1995.
[173] M. Howard, quoted in "Howard unveils life at 'boot camp'", *The Daily Telegraph*, 19 September 1995.
[174] See "First 'boot camp' to kick off without hard-line regime", *The Independent*, 19 September 1995.
[175] See R. Levitas, *The Ideology of the New Right* (Polity Press 1986), passim.

practices present in some US boot camps is to be applauded, there is a danger that Britain's proposed "high intensity training" centres - as the Home Office would prefer its boot camps to be called[176] - will in practice differ little from existing young offenders' institutions. This will do nothing to reduce the reconviction rate of 82 per cent among 17 to 20-year-old males released from custody,[177] but it may permit a future Home Secretary to repeat the errors of Messrs. Whitelaw and Howard by insisting on the return of the short, sharp shock.

[176] See "Howard unveils life at 'boot camp'", *op. cit.*

[177] This rate of reconviction is within four years of discharge from custody: see *Prison Statistics, England and Wales* (HMSO 1992), at p. 132.

PARTNERSHIPS – WHEN THE VIEW IS NO LONGER OF PROFIT

*Elspeth Deards**

1. INTRODUCTION

THE PARTNERSHIP ACT 1890 DEFINES A PARTNERSHIP as, inter alia, an organisation set up "with a view of profit".[1] In the eyes of the law, any subsequent failure by the partnership to be profitable is irrelevant to its legal status. It remains, until its dissolution, a partnership. The crucial factor is that the parties intend to make a profit, and are not simply engaged in a charitable or other non profit-making endeavour.

That having been said, a loss-making partnership will not continue to exist indefinitely. Although partnership law regards the existence of profits as entirely distinct from the existence of the partnership, the partners and their creditors certainly do not.

The Partnership Act 1890 envisages that a loss making partnership will be dissolved, either with or without the intervention of the court[2] (depending on the nature of the problem and the terms of any partnership agreement), and then wound up by the partners without court involvement[3] (although in appropriate circumstances a receiver might be appointed by the court[4]). Prior to the Insolvent Partnerships Order 1986[5] (the "1986 Order"), the only alternative to this informal winding up was to present a joint bankruptcy petition against all the partners.[6]

The Insolvency Act 1986 (the "1986 Act"), which created a radical new insolvency regime for companies, was applied to partnerships to a very limited extent by the 1986 Order, which introduced the possibility of winding up a partnership as an unregistered company either with, or without, the presenting of concurrent insolvency petitions[7] against partners.

The Insolvent Partnerships Order 1994[8] (the "1994 Order"), which replaced the 1986 Order, has added a further two procedures from the 1986 Act, voluntary arrangements and administration orders, to the range of

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1 Partnership Act 1890, s. 1.

2 Partnership Act 1890, ss. 32-35.

3 Partnership Act 1890, s. 38.

4 See, for example, *Taylor* v. *Neate* (1888) 39 Ch. D. 538, *Dixon* v. *Dixon* [1904] 1 Ch. 161, *Boehm* v. *Goodall* [1911] 1 Ch. 155, *Choudhri* v. *Palta* [1994] 1 B.C.L.C. 184. See also *Sargant* v. *Read* (1876) 1 Ch. D. 600 and *Collins* v. *Barker* [1893] 1 Ch. 578, in which the receivers appointed were in fact partners of the relevant firms.

5 S.I. 1986/2142, which came into effect on 29 December 1986.

6 Currently contained in the Insolvent Partnerships Order 1994 S.I. 1994/2421, art. 11.

7 That is to say, bankruptcy petitions in the case of individual partners and winding up petitions in the case of corporate partners.

8 *Op. cit.*, which came into force on 1 December 1994.

possibilities open to partners and their creditors. While the delay in extending the benefits of these rescue procedures to partnerships is open to criticism, there can be little doubt that this extension is likely to be advantageous to both partners and creditors, for reasons which will be examined below. However, two general criticisms may be made of the 1994 Order:

i) As with the 1986 Order, the 1994 Order has attempted to apply a statute largely aimed at corporate structures to the partnership medium. This approach has been succinctly summarised as being that "An English partnership does not have separate legal personality, but insolvency law treats it to some extent as if it did".[9] One disadvantage which stems from this "corporate approach" is that certain concepts contained in the 1986 Act do not easily lend themselves to an interpretation which is consistent with the partnership form. Some examples of this difficulty will be examined later.

ii) Not only does the 1994 Order apply sections of the 1986 Act to partnerships, some with modifications, but that the applicable parts of the 1986 Act themselves apply other parts of that Act to partnerships, again, some with modifications. Although the 1994 Order sets out the modified sections in full, which is an improvement on the 1986 Order which did not, the task of identifying the exact regime which now applies to partnerships remains unnecessarily arduous. It would be preferable for all concerned if partnerships were dealt with in a separate, and self-contained, Act or amendment to the 1986 Act.

The result of this rather piecemeal development of partnership insolvency law has been to create a body of law which is extremely (and, it is submitted, unnecessarily) complex. The purpose of this article is both to review the full range of possibilities now open to a financially troubled partnership, and to comment upon them.

As with companies, certain insolvency procedures will, or at least may, aid the survival of the business in some part, and these will be examined first. The second part of this article will deal with those procedures which exist to regulate and assist in the termination of the business.

Where the 1994 Order and the provisions of the 1986 Act to which it refers make use of the word "member", this is defined as, inter alia, a member of a partnership, or a person who has been held out as a partner

9 Hamish Anderson, "Insolvency Focus" L.S.G. 91/7 Dec. 94 18.

under the Partnership Act 1890, s. 14. In this article therefore, the term "member" will be used in this sense, unless otherwise indicated.

2. ASSISTING IN THE SURVIVAL OF THE BUSINESS

The rescue procedures provided by the 1986 Act (voluntary arrangements and administration orders) may well prove more attractive to partnerships than they appear so far to have been to companies,[10] at least from the point of view of the owners of the business. Their unlimited liability means that partners stand to lose relatively more on a winding up of the business than shareholders, and therefore have correspondingly more incentive to attempt a rescue.

Prior to the 1994 Order, there were no legal mechanisms to assist a partnership which found itself in financial difficulties. Although any member, individual or corporate, could be the subject of a voluntary arrangement, and any corporate member could be the subject of an administration order, the law stepped in to "assist" partnerships themselves only at the stage of dissolution and/or winding up.

At first sight, the financial difficulties of a partnership might seem unlikely to compare in magnitude with those which can affect major companies. However, the 1986 Act procedures apply to all companies, regardless of size or turnover, and of course the failure of any business organisation can have a devastating effect on investors, creditors and employees. Why should the law assist, by means of an administration order, a company such as Olympia & York, or Maxwell Communications Corporation, but not (to take a hypothetical example) the legal and accountancy partnerships which advise such companies, were they to experience similar difficulties? Indeed, in the light of the potential liabilities accruing to many accountancy firms as a result of the *Paramount* ruling[11] and the general increase in the number and size of professional negligence claims, it is not far-fetched to envisage the use of rescue procedures by

[10] See the Conclusion to this article and the DTI statistics referred to therein.

[11] *Powdrill and Another* v. *Watson and Another (Paramount Airways Ltd), Re Leyland DAF Ltd (No 2), Re Ferranti plc* [1995] 1 B.C.L.C. 386. The House of Lords ruled that receivers and administrators could, in certain circumstances, be held to have adopted the employment contracts of employees of the companies in receivership or administration and could therefore be liable for any sums payable on termination of these contracts. Subsequent to that decision, concern has been expressed, for example by D. Keenan in "Reforms to the Rescue" Acc. May 1994 105, "Paramount defeat leads to calls for retrospective legislation" S.J. 24 Mar. 95 255 and "Paramount case puts accountants on precipice" S.J. 31 Mar. 281, as to the effect of such claims on small and medium sized accountancy firms.

accountancy and other professional firms.[12]

This inconsistency was resolved by the 1994 Order, which introduced voluntary arrangements and administration orders to the world of partnerships and Partnership law.

A) VOLUNTARY ARRANGEMENTS[13]

This section is concerned only with partnership voluntary arrangements ("PVA"s). Individual or corporate partners have been able to utilise individual ("IVA"s) or corporate voluntary arrangements ("CVA"s) under the 1986 Act since the 1986 Order came into force, but now that voluntary arrangements are available to the partnership as a whole, IVAs and CVAs of members will chiefly be relevant to the partnership insofar as they affect that partner's share of the assets.

The fact that the voluntary arrangement procedure for partnerships is based on the CVA procedure, rather that the IVA procedure, although open to criticism for the reasons set out below, is consistent with the availability of other 'corporate' procedures, such as administration and winding up.

Where a partnership is insolvent, members may now propose a PVA, unless an administration order, winding up order or joint bankruptcy order has already been made. In those cases, a PVA may only be proposed by the administrator, liquidator, or trustee in bankruptcy. The procedure then follows that for a CVA. The nominee named in the proposal will report to the court on whether meetings of creditors and members should be called. In effect, the nominee reports on whether the proposals are feasible. The proposed PVA will be implemented if it is approved by three quarters in value of the creditors and one half in value of the members,[14] and the PVA then becomes binding on all creditors and members who had notice of the meeting and were entitled to vote, other than those secured and preferential creditors who did not agree to the PVA.[15]

The results of the meetings are reported to the court and if the proposal has been approved, the nominee will become the supervisor of the arrangement, although he may apply to the court for directions.[16] A

[12] As an alternative to this eventuality, a number of large accountancy firms are apparently considering registering in Jersey to take advantage of its proposed Limited Liability Partnerships law. This law would protect the personal assets of all partners other than those actually responsible for a negligent act.

[13] 1994 Order, art. 5 and sch. 1.

[14] Insolvency Rules 1986 S.I. 1986/1925, rules 1.19 and 1.20.

[15] 1986 Act, ss. 4 and 5.

[16] 1986 Act, s. 7 as modified by the 1994 Order, sch. 2, para. 7.

proposal which has been approved is still subject to challenge[17] by a dissenting creditor, member, nominee, administrator, liquidator or trustee in bankruptcy of the partnership, on the ground either of a material irregularity concerning the meetings or of unfair prejudice to the interests of a creditor, member or contributory.[18]

A number of potential problems exist in relation to this procedure:

i) Use of the CVA model for partnerships

The CVA model, rather than the IVA model, has been adopted for PVAs. Since their introduction in 1986, CVAs have been the subject of a number of criticisms and indeed the Insolvency Service of the DTI has issued two Consultative Documents[19] putting forward proposals for the reform of CVAs. The application of the CVA procedure to partnerships prior to any reform might therefore appear somewhat surprising. Even more surprising is the fact that the proposals for reform of CVAs are not, it seems, intended to not apply to PVAs.[20] It is submitted that the Insolvency Service should consider whether some or all of any reforms which ultimately result from the Consultative Documents should be extended to PVAs.

The chief criticism of CVAs made in the Consultative Documents is that whereas IVAs provide for the making of an interim order, which imposes a moratorium, CVAs do not. The same comments apply to PVAs and therefore a proposal for a partnership voluntary arrangement may be overtaken by the presentation of a bankruptcy petition or other proceedings against the partnership. The Consultative Documents have suggested the introduction of a standalone 28 day moratorium from the date of notice of the prospective voluntary arrangement to allow the arrangement to be approved (the existing procedure would remain for those situations where a moratorium was unnecessary).

The alternative argument is that new legislation is unnecessary.[21] Instead, to correct the alleged deficiency, companies (and by extension, partnerships) should simply, it is said, utilise the existing voluntary arrangement procedure, and ward off predatory creditors with an administration order (see below) or the threat of one. This suggested course of action accords with the existing provisions of the 1986 Act on

17 1994 Order, sch. 1, para. 6.

18 The 1986 Act, s. 226, defines a contributory as a person who is liable to contribute to the assets of the company on winding up. In a partnership, contributories and partners are likely to be the same people.

19 *Company Voluntary Arrangements and Administration Orders* (The Insolvency Service October 1993). In the light of the responses to this a further Consultative Document was issued, *Revised Proposals For a New Company Voluntary Arrangement Procedure* (The Insolvency Service April 1995).

20 Neither of the Consultative Documents, the second of which was published after the 1994 Order had come into force, refer to PVAs.

21 John Gibson, "Making corporate voluntary arrangements work" (1992) 5 Insolv. Intell. 59.

administration orders, which cite the approval of a voluntary arrangement as one possible ground for an administration order.[22] Given the existing complexity of the law in this field (as outlined above), this alternative argument is to be preferred over the DTI proposals for reform, since the same objectives would be achieved but without any increase in the complexity of the legislation.

ii) The making of the proposal

Although the 1986 Act states that "members ... may make a proposal"[23] for a PVA, the 1994 Order does not specify whether the members are to act unanimously, by a simple majority, or otherwise.

Presumably the use of the plural precludes the making of a proposal by a single member, and of course in certain circumstances it may be possible for the proposal to be made by all the members. However, if some members dissent, or are unavailable at the time, or if the partnership is international in nature, or very large (for example a two or three hundred partner legal or accountancy firm), this lack of clarity in the drafting of the 1994 Order presents a very real problem.

It has been argued[24] that it is possible for the majority to act, so long as it has power to bind the minority. In the absence of contrary agreement, it may be that the power for the majority to take a binding decision is provided by section 24(8) of the Partnership Act 1890, which states that "ordinary matters" may be decided by a majority, although unanimity is required in order to admit a new partner or change the nature of the partnership business. However, it has also been argued[25] that this section does not simply provide a rule with two specific exceptions, but actually draws a distinction between day-to-day business decisions, which may be taken by a majority, and decisions which affect the fundamental nature of the partnership (such as the admission of a new partner), where the implied rule is that of unanimity.

If this latter argument is correct (and it is a sensible way of interpreting the Partnership Act 1890 so as to apply it to modern circumstances), then a proposal for a voluntary arrangement must be made unanimously, since it falls into the category of decisions which affect the partnership fundamentally. The best course of action for any partnership would therefore be to include a clause in the partnership agreement which specifies the manner in which such a proposal is to be approved.

22 1986 Act, s. 8.
23 Section 1 as modified by the 1994 Order, sch. 1, para. 1.
24 Keith Otter, "The new regime for insolvent partnerships" (1995) 8 Insolv. Intell. 2 at p. 3.
25 Geoffrey Morse, *Partnership Law*, 3rd ed., (Blackstone 1995), at pp. 123-4.

iii) The approval of the proposal

The proposal for a PVA is to be approved by "one-half in value of the members".[26] This gives rise to greater difficulties with partners than with shareholders. The Insolvency Rules 1986[27] state that for the purpose of voting, the value of members is to be determined by reference to the number of votes conferred on each member by the company's articles of association.

The 1994 Order, art. 3, states that expressions appropriate to companies are to be construed as references to the corresponding elements of a partnership, and so if the partnership agreement (rather than a company's articles of association) lays down the voting entitlement of each member, or a procedure whereby this entitlement may be ascertained, then this will clearly apply.

However, where there is no partnership agreement or where the agreement makes no provision as to voting entitlement (which may, at least initially, constitute the majority of cases), the way in which the Insolvency Rules 1986, art. 1.20, should be applied to partnerships is unclear. Should the "value" of votes be assessed simply on the basis of capital contribution? Alternatively, if the views of certain members, for instance the managing or senior members, have generally been accorded more weight in decision making, should this be reflected in a vote to propose a voluntary arrangement? The position of so-called sleeping partners, with large capital contributions and little input in management, will be very different under each of these tests. What about limited partners, who by their very nature are unable to take part in management?

Although members may often be unanimous in support of a voluntary arrangement (since they usually have the most to lose if the partnership fails), the possibility of disagreement cannot be ignored. Clarification on the issue of voting rights is therefore needed, perhaps by way of a provision in the 1994 Order that in the absence of agreement to the contrary, the value of a member is to be calculated by reference to his capital contribution. What such a provision would lack in sophistication, it would gain in clarity.

Creditors, of course, are unlikely to approve a voluntary arrangement if members remain solvent, but this obstacle may be overcome if the members' private assets are effectively brought into the PVA by the use of concurrent IVAs or CVAs by those members.[28]

[26] Insolvency Rules 1986, S.I. 1986/1925, rule 1.20.

[27] Article 1.20, *ibid.*

[28] See the views of Stuart Frith and Beverly Jones, "The Insolvent Partnerships Order" I.L.&P.Vol. 11 No. 1 1995 14 at p. 16.

iv) A PVA which is approved does not bind all creditors.

The 1986 Act[29] excludes from the effect of a voluntary arrangement all non-assenting preferential and secured creditors as well as any who did not receive notice of the meeting or who were not entitled to vote.[30] These exclusions alone have been described as a "generally fatal flaw" in the 1986 Act,[31] and in the case of a partnership there are further exclusions. Personal creditors of members cannot be involved in, let alone bound by, a PVA, but of course if they obtain judgment on their debt, they can charge that member's share of the partnership assets with that debt.[32] This could result in such creditors being paid off ahead of partnership creditors who are bound by the voluntary arrangement.

While little can be done to bind those partnership creditors mentioned above, a member may protect himself, and indirectly the partnership and his fellow members, by instigating a personal voluntary arrangement (an IVA or CVA as appropriate) which will then bind his personal creditors.

v) Unfair prejudice and material irregularity

Since a challenge may be made to a voluntary arrangement on the ground of "unfair prejudice" to the interests of a member or of a "material irregularity" in relation to the meeting or the voting, it is regrettable that the 1994 Order does not define these phrases in relation to the members of a partnership.

Problems have already arisen as to the meaning of these phrases in relation to CVAs and IVAs, because they are not defined in the 1986 Act. These problems may be exacerbated for partnerships, since existing caselaw is not always susceptible of an easy application to partnerships.

The question of a "material irregularity" has been least problematic and there is little difficulty in transposing the caselaw on CVAs and IVAs to PVAs. The following cases, as examples of the judicial approach to the meaning of "material irregularity", appear to be equally applicable to PVAs.

In the case of *Re Cranley Mansions Ltd*[33] it was held that mistakes in the statement of affairs did not amount to a material irregularity but that the attribution of a value of £1 to an unliquidated debt did. Ferris J. held that since the creditor had not agreed to this value, it had not been "agreed"

29 Section 5.

30 As to the difficulty in ascertaining the entitlement to vote of creditors with unliquidated debts, see the conflicting rulings, discussed below, in *Doorbar* v. *Alltime Securities Ltd* [1995] 1 B.C.L.C. 316 and *Re Cranley Mansions Ltd* [1995] 1 B.C.L.C. 290.

31 Mark Homan, *Administrations under the Insolvency Act 1986: The Result of Administration Orders made in 1987* (Research Board Research Paper, The Institute of Chartered Accountants), at para. 2.14.

32 See the Partnership Act 1980, s. 23.

33 *Op. cit.*

under the Insolvency Rules 1986[34] and therefore the creditor was not entitled to vote and could not be bound by the arrangement.[35] In *Re a Debtor (No 222 of 1990), ex parte the Bank of Ireland and others*,[36] Harman J. held that the exclusion of the votes of creditors whose (liquidated) debts were disputed constituted a material irregularity, since the votes should have been admitted, with the possibility of being declared invalid if the objections to the underlying debt were sustained. In *Re a Debtor (No 259 of 1990)*[37] Hoffmann J. held that failure to notify a creditor of the meeting was not a "material irregularity", since, on the facts, her vote could not have affected the outcome of the meeting because she was an associate of the debtor and therefore, under the Insolvency Rules 1986, her vote would have been excluded.[38]

It is in attempting to decide what matters will be considered "unfairly prejudicial" in the context of a PVA that most problems arise. While the phrase "unfair prejudice" obviously bears some relation to the phrase "unfairly prejudicial" in the Companies Act 1985, s. 459,[39] a separate line of jurisprudence has begun to develop[40] on the meaning of the phrase in the 1986 Act, because "unfair prejudice" in the latter context relates to the terms of the arrangement, and either a creditor or member may complain, whereas under section 459 "unfairly prejudicial" relates to the conduct of the company's affairs, and an action may only be brought by a member. It has also been argued[41] that the circumstances in which the court will accept that there has been unfair prejudice may reflect those in which it would have refused to sanction an arrangement under the Companies Act 1985, s. 425. It may therefore prove instructive to consider all three areas of caselaw when attempting to apply this phrase to PVAs.

a) "Unfair prejudice" in the 1986 Act

It has been held that a challenge to a voluntary arrangement may only be grounded on prejudice arising from the arrangement itself, rather than

[34] *Op. cit.*, rule 1.17(3)1.

[35] See also *Doorbar* v. *Alltime Securities Ltd, op. cit.*, in which only six months after the ruling in *Re Cranley Mansions, op.cit.*, Knox J. ruled that "agrees" simply required the chairman to have decided on the value of the claim for voting purposes, and did not require that the creditor had agreed to this value.

[36] [1992] B.C.L.C. 137.

[37] [1992] 1 All E.R. 641.

[38] Insolvency Rules 1986, rule 5.18(4).

[39] See, for example, R.P. Pennington, *Pennington's Corporate Insolvency Law*, 3rd ed., (Butterworths 1991), at p. 378 where the author states that the provision in the 1986 Act is "obviously modelled on" section 459.

[40] See, for example, *Re Cranley Mansions Ltd, op. cit.*; *In re Mohammed Naeem (A Bankrupt) (No 18 of 1988)* [1990] 1 W.L.R. 48; *Re a Debtor (No 259 of 1990), op. cit.*

[41] R.P. Pennington, *Pennington's Corporate Insolvency Law*, 3rd ed., (Butterworths 1991), at p. 378.

from the statement of affairs[42] or from the voting.[43]

It has also been argued[44] that a voluntary arrangement could be prejudicial to a creditor if his particular circumstances were such that he would derive no benefit from the arrangement.[45] This argument is applicable equally to partnerships and, if accepted by the courts, could lead to an increased number of challenges to PVAs. It is submitted that it would be undesirable for a creditor who would suffer no actual detriment under a PVA (but who would simply gain no benefit from it) to be able to challenge it.

b)"Unfairly prejudicial" under the Companies Act 1985, s. 459

There have been many cases in which the meaning of this phrase in the context of section 459 has been discussed, and it will be possible within the scope of this article to comment on only a few of those cases, but some useful points may nonetheless be made.

Although a member of a company who wishes to petition under section 459 may do so only on the grounds of conduct which is unfairly prejudicial to his interests *qua* member[46], the definition of a members' interest *qua* member has been construed flexibly in the context of section 459.[47] This relaxation is particular to section 459. For example, the rights *qua* member which may be enforced under section 14 of the Companies Act 1985 have been restricted in cases such as *Beattie* v. *E and F Beattie Ltd*[48] to rights under the company's constitution or under the Companies Act 1985 which are bestowed on a member by reason only of his membership.

Most section 459 actions have been brought in relation to small companies,[49] often of a quasi-partnership nature,[50] and in such instances, the courts have been prepared to look not just at membership rights under the articles of association, but at all the circumstances, including the

42 *Re Cranley Mansions, op. cit.*

43 See *Re a Debtor (No 259 of 1990), op. cit.*, in which creditors with disputed debts were allowed to vote, and *Re Cranley Mansions, op. cit.*, in which it was held not to be unfairly prejudicial that an unliquidated debt alleged to amount to £90,000 was valued at £1 for voting purposes.

44 J. R. Lingard, *Corporate Rescues and Insolvencies*, 2nd ed. (Butterworths 1989), at para. 5.60.

45 In *Re N.F.U.* [1972] 1 W.L.R. 1548 Brightman J. held that a scheme of arrangement which had to be sanctioned by the court was prejudicial to the complainant members. Under the scheme, they would lose the right to attend meetings, receive accounts or vote, in return for the benefit of not having to contribute a nominal sum on an insolvent winding-up, a benefit which the court considered to be particularly hypothetical since the company's assets far exceeded its liabilities.

46 *Re a Company (No 004475)* [1983] Ch. 178; *Re J.E. Cade & Son Ltd* [1992] B.C.L.C. 213.

47 See, for example, *Re Saul D. Harrison* [1995] 1 B.C.L.C. 14.

48 [1938] Ch. 708.

49 See, for example, *Re J.E. Cade & Son Ltd, op. cit.*

50 See, for example, *Re a Company (No 00477 of 1986)* [1986] B.C.L.C. 376.

expectations of the member when joining.[51] In *Re a Company (No 00477 of 1986)*[52] Hoffmann J. ruled that a member could enforce wider rights "*qua* member" than simply those enshrined in the company's constitution.[53] On the facts those rights included the legitimate expectation of the member that he would be a director. In *Re Bird Precision Bellows Ltd*[54] the Court of Appeal, affirming the decision of Nourse J., ruled that the exclusion of a shareholder director from management could amount to unfair prejudice. However, all such rulings will, of course, turn on the particular facts of the case.[55]

A member of a partnership may find it easier than a member of a company to argue that the approval of a PVA under which he is excluded from management is unfairly prejudicial to him. This is because the Partnership Act 1890, s. 24(5), which applies to all partnerships in the absence of contrary agreement, provides that a member of a partnership, that is to say, an investor in it, will have the right to participate in management.

Further examples of conduct which has been held to be unfairly prejudicial include conduct which diminishes the value of a member's capital investment,[56] since the value of such an investment obviously attaches to membership, and the persistent payment of a dividend at low rates.[57]

A PVA which adversely affects the value of a partner's share, or restricts his drawings to an inadequate level, might be open to challenge, but only, it is suggested, if there was some discrimination between the treatment of different partners. In the absence of discrimination, there would be no unfairness.

[51] *Re J.E. Cade & Son Ltd, op. cit.*; *Re a Company (No 00477 of 1986), ibid; Re Posgate & Denby (Agencies) Ltd* [1987] B.C.L.C. 8; *Re Bird Precision Bellows Ltd* [1984] Ch. 419, [1984] 3 All E.R. 444, Ch. D.; affd. [1986] Ch. 658, [1985] 3 All E.R. 523, C.A.

[52] *Op. cit.*

[53] See also *Re Posgate & Denby (Agencies) Ltd, op. cit.*, in which Hoffmann J. adopted the same reasoning.

[54] *Op. cit.*

[55] See, for example, *Re a Co (No 005685 of 1988) ex parte Schwarcz (No 2)* [1989] B.C.L.C. 427, in which Peter Gibson J. held that the petitioning directors had no legitimate expectations beyond those contained in their service agreements, since there was no quasi-partnership and the parties had spelt out the details of their relationship in those agreements; and *Re Posgate & Denby (Agencies) Ltd, op.cit.*, in which Hoffmann J. held that the shareholder had failed to show any legitimate expectation beyond the contents of the articles of association.

[56] *Re Bovey Hotel Venture Ltd* (Ch. D. 31 July 1981, unreported). Parts of the judgment of Slade J. in that case were quoted by Nourse J. in *Re R.A. Noble (Clothing) Ltd* [1983] B.C.L.C. 273.

[57] *Re Sam Weller & Sons Ltd* [1990] Ch. 682, [1990] B.C.L.C. 80.

c) Compromises and arrangements under the Companies Act, s. 425

Such arrangements must be sanctioned by the court[58] if they are to be binding, and the court may refuse to sanction an arrangement. Section 425 does not specify the grounds on which this sanction may be refused, but in practice the courts have looked at whether those shareholders voting in favour of the arrangement have acted bona fide in the best interests of the members as a whole.[59] It is submitted that this reasoning should be applied to PVAs so that a PVA which has not been approved by the members in good faith or is not in the interests of the members as a whole will be held to be unfairly prejudicial. This would protect the legitimate interests of dissenting members.

d) Conclusion as to the meaning of "unfair prejudice" in the 1994 Order

Although the meaning of "unfair prejudice" will always depend on the facts of the case, including the provisions of any partnership agreement, the existing caselaw on the 1986 Act and the Companies Act 1985, ss. 459 and 425, provides us with examples of conduct likely to amount to "unfair prejudice".

It will also be interesting to see whether the concept of unfair prejudice in the context of partnerships is, in practice, largely restricted to the small and medium sized business, and whether the really large partnerships will be treated as "quasi-company" partnerships, to which the concept of unfair prejudice will rarely be applicable. It is submitted that the latter is more likely and indeed more appropriate.

B) ADMINISTRATION ORDERS[60]

As with voluntary arrangements, the procedure in relation to partnership administration orders broadly mirrors that for company administration orders. The members or one or more creditors of the partnership may petition the court for an administration order on similar grounds to those applicable to companies. These grounds are that the partnership is unable to pay its debts, and that the order would be likely to achieve one or more of

i) the survival of the whole or any part of the undertaking of the partnership as a going concern;

58 Companies Act 1985, s. 425(2).
59 See, for example, *Re Holders Investment Trust Ltd* [1971] 2 All E.R. 289.
60 1994 Order, art. 6 and sch. 2.

ii) the approval of a voluntary arrangement; or

iii) a more advantageous realisation of the partnership property than on a winding up.

The most notable difference between the procedure for partnerships and that for companies is that in order for an application for an administration order to be made, a partnership must be unable to pay its debts, whereas a company may petition on the grounds either that it is unable to pay its debts, or that it is likely to become so. This is justifiable on the ground that pre-emptive action is arguably more important for company creditors, whose sole recourse is to company assets, than for partnership creditors who may, if necessary, have recourse to the personal assets of the partners.

As with companies, on presentation of the petition a moratorium is created, which becomes more comprehensive on the making of an order. At both stages the moratorium prohibits the making of a winding up order, the enforcement of security, and the taking of proceedings without the permission of the court or the administrator. Once an order is made, no receiver may be appointed and no petitions for bankruptcy or winding up may be presented.

An administrator is appointed with powers broadly equal to those of a company administrator (save for those powers which are inapplicable to partnerships, such as the power to use the company seal). In addition, a partnership administrator is unable to dismiss partners in the same way that company administrators are able to sack directors, although he may exclude them from management. While the immediate effect of this sanction is the same, partners of a partnership which survives administration will simply resume their former roles whereas directors who have been sacked cannot do so unless and until they are reappointed.

A number of potential problems exist in relation to this procedure:

i) The making of a proposal

It is again the 'members' who may petition,[61] and therefore the same problems arise as in relation to PVAs (see above) in determining just how many members this requires.

ii) Inability to pay debts

The inability of a partnership to pay its debts is to be tested in a

[61] 1986 Act, s. 9, as modified by the 1994 Order, sch. 2, para. 3.

similar way to registered companies.[62] The only difference is that a partnership will also be deemed unable to pay its debts if it has failed to pay a debt of over £750 within three weeks of receiving notification of proceedings against a member for that debt. This bestows no particular advantage on creditors of a partnership over those of a company, and merely reflects the fact that partnership creditors have the right to take proceedings against any member in respect of a partnership debt whereas creditors of a company generally have no such right against members or directors.[63]

iii) Dissolution

The moratorium created by the presentation of the petition prevents the making of an order under the Partnership Act 1890, s. 35, for the judicial dissolution of the partnership. A member of the partnership who dissents from the making of an administration order is therefore unable to seek judicial dissolution in order to avoid such an order. This is a necessary part of the moratorium but is arguably unfair if it prevents a partner from realising his share of the partnership assets when he would otherwise be able to do so.

If the partnership is "at will",[64] any member may dissolve it without court involvement simply by giving notice to the other partners. Although the giving of such notice would presumably not amount to "other proceedings", which would be prohibited under the 1986 Act,[65] it may amount to a "power exercisable by the officers of the partnership . . . which could be exercised in such a way as to interfere with the exercise by the administrator of his powers". If this is so, the notice may only be given with the consent of the administrator,[66] which would limit a right of a partner which has been in existence for over a hundred years. However, it is submitted that this is the correct view since otherwise dissenting members of a partnership at will could defeat the objectives of an administration with ease.

iv) *Receivers*

While secured creditors with the right to appoint an administrative

[62] Under the 1986 Act, ss. 222-4, a partnership is deemed unable to pay its debts if a partnership debt of more than £750 remains unpaid three weeks after a written demand on the partnership, or three weeks after notice of proceedings commenced against a member for a partnership debt has been served on the partnership; or if a judgment debt is unsatisfied; or if it has been proved to the satisfaction of the court that the partnership is unable to pay its debts, or that its assets are less than its liabilities.

[63] Creditors of a company are bound by the principle of separate legal personality unless one of the exceptions to *Saloman* v. *Saloman* [1897] A.C. 22, such as the existence of fraud, applies.

[64] This will be the case in the absence of contrary agreement - Partnership Act 1890, s. 26.

[65] 1986 Act, s. 11, as modified by the 1994 Order, sch. 2, para. 5.

[66] 1986 Act, s. 14, as modified by the 1994 Order, sch. 2, para. 8.

receiver may effectively veto a company administration by appointing a receiver before the order is made, the only creditors with an analogous right in respect of partnerships are those entitled to appoint agricultural receivers.[67]

The DTI has identified this right of a veto as a barrier to the use of administration orders by companies,[68] and so the fact that few partnership creditors are able to exercise this veto may result in greater use of the administration procedure by partnership, an outcome which would be welcome.

v) Unfair prejudice

If the administrator manages the company's affairs, or proposes to act or fails to act in a way which is unfairly prejudicial to a creditor or member, that creditor or member may petition the court for relief under the 1986 Act, s. 27. As Millet J. in *Re Charnley Davies (No 2)*[69] acknowledged, section 27 is "obviously derived" from section 459 of the Companies Act 1985, and the jurisprudence under section 459 (see above) will therefore be relevant to identifying conduct which may be held to be unfairly prejudicial under section 27.

In *Re Charnley Davies (No 2)*[70] the meaning of "unfairly prejudicial" under section 27 was discussed, obiter dicta.[71] Millet J. drew a distinction between misconduct, such as professional negligence, and unfairly prejudicial management. Where misconduct was be the sole complaint, it could be redressed by the appropriate legal remedy for that wrong. Where misconduct was merely evidence of a wider complaint of unfairly prejudicial management, the complaint could only be redressed by relief from the mismanagement itself.

Under section 27, the relief which may be granted is at the discretion of the court, but may include, inter alia, an order regulating the management of the business or an order restraining the administrator from acting in a particular way, or compelling him to do so. In most of the cases so far brought under section 27, relief has been awarded to the petitioners under

67 Such receivers may be required to vacate office if the chargeholder consents, or if the underlying security is open to challenge: 1986 Act, s. 9, as modified by the 1994 Order, sch. 2, para 3.

68 *Company Voluntary Arrangements and Administration Orders, op. cit.*, at para. 5.7.

69 [1990] B.C.L.C. 760 at 782.

70 *Ibid.*

71 The petitioners' claim that the administrator had entered into a transaction at an undervalue and had been negligent was dismissed by the court. There was therefore no loss and, as a result, no conduct which could give rise to a claim under the Insolvency Act 1986, s. 27.

other sections of the 1986 Act,[72] and it would seem that the distinction drawn by Millet J. has not always been observed by petitioners.

vi) Expense and delay

As the DTI has recognised,[73] company administrations are perceived as involving an "expensive and unnecessarily time consuming process". While the proposals for reform[74], if implemented, may alleviate these difficulties for companies, there is no indication that any reforms will be extended to partnership administrations.[75] Admittedly no revised proposals have yet been published in respect of administrations and the initial proposals[76] predate the 1994 Order. However, it seems unlikely that the revised proposals, if and when they are published, will extend to partnerships, since the revised proposals for CVAs,[77] which were published in April 1995, did not.

Despite the absence of reform, it is submitted that the disadvantages of delay and expense will often, in the case of partnerships, be outweighed by the potential advantages of rescuing the partnership and thereby reducing or eliminating the personal liability of its members.

vii) Application of the Company Directors Disqualification Act 1986

A disadvantage of an administration order is that each officer of a partnership in administration is potentially liable to disqualification as a company director under the Company Directors Disqualification Act 1986 ("CDDA"). An officer of the partnership is defined as a member or a person with management of control of the partnership business.[78] (The CDDA also applies to officers of partnerships which are wound up as an unregistered company (see below)).

The definition of an officer of the partnership is wide enough to include those who are neither partners nor have been held out as such, thus extending some of the burdens associated with partnership beyond those normally encompassed by Partnership law. It is therefore important that firms make senior employees who are not held out as partners to the outside world, but who have some management responsibilities (such as a chief

72 In *Re Atlantic Computer Systems plc (No 1)* [1991] B.C.L.C. 606 the petitioners asked for, *inter alia*, relief under the 1986 Act, ss. 11(3) and 27. The Court of Appeal awarded relief under section 11(3) (repossession of goods), and ruled that it was therefore unnecessary to discuss the section 27 claim.

73 *Company Voluntary Arrangements and Administration Orders, op. cit.*, at para. 5.2.

74 *Company Voluntary Arrangements and Administration Orders, op. cit.*

75 *Company Voluntary Arrangements and Administration Orders, op. cit.*, makes no reference to partnership administrations.

76 *Company Voluntary Arrangements and Administration Orders, op. cit.*

77 *Revised Proposals For a New Company Voluntary Arrangement Procedure, op. cit.*

78 1994 Order, art. 2.

executive or internal financial adviser), aware of their potential liabilities under the CDDA.

The procedure for the making of a disqualification order is that if the administrator (or Official Receiver in the case of a winding up) believes that the conduct of an officer of an insolvent partnership, either in relation to that partnership alone, or when taken together with conduct as a director or partner of another business, makes him unfit to be concerned in the management of a company, he must make a report to the Secretary of State, who may apply for a disqualification order.[79]

The court may, without any further application being made, make a disqualification order against a partner who has been ordered to contribute under the 1986 Act, s. 213 (fraudulent trading) or s. 214 (wrongful trading).[80]

A partner may be disqualified from being a company director for a period of up to fifteen years.[81] If a partner who is subject to a disqualification order acts in contravention of that order, he may also become personally liable for the debts of the company with which he is involved,[82] although unlike a person who was disqualified as a result of actions concerning a company, a former partner is not liable to a fine or imprisonment.[83] This lack of criminal liability appears to have no justification except insofar as the law, in general, regulates the behaviour of directors of companies more strictly than members of partnerships, and stricter penalties are therefore imposed on directors.

A member against whom a disqualification order under the CDDA is made is not thereby disqualified from remaining or becoming a partner, and is not even forced to disclose the existence of the order to any new partnership he may join.[84] However, such an order can only have been made where the partnership has become insolvent, and in those circumstances it is likely that the partner will have been made bankrupt. As a matter of bankruptcy law,[85] a bankrupt may not obtain credit exceeding £250, or trade without disclosing the fact of his bankruptcy. In practice, this is likely to

[79] CDDA, ss. 6 and 7 as modified by the 1994 Order, sch. 8. The Secretary of State may also apply for a disqualification order if he considers that a partner's conduct makes him unfit to be concerned in the management of a company and that it is in the public interest for such an order to be made.

[80] CDDA, s. 10.

[81] 1986 Act, s. 8 as modified by the 1994 Order, sch. 8.

[82] CDDA, s. 15.

[83] 1986 Act, s. 13, which deals with criminal penalties, does not apply to partners.

[84] But see the comments to the contrary of Berry, Bailey and Schaw-Millerat, *Personal Insolvency: Law and Practice*, 3rd ed., (Butterworths 1993), at para. 16.23 and those of R. C. I'Anson Banks *Lindley & Banks on Partnership*, 17th ed., (Sweet & Maxwell 1995), at para. 27.64 in respect of somewhat more ambiguous wording in the 1986 Order.

[85] 1986 Act, s. 360, and the Insolvency Proceedings (Monetary Limits) Order 1986 S.I. 1986/1996 sch., Pt. II.

limit substantially the number of partners who, whilst subject to a disqualification order, are able to practice in a partnership.

The application of the CDDA to partnerships is otherwise similar to its application to companies save for minor discrepancies which reflect the fact that partnership cannot be put into administrative receivership or creditors' voluntary winding up.[86]

viii) Partners' private assets

While the moratorium conferred by an administration order protects the partnership assets, the partners' private assets may still be subject to attack. As with PVAs, which cannot bind private creditors, the best advice is for all partners to use IVAs, CVAs or company administration orders to protect their assets.

3. ASSISTING IN THE REALISATION AND DISTRIBUTION OF THE PARTNERSHIP ASSETS

A) INFORMAL WINDING UP UNDER THE PARTNERSHIP ACT 1890

In circumstances where the dissolution of a partnership has become desirable the members have always had the option of winding up the partnership informally themselves. This will be the appropriate procedure where the partnership is solvent, but may also be used where the partnership is insolvent but some partners are not. In this instance, the solvent partners will be liable to make good all the debts of the partnership, and so all partnership creditors will be paid. Where all partners, as well as the partnership, are insolvent, one of the procedures under the 1994 Order will be more appropriate as the position of the partners' private creditors can then be taken into account.

As with all partnership matters, the members act as agents for each other in the winding up.[87] Where one or more of the members object to this procedure, an application may be made to the court for a receiver to be appointed to conduct the winding up. The court may appoint a receiver if it determines that to do so would be just and equitable[88] and it will take into

[86] See the CDDA, sch. 1 as modified by the 1994 Order, sch. 8, concerning the matters to be taken into account in establishing the unfitness of officers; and the CDDA, s. 6 as modified by the 1994 Order, sch. 8, concerning the definition of insolvency for the purposes of the CDDA.

[87] Partnership Act 1890, s. 38.

[88] Supreme Court Act 1981, s. 37.

account the nature of the business and the probable effects of the appointment of a receiver.[89] An application will usually be granted where the partnership has already been dissolved,[90] but in other instances it will be necessary to show facts which could lead to a judicial dissolution, such as exclusion from management,[91] or misconduct of a partner and jeopardy to partnership assets.[92] A member of the partnership may be appointed as the receiver if this is appropriate in all the circumstances.[93]

The function of a receiver is to get in the assets of the partnership and pay the partnership debts, but not to determine the rights of the partners *inter se* or to run the business. The taking of a partnership account is a matter for the court itself, and a manager may be appointed if it is necessary for the business to be continued. As Lord Lindley has explained:

> The object of having a receiver appointed by the Court is to place the partnership assets under the protection of the Court, and to prevent everybody, except the officer of the court, from in any way intermeddling with them. The object of having a manager is to have the partnership business carried on under the direction of the Court; a receiver, unless he is also appointed a manager, has no power to carry on the business.[94]

In practice, where a manager and receiver are appointed, they are likely to be the same person.[95] The receiver has authority to deal only with the assets of the partnership, and not with those of the individual members,[96] and assets subject to a prior charge are not partnership assets for this purpose.[97] The partners may generally carry on the business until the receiver is appointed, unless this is opposed by some of them,[98] but must not interfere with the work of the receiver after appointment.[99]

89 *Sobell* v. *Boston* [1975] 1 W.L.R. 1587.
90 *Pini* v. *Roncoroni* [1892] 1 Ch. 633, 66 L.T. 255.
91 *Floydd* v. *Cheney* [1970] 2 W.L.R. 314.
92 *Smith* v. *Jeyes* (1841) 4 Beav. 503. See also *Floydd* v. *Cheney*, *ibid*, and *Sobell* v. *Boston*, *op. cit.*, in which the appointment of a receiver was held to be inappropriate.
93 See, for example, *Collins* v. *Barker*, *op. cit.*, and *Sargant* v. *Read*, *op. cit.* In *Sargant* v. *Read*, a case concerning a partnership of brokers, Jessel M.R. accepted that a partner would not normally be appointed as a receiver where this was opposed by one or more of the other partners, but ruled that an exception should be made in that case for a number of reasons. Firstly, the proposed receiver and the other plaintiffs were the original owners of the business; secondly, they were entitled to the majority share of the profit; and thirdly, it was in the nature of a broker's business for personal pledges to be routinely required, and these would not be given by an ordinary receiver.
94 *Lindley & Banks on Partnership*, *op. cit.*, para. 23.149.
95 See, for example, *Taylor* v. *Neate*, *op. cit.*
96 *Boehm* v. *Goodall*, *op. cit.*
97 *Choudhri* v. *Palta* [1994] 1 B.C.L.C. 184.
98 *Sargant* v. *Read*, *op. cit.*
99 *Dixon* v. *Dixon* [1904] 1 Ch. 161, 89 L.T. 272.

Whether a receiver is appointed or not, the final distribution of the assets will be governed by the list of priorities in the Partnership Act 1890, s. 44[100] as amplified by subsequent caselaw.[101] These priorities differ slightly from those which apply to the winding up of a partnership under the 1994 Order, and it is submitted that the two sets of rules should be brought into line in the interest of consistency and clarity.

Under the 1994 Order,[102] the expenses of the winding up are to paid first, followed by preferential debts. Although a winding up under the Partnership Act 1890 is usually conducted jointly by the members, section 44 should be amended so that if a receiver is appointed, his expenses are paid in priority to all other debts.[103] (A similar amendment to section 44, to provide for priority to be given to preferential creditors, is unnecessary because in a winding up under the Partnership Act 1890, all outside creditors will be full repaid.)

Inconsistency also exists between the 1994 Order and section 44 as to the position of loans by members to the partnership. In this instance it is the 1994 Order which, it is submitted, is deficient, and therefore this argument will be addressed in the context of winding up procedures under the 1994 Order (see B) vii) below).

B) WINDING UP THE PARTNERSHIP AS AN UNREGISTERED COMPANY (WITHOUT CONCURRENT ACTIONS AGAINST THE MEMBERS)[104]

The provisions of the 1986 Order have largely been repeated, that is to say, a partnership is wound up as if it were an unregistered company. Unlike a registered company, a partnership cannot be wound up voluntarily, presumably because the informal winding up procedure referred to above is

[100] Section 44 states that the debts of outside creditors are to be paid first, then any debts owing to partners and then partners' capital. Any surplus is to be paid to partners in their profit sharing ratio.

[101] See, for example, *Green* v. *Hertzog* [1954] 1 W.L.R. 1309, in which the Court of Appeal held that a loan made by a partner to the partnership could only be recovered by the taking of an account under the Partnership Act 1890, s. 44, and not by a private action against the other partners. See also *Garner* v. *Murray* [1904] 1 Ch. 57 in which Joyce J. held firstly that solvent partners need only contribute their own share of the losses and not that of an insolvent partner and secondly that capital losses should be shared rateably rather than equally.

[102] 1986 Act, ss. 175 (winding-up of the partnership alone) and 175A as modified by the 1994 Order, sch. 4 (winding-up of the partnership with concurrent petitions against one or more members).

[103] In *Davy* v. *Scarth* [1906] 1 Ch. 55, a partner receiver was awarded his expenses, despite the fact that he was unable to pay his debts to the partnership. This decision gives implied recognition to the principle that a receiver should be paid first, but an express statement to this effect in the Partnership Act 1980, s. 44 would, it is submitted, be preferable in the interest of clarity.

[104] 1994 Order, arts. 7 and 9 and sch. 3.

broadly equivalent to the voluntary winding up of a company, and so no further procedure is required.

The following comments are relevant:

i) The petitioner

The procedure for winding up the partnership can be initiated by:

a) A member of the partnership

A member may petition on the grounds set out under paragraph ii) below, but only if there are eight or more partners, or the court gives leave and the petitioning partner has paid a joint debt of more than £750, in respect of which he has obtained judgment against the partnership and for which he has not been reimbursed by the partnership within three weeks of service on the partnership of a written demand.

The restrictions on the right of a member to bring a petition seem unduly restrictive. Regardless of the number of members, it should be open to a partnership to specify in its agreement that a particular majority of members may petition for a winding up under the 1986 Act. This would then give members of a partnership the same rights as those of a company, who are able to bring such a petition if a special resolution has been passed. The 1994 Order should, it is submitted, provide that in default of any agreement, three quarters of members of a partnership (by number rather than value, since this is in accord with the provisions of the Partnership Act 1890, s. 24(8), as to decision making) may bring a petition without the need to specify one of the grounds in ii) below.

b) A creditor of the partnership

A creditor may petition on the grounds set out under paragraph ii) below.

c) A partnership administrator/supervisor of a voluntary arrangement/ liquidator or trustee of an individual member

These office holders may petition on the grounds set out under paragraph ii) below. If the ground for the petition is that the partnership is unable to pay its debts, this may additionally be proved by the existence of an insolvency order against the member for whom the office holder acts.[105]

d) The Secretary of State

If the Secretary of State considers that, in the light of a report made to

[105] 1986 Act, s. 221A as modified by the 1994 Order, sch. 3, Pt. I, para. 3.

him under one of certain listed statutory provisions, it would be expedient in the public interest for a disqualification order to be made, he may petition for the partnership to be wound up on the just and equitable ground.

ii) Grounds of the petition

The grounds for winding up, which are now to be found in the 1994 Order (replacing similar provisions in the 1986 Order), are more limited than those on which a registered company may be wound up and are similar to those for an unregistered company. They are that:

i) the partnership is dissolved, has ceased to carry on business, or is only trading to wind up its affairs, or

ii) it is unable to pay its debts,[106] or

iii) the court is of the opinion that it is just and equitable that the partnership should be wound up.

These grounds derive from those on which a company may be wound up, and it is therefore curious that there is no analogous ground to that of a special resolution having been passed by the members of a company. Although a decision by the members that the partnership be wound up could be taken into account by the court under c) above, it is submitted that it should be expressly included in the grounds for a petition so that, as referred to above, a partnership which has resolved by a three quarters majority to petition for winding up need not show further grounds for the petition.

iii) Jurisdiction

The High Court and County Court have concurrent jurisdiction over the winding up of partnerships, whereas in respect of both registered and unregistered companies the County Court has jurisdiction only where the share capital is £120,000 or less.

The 1994 Order widened the basis of jurisdiction for creditor's petitions. In addition to the basis used in the 1986 Order (that the principal place of business is situated in England or Wales), a creditor may petition

[06] This is deemed to be the case, under the 1986 Act s. 224 and ss. 222 and 223 as modified by the 1994 Order, sch. 3, if a partnership debt of more than £750 remains unpaid three weeks after a written demand on the partnership, or three weeks after notice of proceedings commenced against a member for a partnership debt has been served on the partnership; or if a judgment debt is unsatisfied; or if it is proved to the satisfaction of the court that the partnership is unable to pay its debts, or that its assets are less than its liabilities.

for the winding up of a partnership under the 1994 Order if it has any place of business in England or Wales, provided that the business to be wound up was carried on from that place.

iv) Powers of the liquidator

If a winding up order is granted and a liquidator appointed, his powers differ from those of a company liquidator only in that the sanction of the court is required for the bringing or defending of actions, and for the carrying on of business for the purposes of winding up. This gives slightly more protection to creditors and members of a partnership than to those of a company, since any activities which could potentially dissipate the assets must not only be proposed by the liquidator, but must receive court approval.

v) Application of the CDDA

A disadvantage of formally winding up the partnership (with or without concurrent petitions against members) is that each officer of the partnership is potentially liable under the CDDA (see above).

vi) Application of the Employment Protection (Consolidation) Act 1978

Two particular difficulties with winding up a partnership under the 1994 Order were highlighted by the problems of the Riverbus Partnership,[107] one of the many businesses which suffered in the wake of the collapse of Olympia and York. The first is examined here and the second under paragraph vii) below. Firstly, although employees of insolvent companies may be able to claim from the government unpaid wages and certain other payments under the Employment Protection (Consolidation) Act 1978, s. 122, this statute has not been amended to cover insolvent partnerships.

The DTI is willing to reimburse employees of insolvent partnerships, but considers as insolvent only partnerships of which all members are subject to voluntary arrangements, administration orders, bankruptcy or liquidation. The fact that the partnership itself is subject to one of these procedures is insufficient. While it is only to be expected that employees of an insolvent partnership should look first to its members for recompense, and only to the State where neither the partnership assets nor the partners' private assets are sufficient, this effectively puts creditors of a partnership in a worse position than those of a company. Creditors of a partnership will, in effect, be forced to pursue all partners, a potentially expensive and lengthy process, before they can apply for compensation from the State.

[107] See Celia Gardner, "The Riverbus Partnership", B.J.I.B.F.L. Nov. 94 506.

vii) Transfer of land

Since partnerships cannot own land directly, but must do so through up to four named partners who hold the land on trust for the others, it is necessary to secure the co-operation of all these partners if land is to be transferred by the liquidator. There may be a practical problem in arranging for all the necessary members to sign the transfer and, where a creditor's petition has been brought, any members who object to the winding up and who are nominal owners of the land may choose to be obstructive over the transfer of the land, with the result that a court order will be required to order the transfer of the land.

viii) Distribution of assets

Although the 1994 Order makes express provision as to the order in which assets are to be distributed on a winding up of the partnership where there are concurrent petitions against the partners (see below), it is regrettably silent where petitions are brought only against the partnership. As a result, the priorities in such a situation are less easy to identify. Under the 1986 Act, s. 175, the expenses of the winding up are to be paid first, followed by the preferential debts. Other debts are, according to the Insolvency Rules, rule 4.181, to rank equally and the 1986 Act, s. 189 states that interest on debts is payable after the debts themselves have been paid. Any surplus will be distributed amongst "the persons entitled to it",[108] that is to say, the members.

There is no provision for loans by members to the partnership to rank behind other debts, as there is in the Partnership Act 1890, s. 44 (see 3 A) above). Where an insolvent partnership is concerned, this could work considerable injustice to the outside creditors. This inconsistency with a clear principle of Partnership law should, it is submitted, be remedied by the inclusion in the 1994 Order of an express provision to this effect. This could sensibly be made part of a section setting out in full the priority of debts on a winding up of the partnership only.

C) WINDING UP THE PARTNERSHIP AS AN UNREGISTERED COMPANY WITH CONCURRENT INSOLVENCY PETITIONS AGAINST THE MEMBERS[109]

The third possible winding up procedure is really a variation on the second, the winding up of the partnership as an unregistered company under

[108] 1986 Act, s. 154.
[109] 1994 Order, arts. 8 and 10 and schs. 4 and 6.

the 1994 Order. In addition to winding up the partnership itself, insolvency petitions may be presented concurrently against one or more of the members. The key differences between this procedure and that outlined above may be summarised as follows.

i) The grounds of the petition

The following rules apply to both members' and creditors' petitions, but a member's petition must be against all the members and must show that all of those members are in support of the petition.[110] In effect, a members' petition is brought by one member on behalf of all the members.

a) The petition against the partnership

The sole ground for the petition against the partnership is that it is unable to pay its debts. This is deemed if the partnership and its members have failed to pay a debt of over £750 within three weeks of a written demand being served on the partnership and on at least one member.[111] (Under the 1986 Order, a petition had to be presented against at least two members.[112])

b) The petition against a corporate member

The sole ground for any petition against a corporate member is also that it is unable to pay its debts. This is deemed if it has failed to pay a joint debt of over £750 within three weeks of service on it of a written demand.[113]

c) The petition against an individual member

The sole ground for any petition against an individual member is that he or she appears unable to pay his or her debts. This is deemed if a liquidated and immediately payable debt (not necessarily a joint debt) of £750 or more is not paid within three weeks of service on the member of a statutory demand.[114]

In respect of all three types of petition, the grounds on which an inability to pay debts will be deemed are rather limited, but it is, of course, always open to the petitioner to prove this inability in some other way.

ii) Jurisdiction

For a reason which is not readily apparent, the district registry of the High Court does not have jurisdiction where concurrent petitions are

[110] 1986 Act ss. 124, 264 and 274 as modified by the 1994 Order, sch. 6, para. 2.
[111] 1986 Act s. 222 as modified by the 1994 Order, sch. 4, Pt. I, para. 4.
[112] 1986 Order, art. 8.
[113] 1986 Act ss. .123-4 as modified by the 1994 Order, sch. 4, Pt. II, para.s. 6-7.
[114] 1986 Act ss. 267-8 as modified by the 1994 Order, sch. 4, Pt. II, para.s. 6-7.

made.[115] Since the County Court is available, this is not likely to inconvenience petitioners, but any petitioner who does wish to issue proceedings in the High Court may only do so in London.

iii) Priority of creditors

Prior to the 1994 Order the principle of priorities in a partnership was that joint debts had to be paid out of partnership assets as far as possible, and that personal debts of members had to be paid out of their own private estate.[116] This rule was criticised as "neither fair nor logical" by the Cork Report[117] and the 1994 Order now provides that where the joint estate of the partnership is insufficient to meet its debts, those debts rank equally with personal debts in the estates of the members.[118] This is a step forward for the creditors of the partnership, but a blow to private creditors of the partners, who may be unaware that their debtor is a member of a partnership. The estates continue to be treated as separate[119] and private creditors do not rank equally in the joint estate because, of course, the partner through whom they are claiming must wait until all other debts are paid off before claiming his share of the partnership assets.

D) JOINT BANKRUPTCY PETITION[120]

Where the partnership is insolvent and all the members are bankrupt individuals, with none being limited partners, all the members may, instead of winding up the partnership, present a joint bankruptcy petition on the ground that the partnership is unable to pay its debts. Although the estate of each member will be dealt with separately, as on an ordinary bankruptcy order, a single trustee will be appointed to deal with all the estates. This procedure is not available to creditors, who must instead present petitions against one or more partners individually.[121] This is presumably because the procedure is a device to enable partners to wind up their own affairs and those of the partnership as efficiently as possible, not to allow partnership

115 1986 Act ss. 117 and 265 as modified by the 1994 Order, sch. 4, Pt. II, para. 5 and sch. 6, para. 1.

116 The only exception to this rule was that if the joint estate or an individual estate was insufficient to meet the expenses of its winding-up, those expenses would rank equally with the expenses of the separate estates or the joint estate, as the case might be (1986 Order, art. 9).

117 *Insolvency Law and Practice: Report of the Review Committee* Cmnd 8558 (HMSO 1981), at p. 1688.

118 1986 Act ss. 175 and 328 as modified by sch. 4, Pt. II, para. 23.

119 However, see *Read* v. *Bailey* (1877) 3 App. Cas. 94 in which the House of Lords made an exception to this rule because the assets had become mixed by fraud.

120 1994 Order, art. 11 and sch. 7.

121 If a creditor brings bankruptcy petitions against more than one partner the court may consolidate such actions (see the 1986 Act, s. 303 as modified by the 1994 order, art. 14).

creditors to wind up the partnership indirectly and without having to prove that there are grounds to do so.

The Official Receiver becomes the trustee in bankruptcy of all the members, although he may call a creditors' meeting, or be requested to do so, to appoint a different trustee. This represents a change from the procedure under the 1986 Order, in which the Official Receiver became the manager and receiver of the partnership pending the appointment of a trustee,[122] and will save the time and cost of appointing another trustee when neither the Official Receiver himself nor the creditors require it. A joint meeting of the creditors of the members and those of the partnership may establish a creditors' committee to act as a creditors' committee for each member and a liquidation committee for the partnership.[123] The trustee will realise and distribute the estates of the partnership and the members.[124]

The priorities on a distribution of assets are set out in the 1986 Act, ss. 328 and 328A as modified by the 1994 Order, sch. 7.[125] If the joint estate is insufficient to meet joint debts, those debts rank equally with personal debts in the estates of the members. As with winding up, this does not operate in reverse, and only if there is a surplus after the debts of the joint estate are paid will the members' estates receive anything from the joint estate.

An advantage of this procedure, which should not be underestimated, is that the members are not liable to the rigours of the CDDA (see above).

4. LIMITED PARTNERSHIPS

The procedures outlined above, and the comments made on them, apply equally to limited partnerships under the Limited Partnerships Act 1907, with the following exceptions:

i) A joint bankruptcy petition may not be presented.[126] The assets of a limited partner are not available to partnership creditors and it would therefore be impossible for that partners' estate to administered jointly with those of the partnership and the other partners.

[122] 1986 Act, s. 287 as amended by the 1986 Order, art. 13.
[123] 1986 Act, ss. 301 and 301A as modified by the 1994 Order, sch. 8, para. 18.
[124] Section 305 as modified by sch. 8, para. 19.
[125] Sections 328 and 328A state that the priorities are, for each estate, its bankruptcy expenses, its preferential debts, its other debts, interest on those debts, its postponed debts, interest on those postponed debts, and finally any adjustment between the members.
[126] 1986 Act, s. 264 as modified by the 1994 Order, sch. 7, para. 2.

ii) It will rarely be appropriate to present a concurrent insolvency petition against a limited partner, since the insolvency of the partnership is unlikely to affect the solvency of such a partner.

iii) Although all members, including limited partners, are deemed to be officers of the partnership for the purposes of the CDDA,[127] by their very nature such partners are less likely than other partners to have been engaged in any conduct which would indicate their unfitness to manage a company. However, the matters to be taken into account when determining unfitness specifically include the breach of certain provisions under the Limited Partnerships Act 1907,[128] and so the disqualification of a limited partner therefore remains a possibility.

5. CONCLUSION

A) The potential importance of the new rescue procedures

Although two new procedures (PVAs and administrations) are now available for the benefit of members and creditors of partnerships, DTI statistics[129] which show a relatively low level of use of these procedures by companies indicate that their disadvantages may often be perceived to outweigh their advantages. In a three year period prior to 1993, there were only 296 CVAs and 447 company administration orders compared with 40,052 creditors' voluntary liquidations and 26,120 compulsory company liquidations.

The reasons suggested by the DTI for the relatively low level of CVAs and administration orders by companies[130] are summarised below, with comments as to whether, and to what extent, the same comments may apply to PVAs and partnership administrations.

i) CVAs

a) The lack of a moratorium

This problem applies equally to partnerships, and has been discussed above.

[127] See 2 B) vii) and footnote 77, above.
[128] CDDA, sch. 1, Pt. 1, para. 6 as modified by the 1994 Order, sch. 8.
[129] *Company Voluntary Arrangements and Administration Orders, op. cit.*
[130] *Company Voluntary Arrangements and Administration Orders, op. cit.*

b) Funding

The difficulty in extending or raising the necessary funding for the CVA is a problem which may be even more acute for PVAs since raising finance is generally more difficult for partnerships than for companies, as the former cannot use the security of a floating charge to raise loans, and cannot offer potential investors the benefits of limited liability. However, partners who are able to do so have more incentive to put in extra funds than shareholders, since they have more to lose than shareholders if an administration fails to achieve its objectives.

c) The right of secured creditors to block the CVA.

A secured creditor who does not consent to a CVA is not bound by it, and may effectively block it by enforcing his security. This problem may be less likely to occur with a PVA since partnerships can only grant fixed securities and therefore the category of secured creditors will be smaller than for companies.

d) Directors' lack of knowledge of and experience of CVAs

These comments are likely to apply equally to members of partnerships and their knowledge of PVAs, although the numbers of CVAs already undertaken, and the publicity given to the 1994 Order, may alleviate the problem.

e) Fear amongst directors of procedures connected with the 1986 Act and with insolvency practitioners.

This fear, at least initially, may be less among members of a partnership since the 1986 Act has had, and continues to have, a much more restricted application to partnerships than to companies.

f) CVAs are usually considered at too late a stage when fear of a charge of fraudulent or wrongful trading becomes a barrier.

Although these offences also exist in relation to any insolvent partnership which is ultimately wound up as an unregistered company,[131] their effect is less severe on partners than on directors. An order to contribute to the firm's assets adds nothing to the liability of a partner to contribute generally, and the fact that an order under the 1986 Act, ss. 213 or 214 renders that person liable to a disqualification order under the CDDA, s. 10, adds little to the liability of partners under that Act (as to which, see above).

[131] In such circumstances the 1994 Order, schs. 3, 4, 5 and 6, state that all relevant provisions of the 1986 Act apply, including sections 213 and 214.

g) Distress

The right of distress continues to be available to creditors of both companies and partnerships during the voluntary arrangement.

h) Tax difficulties

These difficulties are applicable to partnerships, and include the right of preferential creditors to be paid in full under a voluntary arrangement, unless they agree to other arrangements, difficulties in ascertaining exact tax liabilities in relation to the period covered by the voluntary arrangement; and problems relating to the tax treatment of compromised debts both from the point of view of the creditor, and the debtor partnership or company.

ii) Administration Orders

a) Time and cost

These factors relate equally to partnerships.

b) The secured creditors' right of veto

This is less of a problem for partnerships, as has been discussed above.

c) *The administrator's powers to remove the directors*

While members of a partnership cannot be dismissed, they can be excluded from management, and this may be just as great a deterrent.

d) A report on directors conduct is obligatory for the purposes of the CDDA[132]

An administrator must report on the conduct of any partner or director of a business which has been in administration if that person's conduct makes him unfit to be concerned in the management of a company. This report must be made whether or not the partnership or business survives administration, and makes administration a less attractive option for those who run partnerships and companies.

e) The creditors are not brought into the process until it is too late

The administrator need not consult the creditors prior to taking action, and need not call a creditors' meeting for three months. This criticism applies equally to partnership administrations.

[132] CDDA, s. 7.

Although the matters detailed above are clearly serious obstacles, they are generally less so for partnerships than for companies. Since members of a partnership have unlimited liability, liquidation is likely to have even more serious consequences for them than for members or directors of companies. As a result, PVAs and partnership administration orders may prove to be more popular, relatively speaking, than CVAs and company administration orders, at least as far as the owners and managers of the businesses are concerned. Creditors, on the other hand, have no more to gain from the PVA or the partnership administration than from the corresponding company procedures, and have more to gain in a partnership winding up (whether formal or informal), since the assets of the partners will, if needed, become available to the partnership creditors.

B) The importance of the procedures designed to assist in the realisation and distribution of a partnerships' assets

Although winding up may now be less attractive than the new rescue procedures (because of the matters referred to above), there can be no doubt that there will be circumstances in which the rescue procedures cannot or will not be used. For the creditor, this leaves the option of winding up the partnership, either with or without concurrent petitions against the partners. The appropriate procedure will depend on the financial situation of the business and the individuals.

For the members of the partnership, the choice is wider, since they may also wind up the partnership informally, or present a bankruptcy petition. Similar results may be achieved by winding up the partnership under the 1994 Order, informally winding it up, or presenting a joint bankruptcy petition. The advantage of the latter two procedures is that the CDDA does not apply. The advantage of some form of winding up, if it is against the partnership only, is that the members may avoid personal bankruptcy (or liquidation).

A further distinction, which may be important to both creditors and members, can be drawn between the different winding up procedures. Where the partnership is wound up with concurrent proceedings against members, the assets of the partners, as well as those of the partnership, are available to creditors. However, where the partnership is wound up without concurrent proceedings against members, only the partnership assets are available directly to the creditors. In *Investments & Pensions Advisory*

Service v. *Gray*,[133] Morrit J. ruled that where proceedings were instituted only against the firm and not against the partners concurrently, assets of individual partners did not form part of the partnership estate. The members were therefore able to continue to use them for their private purposes (and could therefore, if they so wished, easily dissipate them before the creditors were able to institute further proceedings).

Although this ruling is appropriate in the scheme of the 1994 Order, it does appear to allow a partner's private assets to be put out of the reach of partnership creditors if a partner who is not insolvent at the time of the petition against the partnership (and against whom a concurrent petition may therefore not be presented) dissipates his assets before the liquidator or the creditors can take action against him.

C) Possible reforms of the 1994 Order

The procedures applicable to insolvent partnerships have always been a hybrid of individual and corporate procedures, which perhaps befits a business medium which is itself part way between a sole trader and a company.[134] However, the trend in partnership insolvency law since 1986 has been towards the adoption of corporate procedures and, as an inevitable result of this, greater regulation.

Partnerships have evolved in a different, less regulated way to companies. They occupy a different niche in the business world, allowing those who are prepared to take the risk of unlimited liability to operate their business with the minimum of regulation. Increased regulation of the type introduced by the current insolvency legislation is justifiable only if that law is clearly drafted and of recognised merit.

Although the latter condition is fulfilled, at least in part, by the introduction of the new rescue procedures, it is submitted that the matters referred to in this article suggest that the former condition has not been fulfilled, and could only be so by a separate and self contained statute dealing solely with insolvent partnerships and tailored more specifically to their needs. This should be drafted with careful regard to the provisions of the Partnership Act, and would have the following advantages:

[133] [1990] B.C.L.C. 38.

[134] See the comments of Steven A. Frieze in "Action Against Partnerships" (1995) 8 Insolv. Intell. 33 at 35 that "Partnerships have now become hybrid animals. They are neither companies nor simply groups of individuals". This conflicts with the more traditional view that "a partnership has no corporate identity but comprises a collection of individuals" (per Wall J. in *Mephistopheles Debt Collection* v. *Lotay* [1995] 1 B.C.L.C. 41 at 45).

(1) It would lead to greater clarity, since all the relevant provisions would be set out in full in one piece of legislation. This would in turn save partners both time and money.

(2) It would reduce the likelihood of those areas of difference between partnerships and companies which require different provisions being overlooked. For example, it would be obvious when drafting provisions relating to PVAs that the number or proportion of partners who could propose or approve a PVA must be stated. Similarly, the apparently anomalous application of the CDDA only in respect of future directorships and not future partnerships would have to be addressed.

(3) The pattern of the Partnership Act could be repeated, in that discretion could be reserved to partners, in appropriate areas, to deal with certain insolvency matters in their partnership agreement. For example, the proposal or approval of a PVA could be dealt with in this way, with reliance being made on the new statute only in the absence of any agreement.

(4) It would provide an appropriate forum for the giving of guidelines. For example, instances which might constitute a "material irregularity" or "unfair prejudice" in the context of PVAs could be listed.

(5) It would be susceptible to reform or revision relatively easily. Had such a law been used instead of the 1986 Order, the changes made by the 1994 Order would have been more obvious and comprehensible.

This approach would remedy the insufficient allowance made by the 1986 and 1994 Orders for the fundamental differences between partnerships and companies and alleviate the complexity of this important area of law.

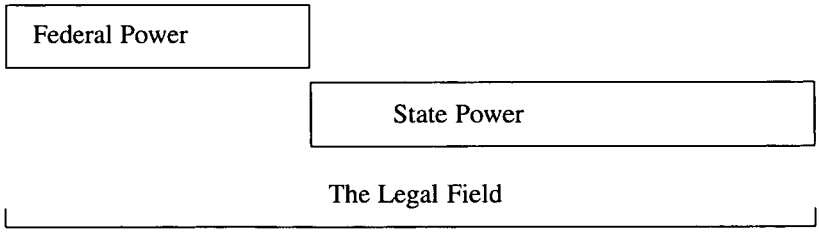
UNITED STATES v. *LOPEZ* – FEDERALISM IN THE UNITED STATES JUST MANAGES TO SURVIVE

*Dr. Roger Sexton**

I. THE HISTORICAL AND CONSTITUTIONAL BACKGROUND

WHEN THE UNITED STATES CONSTITUTIONAL CONVENTION MET in Philadelphia in 1787 it determined to create a "Federal" system of government under which all legislative (and executive and judicial) power was divided between the central Federal government and the member states of the Union. With memories of ill-treatment by the British authorities still fresh in their minds, the members of the Convention saw the Federal system as a crucial way of protecting individual citizens from governmental oppression. (Significantly, the drafters of the 1949 German Constitution, the *Grundgesetz*, thought in a very similar way.)

One of the cornerstones of the 1787 Federal plan was the creation of a Federal legislature, "The Congress", with power to enact nationwide legislation on a quite long list of topics, *but only on those topics.* If a particular topic (a good example is education) fell outside this list, then the state legislatures had the exclusive power to legislate in that field. The position (as envisaged in 1787) can be illustrated by the following diagram:



(By "Legal Field", I mean all those aspects of human existence which are capable of legal regulation.)

Readers will immediately notice that I have made the block representing "Federal Power" much smaller than that representing "State Power". The drafters of the US Constitution envisaged that most law-making powers would reside with the states. In particular, traditional areas of Private law such as Contract, Tort, Property, Family law and Succession, all came under (exclusive) state control.

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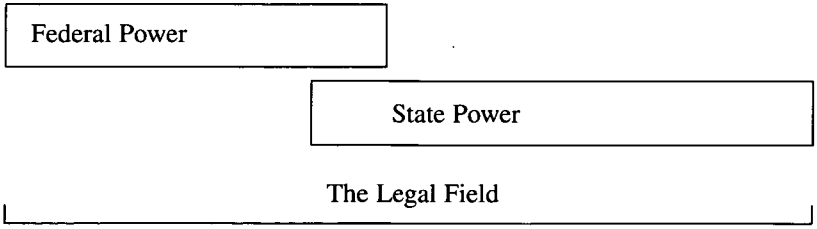
The list of those topics on which the Federal Congress can legislate is (largely but not exclusively) contained in Article 1, section 8 of the Constitution. The third paragraph of that section states:

> [The Congress shall have power] to regulate commerce with foreign nations and *among the several states* and with the Indian tribes.

This paragraph contains three elements; I have emphasised the middle element, the so-called "inter-state commerce clause", as it is this element which is of crucial relevance to this article.

In the nineteenth century the inter-state commerce clause was narrowly construed, and was thus not a particularly important source of Federal legislative power. However, Franklin D. Roosevelt's "New Deal" brought about a radical change. Citing the inter-state commerce clause as the source of its authority, the Federal Congress started to enact wide-ranging legislation in the fields of economic regulation and social welfare.

Initially the Supreme Court held much of the "New Deal" legislation unconstitutional. But in 1937 the Court changed its mind,[1] and for the last 58 years it has been clear that Congress does have power to enact nationwide laws governing business and social welfare. The Court has repeatedly endorsed an expansive reading of the inter-state commerce clause. Largely as a result of this expansive interpretation, the diagram on the previous page now looks as follows:



II. THE FEDERAL "GUN-FREE SCHOOL ZONES ACT" OF 1990[2]

For many years there has been a growing problem in the USA of pupils (and others) bringing guns (sometimes loaded) onto school premises. In

[1] The case of *NLRB* v. *Jones and Laughlin Steel Corporation* 301 U.S. 1 (1937) is usually regarded as being the turning point.

[2] The relevant terms of the Federal "Gun-free School Zones Act" of 1990 are set out at the beginning of Rehnquist C.J.'s judgement in *United States* v. *Lopez* 63 U.S.L.W. 4343 (1995). As is usual with Federal legislation, it has been codified into the "United States Code". Its official reference is 18 U.S.C. §992.

1990 the Democrat-controlled Congress decided to take action, and passed the Federal "Gun-free School Zones Act". This Act placed a blanket prohibition on taking a gun into school premises (state or private). Indeed it went further than that. It prohibited possessing a gun within a 1,000 feet of school premises.

Although regulation of schools is traditionally left to the states (and sub-divisions such as cities and counties), Congress claimed that the inter-state commerce clause empowered it to pass the Act. The constitutionality of the Act was the central issue in *United States* v. *Lopez*.[3]

Lopez was a pupil at a Texas high school who was caught within the school carrying a hand-gun. He was prosecuted in a Federal court for breaking the 1990 Act. He successfully contended that the law was unconstitutional. By a narrow 5-4 majority the Supreme Court held that Congress had exceeded its powers under the inter-state commerce clause. It had attempted to regulate an area of activity still reserved exclusively to the states and their legislatures.

The Clinton administration vigorously defended the constitutionality of the Act. Its strongest argument (the "national productivity" argument) in effect involved four stages:

(1) Guns in schools damage the quality of education in US schools;
(2) therefore Americans are less well educated;
(3) that in turn damages the US economy, in particular it undermines American productivity and competitiveness;
(4) Congress can pass any legislation it likes which it considers to be good for the national economy.

An alternative line of argument put forward by the government was that the Act was a measure to combat violent crime, and that it was constitutional because crime affected the national economy in two ways. Firstly, crime pushed up the costs of insurance. Secondly, it discouraged travel to areas which citizens considered "unsafe".

These potentially far-reaching lines of argument were accepted by the four dissenting judges, Stevens, Souter, Ginsburg and Breyer J.J.[4] Fortunately for Federalism in the USA, five judges ruled otherwise.

[3] *Ibid.*

[4] The principal dissenting judgement was written by Breyer J., a judge appointed by President Clinton to the Supreme Court in July 1994. This dissent focuses mainly on the argument that poor education affects national productivity. See *ibid* at 4362-4367.

III. THE CURRENT MEANING OF THE INTER-STATE COMMERCE CLAUSE

In summary, the majority of the Supreme Court in *Lopez* (Rehnquist C.J., and O'Connor, Scalia, Kennedy and Thomas J.J.) held that Congress had exceeded its powers because possession of guns in schools did not substantially relate to inter-state commerce or economic activity.

The main majority opinion in *Lopez* was written by Rehnquist C.J.[5] This opinion firmly rejects the "Congress can enact any law it considers good for the national economy" type of argument. Instead, the opinion firmly based itself on Supreme Court decisions from 1937 onwards explaining the meaning of the inter-state commerce clause. Rehnquist C.J. concluded from these cases:

> We have identified three broad categories of activity that Congress may regulate under its commerce power . . . First, Congress may regulate the use of the channels of inter-state commerce [e.g. canals and railroads] . . . Second, Congress is empowered to regulate and protect the instrumentalities of inter-state commerce [e.g. safety requirements for road vehicles] or persons or things in inter-state commerce, [e.g. goods or travellers in transit] . . . Finally Congress' commerce authority includes the power to regulate those activities having a substantial relation to inter-state commerce, . . ., i.e. those activities that substantially affect inter-state commerce.[6]

On this three-head analysis, the only possible head which could validate the 1990 Act was the third. Under this head, Congress can regulate commercial activity taking place purely *within* a single state (*intra*-state commerce) if that activity substantially affects commerce *between* states:

> We have upheld a wide variety of congressional Acts regulating *intra*-state economic activity where we have concluded that the activity substantially affected *inter*-state commerce. Examples include *intra*-state coalmining; . . . *intra*-state extortionate credit transactions; . . . and production and consumption of home-grown wheat. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects *inter*-state commerce, legislation regulating that activity will be sustained.[7] (My emphasis.)

5 *Ibid.* at 4343-4348.
6 *Ibid.* at 4346.
7 *Ibid.*

Rehnquist C.J. went on to discuss in some detail the 1942 case of *Wickard* v. *Filburn*.[8] In that case the Supreme Court upheld the application of the 1938 Agricultural Adjustment Act to an Ohio farmer who had grown just 23 acres of wheat mainly for consumption either by his family or by his livestock. In the view of Rehnquist C.J. there was a clear distinction between *Wickard* and the situation confronting the Court in *Lopez*. In *Wickard* the farmer had been engaged in an economic activity, wheat-growing, in which there existed a national market. By no stretch of the imagination could possession of a firearm on school premises be regarded as an economic activity:

> [The 1990 Act] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might take those terms. [The Act] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intra-state activity were regulated.[9]

IV. WHAT IF THE GOVERNMENT VIEW OF THE INTER-STATE COMMERCE CLAUSE HAD PREVAILED?

As noted earlier, the United States Government argued that Congress could, invoking the inter-state commerce clause, enact any law which was good for the economy of the country. Rehnquist C.J. clearly saw the implications of this argument:

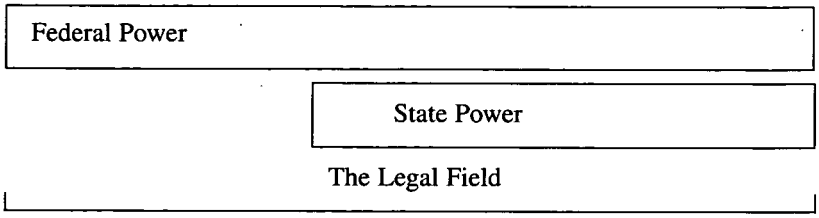
> Under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: Family law (including marriage, divorce, and child custody), for example. Under the theories the Government presents in support of [the Act], it is difficult to perceive any limitation on Federal power, even in areas such as criminal law enforcement or education, where states have historically been sovereign.[10]

If the Federal government had won *Lopez*, then it would seem that Congress could regulate every area of life - nothing would be left to

8 317 U.S. 111 (1942).
9 *Op. cit.*, at 4346-4347.
10 *Ibid.* at 4347.

exclusive regulation by the states.

The diagram on the first page of this article would now look like this:



Even on this interpretation of the inter-state commerce clause, which I will call "the Clinton interpretation", the states would not lose all their law-making powers. Congress would have *power* to enact national legislation in fields such as Family law, Succession and Land law, but it would be under no obligation to pass such legislation. It could decide that these matters are best left to the individual states.

However if, in the interests of "national productivity", Congress decided (say) that Divorce should be available on the basis of one month's separation, or that a surviving spouse should automatically be entitled to a half of the decedent spouse's estate, or that there should be a standard perpetuity period of one hundred years, then on the Clinton interpretation such laws would be valid and binding nationwide.

Any conflicting state laws, e.g. a Divorce law requiring a minimum of one year's separation, would automatically be invalid. This is because of the "supremacy clause" in Article VI of the Constitution, under which a valid Federal law automatically overrides ("pre-empts") any conflicting state law, and even state courts must give effect to the Federal law.

On the Clinton interpretation, (which remember found favour with four of the nine Supreme Court Justices) a national Divorce law would be valid and would pre-empt, i.e. destroy, the various and varying state laws on the issue. The same would be true of a whole myriad of other legal topics as diverse as (say) Abortion, Trusts, Murder and Nuisance.

Happily, a bare majority of the Supreme Court rejected the Clinton interpretation. If the Supreme Court had ruled otherwise, the USA would have ceased to have been a Federation. It would have become a unitary state with a central parliament (i.e. Congress) able to legislate on any subject it wished.

V. PARALLELS WITH THE EUROPEAN UNION.

It has always been my view that the European Union (formerly the EC)

is a Federation. I hold that view because the "constitution" of the EU (the various treaties, especially those of Rome and Maastricht) divides legislative power between the central authorities in Brussels and the (now fifteen) Member States. Moreover the EU "constitution", like the much older United States Constitution, works on the basis that the central authorities have the power to enact laws only in certain fields. All activities outside those fields (e.g Divorce and Criminal law) remain exclusively within the legislative power of the Member States.

Unfortunately the EU "constitution" lacks an equivalent to Article 1, section 8 - a neat list of those legislative powers given to the central authorities. However, Article 2 of the Treaty of Rome sets out the "task" of the European Union. As amended, it reads:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

This statement of objectives is alarmingly vague, and is consequently open to very wide interpretation. In particular it could be used to justify the EU enacting centralised "Federal" legislation on topics which hitherto have been left to the exclusive jurisdiction of the Member States. Indeed it could be used as the basis of a "national productivity" argument similar to that deployed by the Clinton administration in *United States* v. *Lopez,* with the result that the European Union could enact "Federal" legislation on any legal topic whatsoever.

For example, it could be argued that the promotion of "economic and social cohesion and solidarity among Member States" would justify the EU enacting wide-ranging legislation to combat business frauds. Such EU legislation would encroach upon matters of general Criminal law such as Theft.

Similarly, it could be argued that the promotion of "a high level of employment and social protection" would justify the EU intervening to regulate primary and secondary education. Some might say that, in pursuit of high quality education, the enormous disparities between the education

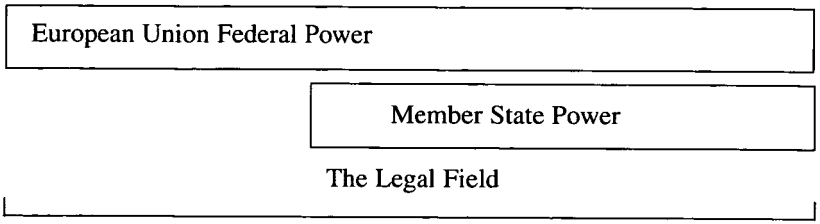
systems of the various Member States (far greater than in the USA) need to be ironed out. But such standardising legislation would undoubtedly be strongly resisted by some elements within the EU. The whole question of religion within schools would be a particular minefield. In Germany, where education is a "Länder" (Provincial) not "Bund" (Federal) responsibility, EU legislation might well provoke an internal constitutional crisis.

Those seeking to defend the Member States' legislative freedom in areas such as Criminal law or education would undoubtedly invoke the principle of "subsidiarity". This is embodied in the second paragraph of Article 3b of the EC treaty, which reads:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, *only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States* and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. (My emphasis)

The answer which the proponents of EU "Federal" legislation governing (say) education will give to the "subsidiarity" argument is a very simple one. They would argue: "Our objective, uniform high quality education, cannot be achieved by the Member States acting in isolation from one another".

Thus, despite "subsidiarity", there is a danger that, relying on the broad words of Article 2, more and more legislative power will be exercised by the central EU authorities. The division of legislative power between the EU and Member States could eventually reach a stage as depicted in the following diagram:



I hope that readers immediately spotted that this diagram is very similar to that on page 203. That diagram represented what the position in the USA would have been if the Clinton Administration's arguments had prevailed in *United States* v. *Lopez*.

VI. CONCLUSION- PRESERVING THE FEDERAL SYSTEM

In *United States* v. *Lopez,* Federalism survived in the USA because five out of the nine Supreme Court justices rejected the expansive interpretation of the inter-state commerce clause being urged upon them by the Clinton Administration, an interpretation which would have turned the United States into a unitary legal system.

A similar fate would await the European Union if Article 2 were given a broad interpretation. There are however, in Europe, two potential safeguards against such a wide interpretation.

Firstly, there is the legislative process within the European Union itself, which (unlike in the USA) is largely controlled by the governments of Member States. At least some Member States (including almost certainly the United Kingdom) would probably hotly oppose, in the Council of Ministers, legislation based on an expansive interpretation of Article 2.

However, the system of qualified majority voting laid down in Article 148 of the EC treaty can lead to the overruling of objections from a minority of Member States. Suppose, over UK objections, the Council of Ministers purported to create, by Regulation, a European Criminal law of Theft designed to combat business frauds. At this point the second potential safeguard would come into play. No doubt somebody would argue that the new EU Theft law was *ultra vires* the European Union's legislative powers, and the issue would be referred to the European Court of Justice in Luxembourg. The judges in Luxembourg would then face a decision critical to the whole future of the European Union.

They could, like the dissenting four judges in *Lopez* interpreting the inter-state commerce clause, adopt a wide reading of Article 2. They would thereby convert the European Union into a unitary state. Alternatively, they could adopt an approach similar to the five judge majority in *Lopez,* and thus maintain a rational balance between central and Member State legislative power.

NOTTINGHAM LAW JOURNAL

CASENOTES

The address for submission of casenotes is given at the beginning of this issue.

WHEN THE STATE KILLS

McCann and Others v. *United Kingdom*

The Times 9 October 1995

To what extent can a democracy defend itself against terrorism? Is it the case that "terrorists have no human rights"?[1] Should those who "live by the sword die by the sword"?[2] Or are the rights of all human beings, even terrorists, inalienable?[3] In *theory* every democracy is committed to the rule of law. Yet in *practice* at what point is a state in danger of resorting to the tactics traditionally associated with terrorism?

These questions lie at the very heart of *McCann and Others* v. *United Kingdom.*[4] In what was its most politically controversial decision for a decade, the European Court of Human Rights held that in 1988 three unarmed members of the IRA had been unlawfully shot dead by SAS soldiers on Gibraltar. The ruling generated a political furore. Conservatives and Unionists were outraged. The decision was variously described as "incomprehensible and dangerous" (Deputy Prime Minister Michael Heseltine),[5] "defying common sense" (Michael Ancram MP),[6] "a bad decision" (David Trimble MP),[7] and an "idiotic judgment" (Peter Robinson MP).[8] Equally predictable was the reaction of Republican leaders and

1 *The Sun,* Editorial 28 September 1995.
2 *The Bible,* Matthew 26:52.
3 The Preamble to the Universal Declaration of Human Rights (1948) recognizes the "inalienable rights of all members of the human family".
4 Case Number 17/1994/464/545.
5 *BBC2 Newsnight,* 27 September 1995.
6 *The Belfast Telegraph,* 27 September 1995.
7 *Ibid.*
8 *Ibid.*

relatives of the victims. Niall Farrell (the brother of one of the deceased) claimed that the ruling showed that "the British Government has blood on its hands";[9] his solicitor Barra McGrory celebrated a "tremendous verdict";[10] and it was claimed that "all reasonable people knew that these young people had been summarily executed" (Dr Joe Hendron MP).[11]

The European Court's ruling had the effect of abruptly ending the hitherto cross party consensus on Northern Ireland. The failure of Labour Home Affairs spokesman Jack Straw to criticise the Court led Michael Heseltine to claim that Mr Straw had allegedly given "encouragement to the terrorist mentality that this sort of judgment provokes."[12] Outraged by these comments, Jack Straw threatened the Deputy Prime Minister with legal action.[13] Few cases have caused such political bitterness in recent years and its facts are as follows.

Daniel McCann, Mairead Farrell and Sean Savage were the members of an IRA active service unit. British intelligence reports suggested that they were planning a major terrorist attack on Gibraltar by means of a car bomb which would probably be detonated by a remote control device. During an attempted arrest, all three of the suspects were shot dead by SAS soldiers. The soldiers claimed that the suspects' movements had aroused fears that they might have been reaching for remote control devices to detonate a car bomb. Hence, the soldiers opened fire killing each of the suspects. No weapons or detonating devices were found on the bodies of those killed, while the suspect car was discovered not to contain a bomb. However, another car, which had been hired by Mairead Farrell under a false name, was later found nearby in Spain containing semtex explosives, ammunition and two timer devices.

On 30th September 1988, a Gibraltar coroner's inquest (with a jury chosen from the local population) returned a verdict of lawful killing. Dissatisfied with these findings, the applicants (relatives of the three) sued the Ministry of Defence in the Northern Ireland High Court. However, the then Foreign Secretary, Douglas Hurd, issued certificates (under the Crown Proceedings Act 1947) which excluded proceedings against the Crown. On 31st May 1991 the High Court of Northern Ireland refused to judicially review these certificates and the relatives' High Court writs were subsequently struck out. Having exhausted domestic remedies, the

9 *The Times*, 28 September 1995.
10 *The Belfast Telegraph*, 27 September 1995.
11 *The Independent*, 28 September 1995.
12 *The Guardian*, 28 September 1995.
13 *Ibid.*

applicants invoked Article 2[14] of the European Convention on Human Rights (ECHR) and petitioned the European Commission of Human Rights.[15]

Article 2(1) guarantees that "Everyone's right to life shall be protected by law," whereas Article 2(2) lists the circumstances in which the taking of life is justified. These circumstances include situations where the use of force is "no more than absolutely necessary" : (a) in self defence or in the defence of another; (b) to effect an arrest or to prevent an escape; and (c) to quell a riot or an insurrection. Relatives of people killed by state forces have traditionally enjoyed little success when seeking to invoke these provisions. In an early case, *X* v. *Belgium,*[16] the European Commission appeared to introduce a requirement of intention into Article 2(1). This case involved the death of a man who had been shot by the police during a riot in Belgium. A case brought by the victim's wife was rejected by the European Commission on the ground that there was no evidence that the killing had been intentional. The ruling was controversial since it suggested that Article 2 would only prohibit intentional killings and could not cover accidental or negligent death. This principle radically narrowed the scope of Article 2 and it was only rejected in 1984 by the European Commission, in *Stewart* v. *UK.*[17]

In this case, 13 year old Brian Stewart died after having been hit on the head by a plastic bullet[18] fired by a British soldier (lacking any intention to kill) during a civil disturbance in Belfast. The case turned on the wording of Article 2(2)(c). Stewart's family denied the existence of a riot and claimed that the force used by the soldiers had been disproportionate to the threat they faced. This interpretation was rejected by the European Commission. It held that the patrol of eight soldiers had been in danger from a crowd of 150 people who were throwing stones and bottles - that since riots were sometimes used as a cover for sniper attacks on soldiers,

[14] Article 2:
(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[15] See the ECHR Arts 26-37. On the Commission see generally, *European Human Rights: taking a case under the Convention,* by L.J. Clemens (Sweet and Maxwell 1994), at pp. 40-64.

[16] No 2758/66, 12 YB 175 (1969).

[17] No 10044/82, 39 DR 162 (1984).

[18] Plastic bullets are manufactured from solid PVC and are approximately four inches long and two inches wide. On plastic bullets generally see L. Jason-Lloyd, "Plastic Bullets on the mainland" (1990) 140 New Law Journal 1492.

the firing of the fatal plastic bullet had been "no more than absolutely necessary" to restore order.[19]

A similar verdict was reached in *Kelly* v. *United Kingdom*.[20] Seventeen year old Paul Kelly had been shot dead by soldiers after a stolen car (in which he was a passenger) tried to evade an army checkpoint in Belfast. The soldiers' defence was they thought they had been firing at terrorists. The European Commission found that on the facts their belief was reasonable and that the use of lethal force had been justified. Therefore, the Commission held that soldiers could shoot with an intent to kill where it was the only way of preventing the escape of those who were reasonably suspected of being terrorists.[21] The Kelly decision has been criticised on the ground that it is based on a misinterpretation of Northern Ireland law.[22] However, in *Kelly* and other cases,[23] the European Commission appeared reluctant to castigate those soldiers and police officers who were involved in the use of deadly force. Initially this was the approach adopted in the Gibraltar case. The European Commission concluded that the Gibraltar shootings could be "considered as absolutely necessary for the legitimate aim of the defence of others from unlawful violence".[24] Whilst ruling against the relatives of the three IRA members, the Commission referred the matter to the European Court for a final decision, and in this, the first case to be examined by the Court on Article 2, the Court appears to have shown a boldness not normally synonymous with Commission decisions in this area. So why the change?

The European Court's own explanation is that Article 2 is "one of the most fundamental provisions of the Convention", so should be "strictly construed".[25] In applying Article 2 to the facts of this case, the Court appears to have considered two possible explanations - either the authorities knew that there was no bomb in the car in the centre of Gibraltar; or else those controlling the security operation were guilty of a "serious miscalculation".[26] The Court rejected the first possibility (which would have suggested a premeditated policy to kill the terrorists) but accepted the second.

[19] *Stewart* v. *UK*, *op. cit.*, at 171.

[20] No 17579/90 (1993), unreported.

[21] On the allegations of a "shoot to kill" policy operated by the security forces in Northern Ireland see A. Jennings, in A. Jennings (ed), *Justice under Fire: the abuse of civil liberties in Northern Ireland* (Pluto Press1988), Chapter 5.

[22] "The Commission dismised Mr Kelly's application on the assumption that there existed in Northern Ireland a power of arrest which the Northern Ireland courts had not recognised and which does not appear to exist": J.C. Smith, "The right to life and the right to kill in law enforcement" (1994) 144 New Law Journal 354 at 356.

[23] See also *Diaz Ruano* v. *Spain* A 285-B (1994) and *Farrell* v. *UK* No 9013/80, 30 DR 96 (1982).

[24] No 18984/91 (1994).

[25] *The Times*, 9 October 1995.

[26] *Ibid.*

The European Court castigated the UK authorities for making a number of crucial assumptions which turned out to be false. The European Court was particularly critical of mistakes the UK had made in planning the Gibraltar operation. Intelligence reports incorrectly suggested that the bomb would be in the car parked in Gibraltar; that it would be detonated by a radio controlled device; that it would be activated by the pressing of a button; that the terrorists would respond by detonating the bomb if challenged; and finally, if confronted, the terrorists would respond by using firearms. As the Court noted, "all of those crucial assumptions ... turned out to be erroneous," and "insufficient allowances" had been made for "other assumptions".[27]

In assigning the blame, the Court pointed its finger less at the soldiers, than at those who planned the counter terrorist operation. The Court accepted that the SAS soldiers honestly believed it was necessary to shoot the suspects to prevent them from detonating a bomb which would cause a serious loss of life. However, it found that the soldiers' "reflex action(s)... lacked the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorists".[28] In this, the only part of the Court's judgment critical of the soldiers, perhaps the Court was quietly alluding to the number of bullet wounds found on the bodies of the dead terrorists. Farrell and McCann had been shot several times while Professor Watson (the official pathologist at the Gibraltar Inquiry) noted that Savage's body had been "riddled with bullets" after what had seemed like "a frenzied attack".[29] Thus the Court acknowledged that the UK had used troops trained to "continue shooting ... until the suspect was dead".[30] Their deployment meant that there was a special duty on the state carefully to control the arrest operation and the UK had failed adequately to discharge this duty. So what should the UK have done?

The majority of the Court suggested that the authorities should have stopped the three IRA members from entering Gibraltar. The Court claimed that it would have been "possible for the authorities to have mounted an arrest operation"[31] since the UK security services had photographs of the three suspects and were aware of their names and aliases. The UK's argument that it lacked the evidence to hold the terrorist suspects failed to impress the Court. It held that the failure to prevent the terrorists entering

27 *Ibid.*
28 *Ibid.*
29 As quoted in *Statewatch*, September-October 1995, at p. 21.
30 *The Times, op. cit.*
31 *Ibid.*

Gibraltar meant that the fatal shootings became "a foreseeable possibility if not a likelihood".[32] On the other hand, the UK's argument persuaded the nine dissenting judges. They held that to have prematurely arrested the suspects would have "heightened the risk of another attack".[33] Indeed, the wide gulf between the majority and dissenting judgments was illustrated by the dissenting judges' assertion that "for the authorities to have proceeded otherwise . . . would have been to show a reckless failure of concern for public safety".[34] Thus, the minority of European Court judges considered that the use of force to prevent a "criminal enterprise" which could have "resulted in the loss of many innocent lives" was no more than "absolutely necessary" in the circumstances.[35]

This powerful dissenting judgment provided some crumbs of comfort for the United Kingdom. British Government representatives were able to console themselves with the knowledge that the vote was by the very narrowest of margins (10-9); that one of the dissenting judges was the distinguished Norwegian President of the Court, Rolv Ryssdal; that the Court's ruling was unusual in that it deviated from the earlier opinion of the European Commission of Human Rights; that the Court had rejected the victims' families claims of an "execution plot" or a "shoot to kill" policy; that the four SAS soldiers involved were found to have acted honestly; and that even the majority judges had pointedly refrained from instructing the UK to pay compensation to the families of the deceased.[36]

The reaction of the Deputy Prime Minister to the European Court's ruling was bullish. He asserted that if "faced with similar circumstances as those in Gibraltar ... the same decisions would be taken again".[37] Nevertheless, it is indisputable that the judgment has caused considerable embarrassment in Whitehall. British efforts to occupy the moral high ground in the propaganda war with terrorist organisations will have been dealt a serious body blow. The Court's ruling will invariably lend weight to the credibility of those who claim that British forces routinely used unreasonable force in military operations connected with Northern Ireland.[38] It enabled Gerry Adams, the Sinn Fein President to declare, "This

[32] *Ibid.*
[33] *The Daily Telegraph*, 28 September 1995.
[34] *Ibid.*
[35] *Ibid.*
[36] However the Court ordered the British government to pay the £38,700 legal costs incurred by the families of Farell, Savage and McCann. Notwithstanding the earlier rhetoric of government ministers, these legal costs have now been paid: *The Times* 27 December 1995.
[37] *The Guardian*, 28 September 1995.
[38] See also Amnesty International, *Political Killings in Northern Ireland* (1994) and Amnesty International, *Investigating Lethal Shootings: the Gibraltar Inquest* (1989).

guilty verdict is only the tip of the iceberg in Britain's long dirty war in Ireland".[39]

When he recently visited Belfast, Bill Clinton warned the Ulster paramilitaries that they would "never escape the dead-end street of violence".[40] In this bold and brave decision, the European Court appears to be suggesting that these sentiments apply not merely to terrorist organisations, but also to states.

PETER CUMPER*

LOCAL AUTHORITY LIABILITY: CONFUSION DOUBLY CONFUSED?

X v. *Bedfordshire County Council*
[1995] 3 All E.R. 353

In this case,[1] a conjoined appeal, the House of Lords[2] considered the potential liability of local authorities in two groups of cases and under three potential heads of liability. Two cases concerned allegations of failure by the child care element of the Social Services Departments of the councils concerned. One allegation was that children had not been taken into care soon enough, the other that a family had been disrupted by an inaccurate assertion of sexual abuse. The other three concerned special educational needs. In two cases it was alleged that the child had suffered because the arrangements for statementing and/or providing appropriate education had failed, in the third that a head teacher and others had failed to diagnose dyslexia and associated problems.

The three causes of action considered were said by Lord Browne-Wilkinson, who delivered the principal speech, to be:

(i) breach of statutory duty *simpliciter* (i.e. irrespective of carelessness);
(ii) actions based solely on the careless performance of a statutory duty in the absence of any other common law right; and

[39] *Ibid.* Gerry Adams also claims that almost 400 people were killed unlawfully by the Crown forces in Northern Ireland during the "Troubles". In 1988 it was claimed that of 270 individuals killed by the security forces in Northern Ireland since 1969, at least 155 of them had been "civilians": A. Jennings, *op. cit.*, Chapter 5.

[40] *The Times*, 1 December 1995.

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[1] Hereafter, *Bedfordshire.*

[2] All the cases were at an interlocutory stage and the appeals to the House were against orders to strike out causes of action (or refusals to make such orders).

(iii) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it.

The first was dealt with very briefly. There was nothing in earlier cases to indicate that such a duty existed in relation to general regulatory schemes or welfare legislation which, although clearly beneficial to specific groups in society, is passed not for their benefit but for that of society at large. The established cases were all of limited and specific duties (e.g. in relation to industrial safety) which involved no general administrative discretion.

The second potential cause of action was treated at greater length; a main thrust of Lord Browne-Wilkinson's speech being that to allow such a cause of action would be to distort into a cause of action what is in reality merely an aspect of the defence of statutory authority. The essence of that defence is that Parliament may specifically authorise acts otherwise unjustified but *only* where these are done without negligence: *Metropolitan Asylum District* v. *Hill,*[3] *Allen* v. *Gulf Oil Refining.*[4] Confusion, it is said, has arisen from dicta of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*[5] being taken out of this context. Lord Browne-Wilkinson also rejected an argument based on Lord Diplock's speech in *Dorset Yacht Co Ltd* v. *Home Office,*[6] on the basis that the majority view of that case was that there was a common law duty of care subject to a possible defence of statutory authority.

Both of these propositions seek, in the first case directly, in the second indirectly, to maintain and reinforce the old public/private or policy/operational dichotomies, although these are not addressed until the discussion of the third (and only surviving) cause of action. Lord Browne-Wilkinson accepted that a distinction must be drawn between harm arising from the exercise of a statutory discretion to act or not to act and harm arising in the course of an activity so decided upon. In the former case, although it is unhelpful to rely on public law concepts such as *ultra vires,* or *Wednesbury* unreasonableness, it must be accepted that the body has been given a discretion in order to exercise it, so liability can only arise if the decision actually taken is "outside the ambit of the discretion altogether". However, to establish whether this is so, the factors to be taken into account must be considered. If these are policy issues, they are non-justiciable. Thus in such cases there can be no liability. This approach is not

3 (1881) 6 App. Cas. 193.
4 [1981] A.C. 1001. This case shows how difficult it can be to distinguish harm intrinsic to the authorised act from extrinsic, avoidable, actionable harm.
5 (1878) 3 App. Cas. 430 at 455-6.
6 [1970] A.C. 1004.

of course new and is derived from the usual authorities.[7] The non-justiciable area seems to be wider in private than in public law, but this is consistent with the proposition that these are essentially public law activities which fall to be regulated accordingly.

The real meat of the speech concerns those discretionary decisions which are justiciable, and potential liability arising from activities pursuant to discretionary decision. Here foreseeability of harm, proximity and the just and reasonable test will apply in the usual way (i.e. not as the defining ingredients of a duty, but as labels for the factors to be taken into account in the judicial balancing act[8]) to establish, incrementally, any novel duty of care. The claims against the authorities in the education cases failed[9] as falling into a discretionary area where only gross unreasonableness could in principle found an action. It was in practice inexpedient to give an action because of the risk of vexatious claims; further it was unnecessary, because those actually providing services would be professionally responsible. They could therefore be sued, and the scope of the responsibility was such that it could safely be assumed that it would cover all cases where actual harm resulted.

So far as the direct liability of the local authorities under the child care legislation is concerned, the attempt to establish a duty also failed, but for the following reasons:

(i) there is no similar established category of duty to act as a basis for incremental extension;

(ii) a duty would "cut across the whole statutory system set up for the protection of children at risk". As a result of statutory guidance this system is interdisciplinary, involving joint discussions and co-decision making with other bodies. Further, the issues to be considered are delicate and involve balancing risks and benefits. As they are also emotionally charged, there is a large risk of vexatious litigation arising out of conflicts between parents and professionals; and

(iii) there is machinery for redress of grievances (although not the award of damages) through the statutory complaints procedures and the local government Ombudsman. This seems to be treated as equivalent to the availability of criminal penalties in *Atkinson* v. *Newcastle Waterworks*.[10]

7 *Dorset Yacht Co Ltd* v. *Home Office, ibid*; *Anns* v. *Merton LBC* [1978] A.C. 728 and *Rowling* v. *Takaro Properties Ltd.* [1988] A.C. 473.

8 C.f. *Caparo Industries plc* v. *Dickman* [1990] 2 A.C. 605; [1990] 1 All E.R. 568.

9 Except a claim in respect of negligent operation of a school psychology service, treated as analogous to other local authority services such as hospitals (pre N.H.S): *Gold* v. *Essex CC* [1942] K.B. 293.

10 (1877) 2 Ex. D. 441.

There remained the question of the personal liability of the professional staff employed by the authorities. Such liability can exist irrespective of contract, and even where there is a contractual duty owed to a third party.[11] This is however said to be subject to a proviso that the duty alleged in relation to the plaintiff must not be inconsistent with the proper performance of the authority's statutory duty. This is derived by analogy with *Henderson* v. *Merrett Syndicates Ltd*[12] where the tortious duty owed by the managing agent to the names could not be inconsistent with the contractual duty of the managing agent to the members' agents to provide services to the members. This however appears to contrast with the approach of the House in *Spring* v. *Guardian Assurance*[13] where a duty of care was said to exist toward the subject of a reference notwithstanding the fact that the reference was given under Rule 3.5(2) of the quasi-statutory Lautro Rules which provides that references must be taken up, and that a Lautro member "shall make full and frank disclosure of all relevant matters which are believed to be true".[14] Only Lord Woolf recognised the incompatibility of the duties to Lautro and the subject of the reference, but he regarded it as immaterial.[15] Of course, *Spring* and *Henderson* are both examples of assumption of professional responsibility within the *Hedley Byrne* principle, and that principle is not mentioned in *Bedfordshire.* It is said to be important that the professionals here were advising the council, not the children, and the children were not relying on the report. With respect, the first ground is inconsistent with *Spring*, where a duty to the plaintiff arose in relation to a report about the plaintiff, and the second with *White* v. *Jones*[16] where a *Hedley Byrne* liability was in effect held to exist where there was an assumption of responsibility irrespective of reliance. Lord Nolan dissented on this point, and would have held that there was a professional duty, but for his acceptance of a second argument, also endorsed by Lord Browne-Wilkinson, that the public policy reasons which were conclusive in denying a duty owed by the authority applied to the individuals.

The common feature of the education claims was that identified or identifiable professionals, namely teachers and educational psychologists, had entered into a relationship of a professional nature with the plaintiff in which they had assumed to act for his benefit. This was not, at least in

11 *Henderson* v. *Merrett* [1994] 3 W.L.R. 761; [1994] 3 All E.R. 506.

12 *Ibid.*

13 [1995] 2 A.C. 296. The Committees in *Spring* and *Bedfordshire* were completely different.

14 Which is a duty of honesty, designed to mirror the rules of defamation, which were believed to be applicable, and which give a defence of qualified privilege to non-malicious (in general terms, honest) references.

15 *Spring* is not referred to in the speeches in *Bedfordshire.* It is not clear if it was cited by counsel.

16 [1995] 2 W.L.R. 187.

principle, inconsistent with their duty to their employing authority, and so a claim could in principle lie, i.e., such a claim cannot be struck out *in limine* as disclosing no cause of action. There is no adequate countervailing policy reason and the duty situation is an established one.

These cases are part of the two way stretch evident in the approach of the Law Lords to tortious liability in novel situations over the past couple of years. On the one hand there is a continued reluctance to allow novel tort claims to upset systems which are designed to work under other legal regimes, whether contract and the Hague and Hague/Visby Rules in *Marc Rich & Co AG and Others* v. *Bishop Rock Marine Co Ltd and Others*,[17] or public law in *Bedfordshire* in relation to the direct duties of the authorities. On the other there is an expansion of the principle of tortious liability where professional responsibility is assumed from cases where there has been actual reliance on advice given to cases where the plaintiff has an interest in the performance of a duty by advising (*Spring*) or acting for (*White* v. *Jones*) others. The potential liability of the professionals in the child care cases falls squarely into this category, but was determined[18] without reference to it, which has led to the inconsistencies of approach referred to above. In the rather vague suggestion that the duty sought to be imposed on the child care professionals was inconsistent with that owed to the authority (although it is not clear that this was in fact the case, as the areas of conflict or non-congruence are not spelled out) Lord Browne-Wilkinson is, albeit unconsciously, indicating the weakness of *Spring*. This point was specifically made in relation to the education cases where the duty was acknowledged. There is no obvious conflict of duties, but if "at trial, it emerges that there are such conflicts, then the trial judge may have to limit or exclude any duty". This also reflects the approach to *Spring* by the Court of Appeal in *Elguzouli-Daf* v. *Commissioner of Police for the Metropolis*[19] and *West Wiltshire DC* v. *Garland*,[20] which gives proper weight to the conflicts.

It is possible that out of this tangled web of contributions to the law of tort by eminent Chancery judges[21] we may derive a coherent approach to the assumption of professional responsibility for the benefit of third parties. Such a duty should arise out of a close relationship of proximity where there is a risk of physical harm and a special relationship in the traditional

17 [1995] 3 All E.R. 307.

18 Except by Lord Nolan, whose dissenting opinion on this point, also held by Sir Thomas Bingham M.R. ([1994] 4 All E.R. 602) is, with respect, to be preferred.

19 [1995] 2 W.L.R. 173.

20 [1995] 2 W.L.R. 439.

21 The leading speeches in *Spring, Henderson, White* and *Bedfordshire* are given by Lords Goff and Browne-Wilkinson. See also note 8 to my article "Hedley Byrne, a New Sacred Cow" (1995) Nott L.J. 1.

Hedley Byrne sense.[22] It should yield to other specific duties which are inconsistent or to the dictates of policy. Will it happen?

JOHN HODGSON*

THE ENGLISH COURT'S POWER TO GRANT MAREVA RELIEF IN SUPPORT OF AN ACTION UNDERWAY BEFORE A FOREIGN COURT

Mercedes-Benz AG v. *Leiduck*
[1995] 3 All E.R. 929

Throughout history the first instinct of the successful fraudster has always been to stuff his swag into a suitcase and climb aboard the first steamer out of Southampton. Even relatively honest defendants are sometimes tempted to avoid disadvantageous national court judgements by moving their assets to a more friendly jurisdiction. In an economic sense this has never been easier. During the last twenty years we have seen the general removal of exchange controls, the growth of multi-national corporations, the implementation of free trade zones and the invention of technology that facilitates the transfer of money around the world at the touch of a button. Today's fraudster is likely to shun Southampton and ring a friendly Cayman Island banker instead.

As a result we have recently seen the English courts make a concerted effort to remain effective in this new environment of trans-national trade and litigation. One of the primary weapons in this task has been the Mareva injunction and in this context the recent advice delivered by the Privy Council in *Mercedes-Benz* v. *Leiduck*[1] is of particular interest.

The Facts

In order to facilitate the sale of 10,000 cars in the Russian Federation, Mercedes, the plaintiff, advanced $US20m to Leiduck, the first defendant (a German citizen), and a Monaco corporation controlled by him. In breach of his guarantee Leiduck misappropriated the loan and applied it in favour of one of his companies incorporated in Hong Kong. The relevant Monaco court took the defendant into custody and attached his assets within its territory, but found that it had no power to make a similar order regarding

22 This of course denies general validity to *White* v. *Jones*, although it may be a legitimate anomaly.

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1 [1995] 3 All E.R. 929.

assets in Hong Kong. As a result the plaintiff applied, *ex parte,* for a world-wide Mareva injunction restraining the defendant from dealing with his assets in Hong Kong, pending the resolution of the Monaco action. He also applied for leave to serve the writ outside the jurisdiction under RSC Ord 11, r(1)(b) and (m).[2]

The question of interest which eventually came before the Privy Council[3] was whether the court could permit the issuing of a writ or other originating process claiming Mareva relief against a foreigner who was out of the jurisdiction, in support of an action underway in a foreign court.[4]

The Mareva Injunction

The Mareva injunction[5] is a freezing order preventing a party from dealing with assets in such way as to frustrate a judgement (or potential judgement). The court's right to grant such an order is normally attributed to the Supreme Court of Judicature Act 1873.[6] However alternate heritages are sometimes suggested[7] and until recently[8] its legitimacy was still in doubt. Unfortunately this relatively short and, some would say, dubious history[9] means that the injunction often sits uneasily with the traditional rules concerning interim relief.[10] This unease was exemplified by the difficulties Lord Nicholls experienced in reconciling the traditional rules (specifically those laid down in *The Siskina)*[11] with the novel facts of the instant case.

The Questions of Law

The problem facing the court involved two questions of law: (a) whether the court had the legal power to grant a Mareva injunction in support of a

2 Which corresponds to the identical rules of court in England and Wales.

3 It should be noted that the majority appeared to feel that the case could also have been decided in favour of the respondent because technically ". . . no leave to effect the service of such a document [a Mareva under Ord 11 r(1)] was ever sought, and no such document was ever served". *Op. cit.,* at page 936, *per* Lord Mustill.

4 It should be born in mind that the eventual decision of the Monaco court (which was expected in a matter of days) would itself have been enforceable in the Hong Kong court under RSC Ord 11, r(1)(m).

5 *Mareva Naviera SA* v. *International Bulkcarriers SA* [1980] 1 All E.R. 213.

6 Section 25(8) of which bestows the power to issue injunctions ". . . in all cases in which it appears to the High Court to be just or convenient to do so".

7 See the arguments of Lord Denning M.R. in *Rasu Maritima SA* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1978] QB 644.

8 When the Mareva injunction was given statutory recognition by Section 37 of The Supreme Court Act 1981 which uses the words "...just *and* convenient...".

9 See Meagher, Gummer and Lehane, *Equity Doctrines and Remedies,* 3rd ed., 1992, para. 2186.

10 ". . .the old High court of Chancery would not have entertained a bill for Mareva relief . . .", S. Gee, "Mercedes and Mareva" S.J. 27 October 1995, 1076.

11 *Siskina (cargo owners)* v. *Distos Cia Naviera SA, The Siskina* [1979] A.C. 210.

judgement being sought in a foreign court,[12] and; (b) whether the injunction could be served outside the jurisdiction.[13]

Territorial Jurisdiction

Lord Mustill (speaking for the majority)[14] felt that the problem could be solved by reference to the territorial question alone. This is to be regretted not only because it represents a missed opportunity to investigate the nature of the Mareva injunction, but also because if Lord Nicholls' (dissenting) argument is correct, the answer to the former question necessarily impinges upon the latter.

The court's territorial jurisdiction centred around RSC Ord 11, r1(1)(b), which states that a court may grant service of a writ out of the jurisdiction where "an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are claimed in respect of a failure to do or the doing of that thing)". The majority took the view that the sub-paragraph could not be read literally, ". . . Regard must be paid to their [the words] intended spirit".[15] This lead to the conclusion that the Mareva injunction was *sui generis* and sub-paragraph (b) was not intended to include such orders where the necessary jurisdiction was based only on the presence of assets within the territory. It applied only to claims based upon, ". . . a legal right which the defendant can be called upon to answer, of a kind falling within Ord 11, r 1(1) . . .".[16] Ord 11 was confined to ". . . originating documents which set in motion proceedings designed to ascertain substantive rights . . .".[17] It might be argued that this appeal to the spirit of Ord 11, r(1), while apparently ignoring the underlying rationale of the Mareva injunction itself (by failing to consider the question of subject-matter jurisdiction),[18] is at the very least inconsistent. Nevertheless, the majority took the view that the appeal could be decided without going beyond this narrow and technical interpretation of the sub-paragraph.

Lord Nicholls on the other hand argued that the question of territorial jurisdiction was necessarily dependant upon the subject matter jurisdiction: i.e. whether the court had the power to issue an independently standing Mareva injunction in the relevant circumstances. If it could, then RSC Ord

12 Subject matter jurisdiction.
13 Territorial jurisdiction.
14 Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadley and Lord Hoffman.
15 *Op. cit.*, at 938.
16 *Op. cit.*, at 940.
17 *Op. cit.*, at 941.
18 The majority did touch upon the origin and nature of the Mareva but came to the conclusion that, "The most that can be said is that whatever its precise status the Mareva injunction is quite a different kind of injunction from any other". *Op. cit.*, at 940.

11, r 1(1)(b) would be "... apt to apply to a Mareva injunction which comprises the sole relief sought in the action ... A Mareva ... is a novel form of injunction, but this affords no reason for excluding it from sub-para (b), applying as this sub-paragraph does to all forms of injunctions".[19]

Subject Matter Jurisdiction: Lord Nicholls' View

In considering the principles underlying the question of subject matter jurisdiction Lord Nicholls postulated a hypothetical case in which two Hong Kong residents and citizens entered into a contract containing a clause which required all disputes to be determined in a foreign court. Could the Hong Kong court grant a Mareva in support of such an action?: "Justice and convenience suggest that the answer to the question is Yes".[20] Unfortunately, if these high aspirations were to prevail, his Lordship needed to overcome a considerable barrier placed in his way by *The Siskina*.[21] Most importantly, Lord Diplock's finding that a Mareva could not stand independently of a cause of action within the court's jurisdiction.[22]

At first sight this is a persuasive argument; the concept of free standing interim relief seems, intuitively at least, paradoxical: interim to what? Nevertheless, to his credit his Lordship decided to meet the authority of *The Siskina* head on. First, Lord Diplock had considered the Mareva, to be "... ancillary to a substantive pecuniary claim for debt or damage". This, Lord Nicholls, agreed was correct "... but only in the sense that the whole enforcement process can be so described".[23] Second, the court in that case had not been called upon to consider the two questions of jurisdiction separately.[24] Finally, and most importantly, *The Siskina* was decided when the injunction was in its infancy: it had grown and developed in a way which, "makes it easier than formerly to see the Mareva jurisdiction in its wider, international context".[25]

Moreover, as his Lordship pointed out, the English courts have taken a flexible approach in this area[26] and have in certain circumstances accepted anticipatory interim orders against parties who at that time have done no

19 *Op. cit.*, at 951 (although such jurisdiction would apply only to acts or omissions confined within the territory).

20 *Op. cit.*, at 944.

21 *Op. cit.*

22 *Op. cit.*, at 256, "The right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action".

23 *Op. cit.*, at 946.

24 *Ibid.*

25 *Ibid.*

26 *British Airways Board* v. *Laker Airways Ltd* [1983] 3 All E.R. 375.

wrong.[27] He conceded the normal position was that ". . . the right to obtain an interlocutory injunction in aid of substantive relief sought in an action is not normally regarded as a cause of action . . . The claim to interim protective relief is ancillary to the underlying cause of action, and in that respect it has no independent existence of its own".[28]

However, he opined that the situation changed where the substantive dispute is tried before a foreign court. The purpose of the Mareva was to prevent the prospective judgement debtor from taking steps to prevent enforcement, irrespective of the underlying cause of action. This being the case: "If the Hong Kong court will make its enforcement process available in respect of a foreign judgement, then in principle that must surely encompass Mareva relief".[29] Any other position would be "pointlessly negative".[30] Insomuch as the underlying cause of action is a factor, it is one which goes toward discretion not jurisdiction.

This was the case not only in principle but also in law. Cases decided since *The Siskina*[31] provided ". . . highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive category by judicial decision".[32] Most specifically his Lordship relied on the *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd*[33] in which Lord Browne-Wilkinson had said:

> Even applying the test laid down by *The Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court . . .

Thus both principle and authority lead Lord Nicholls to conclude that:

> . . . a writ may be issued claiming only interim relief ancillary to a final order being sought from some other court or arbital body . . . if the consequence is that in such a case, where the court is seized only of a claim for

27 See for example, *Norwich Pharmical Co* v. *Customs and Excise Comrs.* [1974] A.C. 133 and *quia timet* injunctions.

28 *Op. cit.*, at 949.

29 *Op. cit.*, at 945.

30 *Op. cit.*, at 949.

31 *Castanho* v. *Brown & Root (UK) Ltd.* [1981] A.C. 557 at 573; *South Carolina Insurance Co* v. *Assurantie Maatshappij 'de Zeven Provincien' NV* [1987] A.C. 24 at 44; *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] A.C. 334 at 340-341 and 344.

32 *Op. cit.*, at 946.

33 *Op. cit.*, at 341.

> interim relief, that claim must bear the burden of being labelled a cause of action . . . let that be so.[34]

Conclusion

In truth, this case raises a simple question: should a dishonest defendant be allowed to use English law to frustrate an action underway in a foreign court, when the English (or Hong Kong) court will readily enforce the eventual judgement? Principle strongly suggests no, traditional authority yes. With respect to the majority it is submitted that in this case the former should be favoured. The Mareva injunction is a recent and unique form of relief specifically introduced to meet new and novel situations. To suggest that its development should be constrained by traditional rules created in an entirely different context is to unacceptably place consistency above both logic and justice.[35] It is true that the majority themselves seem to have been swayed by the desire to do justice to the respondent.[36] However in doing so they fail to give full weight to the fact that the case concerned jurisdiction not discretion.[37] Even if empowered with the necessary jurisdiction the court would still be expected to grant an injunction only where it is ". . . just and convenient to do so"[38] and can use its discretion to refuse relief even where the usual requirements are met.[39] Moreover the court will normally require the plaintiff to make an undertaking to pay damages to the defendant should the injunction subsequently be found to have been wrongly granted.[40]

Lord Nicholls' arguments are therefore both powerful and persuasive. If however they cannot prevail as a matter of authority then it is to be hoped that the House of Lords or Parliament will reconsider this area at the earliest possible opportunity. The present situation was eloquently summarised by his Lordship when he said:

[34] *Op. cit.*, at 949.

[35] In Lord Nicholls' words: ". . . as the world changes, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions . . . jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yesteryear". *Op. cit.*, at 946.

[36] For example, it was suggested that accepting the appellants' arguments would force the respondent ". . . to chose between submitting to a judgement in default or appearing before the court, which had no other jurisdiction over him, to argue that his assets should not be detained." *Op. cit.*, at 930.

[37] It is also at least arguable that in a modern commercial context the location of a defendant's assets can be of more import than his/her physical location or nationality, and should therefore be considered connection enough to establish jurisdiction. Note, for example, Rupert Murdoch's willingness to renounce his Australian nationality rather than lose control of his US media interests. For a discussion of this argument see, Davidson, P.F. "Jurisdiction Based on the Presence of Assets in Germany: A Case Note" (1992) I.C.L.Q. Vol 41 at 632.

[38] 37(1) of The Supreme Court Act 1981.

[39] *Rasu Maritima SA* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [1978] QB 644.

[40] See the 1994 Practice Direction on Mareva Injunctions and Anton Piller Orders 4 [1994] All E.R. 4.

> The defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. This is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.[41]

IAN HUTTON*

PURE ECONOMIC LOSS: A NEW PERSPECTIVE?

Marc Rich & Co AG and Others v. *Bishop Rock Marine Co Ltd and Others*

[1994] 3 All E.R. 686 and [1995] 3 All E.R. 307

In historical terms claims for "pure" economic (or financial) loss have generally been unsuccessful in the tort of negligence. The law of tort in general is mostly concerned with physical loss and economic loss consequential upon that physical damage. Loss of a purely economic nature is recoverable elsewhere however, for example, in the law of contract and indeed in some torts, such as deceit, conspiracy and interference with contractual relations.

At common law the traditional position is that where negligence leads to so-called "pure" economic loss, i.e. financial loss which is not the direct result of physical loss, that loss may well not be recoverable. Consequential loss i.e. financial loss which is the direct result of physical damage (whether to person or property) is generally recoverable.

Thus, in *Cattle* v. *Stockton Waterworks,*[1] the plaintiff had contracted with a landowner to build a tunnel under his land and was unable to recover extra expenses incurred in finishing the work after the defendant (a waterworks) had negligently flooded the land. The decision went against the plaintiff because his "only" loss was connected to his liability under the contract to finish the job on time. No tangible property of his had been damaged; nor had he suffered any personal injury. Any financial loss flowing from either kind of damage would have been recoverable.

On this view of the law, it seems that in order to succeed in a claim for

41 *Op. cit.*, at 943.

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1 (1875) L.R. 10 Q.B. 453.

pure economic loss a plaintiff must bring his or her case within some recognised exception to the general rule.

Modern judicial opinion is not, however, unanimous on this point. In *Murphy* v. *Brentwood District Council*[2] Lord Oliver reviewed a long line of cases from *Cattle* v. *Stockton Waterworks Co*[3] to *Leigh and Sillavan Ltd* v. *Aliakmon Shipping Co Ltd, The Aliakmon*,[4] and took the view that, in those cases, the plaintiffs' failures were not because the losses sustained were "economic", but because the claims fell foul of the remoteness of damage rule, or because it was felt that to allow those claims would open the floodgates. He concurred with the view of Brennan J. in *Sutherland Shire Council* v. *Hayman*[5] that the critical question was "whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained".

In the same case Lord Keith expressed the contrary view, that recovery for pure economic loss is possible *only* if the plaintiff falls within some recognised exception to the general rule (such as liability for negligent misstatement), which forbids recovery.

More recently, the Court of Appeal and the House of Lords had to consider the following facts in *Marc Rich & Co AG and Others* v. *Bishop Rock Marine Co Ltd and Others*.

The plaintiffs were owners of cargo carried in a ship which went down at sea as a result of a cracked hull. This fault had developed during the earlier part of the voyage and at one point the ship put into port and temporary repairs were carried out. The defendants, who were surveyors of ships, had inspected the vessel after the repairs were done, and had passed it as sea-worthy. It sank after resuming its journey.

It is important to understand the status of the defendants, because *Marc Rich* is one of the so-called "hard" cases that are often encountered in the tort of negligence. In shipping terms they are known as a "Classification Society"; these societies (the defendants being one of the biggest in the world) provide services, for example in surveying, to those ship owners who register with them. They set standards of safety, etc, and are therefore very important to ship owners in connection with insurance and matters concerning governmental regulation. Ship owners must abide by the rules set by the society with which they are registered, but the society can only make recommendations to the ship owners, who are not forced to follow the recommendations. The only sanction which a society can apply is the suspension or withdrawal of classifications.

2 [1991] 1 A.C. 398.
3 (1875) L.R. 10 Q.B. 453.
4 [1986] A.C. 785.
5 [1985] 60 A.L.R. 1.

The plaintiffs in the present case had sued (i) the ship owners (ii) the head charterers of the ship and (iii) in tort, the defendants. In the event, the action against the ship owners was settled out of court for a proportion of the loss and proceedings against the head charterer were dropped. This left proceedings in the tort of negligence against the defendants to be determined.

A surveyor acting for the defendants had inspected the damaged vessel while she was at anchor off San Juan in Puerto Rico, and subsequently recommended that the vessel should proceed to the port of San Juan and undergo permanent repairs in dry dock. The novel question for the court was whether a classification society owed a duty of care to the owners of cargo laden on a vessel, arising from the careless performance of this survey.

It was alleged that the defendants had a duty of care to avert the consequences of the ship owner's breach of duty. The plaintiffs also contended that where physical damage was involved it was incumbent on them to show only foreseeability of damage; in other words, where only physical damage was involved it was not necessary that a plaintiff, in seeking to establish a duty of care, should satisfy the "three-stage test" laid down for negligence in cases such as *Caparo Industries plc* v. *Dickman*.[6]

In *Caparo* the House of Lords found that in all novel situations, the plaintiff, as well as establishing both foreseeability and proximity, had to convince the court that it was just and reasonable to impose a duty of care in the circumstances. It was also made clear that the test operated within an incremental framework i.e. in general, the law should develop on a case by case basis.

The court in *Marc Rich* held that there is in principle no legal distinction between physical damage, whether to person or property, and pure economic loss. All claims for loss in negligence are matters of *financial* compensation and it followed that the three-stage test must be satisfied in all cases.

On the facts, the bills of lading (contracts of carriage) imposed a non-delegable, contractual, duty on the ship owners to exercise "due diligence" to ensure the seaworthiness of their vessel. These contracts incorporated the Hague Rules - an international code of practice drawn up between carriers and cargo owners - which benefited both sides. If a duty in negligence were imposed on the defendants in the present case it would be virtually identical to the duty owed by the ship owners (under the contract) but without the benefit of the Hague Rules; therefore, it would not be "just and reasonable"

[6] [1990] 2 A.C. 605, [1990] 1 All E.R. 568.

to impose a duty of care on the defendants in these circumstances. After all, there were no "dealings" at all between the plaintiffs and the defendants in this case. As Balcombe L.J. put it:[7]

> Since this is not a case of direct physical damage where it is self-evident that a duty of care exists, then in my judgement it is necessary to consider the matter in the light of the criteria mentioned by Lord Bridge in the *Caparo Industries* case. For my part I doubt whether the words "fair, just and reasonable" impose a test additional to that of "proximity": in my judgement these are criteria to be adopted in considering whether the necessary degree of proximity exists.

The House of Lords,[8] by a majority, affirmed the decision of the Court of Appeal. Lord Steyn, with whom Lords Keith, Jauncey and Browne-Wilkinson agreed, said that ever since the decision in *Dorset Yacht Co Ltd* v. *Home Office*,[9] it had been settled that the elements of foreseeability and proximity, as well as considerations of fairness, justice and reasonableness, were relevant to all cases whatever the nature of the harm sustained by the plaintiffs.

At first sight, *Marc Rich* suggests that at long last the courts have recognised the fact that there is no fundamental legal distinction between physical damage to property and "pure" economic loss. This decision has the potential for bringing *Hedley Byrne & Co* v. *Heller & Partners* closer than ever to *Donoghue* v. *Stevenson*, particularly in the light of developments in *T (a minor)* v. *Surrey County Council and Others*[10] and *White* v. *Jones*.[11]

In the context of personal injury, the House of Lords in *Page* v. *Smith*,[12] has drawn attention to the dangers inherent in attempts to delineate in hard and fast terms between "physical" illness and its causes and psychiatric illness and its causes.

Past experience suggests, however, that the courts will in general continue to treat pure economic loss as a different form of damage. As Scott Baker J. said in *T*;[13] ". . . the courts are more ready to find a duty of care owed where the consequence of a breach is personal injury rather than

7 [1994] 3 All E.R. 687 at 704C.
8 [1995] 3 All E.R. 307.
9 [1970] A.C. 1004.
10 [1994] 4 All E.R. 577.
11 [1995] 1 All E.R. 691.
12 [1995] 2 All E.R. 736.
13 *Op. cit.*, at 599D.

damage to property and still less mere economic loss".

It may be of significance that Lord Steyn in *Marc Rich* did say that the shipowner in that case was primarily responsible for the ship sailing in a seaworthy condition and that the defendant's role was of a subsidiary nature. He said:

> In my view the carelessness of the NKK surveyor did not involve the direct infliction of physical damage in the relevant sense. That by no means concludes the answer to the general question. But it does introduce the right perspective on one aspect of this case.[14]

In his dissenting speech Lord Lloyd said[15] that it was assumed that the plaintiffs had suffered physical damage to their cargo, and that "almost all" of the decisions signalling the "retreat" from *Anns* v. *Merton LBC,*[16] concerned claims for economic loss "unassociated with physical damage or personal injury".

His Lordship said that in physical damage cases proximity "very often went without saying". Where the facts "cried out" for the imposition of a duty of care between the parties, as in the present case, the case would have to be an exceptional one to refuse a duty on the ground that it would not be fair, just and reasonable to impose an obligation on the part of the defendant(s). As his Lordship put it:[17] "Otherwise there is a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principle at all, and the retreat from *Anns* will turn into a rout".

JOHN LEWTHWAITE*

FINDERS WEEPERS

Waverley Borough Council v. *Fletcher*
[1995] 4 All E.R. 756

The recent decision of the Court of Appeal in *Waverley Borough Council* v. *Fletcher* clarifies the law relating to those who use metal detectors to find abandoned chattels upon or buried in the land of another, but does so by drawing a fine distinction which may prove difficult to apply in practice.

[14] *Op. cit.*, at 328H.
[15] *Ibid.*, at 321E.
[16] [1978] A.C. 728.
[17] *Op. cit.*, at 322B.

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Mr. Fletcher took his metal detector to Farnham Park in Surrey (the property of the plaintiff council). He detected something below the ground, and by some "determined digging"[1] he unearthed a medieval gold brooch some nine inches below the surface. Mr. Fletcher reported his find, and subsequently a coroner's jury ruled that the brooch was not a treasure trove.[2] The present proceedings were to determine the competing claims of Mr. Fletcher and the plaintiff council. The county court judge held for Mr. Fletcher, but the Court of Appeal allowed the council's appeal. The case fell within the "general rule that an owner or lawful possessor of land has a better title to an object found in or attached to his land than the finder . . ."[3] In any event, Mr. Fletcher's digging and removal of property from the council's land constituted acts of trespass. An argument that metal detecting was a recreation of the sort for which members of the public were entitled to access and use of the park was rejected. Metal detecting was "inherently invasive"[4] unlike sports such as cricket or golf, which may involve some incidental disturbance of the soil. Even if there were such a right to dig, it did not extend to a right to take away anything which was found. In this case the stated policy of the council (although unknown to Mr. Fletcher) was against the use of detectors in its parks, but it had been unable to persuade the Home Office to approve a bye–law to that effect.

Auld L.J., in the only substantive judgment, undertook a comprehensive review of the authorities. He discerned a clear distinction between those objects which are in or attached to the land and those which are simply lying unattached. The latter category of case requires the owner of land to demonstrate a sufficient degree of "control" over their property before they can assert a superior title to the finder. Famous cases such as *Bridges* v. *Hawkesworth*[5] (banknotes lying on shop floor) and *Parker* v. *British Airways Board*[6] (gold bracelet in airport departure lounge) featuring unsuccessful landowners who failed to demonstrate effective control, fall into this category. In contrast, for the former category the concept of control is irrelevant. All that matters for objects found in or attached to land is the question of the ownership or lawful possession of the land. Auld L.J. relied upon *Elwes* v. *Brigg Gas Co*[7] where a two thousand year old boat was embedded six feet below the surface of land. There Chitty J. stated that the

1 [1995] 4 All E.R. 756 at 758.
2 As to which see *Bl.Comm* I: 285–286; Palmer, "Treasure Trove and Title to Discovered Antiquities" in Palmer and McKendrick (eds.), *Interests in Goods* (London: Lloyd's of London Press, 1993), at pp. 305–344.
3 [1995] 4 All E.R. 756 at 768, *per* Auld L.J.
4 *Ibid*, at 766.
5 (1851) 21 L.J.K.B. 75.
6 [1982] Q.B. 1004.
7 (1886) 33 Ch. D. 562.

tenant for life of the land was entitled to the boat as against the lessee because, "he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth . . .".[8] Auld L.J. further relied on the statement of principle by Donaldson L.J. (as he then was) in *Parker's case*[9] that: "An occupier of land has rights superior to those of a finder over chattels in or attached to that land . . .". Auld L.J. also cited recent Irish authority (*Webb* v. *Ireland*,[10] the Derrynaflan hoard case also involving metal detectors) and New Zealand authority (*Tamworth Industries Ltd* v. *Attorney–General*[11]) to similar effect.

In truth the distincton does not emerge clearly from the early cases but is found in the seminal essay on the subject by Pollock and Wright: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and in the absence of better title elsewhere, the right to possess it also".[12] This was adopted and applied in *South Staffordshire Water Co* v. *Sharman*[13] (two gold rings found in mud at the bottom of a pool – owner of land entitled to possession), and has now been firmly entrenched by the Court of Appeal in *Waverley* v. *Fletcher*.

The distinction between *in* and *on* may be a fine one in practice, as illustrated by an example mooted by counsel for Mr. Fletcher. Suppose a lost watch on a muddy path which as the days pass becomes covered with a film of mud. Should the thin coating of mud effect a change in the possessory title? Auld L.J. laconically accepted that "potential absurdities can always be found at the margins in the application of any sound principle".[14] He suggested three reasons for the suggested distinction. First, an object in the land is an "integral part of the realty".[15] Secondly, the removal of such an object would involve interference with the land which may result in damage. Thirdly, in most cases where an object is lodged in the ground the original owner is unlikely to claim it. Therefore the appropriate substitute owner is the landowner.

With respect, this suggested conclusion does not seem to follow. Where a claim by the true chattel–owner is likely, common sense favours giving possessory title to the landowner (or at least one who shows concern for objects lost on his land). Where else would I go but to the shop where I

[8] *Ibid*, at 568.
[9] [1982] Q.B. 1004 at 1017.
[10] [1988] I.R. 353.
[11] [1991] 3 N.Z.L.R. 616.
[12] Pollock and Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press 1888) at p. 4.
[13] [1896] 2 Q.B. 44 at 46–47.
[14] *Op. cit.*, at 764.
[15] *Ibid*, at 763, citing Donaldson L.J. in *Parker's case* [1982] Q.B. 1004 at 1010.

think I have dropped my roll of banknotes? But equally, English law has been indulgent to the honest finder who announces his find and has often conferred possessory title upon him. In cases where a claim by the chattel–owner is unlikely, the claims of the landowner and honest finder are finely balanced. At least where the finder is not a wrongdoer (that is, a trespasser) perhaps the best solution would be to adopt the solution of apportioning the find between the two claimants in equal shares, as was the rule in Roman law and as is done in some American states.[16] After all, were it not for the painstaking efforts of Mr. Fletcher, the council would probably never have known they had a medieval gold brooch in their land. Such an approach would apply to all honest finders and all objects whether *in* or *on* the land. Clearly wrongdoing finders would not benefit from the rule. In the instant case, the dictum that Mr. Fletcher was a trespasser seems to go too far. The unpublicised policy of the council against metal detecting seems insufficient to convert him into a tortfeasor. In the absence of a bye-law, Mr. Fletcher's conduct appears to be an arguably lawful use of a public recreation area. Even if the digging and removal did technically constitute acts of trespass it might still be appropriate to award a share in the thing found or a reward to the honest finder, that is, one who declares his find, as Mr. Fletcher did. Such a flexible response would promote honesty and the preservation of items of historical significance. In constrast the technical distinction drawn by the Court of Appeal would seem to promote concealment.[17]

GERARD McMEEL*

[16] See Harris, "The Concept of Possession in English Law" in Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) at p. 83.

[17] The Irish Supreme Court awarded a reward to the finders of the Derrynaflan hoard on the particular facts of the case in *Webb* v. *Ireland, op. cit.*

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NOTTINGHAM LAW JOURNAL

BOOK REVIEWS

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

CRIMINAL JUSTICE

Relational Justice - Repairing The Breach (JONATHAN BURNSIDE and NICOLA BAKER, editors), Winchester, Waterside Press, 1994, 176pp., Paperback, ISBN 1 872 870 22 8

In his foreword to this volume Lord Woolf calls it an "extremely important book" and describes Relational Justice as a "radical new approach about which anyone with any concern about our criminal justice system needs to be aware". While His Honour Judge Stephen Tumim, co-author of the *Woolf Report*[1] on prison disturbances acknowledges that he and Lord Woolf "have been preaching Relational Justice without knowing it, and our report is to become perhaps a Relational text book!".

The *Woolf Report*, it will be recalled, came about in response to widely publicised prison riots in Manchester and elsewhere. Its recommendations included a call to closer co-operation between different parts of the criminal justice system and for better prospects for prisoners to maintain links with their families and communities through increased visits, increased home leave and through location in community prisons as near to their homes as possible. Such recommendations flow naturally from a Relational critique of criminal justice, but what is intriguing is that the Woolf Report reached these conclusions without expressly acknowledging any coherent Relational Theory, or as it has elsewhere been termed "relationality"[2] or "Relationism".[3] Should one conclude from this observation that Relational Theory is an unnecessary gloss on the already crowded criminology and penology debate? Having read the publication under review I should say not. On the contrary, in Relational Theory we may have a practically useful

1 Rt. Hon. Lord Justice Woolf, Prison Disturbances April 1990: Report of an Inquiry, (Parts I and II and His Honour Judge Stephen Tumim Part II), Cm 1456, (London: HMSO, 1991).

2 "Distributive Liberty: A Relational Model of Freedom, Coercion and Property Law" (1994) 107 Harv.L.Rev. 859.

3 M. Schluter and D. Lee, *The R Factor* (Hodder and Stoughton 1993), at p.264.

perspective on criminal justice, and one which already displays strong strands of conceptual coherence.

The list of contributors is impressive for its diversity. Included are Professor Anthony Bottoms,[4] Dr. Andrew Coyle (Governor of HM Prison, Brixton), Professor Christie Davies,[5] John Harding (Chief Probation Officer, Inner London Probation Service), Dr. Michael Schluter (Director, The Relationships Foundation, Cambridge) and David Faulkner CB.[6] The contributors approach the subject from different professional positions, they occasionally differ in the detail of their conclusions and they appear to vary somewhat in their particular conceptions of Relational Theory (which is hardly surprising, for as a body of thought it is still emergent). However, what the contributors do have in common is that they see the problems of crime, injustice and social instability as resulting from failures in relationships - between individuals, between individuals and institutions, and between individuals and their communities. Further, they have suggested remedies which would restore, repair or re-create those relationships.[7] At first sight there is nothing remarkable, though much to be commended, here. However, it is soon apparent through reading the chapters in turn that the Relational approach has its opponents and that the battle for Relational Justice is being fought on many fronts.

In chapter one Dr. Michael Schluter introduces two of the major themes of the book. First, that the break up of Relational bonding in society is a key factor in the creation of crime, and secondly, that attention to relational bonds should inform our response to crime.

Regarding the first, he states that crime is to be seen primarily as a breakdown of relationships and only secondarily as an offence against the state and its laws. In this way the book side-steps the largely sterile intellectual discourse on the definition of crime, the currency of which has barely progressed beyond Paul Tappan's observation in 1947 that crime is "any violation of the criminal law".

Regarding the second, he cites with approval John Braithwaite's argument that punishment should shame the wrongdoer, in a way that is reintegrative and not stigmatising.[8] Schluter points out that "strong relationships are essential to effective shaming". Like so much of Relational thought, the argument appeals to common sense. Surely one is

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6 Fellow of St John's College, Oxford and Senior Research Associate at the Oxford Centre for Criminological Research.
7 Here I have closely paraphrased the conclusion of David Faulkner CB, who contributed the final chapter to the reviewed work.
8 *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press 1989).

more likely to accept the error of one's ways if persons to whom one closely relates, and whose opinions one respects, affirm that one is in the wrong. The problem for the argument is a practical one. If offenders typically come from backgrounds which are Relationally disfunctional, where are the strong Relational settings to be found into which they are to be reintegrated? Future chapters provide some suggestions. Chapter one itself concludes in optimistic vein, with a vision of crime as crisis bringing with it the hope of change, crime as a social opportunity. To judge by recent newspaper headlines the opportunity has never been so great.

In chapter two Professor Christie Davies develops the central thesis that people are law-abiding not because of "the impersonal threats of the law", but because of "the disapproval of other individuals who know them and their own conscience". Taking a long-term historical perspective he notes that the "key problem" for the Relational analysis is that "during the last century and a half there has been a steady movement in Britain away from small face-to-face communities ... However the pattern of crime and deviance follows a U-curve, falling in the late nineteenth century, reasonably stable in the first half of the twentieth and rising rapidly since the mid-1950's". On a Relational analysis we would expect a steady increase in crime, so why the U-curve? Professor Davies offers a "subtler relational explanation". The U-curve, he says, mirrors the decline and rise, and decline again, of Relational institutions. In support he provides as illuminating comparators figures for church adherence, Sunday school attendance and membership of friendly societies. Almost inadvertently the rise of the welfare state is accused of assisting in the demise of the friendly societies, yet the accusation is surely of central importance to the Relational thesis. To Relational Theory neither right-wing liberal individualism nor left-wing state-centralisation is acceptable. As Schluter and Lee have pointed out, "private ... does not have to be defined in individualistic terms ... it can also mean 'non-state'".[9]

In chapter three Jonathan Burnside takes up the assault on liberal individualism with, inter alia, a brief critique of John Rawls' famous hypothesis that a just society is a society which appears just to an observer standing behind a "veil of ignorance", the veil disguising the observer's own status and individual place in that society. Burnside tells us that "the very idea that there is some neutral vantage-point from which one can talk about justice is open to challenge". He adopts the traditional challenge which is to point out that the observer's attitudes are not neutral, but are themselves socially-constructed.

[9] M. Schluter and D. Lee, *op. cit.*, at p.197.

In chapter four Professor Anthony Bottoms is more reluctant to abandon Rawls. For Professor Bottoms the avoidance of injustice for the individual should still be the prime focus of any criminal justice system, to be balanced with two other major goals, namely to promote legitimacy and to promote relationships. He notes that adherence to the rehabilitative "ideal" resulted, in some cases, in increased oppression of the individual offenders it was designed to help, and he cautions against allowing a Relational approach to be misapplied in the same way. He is, however, enthusiastic about the benefits that improved informal social-ties and community-based programmes could bring to curb recidivism.

In Part II of the book (chapters 5 to 10 inclusive) attention is given to "Applying Relational Justice". Perhaps unsurprisingly mediation and reparation play a large part here, and chapter five is devoted to this. There Nicola Baker[10] informs us that "crime creates a relationship between victim and offender" at which point one suspects that the Relational tag is being applied too loosely. A mere factual link between two persons is surely a "connection", not a "relationship". It is another thing, of course, to see such cold connections as opportunities for relationship, and this is the real message of the chapter. There is, however, little in this message that has not already arisen out of the "victim movement". Only towards the end of the chapter are we taken back to the role that local community might have in mediation when Braithwaite's shaming process is, again, referred to with approval.

For the remainder of Part II, the continued emphasis is on the detailed application of Relational practices to specific criminal justice settings. His Honour Judge Christopher Compston gives his personal view on the need for local justice through increased use of local judges in local courts. His Honour Judge FWM McElrea gives the view from the New Zealand youth court, with its innovative Family Group Conferences. John Harding gives a Relational perspective on youth crime. Roger Shaw[11] focuses on prisoners' children and the unintended punishment they endure. Finally, Dr. Andrew Coyle contributes an illuminating chapter on relationships in prison. He observes that,

> some of the most inhuman prisons in the world have superb physical conditions and state of the art security devices. The most important feature distinguishing a prison which is decent from one which is not is the nature of the human relations within it. These will operate

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at many levels: between staff and prisoners, prisoners and prisoners, staff and staff, the prison community and the outside community.

In Part II there are many positive and detailed proposals for reform: Plea bargaining should be officially endorsed as an opportunity for the offender to confess guilt and for the victim to be saved from the further injury of the trial. Juries should be encouraged to offer an opinion on the sentence appropriate to the offence. Community Service Orders should be more widely used. Prisoners should be imprisoned within a reasonable distance of their home where possible and family members should be assisted to visit at regular intervals. Local people should be encouraged to become more involved in the life of their local prison. Use of Family Group Conferences (attended by the offender, his or her extended family, the victim and the victim's supporters) should be encouraged. Rather than focusing merely upon the offender and the victim we should consider other affected parties such as prisoners' children. Proposals such as these have much to commend them and many, one feels, would not have found a home together were it not for Relational Justice.

In Part III Christopher Townsend, a solicitor practising in the City, considers Hebrew, Christian and Islamic conceptions of justice, concluding that "each faith is willing to contemplate severity but prefers punishment with respect or restoration and/or encourages mercy". The way is thus opened for Relational Justice in a multi-faith society. Next Peter Walker[12] considers in further depth the Christian response to the issues raised by Relational Justice and cites a Prison Fellowship initiative directed at the very problem identified by Roger Shaw in chapter nine, that of prisoners' children. He looks approvingly at a scheme to assist prisoners to provide Christmas gifts to their children.

It is probably appropriate to conclude this review with the last illustration because it highlights that which is unique about the Relational approach to criminal justice. Namely, its concern with the whole range of formal and informal relationships which contribute to, and are affected by, crime. Previous approaches to criminal justice have tended to focus primarily upon the offenders or to attend mainly to the victims of crime. Thus it is that Relational Justice may well be set to succeed Retribution, Rehabilitation, Reparation and Restoration as the dominant perspective. It might even see the downfall of what one might term, for the sake of alliteration, the "Removative" approach. That is the approach which sent offenders to Australia, put them on Alcatraz Island, incarcerated them in

[12] Executive Director of Prison Fellowship England and Wales.

high-walled Victorian prisons and recently proposed the re-introduction of prison-ships off the coast of our land. The Removative myth, that "they can do no harm if we remove them", is the myth that this book seeks to explode. Through re-defining harm, and by raising a serious challenge to the idea that removal from society is desirable, or even possible, I think it succeeds.

GARY WATT*

ENVIRONMENTAL LAW & POLICY

Europe's Environment, The Dobris Assessment, edited by DAVID STANNERS and PHILIPPE BOURDEAU, Luxembourg, Office for Official Publications of the European Communities, 1995, xxiv + 676 pp., Paperback, £47.00, ISBN 92 - 826 - 5409 - 5

This is an important book for all those concerned with environmental law and policy. It contains a comprehensive assessment of the state of the environment in Central, Southern and Eastern as well as Western Europe. As one might expect it is a weighty volume and produced to a very high standard, the main text covering nearly seven hundred pages in A4 format. It is beautifully illustrated with striking satellite pictures, charts, diagrams, photographs and maps - all in colour.

The history of the Report is itself of interest as an essay in European integration in its widest sense. After the fall of the Iron Curtain in 1989, Josef Vavrousek, then Czechoslovak Minister of the Environment, organised a pan-European conference on the state of the environment to be held at Dobris Castle near Prague in June 1991. The conference, attended by thirty six Environment ministers from across Europe, as well as representatives from environment oriented NGOs and international organisations, requested that an Environment Report for Europe should be prepared, a request taken up by Mr Carlo Ripa de Meana, then EC Environment Commissioner. The task of preparing the Report was devolved to the Task Force which had been set up within Directorate General XI of the Commission to prepare for the European Environment Agency. Furthermore, so far as it related to Central and Eastern Europe, work on the Report was funded by the Community's PHARE Programme. Shortly after the European Environment Agency came into being it took over the task of finalising and publishing the Report. The Commission is to be

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congratulated on its efforts, but as the Report fully acknowledges, the work also benefited from the contribution of dozens of individuals, many countries and several international organisations (not least the UN Economic Commission for Europe, the UN Environment Programme, the OECD, EFTA, the Council of Europe, The World Conservation Union and the World Health Organisation).

The Dobris conference set the pattern for continuing pan-European environmental co-operation, being followed by similar conferences in Lucerne in 1993 and in Sofia in October 1995. The Report, which was completed in time for the Sophia Conference and largely informed discussion there, was published in late 1995 and is available in the UK through HMSO.

As well as providing a focus for pan-European environmental co-operation, the Report goes some way toward filling the environmental information gap which was identified in the Community's Fifth Action Programme on the Environment. The information it contains should help improve policy-making and better inform public debate. For the European environmental lawyer it helps provide a context against which the sufficiency of Community measures can be judged.

The Report itself is divided into seven main parts, followed by appendices. Part I outlines "the context" within which it was prepared, explaining, for example, its scope and the way in which information was selected, assessed and presented. As well as describing key environmental characteristics of Europe it also identifies the wider context of environmental change and human development. Part II is entitled "the Assessment" and assesses separately the state of different aspects of the environment, air, inland waters, the seas, soil, landscape, nature and wildlife, the urban environment and, finally, human health. Part III identifies specific environmental pressures; population, exploitation of natural resources, emissions, waste, noise and radiation, chemicals and genetically modified organisms, and natural and technological hazards. In Part IV the assessment considers the role of specific sectors of activity, energy, industry, transport, agriculture, forestry, fisheries, tourism and households. Part V describes the major environmental threats faced by Europe (many of which are, of course, of global significance) namely; climate change, stratospheric ozone depletion, loss of biodiversity, major accidents, acidification, tropospheric ozone and other photochemical oxidants, freshwater management, forest degradation, threats to coastal zones, waste, urban stress and chemical risk. Part VI presents conclusions and potential responses. The Report closes with a rather chilling inventory of 56 pressing environmental problems together with a summary analysis

of the strengths and weaknesses of the information now available on the environment.

No one would suggest that the Dobris Assessment is the last word on the problems and policies which it considers. Nor does it claim that role. It does however achieve its more modest goals. It helps to identify those areas where appropriate data and information are not yet available. It helps inform the policy debate and its very publication assists in the wider disemination of such data as is available. Sadly, Josef Vavrousek was killed with his daughter in an avalanche before the Report was published. The Report stands, however, both as a substantial contribution of the process of environmental co-operation which he inspired and as signpost pointing to the need for further progress along that path.

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