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Lies, Damn Lies and Issue Estoppel

by P H J Huxley*

On 28th June 1973 Bruce Edward Humphrys was acquitted at Chelmsford Crown Court of driving on 18th July 1972 a motor-cycle while disqualified. He had been 'caught' in a radar trap and give his name to PC Weight who gave evidence to this effect as Brian Scott. The motor-cycle had no current excise licence. Humphrys defence was that Weight had misidentified him; that Brian Scott was a lodger in his (Humphrys) house at the relevant time; and that he had not driven a motor-cycle at all during 1972. He admitted that at the relevant time he was disqualified from driving.

The irresistible conclusion on these facts is that the jury was not satisfied that Humphrys was the driver. Further inquiries were made by the police of Humphrys neighbours aimed at attempting to establish that Humphrys had in fact been driving a motor-cycle in 1972.

On 27th November 1974, Humphrys pleaded guilty to a charge of forging, on 20th July 1972 (ie two days after the alleged offence), an application to re-licence the particular motor-cycle in question in the name of Brian Scott. He also pleaded not guilty to a charge of perjury which alleged that he had lied at his earlier trial as to whether he had driven a motor cycle in 1972.

A substantial part of the Crown's case on the perjury charge was the testimony of Weight which consisted of exactly the same evidence that he had given in the first trial. Counsel for Humphrys objected to its admission but the trial judge ruled against him on the ground that Weight's evidence was tendered **not** for the purpose of attacking the previous verdict of acquittal on the charge of driving while disqualified but for the purpose of attempting to establish that he had been driving the motor-cycle on 18th July 1972. ''So at the second trial the jury were invited to accept the evidence of PC Weight which the jury at the first trial had not accepted and which, if they had accepted, would have led to the conviction of the respondent of driving while disqualified.''[1]

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1 (1976) 2 A11 ER 497, 500 per Viscount Dilhorne.

Humphrys appeal against conviction for perjury was allowed by the Court of Appeal[2] on the ground that the Crown had been "attempting to try all over again an offence of which the appellant had already been acquitted by a competent court at an earlier trial and, to put it in rather more technical lawyers language"[3] that there was an issue estoppel against the Crown.

The House of Lords gave the Crown leave to appeal against that decision and the following point of law was certified:

> "Where in a trial on indictment there is a single issue between prosecution and defence and the defendant is acquitted, is evidence tending to show that the defendant was guilty of that offence admissible in a subsequent prosecution of the defendant for perjury committed during the first trial?"

Their Lordships unanimously answered this question in the affirmative, allowed the appeal and restored the conviction of perjury. They also went a good deal further and it is the author's contention that in doing so, to put it in rather less than technical lawyers language, they may have thrown the baby out with the bath-water.

What is Issue Estoppel?

Cross[4] states that

> "When an estoppel binds a party to litigation, he is prevented from placing reliance on, or denying the existence of, certain facts. This justifies the treatment of estoppel as an exclusionary rule of evidence."

Lord Denning explained the term "issue estoppel" as follows:
> "Within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue has been raised and distinctly determined between the parties then as a general rule niether party can be allowed to fight that issue all over again."[5]

In criminal law, issue estoppel is based[6] upon the general proposition that there should be finality in litigation and is considered by some writers and judges to be a part of a wide area of public policy known

2 (1975) 2 A11 ER 1023.

3 (1975) 2 A11 ER 1023, 1025 per Lord Widgery CJ.

4 Cross; Evidence, 4th Edition, 286.

5 *Fidelitas Shipping Co* v *V/o Exportchleb* (1975) 2 A11 ER 4, 8; Emphasis added.

6 To the extent that it may be said to have survived the decision in *Humphrys*.

as the rule against "double jeopardy". In *Hogan*,[7] however, Lawson J doubted this view, stating that "issue estoppel is a principle quite different ... from the principles of criminal law against double jeopardy ... which relate only to the protection of the defendant in criminal proceedings ...." It is difficult to agree with Lord Hailsham's statement in *Humphrys*[8] that issue estoppel is aimed at verdicts rather than issues, even if in criminal proceedings it is only possible to identify the latter through the former (if at all).

One branch of rule against double jeopardy is to be found in the pleas in bar of autrefois acquit and autrefois convict. These are available to help prevent the re-trial of previous cases where the defendant was acquitted or convicted and the essence of the pleas is that they extend to a charge of an offence substantially similar to the original charge and offences of which the defendant *could* have been convicted at the first trial.[9] Since the availability of these pleas is fairly tightly circumscribed

> "the rule against double jeopardy also applies in circumstances in which the ancient pleas are not strictly available and it is in connection with the wider application that the High Court in Australia in particular (in *Wilkes* and *Mraz*[10]) has used the same expression as is used in civil proceedings; issue estoppel."[11]

The finding that there is an issue estoppel results in there being no issue in subsequent proceedings to which evidence would be relevant; it is for this reason that it is sometimes said that issue estoppel is not a rule of evidence. And it is, perhaps, the exclusionary characteristic of the principle which caused Smith to comment[12] that "Estoppel ... is an obstacle to the discovery of the truth."

While it is by no means clear that we must uncritically adopt Smith's view,[13] there is, equally, no doubt that the operation of issue estoppel in criminal proceedings does present problems and it is to those that it is now proposed to turn.

Problems involved in the doctrine of issue estoppel in criminal proceedings.

It is most instructive to compare the wholly different approach of Lawson J in *Hogan* to that of the House of Lords in *Humphrys*. Since both cases contain almost all of the arguments as well as an exhaus-

7 (1974) 2 A11 ER 142, 145.

8 (1976) 2 A11 ER 497, 522.

9 For a complete statement of the law see *Connelly* v *DPP* (1964) 2 A11 ER 401, 412 per Lord Morris of Borth-y-Gest.

10 *Wilkes* (1948) 77 CLR 511; *Mraz* (1956) 96 CLR 62.

11 *Mills* v *Cooper (1967)* 2 A11 ER 100, 104-105 per Diplock LJ.

12 (1974) Crim L Rev 249.

13 His statement, referring as it does to estoppel generally rather than issue estoppel in particular or to possible differences between civil and criminal proceedings, is, with respect, uncharacteristically wide.

tive review of the authorities on the subject of issue estoppel, it is proposed to use these two cases as vehicles for discussion. It is appropriate to start with *Hogan* on the ground that as Lawson J observed - there was not, in 1973, any direct English authority on the question.

The Hogan principle

Hogan is, at first sight, an unusual case.[14] He had been charged with an offence of causing grevious bodily harm contrary to the Offences Against the Person Act, 1861, S18. He had pleaded not guilty, raised a plea of self-defence and did not appeal against conviction. When his victim subsequently died, he was indicted for murder and again pleaded not guilty. The question was raised whether he was entitled to rehearse the evidence at the murder trial which had been given at the earlier wounding trial. Lawson J held[15] that issue estoppel prevented him from contesting the following issues which must have been decided against him at the earlier trial:

(a) The victim suffered grievous bodily harm;

(b) the grievous bodily harm was deliberately inflicted by Hogan;

(c) that it was inflicted without lawful excuse;

(d) that at the time of its infliction, Hogan had intended to do such harm to the victim, this intent having been proved in accordance with the Criminal Justice Act 1967, S8.

In effect, the jury's verdict could be taken as conclusive of the fact that had the victim died immediately, Hogan would have been convicted of murder. At his trial for murder, Hogan could not, on the authority of *Thomas*[16] have relied upon a plea of autrefois convict. His counsel advanced a number of reasons at the voire dire as to why the evidence given at the wounding trial was admissible in the subsequent trial. 1 Lack of direct authority: counsel was on reasonably firm ground for there was no English case which held that issue estoppel was part of our law. There are, however, strong dicta in *Connelly* v *DPP*[17] to the effect that issue estoppel does operate in criminal proceedings as the judgments of Lord Morris of Borth-y-Gest[18], Lord Hodson[19] and Lord Pearce[20] indicate. Lord Reid adopted a neutral attitude and only Lord Devlin was hostile.[21]

14 In *Thomas* v *R* (1949) 2 A11 ER 662, 663 Humphreys referred to an indictment for murder following the death of the victim - after a conviction of wounding with intent as "in accordance with the usual practice" for "similar facts have occured time out of mind."

15 This holding followed arguments by counsel before a jury was empanelled. The trial then proceeded, Hogan raising a plea of provocation. The jury returned a verdict of 'not guilty' a verdict which was to occasion Lord Edmund-Davies "no surprise"; *Humphrys* (1976) 2 A11 ER 497, 532.

16 (1949) 2 A11 ER 662.

17 (1964) 2 A11 ER 401.

18 (1964) 2 A11 ER 401; 422.

19 (1964) 2 A11 ER 401; 430.

20 (1964) 2 A11 ER 401, 450.

21 (1964) 2 A11 ER 401; 437.

In the Commonwealth, however, the principle of issue estoppel is well established as can be seen from the decisions in *Wilkes*[22], and *Mraz (No 2)*[23] and its acceptance forms the ratio decidendi of *Sealfon* v *United States.*[24]

2 Identifying issues: This was one of the problems which caused Lord Devlin to reject issue estoppel in *Connelly.* Criminal proceedings present difficulties not encountered to the same extent in civil proceedings which involve formal pleadings, special verdicts, and reasoned judgments. Moreover in the absence of a jury it is often relatively straightforward to identify the issues and the relevant findings thereon. However, in criminal cases, the only formal pleading is the plea of guilty or not guilty; so that the opportunity to identify issues clearly

> "must rarely arise because the conditions can seldom be fulfilled which are necessary before an issue estoppel in favour of a prisonor and against the Crown can occur. There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent procceding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises, I see no reason why the ordinary rules of issue estoppel should not apply."[25]

If, for the reasons given, the plea of issue estoppel is unusual in criminal proceedings, that is not of itself an argument for its wholesale expulsion from the rules of criminal evidence and a refusal to admit it even in cases where its critics accept that the issues can be identified with precision and certainty. If the fact of its infrequency strengthens the case of those who argue that no significant need for the plea has been demonstrated, it may equally rebut the claim that its operation would in some way undermine the English criminal process.[26]

In *Hogan,* Lawson J stated[27] that the Court record is clearly admissible as evidence in order to ascertain the issues and, additionally, in that case, it was undisputed that the defence of self-defence was raised by and determined against the accused.

22 (1948) 77 CLR 511.

23 (1956) 96 CLR 62

24 (1947) 332 US 575; 68 S Ct 237.

25 *Wilkes* (1948) 77 CLR 518; 519, per Dixon J.

26 By way of illustration, Lord Hailsham in *Humphrys* v *DPP* (1976) 2 A11 ER 497, 517-518.

27 (1974) 2 A11 ER 142, 146.

3 The 'second' jury would be precluded from consideration of what on the facts of *Hogan* could arguably be considered the most important single feature of the murder case, namely the proof of the accused's intention.

> "But I ask where, as in the present case, the Crown has once proved the necessary intent of murder to the satisfaction of a jury what is really the position of a second jury? If counsel is right, would they be, so to speak, sitting on appeal from the verdict of their predecessors...?"[28]

4 That to permit issue estoppel would be to erode the principle that the Crown has to prove its case to the satisfaction of the jury beyond reasonable doubt. Lawson J asked quite simply: "how often has the prosecution got to do that?" They had quite clearly done that once, so that the onus of showing why they should have to do it again is on those who so claim. Yet none of their Lordships in Humphrys grasped this nettle and their failure to do so is both illuminating and dissapointing.[29]

The Humphrys principle

1 The status and functions of the 'second' jury: Viscount Dilhorne considered[30] that the effect of the decision in Hogan was that the jury at the murder trial

> "although sworn to give a true verdict according to the evidence were required to accept the conclusions of another jury on evidence which that jury had heard."

In one sense, there is no problem here, for clearly the second jury *is* giving its verdict on the evidence before it; the fact is that the areas covered by the estoppel are not the subject of evidence, and this is no less true whether the case is of a criminal nature involving a jury or civil proceedings heard by a judge alone.

28 (1974) 2 A11 ER 142; 155 per Lawson J.

29 One of the best known illustrations of requiring the Crown to prove the same issue over again may be seen in the rule (part of the rule in *Hollington* v *Hewthorn Ltd)* that the conviction of a third party is inadmissible as evidence that the goods received were stolen at the trial of the handler - *R* v *Hassan* (1970) 1 QB 423, 426. The Criminal Law Review Committee, 11th Report, paras 217-219 has recommended that it should be admissible, placing a burden of proof of the convicted person's innocence on D on a balance of probabilities.

30 (1976) 2 A11 ER 497; 506.

In any event two other factors combine to diminish the significance of Viscount Dilhorne's objection. The evidence given of the first trial will be fresher in the minds of the witnessess; and a second trial may suffer from witnesses being unavailable or dead. Second, as Lawson J intimated, it is vital that no jury should feel that its verdict is in effect - being reviewed by another.

2 Identifying issues: much of the argument on this problem has been covered and it is not proposed to reconsider it. Their Lordships all considered that the lack of formal pleadings gave rise to formidable difficulties in attempting to apply issue estoppel to criminal proceedings. Yet Parliament has relatively recently reenacted a statutory provision which permits the Appellate Courts to do just that. By virtue of the Criminal Appeal Act 1968, section 3(1)[31] where the defendant has been convicted of an offence and

(1) the jury could on the same indictment have found him guilty of some other offence; and
(2) it appears to the Court of Appeal that the jury must have been satisfied of the facts proving him guilty of that other offence, the Court may substitute a verdict of guilty of that other offence and sentence the defendant for it.

The view of Lord Hailsham[32] that identifying issues "in such a way as to give rise to issue estoppel ... depends not at all on the merits or danger of double jeopardy but on the course which the previous proceedings adventitiously happened to take" must therefore be viewed in the light of Parliament's decision that such is a proper course where circumstances permit. The Court of Appeal in *Deacon*[32] appeared most willing to apply the provision, though the nature and course of the trial actually prevented it.

3 Difference between civil and criminal proceedings: Lord Hailsham considered[34] that in civil cases, issue estoppel arose from the principle that there shall be finality in litigation, ut finis sit litium. By contrast, in criminal proceedings, it arises from the principle against double jeopardy and so it is "intrinsically unavailable to the Crown." In any event the Crown "is charged with the duty of protecting the innocent citizens against crime and vindicating public justice as such. It therefore has interests and duties which are not simply those of a civil litigant."

31 The provision was formerly contained in the Criminal Appeal Act 1907.

32 (1976) 2 A11 ER 497; 517-518.

33 (1973) 2 A11 ER 1145.

34 (1976) 2 A11 ER 497, 516.

There is room for more than one view as to the theoretical basis of issue estoppel[35] in criminal proceedings but nothing in his Lordships other comments compel a rejection of issue estoppel, on the ground of problems arising from its equal application to both Prosecution and accused. According to Lord Edmund-Davies[36] the decision in *Hogan* caused "consternation at the Bar", though it corresponds perfectly with Lord Morris of Borth-y-Gest's endorsement[37] of the principle that once an issue is raised and found in a former proceeding then "so long as the finding stands if there be any subsequent litigation between the parties no allegations legally inconsistent with the finding may be made by one of them against the other."

The Bar would, presumably, ally themselves with Lord Hailsham who considered[38] that such a principle and as applied in *Hogan* would ignore and frustrate "the legitimate requirements of the prosecution" How the decision in *Hogan* affected the prosecution to its detriment is not immediately obvious; and did it really disadvantage the accused to be told that he could not fight over again the very issues he had fought before and lost?

4 The hypothetical examples: Lord Hailsham's imagination[38] asked us to suppose that subsequent to Humphrys acquittal on a charge of driving while disqualified it is found that he had just come away from murdering X. If issue estoppel were to apply, then no evidence could be given that would place Humphrys in that area at the relevant time; and "it is difficult to see where would be the sense or policy behind such a rule."

At first glance, the example is not unattractive; yet it is deceptive Suppose the 'cases' are reversed. D's sole defence to a charge of murder is that is he was in Glasgow at the time; he is acquitted. He is now charged with riding while disqualified in Essex at the relevant time; he is convicted. Does not the second verdict impeach the first and where is the sense or policy of that?

Both of these considerations lay behind Parliament's decision to enact section 13 of the Civil Evidence Act 1968. The section closed a notorious loophole by providing that in an action for libel or slander, proof that a person was convicted of a criminal offence shall be conclusive evidence that he committed that offence.[39] In effect, the plaintiff is estopped from denying his conviction and the civil court must accept as conclusive the verdict of the jury on the evidence

35 In *Hogan*, Lawson J did not accept this argument, above

36 (1976) 2 A11 ER 497, 532.

37 In *Connelly* v *DPP* (1964) 2 A11 ER, 401, 422 citing *Brown* v *Robinson* (1960) SR NSW 297, 301

38 (1976) 2 A11 ER 497, 518.

39 The Law Reform Committee, 15th Report paras 26-33 also and equally considered that proof that a person had been acquitted should be conclusive evidence of his innocence, but this recommendation did not become law.

which it heard. Section 13 has prevented the re-trial in civil actions of criminal cases[40], and hence prevents the impeachment of previous verdicts as well as what Heydon terms "gold-digging actions".[41]

5 The perjury argument: Their Lordships agreed that subsequent prosecutions of accused persons whether convicted or acquitted were rare, and rightly so. However, in exceptional circumstances, such a course is proper; and Lord Hailsham considered[42] that it could only be so if the Crown's case were supported by evidence additional to that given[43] (or available?) at the first trial. It would be improper without such evidence.

Viscount Dilhorne believed[44] that the possibility of a perjury charge remained a vital sanction for breach of the oath and that where it can

> "be proved to have occured it cannot ordinarily be said to be oppressive or vexatious or an abuse of process for a prosecution to be instituted."

Though the reasoning is, with respect, shaky, it is considered a sentiment with which most people would agree. It is suggested that it can be achieved without wholesale rejection of the principle of issue estoppel by use of the rule which invalidates any judgment obtained by fraud.[45]

Conclusion

The certified point of law and the House of Lords unanimous view on it have been related[46] ; no disagreement is taken with it. What has not, however, been demonstrated[47] convincingly is that there is no place for issue estoppel in English criminal proceedings. Although, strictly, the decision in *Humphrys* relates only to issue estoppel in prosecutions for perjury, it would be unrealistic not to recognize that it is aimed at wholesale rejection of the principle. It would be a bold trial judge who would interpret *Humphrys* narrowly.

40 *Hinds* v *Sparks* (1964) Crim L Rev 717; *Goody* v *Odhams Press* (1966) 3 A11 ER 369.

41 Heydon, Evidence, Cases and Materials, 379.

42 (1976) 2 A11 ER 497; 423.

43 (1976) 2 A11 ER 497; 523. His Lordship considered that "due diligence" must have been used at the first trial to obtain the evidence. Whether the police in the instant case had been diligent is open to question. For whatever reasons, the first case took 11 months to get to trial; and the perjury trialoccured 16 months after the first trial.

44 (1976) 2 A11 ER 497, 507.

45 Lord Hailsham, for example, referred to the omission of any mention of the principle in the judgment of the Court of Appeal. Lord Salmon (1976) 2 A11 ER 491, 528 found the argument by anology unhelpful in the instant case.

46 Above page.

47 Either by their Lordships or in Mr Lanhams article at (1970) Crim L Rev 428.

The House has opened a wide gap between British law on the one hand and Commonwealth and American law on the other hand, and this is most regrettable. What is clearly required is a balance between ensuring that the decisions of earlier courts (and especially juries) are treated as conclusive and also in ensuring that no encouragement is given to any person to give false evidence on oath.[48] The maintenance of that balance is a continuing process and it is considered that issue estoppel represents a useful agent in its accomplishment.

48 It would be unfortunate if Lord Salmon's comments (1976) 2 A11 ER 497, 529 were taken as an indication that an accused should be careful how he tells lies. "If he had said no more than that he was not the man driving the motor cycle . . . the perjury charge . . . in my view would have been oppressive and an abuse of the process of the Court."

The Office of Fair Trading - Five Years On'

by Gordon Borrie*

I came to my job at the Office of Fair Trading in 1976. You may remember that that was a very bad year for the British economy; balance of trade was bad, the Pound was at its lowest level ever against the Dollar, inflation was at the highest rate that we have known it in this country and many people were thinking back to 1931 which was also a bad year. You may not know that in 1931 there was a Cabinet Minister called Jimmy Thomas who was a rough diamond but he was a great favourite of George V because he was always blunt and straight speaking. One evening he was chatting to George V and George V was worried about the state of the economy and he said to Jimmy Thomas, "Tell me Jimmy, are things really as bad as the Prime Minister says?" and Jimmy Thomas, without a pause, replied, "Well, if I were you, King, I would put the Colonies in your wife's name.

It was about the halfway mark in the life of the Office of Fair Trading that I came to it in 1976. My predecessor, John Methven, started the thing off on November 1st, 1973 and we have just had our fifth birthday. Knowing your Chairman's interest in Constitutional Law, I thought that I might mention that we are something of a constitutional anomoly because contrary to whatever principles you may understand to exist in relation to the separation of powers, I have administrative powers, judicial powers and legislative powers and therefore it is quite wrong to accept the common view that the Lord Chancellor is the only person who has these three sets of powers of government.

In 1973 the idea was that the law relating to monopolies and restrictive practices should be improved and that there should be a body independent of the immediate political responsibilities of Ministers to take the main initiative in these areas. My job is a non-political job and the idea in 1973 you will remember there was a Conservative Government then was that a non-political office should be set up to deal with these matters of competition policy, monopolies, takeover bids, mergers, restrictive practices *and* to be given a large area of new responsibility for consumer protection.

In 1974 there was a change of Government and the Office of Fair Trading was not abolished, and therefore I don't imagine it will be abolished next year if there is another change of Government. But the Labour Government did introduce a new piece of legislation, the Consumer Credit Act, and the Labour Government gave us more powers by giving us a good deal of responsibility for ensuring that all the thousands upon thousands of traders, finance companies, banks and

* Director General of the Office of Fair Trading. This text is the edited version of an address given to the Department of Legal Studies in November 1978.

everybody else who provide or enable you to get credit should be licensed. I will come back to that later on.

The first thing I wanted to talk about is Consumer Protection in this country because there is a convenient round figure of 10; we have had 10 years of quite substantial legislative intervention in aid of the consumer. 1968 was the year of the Trade Descriptions Act; perhaps and certainly in my view, the most successful so far of adequately enforced consumer protection legislation we have ever had. It is very simple in essence and of course I am not talking about the detail here this afternoon; in essence it requires anybody who describes goods or services that he supplies to describe them in a true and accurate manner and if he does not then there is the possibility of a prosecution in the Magistrate Court or the Crown Court depending on the seriousness of the case and it is not like some bits of legislation which are there on the Statute Book and nobody knows much about them and nobody enforces them. The Trade Descriptions Act was given to the Local Authority Trading Standards Department, which used to be called the Weights and Measures Department, to enforce and they do so. I dare say you can find discrepancies between one part of the country and another as to the degree of enthusiasm in which the law is enforced but I would say for England and Wales as a whole I will leave Scotland for a moment I think that this Act has over 10 years had a tremendous impact and it may be difficult for some of the undergraduates, the young members of this audience, to appreciate that the degree of accuracy and honesty in trading descriptions is far better than it once was. Even in the field of travel brochures which used to be a real mine of false information, things are far better than they used to be when it was common to see architect's drawings of hotels and descriptions of what wonderful swimming pools and the rest of it you were going to find when you turned up on your holiday and you found that indeed it was an architect's drawing and that the building did not exist and probably would not exist for several years and there certainly was not any swimming pool. And so things are much better over the whole spectrum of trading practices and enforcement in the courts is only the tip of the iceburg because there is also the deterrent effect of the legislation. I am a believer in criminal law because it is enforced by public officials at public expense for the public benefit and it does not require individuals to wonder whether they can afford to go to court, or whether they are eligible to get Legal Aid in order to ensure that what is written in the law books that you read is in fact enforced.

Those of you dealing with criminal law and criminal procedure will probably know that there is a Royal Commission on Criminal Procedure and one of the things the Royal Commission is looking at is to see whether we ought to borrow from Scotland the idea of having an independent body between the Police and the courts responsible for the

prosecution, able to bring an independent mind to bear, a prosecuting authority such as they have in Scotland, the Procurator Fiscal. I think the Royal Commission will wish to look at this idea most closely. But one of the disadvantages in consumer protection law is that in Scotland the Trading Standards Officers who in Nottingham and in London would themselves be enforcing the law have to go to the Procurator Fiscal and say we have a case against this trader in Glasgow or wherever, who has been misdescribing his goods and the Procurator Fiscal may say, "I have a desk this high with rape and murder and burglary I cannot be bothered with misdescriptions in the local paper in Glasgow." It seems that the law in Scotland on trade descriptions is not as well enforced as it is in England and Wales.

I have a general responsibility for looking at the whole field of consumer protection to see where it needs improving. Apart from the Trade Descriptions Act the other major legislation in recent years has been the Supply of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977 and both of these pieces of legislation in various ways have been trying to make void unfair exclusion clauses because there was a time when, certainly in the supply of goods many contracts would exclude the seller's responsibility for the basic obligations our Victorian forefathers sought to put on them, basic obligations to supply goods of merchantable quality and reasonably fit for the purpose. The purpose of the 1973 Act was simply to wash away many, many decades of trading practice and a very, very permissive attitude by the courts to these exemption clauses because with some exceptions like Lord Denning, who used to say that any unreasonable exemption clause shall be void, none of the other judges agreed with him. He was, as usual, well ahead of his time and in the end there had to be legislation to deal with the problem. The 1973 Act and the Unfair Contract Terms Act 1977 have sought to do that. But, we are talking here about the civil law and one of the disadvantages of the civil law is, of course, that it is only enforceable by the individual and he has to have the money or the Legal Aid and of course an individual may not have the legal knowledge which is necessary to understand the position. He has at least to get some advice.

Since 1973 exclusion clauses in consumer sales of goods' contracts are void so that whatever the small print says you can get your money back if you act promptly enough when goods are not fit for their purpose and/or get compensation because goods are not as they should be. Those are legal rights which everybody has and you know and I know that any printed or written exclusion clause to the contrary is neither here nor there. But does everybody know that? Did everybody know that when the law came in, in 1973, 1974, 1975? Of course not. There were many notices at sales times (where some people have a misapprehension, that the law is somewhat different) and also at other times, notices near the cash desk simply saying three words: "No

money refunded''. Most people who have not studied law at the Trent Polytechnic or elsewhere might imagine that ''No money refunded'' meant ''No money refunded''. However, of course, since 1973 the words do not mean what they say because if you buy defective goods and even if you have seen that notice and it is in letters 10 feet high you can still get your money back if the goods are defective because it is a basic right of the Sale of Goods Act, and the common law, that if the implied obligations of the seller have been broken you are entitled to the money.

The exclusion clause was made void by the 1973 Act but not an offence and so it was perfectly lawful for people to engage in the game of bluff on the assumption that 98% of the purchasers would not know that ''No money refunded'' did not mean what it said.

My predecessor used powers that were newly given to the Office in the 1973 Fair Trading Act and it is in fact now, as a result of my predecessor's initiative, a criminal offence to have notices of that kind or terms of that kind which purport to take away from the customer the rights, which the 1973 Act intended him to have.

One of the other abuses which seemed to be prevalent just before I came to the Office of Fair Trading was small ads, where a trader would advertise a car, refridgerator or television set etc pretending to be a private individual pretending to be such for all sorts of reasons avoiding the interest of the VAT inspectors, or because many people are less wary, less on their guard when they are dealing with someone like them, just a private individual or a fellow student (I don't know, you might be more on your guard). Normally speaking, if you think you are dealing with another individual you are less on your guard than if you are dealing with a trader who is a professional and is out to make a good bargain and all that. The fact is, of course, that there is an element of law here of great importance. If you buy goods from a fellow student or from a private individual there is no implied obligation on the seller that the goods are of merchantable quality or fit for their purpose. If he sells you an out-of-date text book, and you are new and raw, newly arrived in the Polytechnic, and do not realise this, there is no getting your money back because it is not fit for the purpose for your studies and for your exam because private individuals do not have that obligation.

Now supposing that you bought something quite expensive a second-hand motor car from someone you thought was a private individual and the first day out you realise all kinds of things are wrong with it and you have it examined, and it is certainly not fit to go on the road and so on. Now, if it was a private individual selling to you, you have no rights to claim it should be merchantable and fit for the purpose. If you go along to the Citizens Advice Bureau or even to a lawyer and he says, ''Who did you buy it from?'' And you say, ''I bought it from

a private individual in such and such a road." He will say:- "Well, I am sorry, if you bought it from a private individual, then your rights are less."

That kind of problem meant that many people were being bluffed into thinking they were dealing with a private individual and therefore their rights were less than they really are when the seller may well have been a trader. The law now is, as one of the regulations made under the Fair Trading Act, that any person in business when displaying his wares, when advertising his goods, must in some way by using the words, "so and so limited" or "so and so car dealer", indicate that he is in fact a trader.

Since I came to the Office of Fair Trading the kind of trading abuses I have been worried about, are the whole matter of price display. I think, because most of what we have said about that in the last year or so has been now accepted by Government, we may be reaching a point where things are much better in price display than they ever were. I was concerned, for example, with the fact that many goods and services, including meals in restaurants, have to have VAT added, if the price you and I have to pay for goods is to have VAT added, if the price you are going to pay for your meal in a restaurant is going to have VAT added to the price you see on the menu, we want to know, and we ought to know, what is the total price. Now the trader, for his reasons, may want to tell you, as a matter of your education, that he is not going to get all the money, that some is going to the Government, but what you want to know above all, is the total price and exactly how it is made up is of minimal interest to you. What you want to know is how much you are going to pay out and it is extremely disconcerting to put it no higher than that, if having eaten a meal at a restaurant and you have totted up in your mind I can afford this, I can afford that, that is what the total bill is going to be, 10% service etc, and suddenly you find all your calculations are out because you have not realised they have not mentioned anything about 8% VAT. Sometimes, of course VAT is mentioned, it may say on an advertisement in the small right hand corner "plus VAT", but not tell you the percentage. If you do know the percentage trying to work out in your head 8% of £4.37 may not be the easiest calculation to make. All I am saying is that because this is something of a problem in terms of clarity of price display I think we were right in trying to ensure that, in the case of all goods and services which are subject to VAT, you should be told in clearer terms than is the law at the moment what the total amount is going to be.

A rather wider problem that I have been concerned about is the whole business of what I call phoney bargain offers. Even in the Co-op I am not trying to make any political point but they do have a slogan called the "Caring, Sharing Co-op", a philosophy going back to Rochdale, but I noticed in a Hypermarket of the Co-op in the North

Midlands the other week that they were showing furniture, "Manufacturers Recommended Price £150, our price £99.50." Of course, I said, "How can you have such a discount as that?" and they said, "Well, we have a discount like that because the manufacturer puts his recommended price at a sufficiently high level so that we can show a big discount." "Well, I said, is everybody selling this furniture at £150; can you show me anywhere in the area where they are doing this?" and he said, "no". The trouble is that you and I, and other people, almost certainly, do not know which goods this applies to and which it does not. In many areas of goods like furniture, the MRP is fixed at a point by pressure of the retailers so that virtually all retailers can pretend to be giving an enormous discount, not just at sale time, but all the year round. The trouble is that with the more expensive items of goods, the housewife or a man buying furniture for the house, etc, may very well make his purchase choice sooner than he should because he thinks he had better seize on this "bargain" here while the going is good rather than go to another shop to compare prices, but if he did go to the other shops he might find that there is an even bigger discount somewhere else. Certainly he may well find that nobody is selling at the exaggerated MRP. My proposals for changes in the law in this area have to go to the Secretary of State for Prices, Mr Hattersley, and I made detailed proposals on this and other matters like "up to 40% off" or "worth this our price that", subjective judgements of that kind. I made recommendations earlier in the year and Mr Hattersley announced agreement about 2 weeks ago. Because certain other Departments of Government have been concerned with the thing, the same principle like prices of drinks in pubs have got to be clearly displayed, we are beginning to achieve in this country much greater clarity of price display than has existed in the past and I thinks this is a very good thing when shopping activity is complicated enough without having the extra complexity of phoney bargain offers, tempting in some way, getting us off the main issue of comparing actual selling prices.

What we in the Office of Fair Trading should probably now do is to concern ourselves with much greater clarity of information given to people by traders in the way of quality, service, spare parts availability, durability of goods, because there are all sorts of things which people buy now where the traders have knowledge, the manufacturers have knowledge about their uses or possible uses, about how long the goods are going to last but they do not let us know. They don't tell you what is their knowledge, and I think it is very important that there should be greater transparency between the trader and the customer.

I want now to mention some legal powers that we have to enforce the law. We have the criminal law and we have the civil law in this country. Many people think there should be a middle road as well, but we do not. The advantages of criminal law I have mentioned earlier;

it is enforced at public expense by public officials. Civil law has its difficulties because of enforcement problems. But, we in the Office of Fair Trading, can help in both respects where there have been persistent breaches of the criminal law or persistent breaches of the civil law. If, for example, a trader in Nottingham has been prosecuted not once or twice, but time and again, for offences under the Food and Drugs Act or some other law relating to consumer protection may be he doesn't care, may be he just pays the fines and goes on in the same old way. May be he does care but his business is not sufficiently well managed to enable him to keep clear of the law. The Trading Standards Officer at some point will come to us with the history of prosecutions and say:- can you use your powers under Part 3 of the Fair Trading Act? Now these are interesting powers which straddle the civil and criminal law. If there have been persistent breaches of the criminal law or persistent breaches of the civil law traders constantly selling defective goods and it does not matter whether that is proven by judgement or whether the evidence is sufficiently clear from the complaints in detail which we have received, we can require of the trader to sign on a piece of paper that he promises to behave better in future. It is put in legal terms. Now, of course, if that was all there was to it, I dare say you can imagine the gesture that would be given to us. But there is more than that to Part 3 of the Fair Trading Act. A refusal to give us an assurance or a breach of one entitles us to take him to court not just for fines but for an injunction to stop him continuing to break the law and if the injunction is broken that is contempt of court for which as you know there is unlimited terms of imprisonment, unlimited punishment available.

Since 1973 no case has gone that far. So far as the assurances from traders are concerned we have had 140 from traders up and down the country in all kinds of businesses though quite a large proportion are to do with home improvements because it does seem to be the case that quite a lot of people who go into the realms of central heating and roof insullation and that kind of work, going round from house to house, persuading you to have the work done, are breaking the civil law, they may possibly be breaking the criminal law; certainly many instances, of breaking the civil law again and again and again, doing shoddy jobs, shoddy workmanship, breaking the implied obligations of the contract and of course the house owner is hundreds of pounds out of pocket. Now, I don't have any powers to put that house owner back into pocket, as none of my powers involve enabling me to pursue the trader to make him compensate the house owner; that is a matter for civil law, that is a matter for the house owner to pursue himself. But what I can do is to try to prevent the trader concerned going on doing this by requiring from him an assurance to behave better in future; and if he does not to take him to court. I have only been to court 7 times in relation to the 140 assurances so far obtained. I dare say some of the other 133 assurances will be broken, but in many

other cases the trader has gone out of business because he simply has not got the technical ability, or the management skills, to run a business fairly and properly. I can recall one instance of a man I required an assurance from; he had been convicted umpteen times as a motor car dealer the usual business turning back the odometer I had got an assurance from him that he would never do it again. Well I do not know whether this was asking the impossible of him because having got the assurance he was then reported in the local newspaper, as saying, "I am fed up with the Local Standards Department and I am fed up with the Office of Fair Trading; I am going to retire from being a motor dealer; I am going to live in Scarborough and be an Estate Agent."

I have a special reason for mentioning that particular story, because in the Queen's Speech the other day there is a piece of legislation which you will see getting a second reading next week, to require estate agents to keep the deposit money in separate funds, as solicitors do, to have indemnity insurance and that kind of thing and also to enable me to say in the extreme case, that this person shall not in future practise as an estate agent. Now that probably will be a power to be used only in the ultimate situation.

I have indicated so far that we have responsibilities for developing the law, proposing new laws, and I have added that we have power to take people to court if they will not give us their promises of better behaviour or break those promises and those may seem to you rather strong powers but we also have what I like to think of as equally successful; powers of persuasion. You may perhaps think because of what I have said in the past 20 minutes that I regard everybody as crooks and rogues but obviously I don't do that. Those are the people whose cases come up on my desk, but quite frankly I don't receive vast numbers of letters from customers saying what a marvellous deal they had, what a marvellous holiday they had on the Costa Brava. I don't get letters of that kind indicating what a wonderful relationship they have with their local motor dealer. But I am conscious that most people who are in business are honest people and secondly, which is at least equally important, are keen to give a good deal not just out of altruism, but because it makes commercial sense and time and again I find myself united in agreement with the leaders of a particular industry or a particular trade; united in trying to get across to the ordinary members of particular trade associations that dealing fairly and properly and reasonably with the British public is the best way in the long run of doing good business, of making decent profits and so on and so forth. And if one can combine commercial business sense with the well being of the public, so much the better. In the Fair Trading Act there is a provision, section 124, which says that we shall sponsor and encourage the development of codes of trading practice. And we have 13, next week 14, of these codes of practice in different fields of business. Not only the most obvious ones, where

there are certainly quite big problems of wrong doing, in motor cars and travel, but also in laundries, footwear, furniture, electrical servicing and so on. Now the purpose of these codes of practice is to try and build on to the existing commercial advantage of the trade in behaving fairly and building on to the self discipline of the trade association itself, instead of always suggesting that there has to be a new law. Indeed I think that one has to work at matters of quality, matters of which it is very difficult to legislate for, I think one has to work at it through the trade itself so that we are in all these important fields achieving higher standards by conduct by way of codes of practice.

If I may mention the footwear code, it is the position now that if you buy footwear at any one of the great majority of shops that subscribe to the code of practice, and you cannot get satisfaction when you take back the boots or the shoes that have gone wrong within a very short time of purchase-they say you must have had them longer than you say. or you must have been doing this, that or the other to it you can insist that the footwear be sent to the Footwear Testing Centre at Kettering and it costs you £2 and it costs the shop £2. The idea of there being a sum of money is that people do not use this option frivolously - it is a serious complaint you are making. But all the shops agree then to abide by this independent testing. And if they support your view that the footwear was defective when you bought them, you then, of course, get your money back, plus your £2. It is a simple way, without using expensive legal procedures, without even using a small claims procedure of the county courts, through the self discipline of the industry itself to get a remedy and that is the main purpose and object. I certainly recognise that the small claims procedures in the county courts have been moderately successful but I believe that at the moment all sorts of methods should be tried and experimented with in order to provide remedies for people who have got complaints about goods and services they they have paid for and several of our codes of practice, in the travel one, for example, there is a remedy of arbitration. Arbitration is normally on paper only, as distinct from actually going to a hearing. Because you are all involved with the law or law students I don't suppose there is anybody in this room who would be frightened of taking his case before the local registrar of the county court if necessary but there are people who do not like having to go into a court, no matter how much you tell them that it is not as forbidding as it once was and so on, but would be prepared to go along with the notion that they write down their complaints and the trader puts in his side of the story and with these documents in his hand the independent arbitrator can give a rough and ready view. I only say rough and ready view because no advantages of cross-examination, testing the story and all that lies behind those procedures of our courts but then not everybody is willing to go into court and not everybody is willing particularly if the sum is small to give up a day's pay to go into court, so there are practical reasons for my belief that

providing an alternative to the small claims scheme - if the individual concerned prefers, for getting an arbitral ruling which both sides will adhere to, is I think worth having.

I am not going to discuss in my talk our work with mergers and take-over bids and restrictive practices, the competition policy aside and the only other thing I want to deal with in my talk is the Consumer Credit Act and I just want to say a few things about it.

One is that the Consumer Credit Act was passed in 1974 based on a government committee that reported in 1971 recommending all sorts of changes in the field of credit to make it more comprehensive. The trouble with the 1974 Consumer Credit Act is that is has taken a very long time to bring fully into force and it is still not fully in force this day. I wrote a new edition of a textbook of mine in 1974 and I think most law teachers started about 1974/75 writing or teaching students on the basis that the Consumer Credit Act was in force a fairly sensible view on the basis that most students would not be practising for a few years anyway so why tell them about the old law? But I don't suppose any of us back in 1974 imagined it would take so long to bring the Consumer Credit Act into force. My best estimate at the moment is that it won't be fully enforced until 1981 that is quite some way to go.

The Act, despite it being fairly long, some 200 sections - is a skeleton Act, and many, many sections have to be filled out with regulations. One of the main purposes of the Consumer Credit Act which is not in force yet was so-called, to use the American phrase, "truth in lending", the idea being that wherever you borrowed money, you would be given the rate of interest and the rate of interest would be calculated according to the exact same standard. Wherever you borrowed you would be given a percentage rate and you could compare like with like. You cannot do that at the moment because many people from whom you borrow money, say hire purchase, finance companies do not quote you what is the true rate of interest; they quote you a rate of interest which does not take into account the fact that you are paying off not at the end of 2 or 3 years in one lump sum but month by month so that the amount outstanding is constantly reducing. And there are many examples like that to indicate that the present way in which people quote rates of interest is not true and not fair. We must have truth in lending in this country and people have been saying this for 10 years. They brought it into the US in 1969. It won't be in force in this country for another couple of years because of enormous complexity of types of agreement. So I say to you that this is unfortunate; it is due to the complexity of the legislation. The only other thing on consumer credit I wanted to mention apart from giving people a new right like "truth in lending", enabling them to make their choice about buying credit better, was the business of licensing to which I now refer.

My office is the licensing authority. At the end of the day there are probably about 85,000 traders, banks, finance houses up and down the country who have to have a licence from us if they wish to provide credit or introduce people to credit providers. Motor dealers do not usually provide credit themselves; they introduce you to a finance company but the motor dealer still has to have a licence from us. Now, section 25 of the Consumer Credit Act gives me a quasi-judicial responsibility. It is very broadly phrased so nobody can get a licence unless he can prove to me that he is fit and I am entitled to take into account his contraventions of the law and I am also entitled to take into account if he has engaged in unfair or improper trading practices whether unlawful or not. This is a very broad discretion but I have to exercise the discretion judicially and I must give the trader reasons. I have got to give him the case he has to answer, and then there is a procedure for him making written/oral representations to answer the detail listed reasons that I have given to him. That, of course, makes it in accordance with the rules of natural justice which have been laid down for many, many years by the courts on any court, on any tribunal from the House of Lords to the lowest body exercising judicial functions. There is also a right of appeal. But having said that all of the procedures of natural justice have to be followed, it is nonetheless an interesting new type of power in the field of consumer protection because even when a licence is given it can be taken away and at any time, following the same procedures, we can revoke a licence on receiving evidence that a person has misbehaved, broken the law or been engaging in unfair practices in one way or another.

The Courts and Individual Privacy

by Penelope Pearce*

The fundamental common law principle that justice must

> "manifestly and undoubtedly be seen to be done."[1]

requires that court proceedings should be held in public. Blackstone saw open proceedings as a satisfactory way of discovering the truth

> "This open examination of witnesses *viva voce* in the presence of all mankind is much more conducive to the clearing up of truth than the private and secret examination (in the civil law) . . . a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."[2]

The argument that people prefer to give evidence in private was more recently answered in a similar way by Lord Salmon

> "Secrecy increases the quantity of evidence but tends to debase its quality."[3]

Bentham, typically, concentrated on the position of the judge and found open court proceedings equally important in that respect.

> "Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."[4]

The embarrassment and discomfort to parties and witnesses, and even absent third parties[5], which stem from open hearings are not new or only now being recognised. In 1799 Lawrence J roundly asserted

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1 Lord Hewart CJ in *R* v *Sussex Justices ex parte McCarthy* (1924) 1 KB 256, 259.

2 Commentaries on the Laws of England 16th ed Vol 3 page 372.

3 Royal Commission on Tribunals of Inquiry (1966) Cmnd 3121 para 40.

4 Quoted in *Scott* v *Scott* (1913) AC 417 at 477.

5 For example Mr Maudling in the Poulson bankruptcy and Mr Thorpe in the Norman Scott case.

> "The general advantage of the country of having (court) proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings"[6]

and in 1913, in reply to a plea for more hearings in private lest the court be made

> "a place of moral torture"

Lord Atkinson reasserted the common law position.

> "The hearing of a case in public may be, and often is no doubt, painful humiliating or deterrent both to parties and witnesses and in many cases especially those of a criminal nature the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured because it is felt that in public trial is to (be) found, on the whole, the best security for the pure impartial and efficient administration of justice, the best means for winning for it public confidence and respect."[7]

More recently it was urged before the Younger Committee on Privacy that the reporting of cases decided in magistrates courts caused a haphazard and unjust degree of suffering. The committee rejected the proposal to restrict such reporting for several reasons.

> "Firstly, the public can be certain of the identity of a convicted offender, which it can be important for them to know. Secondly, they will know for certain when a defendant is discharged, which can be important for him to have known. Thirdly, certainty about a defendant's identity protects the innocent from inaccurate rumours. Fourthly, the prospect of publicity can be an effective deterrent to some potential offenders. Indeed the pressure of public opinion may be thought critical for the preservation of a law-abiding community."[8]

Nevertheless, there are circumstances when the public interest is better served by the exclusion of publicity, either by excluding the public or the press (or both) from the hearing or by excluding the evidence completely or giving it to the judge alone or by restricting the reporting of what is said in court. The clearest example is national

6 *R* v *Wright* (1799) 4 RR 649, 656 quoted in Jones: Justice and Journalism 1974 pub. Barry Rose page 13.

7 *Scott* v *Scott* (1913) AC 417 at 463.

8 Report of the Committee on Privacy (1972) Cmnd 5012 para 174.

security where the court may sit in private[9] or evidence may be excluded on the ground of public interest privilege.[10] There may be disagreement as to whether an item of evidence is harmful or is already know to potential enemies[11] but the ground for exclusion is generally recognised. There are, however, other grounds. The European Convention for the Protection of Human Rights and Fundamental Freedoms recognises exceptions to the general rule of open court proceedings.

> "Judgment shall be pronounced publicly but the Press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[12]

The question to be considered is how far the English courts do, and how far they should, encroach on the principle of open court proceedings for the protection of private lives.

In *Scott* v *Scott* the House of Lords were unanimous that whatever grounds there might be for holding judicial proceedings in private

> "the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private."[13]

Several statutory provisions in this field indicate the different levels of restriction which may be applied. Juvenile court proceedings are not held in public, though the press are not usually excluded.[14] Similarly, if a child is giving evidence in the case of "an offence against . . . decency or morality" the public may be excluded and the judge may restrict publicity.[15] Following a proposal of the Law

9 Official Secrets Act 1920 section 8(4).

10 *Conway* v *Rimmer* (1968) AC 910.

11 as in the Official Secrets case of R v Aubrey, Berry and Campbell.

12 Article 6.

13 *Scott* v *Scott* (1913) AC 417 at 435 Viscount Haldane LC.

14 Children and Young Persons Act 1933 section 47(2).

15 ibid section 37.

Commission, legitimacy hearings are in private[16] though a judge has no general discretion to hear any matter relating to a child's status in private.[17] Domestic proceedings in magistrates courts are heard in the presence of the press only[18] and in nullity proceedings evidence of sexual capacity is heard in private.[19] There are severe restrictions on the reporting of matrimonial proceedings[20] and the identity of a victim of rape and a person charged with rape (unless found guilty) may not be reported.[21] Although the reasons behind the various provisions are understandable, there are no general rules excluding the public, or limiting publication in certain circumstances. For example, a question of a child's status may be heard in open court in divorce proceedings; evidence of sexual capacity and activities will have to be given in open court in criminal or divorce proceedings; the name of a person accused of rape must not be given but if the charge is a lesser one, such as assault, or a greater one, such as murder, his name may be given. Statutory provisions have been produced piecemeal and sometimes in response to a particular hard case so the results are haphazard and sometimes unjust.[22] They do, however, represent substantial restrictions on the principle of open court proceedings.

Even more vague and haphazard, however, is the use of judicial discretion for the protection of private lives in court, or sometimes for the opposite purpose. Traditionally, some matters relating to the lives of individuals have always been heard in chambers on the basis that they are administrative rather than judicial activities. Thus matters relating to wards of court and persons mentally ill[23] are heard in chambers and subsequent publicity is only permissible with consent of the judge,[24] at least while the wardship or protection

16 Matrimonial Causes Act 1973 section 45(9); (1966) Cmnd 3149.

17 *B(LA)* v *B(CH)* The Times February 17 1975.

18 Magistrates Courts Act 1952 section 57(2)(3).

19 Matrimonial Causes Act 1973 section 48(2) reversing the actual decision in *Scott* v *Scott* (above) though the principles there stated remain intact.

20 Judicial Proceedings (Regulation of Reports) Act 1926 section 1(1)(b).

21 Sexual Offences (Amendment) Act 1976 section 4. His identity cannot be given if he raped his wife as that would reveal hers: The Times June 20 1978.

22 It has been suggested that serious consideration should be given to repealing them all: Carter-Ruck: The Times June 20 1978.

23 this is regulated by delegated legislation: S1 1960 No 1146.

24 Administration of Justice Act 1960 section 12; *Re R (MJ)* (1975) 2 All ER 749.

subsists.[25] By administrative order[26], the whole jurisdiction to grant injunctions in matrimonial suits has now been taken out of open court and applications are heard in chambers, so being at least unlikely to receive publicity. The battered wife concerned may be glad to give her evidence in private, but her sister may thus be deprived of knowledge of her own rights.

A judge may exercise a discretion to see a party alone or to hear an application in private. Judges, but not magistrates,[27] deciding on custody of children have been rightly encouraged to interview the children privately[28] although not to give them promises that what they say will not be disclosed.[29] The welfare of a child may require such consideration (which is why custody cases are not heard in public) but should a bankrupt or his associates be so tenderly treated? A judge presiding over a public examination in bankruptcy interviewed the bankrupt in private to ascertain why he did not wish to disclose his name[30]; in another case where press allegations of fraudulent dealings had been made an application to the judge for examination of a witness in bankruptcy was heard in private.[31] Administrative orders[32] have been made deferring, whether temporarily or permanently, the placing of depositions in bankruptcy on the file where they would be available to creditors as of right.[33]

Judges sometimes allow a witness not to state his name in open court, either for his protection[34] or to encourage people in such a situation to come forward as with blackmail victims.[35] Such a concession is, of course, useless if the name is then revealed by the press. In *R* v *Socialist Worker Printers & Publishers*[36] contempt of court proceedings were successfully brought against a journalist and newspaper for disclosing the names of blackmail victims before the end of the trial, but the extent of this judicial power is unclear. Does it only apply where the witness is in real danger or there is a clear need to persuade witnesses to give evidence or could it be used simply to save embarrassment? Could proceedings have been brought if the disclosure had been after the trial which might be

25 *Re F (a minor)* (1977) 1 A11 ER 114.

26 Practice Direction (1974) 2 A11 ER 1119.

27 *Re T (a minor)* (1974) Fam L 48.

28 *Official Solicitor* v *K* (1963) 3 A11 ER 191. So that their parents may not hear what they say. 29 *H* v *H* (1974) 1 A11 ER 1145.

30 *Re Paget ex parte Official Receiver* (1927) 2 Ch 85.

31 *Re Green* (1958) 2 A11 ER 1020.

32 They were revealed in *Re Poulson ex parte Granada Television Ltd* v *Maudling* (1976) 2 A11 ER 1020.

33 Bankruptcy Rules 1952 S1 1952 No 2113 amended by S1 1962 No 295.

34 For example "Colonel B", a witness in the Official Secrets case of R v Aubrey, Berry and Campbell. But his evidence enabled his identity to be ascertained.

35 The principle is not logically applied. For example it was not applied to rape victims (before they had statutory protection) although they were an exactly similar case. 36 (1975) 1 A11 ER 142.

just as deterrent to future witnesses? The Phillimore Committee on Contempt of Court in 1974[37] recommended that legislation should specify the circumstances in which a court might be empowered to prohibit, in the public interest, the publication of names or other information arising in a trial. No action has yet been taken on that proposal. In the *Socialist Worker* case Lord Widgery CJ thought it not harmful for a judge to allow part of the evidence to be given in private.

> "There is such a total and fundamental difference between the evils which flow from a court sitting in private and the evils which flow from pieces of evidence being received in (private)"[38]

But if information is given in private its truth is not tested, others do not know the basis of a decision, there may be unfairness between one witness and another. The call-girls who worked for Janie Jones were in as embarrassing a position in court as the male customers whom she had blackmailed but they were not allowed to remain anonymous. The public interest in receiving information publicly in legal proceedings should only be outweighed by another public interest, not a merely private interest, in respect of part of the evidence as well as in respect of the full hearing. The general principle laid down in *Scott* v *Scott*[39] that hearing in private should not depend solely on the individual view of the judge is just as applicable to part of a hearing as to the whole.

But in *Barritt* v *Attorney-General*[40] the judge suggested that the position has fundamentally changed since *Scott* v *Scott*. This was a petition for declaration of legitimacy, a proceeding which the judge now has a discretion to hold *in camera*.[41] The petitioner was an adult, there was no question of publicity deterring him from coming to court be he

> "would find it particularly distasteful to give evidence in public about the conduct of his parents."

37 Cmnd 5794 para 141 note 72. The Younger Committee on Privacy thought magistrates might order non-disclosure of a defendant's name if mental disturbance were feared but they have declined to do so and such an order would be of doubtful validity. Jones: Justice and Journalism page 160.

38 (1975) 1 A11 ER 142 at 150.

39 (1913) AC 417. The principle was approved in respect of contempt of court in *Attorney-General* v *Leveller Magazine Ltd.* (1979) 2 W.L.R. 247 (H.L.)

40 (1971) 3 A11 ER 1183.

41 Matrimonial Causes Act 1965 section 39(9) added by the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 section 2(2).

It was thought unlikely that publicity would produce any further evidence. The statutory restrictions on publicity of divorce and legitimacy proceedings indicated, in the view of the judge, that in matters of status

> "public policy is no longer quite what it was in the days of *Scott* v *Scott.*"

Effectively, because of progressive statutory restrictions on publicity (which apply only to the media not to individuals in court) he was able to decide to hear the petition in private for no weightier reason than the distaste of the parties.

In *Morgan* v *Morgan*[42] the court was even more kind, though this time to a witness. In divorce proceedings the husband subpoenaed the wife's father to give evidence of his wealth since it was likely to come eventually to the wife. The court might have held the evidence inadmissible as irrelevant but did not do so.[43] Instead the judge asked

> "Is the privacy of a person to be so invaded?"

and decided, on the dubious authority of a minority decision of Lord Denning MR[44], that to so would be oppressive. The father did not have to give evidence.

It has been said of the statutory provisions that

> "each measure taken in isolation appears to have invoked reasonable restrictions designed either to further the interests of justice or to protect from distressing publicity those who, by some misfortune, find themselves in a court of law."[45]

It has been seen how the cumulative effect can be to change the climate so that it can be argued that

> "public policy is no longer quite what it was."

42 (1977) 2 A11 ER 515.

43 *Calder* v *Calder* The Times June 29 1976, the case relied on, could have been distinguished as the party there had equitable interests under a trust rather than, as in this case, a mere *spes successionis.*

44 In *Senior* v *Holdsworth* (1975) 2 A11 ER 1009. His ground for decision seems to conflict with *Att-Gen* v *Mulholland* (1963) 1 A11 ER 767.

45 *Carter-Ruck:* The Times June 20 1978.

A similar trend is discernible in the use of discretionary powers by judges to exclude evidence or limit its publicity. Gradual extensions, for individually good reasons, enabled the judge in *Morgan v Morgan* to say

> "The paramount consideration . . . is the right of the individual."

Just as judges are beginning to outweigh the public interest in publicity by a mere private right to privacy, so some judges seem to be disregarding the public interest which requires non-disclosure in favour of private interests. A judge has a discretion in any court proceedings to direct that any report of the case shall not identify a child or young person involved in the case in any way,[46] and in a report of juvenile proceedings no child or young person may be identified unless it is "appropriate to do so for the purpose of avoiding injustice to a child or young person."[47] These provisions reflect the public interest in the protection of youngsters from the stigma of publicity, and one clear example of the use of the general provision is when sexual offences are committed against young girls. The effect of publicity on the children themselves may be harmful and it may be a deterrent against other victims coming forward. But recently, faced with apparently precocious girls, two judges have refused to make the normal order preventing disclosure of their identities. One judge said

> "these girls were an absolute menace to ageing gentlemen."[48]

and the other

> "I think a little publicity for them under the circumstances would do no young men in Cambridge any harm."[49]

One might think there was a higher public interest in ensuring that victims of sexual offences come forward with evidence, and in protecting children, however precocious, from the effects of their youthful indiscretions, than in protecting adults, whether young or ageing, from being lured into committing unlawful sexual acts. They, at least, should be old enough to know better.

46 Children and Young Persons Act 1933 section 39 as amended by the Children and Young Persons Act 1963 section 57(1).

47 Children and Young Persons Act 1933 section 49 as amended by the Children and Young Persons Act 1969 section 10(1)(c).

48 Lawson J at Exeter Crown Court.

49 Croom-Johnson J at Norwich Crown Court, considered by the Press Council: The Times June 12 1978.

The protection of individual privacy is a laudable object. But not in court. There is a public interest in obtaining information for court proceedings which has long been recognised as outweighing private rights[50]; there is a public interest in evidence being heard in public and in freedom to report what is said and done in court.[51] These public interests may be outweighed by other public interests, such as that in the protection of children or in ensuring that witnesses come forward, which may require a private hearing or restrictions on publicity. Parliament may decide that there are other grounds, the powerful press lobby ensuring that arguments for openness are fully stated. But judges, in the exercise of their discretions, should be reminded, as the House of Lords recently reminded the Court of Appeal, that

> "the general public interest that in the administration of justice truth will out"

is only to be counteracted where

> "a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law."[52]

50 *Hopkinson* v *Lord Burghley* (1867) LR 2 Ch App 447.

51 *R* v *Border Television Ltd ex parte Attorney-General* The Times January 17 1978; 1978 Crim LR 221.

52 Lord Diplock in *D* v *National Society for the Prevention of Cruelty to Children* (1977) 1 A11 ER 589 at 594.

Extracts from an interview given by Lady Lockwood of the Equal Opportunities Commission, on the theme of "Law Enforcement - Powers and Duties of the Equal Opportunities Commission"

The Equal Opportunities Commission has been in existence for nearly three years. What is your assessment of the contribution of the Commission to the achievement of the objectives of the Sex Discrimination Act?

I think the first thing that we can say is that there is certainly more awareness about the Sex Discrimination Act and about the objectives towards which we are working. I think this is very important because with an Act of Parliament like this you are concerned with changing attitudes, with the expectations of women in particular but also with an understanding of men's and women's changing role in society, so this question of awareness is very important. On the other side I think one can equally say that there has been quite a considerable move towards the implementation of the Equal Pay Act in that women's hourly earnings are now much higher than they were before the Sex Discrimination Act (which, of course, now embodies the Equal Pay Act) came into operation.

We recognise, though, that the Equal Pay Act is only a very limited part of the move towards equality and therefore attention now has to be given to a much greater extent to the Sex Discrimination Act because the real problem both in equal pay and equal opportunities is the segregation of women into one half of the labour market and men into the other. It is important to break down this division in the labour market and in that context the Commission has recently issued some guidance on equal opportunity policies and practices in employment with a view to trying to do this. We also have been involved over the last 3 years with discussions with the Manpower Services Commission with a view to trying to prompt some more training for women; women if they are going to move into other areas, different areas of employment, are going to need many more training facilities than they have in the past, and I think we can say that we are now beginning to see some useful experiments by the Manpower Services Commission and the Industrial Training Boards in these areas. So there is, on the employment side, limited progress but nevertheless some progress.

On the other hand we have done quite an amount as a Commission in the whole area of taxation, trying to end discrimination against married women in taxation and we have now got the government to make some tentative and small changes this year in the course of the Finance

Bill; we are hoping to press this much more and try to get a more radical improvement but at any rate the government there have taken note. We have begun a great debate, one hopes, on the whole question of equal retirement ages for men and women and we have raised a number of very important issues in the whole field of Social Security.

We have been reviewing protective legislation that is the legislation which treats men and women differently in employment affairs such as forbidding women or preventing women from working nights except with an exemption, preventing women from working shift work and so on, so I think one can say that in nearly 3 years we have begun to move on a wide number of fronts some of which are showing measurable progress but in some of which the progress is just beginning and we shall see the real effects of it within the next 2 or 3 years.

You have talked about co-operation with Government bodies: to what extent if at all, have you been helped by other institutions and organisations? Are there other bodies who you feel have been working in the same direction towards the removal of inequality?

Of course there is a whole range of voluntary organisations which are seeking to promote equality and a whole range of organisations who were behind the introduction of the Equal Pay Act. I think one can also say, for example, that the Trade Union Movement has begun to move on this in the sense that they have a equality clause which they recommended to their own organisations, to be included in collective agreements, also in the sense that the Congress itself has been discussing such issues as child care facilities, the effectiveness of the Equal Pay Act and the Sex Discrimination Act, so we have had some help from them; we have had some help from companies, the few companies, for example, which are pursuing or attempting to pursue equal opportunity policies. So, yes, I think we can say that we have had help from a number of organisations. Indeed, the Commission takes the view that unless other organisations and other institutions are prepared to take up the whole issue of equal opportunities, that we are not going to get very far because one Commission on its own cannot bring about all the changes which are necessary

Have you found your work has been hindered at all by the attitude of other organisations?

I don't know whether I would say that our work has been hindered. I think perhaps what one might say is that we would like some organisations to move more quickly. For example, I mentioned the Trade Unions and employers; certainly we would like to see them moving much more quickly than they are, but I think what we have got to recognise is that we are living in a changing society and changing attitudes and changing values. Until we can bring about, if you like, bring into equilibrium, some of the social changes that have taken

place and some of the expectations about life as a result of those social changes then I think that we are not going to get progress as quickly as we would wish to get progress.

On the governmental side, there are a number of areas where we would like further progress; I think we would like much greater progress in the whole area of education. Although in a number of co-educational schools, for example, where there are supposed to be all the facilities for a wide range of course options open to both boys and girls we do find that the organisation of the syllabus tends to encourage girls to take one group of subjects and boys another group of subjects. I think we would like a bit more initiative from the Department of Education and Science. On the other hand the Secretary of State for Education and Science has been very helpful in some of the speeches she has made on this whole area.

We have also, as a Commission, attempted to change attitudes and expectations through putting in evidence to a number of organisations. For example, we gave evidence to the Royal Commission on Income Distribution and Wealth; we gave evidence to the Royal Commission on the National Health Service; we have been pressing, as I say, the Department of Health and Social Security on various aspects of the Social Security problems and we are in discussion with the Supplementary Benefits Commission on this whole matter and, of course, we gave evidence to the Royal Commission on Legal Services.

Can you tell us your views about the position of women into the legal profession especially at the Bar?

The first thing that we wanted to say about this is that the Senate of the Inns of Court and the Bar might first of all issue a guide to be circulated to all Heads of Chambers outlining the obligations of the Sex Discrimination Act with particular reference to pupillage because we are very conscious of the fact that the Bar is a competitive area but nevertheless it does seem that women do not get their fair share of places in the Chambers, or as pupils in the Chambers. We also made a number of recommendations, for example, we said that the Inns of Court in their recruitment drives at the universities and schools should stress this fact that the Bar is no longer an exclusive male preserve. We said that they might give sympathetic consideration to the special needs of women and make positive recommendations with regard to maternity leave, and provisions for child care facilities, which is always a problem with women in the professions. Then we said that they might give consideration to seeking to register as a training agency under the Sex Discrimination Act thereby enabling the Inns of Court and Bar to provide refresher or re-entry courses to women when they were seeking to return to the Bar after perhaps having had an absence for family purposes.

Finally, we said they could use their powers under the Sex Discrimination Act to reserve seats or perhaps create extra seats for women on those bodies which are wholly or mainly elected. The training issue and the reservation of seats are two of the exceptions under the Sex Discrimination Act whereby positive treatment can be afforded to one sex only and we are suggesting that in the whole area of legal services and particularly the Bar that these facilities might be used.

Is your aim to achieve better practices by persuasion impeded by the obligation to take action where you find discrimination?

No, I don't think so. The Commission has two very specific responsibilities under the Act, one is to eliminate discrimination on grounds of sex and in this sense the Commission is a law enforcement agency and the Commission has not and will not hesitate to use its law enforcement powers.

On the other hand, we are very conscious of the fact that if we are going to promote real equality of opportunity, people have to see the advantages of providing the facilities for equality and this means that we, as a Commission, have got to help them to see their own specific interests in terms of getting rid of sex discrimination and we have got to persuade them that the law has not only to be obeyed in the strictest sense but that the positive provisions are being used. This is part of our educative and persuasive and our positive role; I think the two need to be kept in balance.

Have you any views on the merits or demerits of our anit-discrimination legislation compared with that of other countries? In particular are there powers attached to the appropriate authorities in other countries which you would like your Commission to have?

I suppose the Sex Discrimination Act and our anti-discrimination legislation did draw very considerably on the American experience because of course the Americans were first in the field in this whole area but nevertheless our Act is somewhat different from the American legislation which in the first place covers the whole question of discrimination in areas of race, sex, age, disability and so on, whereas ours is confined to sex discrimination and we have other legislation for race.

But I think what our legislation does, and again I think this was drawn from the American experience, first of all, individuals have the responsibility of processing their complaints under our Act. This was partly put in as a result of our own experience under the former Race Relations Act and equally on the basis of the American experience which at the time our Act was going through had an enormous backlog of about 4 years of cases. We wanted something which was swifter, which gave justice but nevertheless which was much

quicker administratively and, as a consequence, we choose the method of individuals processing their own complaints and in employment matters through the Industrial Tribunals which are quicker than the County Courts.

Equally, and again on the basis of our experience of American legislation, the indirect discrimination clause was put in to our Act. I think originally it was intended that we just had an anti-discrimination clause but then we have the two interpretations of discrimination - direct and indirect - and the indirect discrimination concept was to try and eradicate the effects of past discrimination which in the States have been found to be quite a considerable problem. We did not follow the States to the point of making it necessary in the area of government contracts to apply an equal opportunities policy with the consequent result that you had to impose targets and quotas if your current policies were not producing equal opportunities. We did not go that far. We included the positive training aspects in our legislation and some people wonder if this is strong enough or whether or not we shouldn't think more in terms of the American system of quotas and targets. Personally, I would not like to make a judgement on that; I would like to think that we can give our own positive aspects of the legislation a longer period of time to see if they can be effectively used, so at the moment, whilst there are these differences between our legislation and the American, I think it is too early to judge whether or not we want to follow them into some of these areas.

Other countries, well very few countries, have, as yet, had much experience of anti-discrimination legislation; the Americans first and then certainly in Europe, we were the second to follow and others are now introducing various types of legislation to comply with the European law. But I think one experience which is very interesting and certainly one which we are watching carefully is the Swedish experience where as yet they have not got any anti-discrimination legislation on our lines but they have got other kinds of legislation, which are intended to prompt equality largely in the field of the Social Services and I am very interested in this. For example, their parental leave for both parents or parental leave which means that either parent can choose to take up the leave instead of a woman having to take her maternity leave. I think what this does is to establish quite clearly in law that the law recognises that both working parents have family responsibilities and I think this has an important effect on the attitudes and the policies of companies. The Swedes are taking that even further because, starting in January next year, they have a law which will come into operation which provides for parents of children under the age of 10 to opt to work a 6-hour day. Now there are all sorts of social problems which arise when two parents are working; again the state is recognising this, and I think providing the climate for equal treatment in employment matters. Those two different countries, with

their different approach to the whole problem, I think perhaps have lessons for us and certainly we need to keep our eyes on them. We are also looking at the concept of the national man for the purposes of equality in work, which they have in New Zealand.

You mentioned earlier that the Industrial Tribunal is a quick way of dealing with some of the problems. Do you find there is any difficulty with some cases going to the Industrial Tribunals and other cases to the County Court? Has the Commission found significant differences in the approach to discrimination of the tribunals and courts?

No, again I don't think I would say that. The employment cases are going through the tribunal system and in a way people involved in employment matters are used to using the tribunals and, therefore, there have been many more cases going through the Industrial Tribunal system. For several reasons perhaps. The first one being that if your job, and therefore your means of income, is at stake then you are prepared to pursue a case through the tribunal system. Secondly it is simple, as I have said, and there need be no cost involved because you can take your own case to a tribunal. Thirdly, only in very exceptional cases is there a likelihood of costs being awarded against you. Whereas, of course, when you are talking about the County Court system it is more formal, it is more costly, it takes longer and at the end of the day even if you win your case there is really very little financial compensation for the trouble that you have gone to and there is, of course, always the possibility of costs being awarded against you. So you have got to think in terms of the two systems and what they are intended to do. But on the interpretation of the law, for example, in the first year of the Act, when the cases were going through Industrial Tribunals, there was a great deal of concern about the interpretation that was being put on the Equal Pay Act in particular and also on the Sex Discrimination Act. It is a new Act and, I suppose in many ways for us, based on entirely new concepts and therefore, I suppose, it is understandable that the Industrial Tribunals had some difficulty in interpreting it, and we, as a Commission, were concerned about some of the decisions. Then, as part of our responsibility to monitor the working of the Act, we were monitoring the tribunal cases very carefully, and we were suggesting, in certain cases and certain circumstances, that it might be appropriate for the applicant to take the case up to the Employment Appeals Tribunal and here we began to establish new case law and get a different interpretation of the Act - a wider interpretation of the Act, and I think an interpretation which was in keeping with the intentions. So we did go through a difficult period initially but I am more satisfied now that the right interpretation is being placed on the Act although, of course, there are still some cases about which I have got very strong reservations. But in comparing the tribunal system with the county court system we are in the initial stages there and we may have to get many

more cases before we can begin to bring out the principles involved in those parts of the Act which are adjudicated under the county courts system. Although in the end, of course, when it comes to appeal, both tribunal cases and county court cases go to the Court of Appeal and then if necessary up to the House of Lords so therefore you do have a unifying appeal court anyway.

You don't think following that that the disadvantages of the county court are such that it would be better to have all of the cases before an Industrial Tribunal? I wonder if you are going to get sufficient cases on discrimination in the provision of services for example?

I would not see them being taken under the Industrial Tribunal system because the Industrial Tribunal system is part of our labour law administration and therefore I don't think it would be appropriate. The time that the Bill was going through Parliament, there was a suggestion that there might be such things as special tribunals set up for the administrating of the Sex Discrimination Act and I think it is possible that had that been so, more cases may have gone through on the basis of the goods, facilities and services side of the Act than have so far gone through. The incentive to take cases under this section of the Act. as you quite rightly indicate, is not so compelling, but you see the other thing is, if you look, for example, at the whole area of mortgages and credit generally, if people are not able to get a mortgage at the first building society they go to, they tend to shop around until they get a building society that will give them a mortgage, and in this way perhaps not all discrimination is felt so keenly as when it applies to the one and only job that you have got.

Lord Denning has suggested that your powers of investigation are reminiscent of the Inquisition. What observation would you like to make on this statement?

I would suggest that with due respect that Lord Denning seems to have forgotten or failed to take account of the amendments which were made to our legislation at the time the Race Relations Act was going through which makes it very necessary in the interests of natural justice for the Commission to give ample opportunity to any individual or organisation that is being investigated, or it is suggested should be investigated, to make representation before we proceed with the investigation and then at various points in the course of the investigation. Before we issue a non-discrimination notice again they would have the right to make representation and then before we issue our final report on an investigation then, in the interests of natural justice, we would bring to the attention of the organisation the points that were being brought out in the report. I think we have built into the report very real safeguards for individuals and for organisations and, of course, if you compare our legislation, for example, with the Health and Safety legislation, the Factory Inspectorate have many

more powers which they have been using for the past 100 years, and I think using with circumspection, but nevertheless greater powers of entry than we have.

Do you consider the investigative and enforcement powers of the Commission to be adequate, in particular in relation to the obtaining and dissemination of information?

Until more experience has been obtained in the course of investigations I would not like to give a positive answer on this. Of course arising out of the remarks of Lord Denning which you just mentioned there is a case which is now likely to proceed to the House of Lords on the disclosure of information about applicants for posts which the Commission is very interested in and which may help us in determining whether or not our powers are adequate. We are in fact financing the appeal to the House of Lords in this case, but the Court of Appeal decision has already been followed by the Employment Appeal Tribunal refusing information to applicants.

It is sometimes suggested that your Commission should take a more active role in reaching and assisting people in particular need by positive campaigning and the provision of representation before courts and tribunals.

As I mentioned earlier, the reason why the Commission doesn't have to process every individual case is because of the time factor and the likelihood of a backlog and also because of financial reasons. But the Commission is giving help of some kind in about one-third of the cases that are going through. In other words, instead of just relying upon individuals to come to see us, if we hear of a case which we think is particularly important or which is necessary for appeal then we do go to the individual and say, "We think you ought to take this to appeal, would you like some help from us?" So I think in a very quiet way, the Commission is taking a very active part in seeking to give help and advice to individuals, without clogging up the works.

Another view that is often put is that you can really do no more than seek to influence changes in attitudes. Is it possible, for example, effectively to prevent discrimination in job appointments and promotions?

One comes back to the enforcement role of the Commission here and the formal investigations. Certainly, under a formal investigation, we could at the end of the day, if we had found discrimination, issue a non-discrimination notice. So I think that we can certainly do much more than influence attitudes. In some cases we have not proceeded with a formal investigation, we have been able to effect a conciliation, as it were, which from our point of view, means changing the

practices of the organisation concerned and bringing about changes which we hope will lead to greater equality. So no I think that the law enforcement powers, the very existence of the law enforcement powers, means that we can do more than persuade.

What are the factors which lead you to say in your second annual report that women are unlikely to achieve equal pay in the predictable future? Is there any way in which the Commission can do anything about this?

This is the nature of the Equal Pay Act which says that equal pay can be awarded for work which is the same or broadly similar or work which under a job evaluation scheme has been rated as equivalent. Now in both of these two areas women need a man with whom to compare themselves if they are going to seek equal pay and this is where the problem arises because, as I said earlier, the labour market is divided, still divided largely into a male and a female side and women have not always got the male equivalent with whom they can claim equal pay. There, of course, is the broader provision within the Act for collective bargaining and in this context the central arbitration committee is doing a considerable amount in reviewing the collective agreements which are submitted to it and ensuring that they are not sex-based. But I think all of us accept that the Equal Pay Act can only do a limited amount of work and the more positive work must come under the Sex Discrimination Act in promoting equality. This is why we said what we did in our second annual report and of course, unfortunately, the latest figures on equal pay have borne that out.

So you are not suggesting that every young girl should go into a particularly male job just for the sake of getting some equal pay. Effectively this is the problem isn't it?

No, not necessarily, because you see if women are going to go into non-traditional jobs, jobs which have been done by men in the past, equally men are going to move over into jobs which have been done by women. And some people take the view that many of the jobs that women are doing are low-paid simply because they are being done by women. Now if you have a combination of both men and women, one might be able to reinforce the moves to upgrade some of the jobs that have been done by women and have been low paid. I think there is more than one lever in moving women into non-traditional areas.

Has your experience to date indicated the need for reform of the legislation?

The Commission is now undertaking an examination of the legislation with the view to making recommendations for change, perhaps some time early next year. Indeed I am not in a position at this moment of

time to say what those recommendations will be or are likely to be, I think what I could say is that on the basis of nearly 3 years work we are not looking at any really radical and fundamental changes, that what changes are envisaged would perhaps be in the nature of tidying up rather than radical in the sense of bringing such issues of Social Security into the ambit of the Sex Discrimination Act.

If you were told today that you would have to retire tomorrow but that, in return, you would be granted one only of your aspirations which of those would you choose?

That is a very difficult question. Certainly a very difficult question in the context of the Sex Discrimination Act because as you know it is such a wide-ranging Act and covers so many areas. I think perhaps I would use the criterion of the Commission or take the priority of the Commission which is that employment is the most important area and our first priority, and therefore I think that I would like to start our work on the assumption and the basis that both women and men had the same equal education and training opportunities and I think if that were so, we might be able to make much quicker progress than we are making at the moment.

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THE PUBLIC TRUSTEE - a case for reform

L.C. Quinney*

The English Public Trustee was established for similar reasons to its New Zealand model; firstly the lack of willing private trustees (especially in regard to small estates) and secondly trust losses incurred through incompetence or dishonesty. Unfortunately, it has failed to mirror the success of its New Zealand counterpart. The latter flourishes today, being responsible for an average of $3,200,000 new business per month[1]; whereas, the English Office has but recently been reprieved from the Hutton Committee's[2] recommendations of phasing away, and remains under threat of closure.

Why then this divergence in achievements? To analyse this further one must look to the structure and modes of operation adopted in each case.

Comparison with the New Zealand system

The powers and duties of the English Public Trustee are broadly prescribed by the Public Trustee Act 1906 and various Public Trustee Rules. He has been succinctly defined as

> "a permanent official carrying on the business of executorship and trusteeship as one of the governmental services of the State and with the machinery of a Governmental Department, answerable through the Lord Chancellor, to Parliament, and he acts ... in exactly the same manner and under the same legal obligations as a private individual, but with a guarantee that all breaches of trust will be made good out of the funds of the State."[3]

* B.A. (L.S.), formerly a student in the Department of Legal Studies.

1 "A Career in the Public Trustee Office"; New Zealand staff publication.

2 1972 Cmnd. 4913.

3 per Sir Oswald Simpkin in a lecture to the Incorporated Secretaries Association in 1933.

To this brief appraisal, the writer would add one further important characteristic: that the Public Trustee may charge sufficient to cover his working expenses, although no profit is permitted.4

In contrast, the New Zealand Office has developed since 1872 both as a commercial enterprise in open competition with private firms, undertaking trusts and executorships, and as one of the country's major financial institutions. How, then, has this been effected?

One may categorise the divergences into five areas; of representation, profit, finance, power and duties:-

a) Representation. The New Zealand Office has obtained widespread representation and accessibility by instituting local branch offices;5 boasting representatives in 115 districts by 1973.6 England's one attempt to establish a branch in Manchester was finally terminated following the Holmes' Report recommendations of 1956.7 Why this difference? In the 1870's, New Zealand's population was small, yet widespread, and so diversification was preferable to concentration on one population centre. In addition, it was thought that, to perform adequately, the Public Trustee required local representatives both to attract business, and maintain personal relationships with settlors and beneficiaries alike. In England, the cost of establishing local branches, independent of existing government departments, was deemed prohibitive. Even the Manchester branch was closed through its uncertain financial history.

b) Profit. The New Zealand Public Trustee is allowed to profit from his work; such profits going to Reserve Funds,8 which are utilised in defraying expenses generally (eg office buildings, equipment), acting as a guarantee fund, and also soaking-up losses caused by investment slumps. In England, however, the equitable maxim that a

4 s9 Public Trustee Act 1906.

5 Public Trust Office Act (NZ) 1956 s10.

6 "The Comparative Law of Trusts in the Commonwealth and Irish Republic" Keeton & Sheridan pp 149-150; since 1973 some small uneconomic sub-branches have closed.

7 1956 Cmnd. 9755 paras 48-51.

8 Public Trust Office Act (NZ) 1957 s23.

trustee should not profit from his trust, determined that the Public Trustee should not profit, but only charge sufficient to cover administration costs. Thus, the Consolidated Fund was required to give financial security,9 its presence unfortunately being somewhat restrictive in curtailing operations to ensure that the Fund is rarely drawn upon.

c) **Finance.** Rather than investing trust funds individually, all cash received by the New Zealand Office is invested into a Common Fund, the trust being credited with a rate of interest fixed periodically by the Government, assessed on the capital sum originally invested. This rate of interest is slightly lower than that earned by the investments; the difference replacing administration charges (whereas in England one has to pay management and acceptance fees), and provides the Office's running capital.10 Radically streamlining the system, the Fund thus simplifies financial administration, although settlors may opt out of the scheme if they so wish.11

Much of the Fund is utilised in mortgages of farming land, which yield a good rate of interest without likelihood of capital loss. In England, building societies provide an analogous form of investment. A further reason for not adopting the Common Fund scheme is that a wider range of securities for investment is available in this country. Such economic and social factors are, it is submitted, at best arguable; for they cannot justify the rejection of a Common Fund scheme, save for hinting at possible building society opposition and if higher interest levels available. The legislature failed to recognise that another source of mortgage funds could be beneficial, even of limited to the industrial and agricultural sectors. Beneficiaries could be amenable to forgo maximum interest levels in consideration of no further administration fees. The only hardship would be that tenants for life would have to bear administration costs, whereas, at present, all fees come from capital, with all beneficiaries bearing the cost.12

9 Public Trustee Act 1906 s7.

10 Public Trust Office Act (NZ) 1957 ss 30-38.

11 supra s30(1); recently beneficiaries of full age have employed the rule in *'Saunders v Vautier'* and thus blackmailed the Office into allowing investment outside the Common Fund on threat of withdrawing the trust from its administration. Legislation relaxing investment rules is, therefore, expected; although settlors will still have power of veto.

12 Holmes Report 1956 Cmnd. 9755 paras 22, 29, 32 and 86.

d) Power. The New Zealand Public Trustee is generally more powerful than his English equivalent. In addition to similar rules as to administering estates or trusts, acting as custodian trustee and auditing accounts, he frequently acts as administrator of intestate estates, where solicitors and trust corporations are often loath to act. Such abhorrence is not felt in this country, and it would be inadvisable to adopt the practice here, as it would excite much criticism.

In New Zealand, conflict with the legal profession has been reconciled, in that the Public Trustee may undertake much ancillary work, such as the preparation of wills. For the year 1971/2, 25,860 wills were prepared13, and the majority of estates administered are wills drawn up by the Office itself. Such is the value of business attracted in this way, that many wills are drawn free of charge. Ancillary work could, perhaps, be beneficially introduced into our system, although at present forbidden, in Parliament's attempt not to usurp the functions of lawyers in private practice.14 The relaxation of this rule could be of considerable financial benefit, especially as the Office's only hope of long-term survival is to attract new wills.15 Opposition could, no doubt, be overcome, as have been criticisms of the relaxation of the conveyancing monopoly, with the New Zealand system offered as a working precedent.

e) Duties. In addition to their general duties, both Public Trustees have, by virtue of their being public officials, been called upon to act on behalf of Parliament. Thus, both have acted as Custodian of Enemy Property; but the New Zealand Office is the more widely utilised, especially in the administration of national benefit or relief funds. This was the practice here, the Public Trustee acting for the "Titanic Disaster Fund", but has declined. Perhaps if the employment of a public official as trustee in these cases could be reintroduced the problems, such as arose with the Aberfan Disaster Fund, could be avoided. Further scope in this regard is also given to the New Zealand Office in that they are free to act in charitable trusts a further limitation over here.

13 Keeton & Sheridan (supra) p 151.

14 per Earl of Birkenhead, Lord Chancellor, in a speech in the House of Lords on the Murray Report.

15 "The Battle of Wills Begins" Joe Irving; Sunday Times Business News, 9th October, 1977.

Other additional duties in New Zealand include the management of the affairs of those mentally defective[16] (except Maoris), aged or infirm persons. The latter extends to crippling illnesses and alcholism. These provisions, it is submitted, surpass those of England, where such assistance is only available on certifying the person in question; so the affairs of, for example, the slightly senile cannot be protected.

One should not, however, regard the New Zealand system as the ultimate, for it also has certain procedural difficulties, such as being forced to employ the Common Fund notwithstanding the wishes of beneficiaries.[16A] Indeed, he could not even act as joint trustee until 1968.[17] Some of his powers would not be required in this country. For example, the New Zealand Public Trustee may be appointed administrator of the estate of a convict, but this whole principle has been abolished in English law.[18]

Future prospects

The disappointing performance of the Public Trustee Office in this country leads one inevitably to question what the future holds. Three possibilities lend themselves as solutions, namely:-

1 Closure, following the lines of the Hutton Committee's recommendations; or,

2 Continuance, in the present form; provided that further financial embarrassment is avoided; or

3 Radical reform, to create a commercially viable Office along the lines of the New Zealand system.

16 Deemed as uneconomic public service, a Health Department grant has been paid since 1972.

16A Except, of course, where the beneficiaries may claim the benefit of the rule in *'Saunders v Vautier'*.

17 Public Trust Office Amendment Act (NZ) 1968 s8.

18 Public Trustee Act 1906 s2(1)(e) abolished by Criminal Justice Act 1948.

While conceeding that today there would be no need to create a Public Trustee, the Holmes Committee found that he had by no means outlived his usefulness. Indeed, the service given within his limited scope has proven excellent and by far superior to other large trust corporations; and if small estate administration is discounted, his deficits disappear. It is, perhaps, ironic that in setting out their reasons for abolishing the Office that the Hutton Committee relied upon the unprofitability of small estates the very reason for which the Office was set up.

If the Office is to continue, however, it is submitted that it must be justified by exploiting the Office's full potential the "usefulness" alluded to by the Holmes Report.

At present, the Office's finances are showing considerable improvement. The 69th Annual Report showed a surplus of £287,362 for the 1976/77, with an increase from £4.2 million to £5.4 million worth of new cases accepted. One should not, however, slip into a state of of euphoria, for at the same time some £16.1 million worth of trusts were distributed. If the Office is, then, to survive in its present form, it must attract comparable amounts of new business, and quickly.

The fees charged by the Public Trustee Office are such that there is little reason to prefer the Public Trustee to other trust corporations. In order to compete, he must at least be allowed a reserve fund with which to swallow any immediate losses in entering such competition for business. Failure to assist further would be to fall into the errors of the Holmes Report, where nothing was done to assist the Public Trustee Office in meeting modern requirements, save for bolstering its finances.

Generally though, the majority of the Public Trustee's difficulties have arisen from limitations imposed by Parliament. Rather than lose such a service, it would surely be preferable to reform the Office to bring it into line with current conditions. The Office is seeking to resolve present problems of the cost of small estate administration and diminishing numbers of trusts by seeking executorships; but a better form of attack would be to allow competition on a commercial basis. This would mean that the Public Trustee could offer wills drawn for free in exchange for dealing with estates, and profits obtained would cover the cost of small estate administration.

Prima facie, the best example of such a system is that of New Zealand, which could doubtless be modified to fit English requirements.

Fundamentally, one must remove the restrictions on the Public Trustee not profiting from his trusts, allowing work on a commercial basis. Law Society opposition could doubtless be overcome by showing

that in New Zealand the Public Trustee often assumes joint trust administration with solicitors; who are still allowed to act and thus obtain their fees, but with the Public Trustee's guarantee. The banks might complain, but further competition is surely of public benefit? In addition, if the New Zealand fee scales were adopted, their position would not be greatly harmed. Under that system the Public Trustee takes a percentage of the interest from an estate for a certain period, after which administration is free. Thus, there would be no incentive to accept larger estates requiring lengthy administrations, and these could go to the other trust corporations.

To attract executorships the concept of free wills, as aforementioned, could be utilised; using New Zealand as a precedent. Doubtless the Law Society would criticise this, but in any event one need not go to a solicitor to draw a will.

All profits should be paid into a Reserve Fund, as is the New Zealand practice. This would allow for purchase of equipment, as well as covering other running expenses and acting as a guarantee fund. Perhaps most importantly, the Fund would allow the purchase of local branch offices throughout the country. If the Office is to appeal to the public, it must be on a High Street level one has only to review the results of increased advertisement following the Holmes Report[19] to gain this truth.

The adoption of the Common Fund system would streamline accounts, but should be subject to settlors and/or beneficiaries being able to require other forms of investment. The Fund could be invested both in securities and in mortgages for land. This would give yet another source of money available for mortgages, while the low administration costs would allow low interest rates. No doubt, some form of compromise would be necessary with the building societies; but, again, public benefit should be the prevailing factor.

Restrictions should also be relaxed; allowing, for example, the acceptance of charitable trusts and the estates of those suspected to be insolvent. Powers could be granted in new spheres also; such as assisting in the management of the affairs of those incapable to so act, and yet not certifiable.

Much analagous governmental work could also be accepted, relieving the Official Solicitor's Department and Department of Health and Social Security of much peripheral work. This has been mooted, as in the 1958 Report of the Royal Commission on Land. Here, it was suggested that land registered without an entry in the ownership section would, on a long-term basis, vest in the Public Trustee. The 1971 Justice Report on Home-Made Wills suggested a notarial system, and perhaps here the Public Trustee Office could be employed

19 paras 33-37.

as a central wills registry. Thus, both existing and new work could beneficially be directed at the Office; indirectly increasing its work-load.

Within the revised department, the re-introduction of disaster fund management could also be made, with obvious public benefit.

Conclusion

The future of the Office lies with the legislature. If nothing is done to assist with administration, then the final agony is only being prolonged, with ultimate closure inevitable. It is submitted that the best, although most daring, approach is to completely reform the system, on the New Zealand model, to meet with modern requirements. If the Office is to continue at all, the legislature must compromise, at the very least, and allow a Reserve Fund. Even so, it is considered doubtful if the Public Trustee will be able to promote his Office sufficiently without branch offices. Similarly, the relaxation of the rules relating to ancillary work would relieve his plight.

As concluded by the Holmes Committee, the only reason for which the Public Trustee would need to be created today is in respect of small estates. Yet, the fact remains that he does exist, and can still serve a useful purpose. To flourish once again, urgent reform is needed. Undue delay will lose the opportunity to save the Public Trustee, once and for all.

Suggested Public Trustee Bill

In preparing this draft, the fundamental reforms, which, it is submitted, are required, have been alone considered. If such measures are to be implemented, further measures as to general procedures would have to be adopted. These are, it is felt, matters of policy and business sense, which are outside the ambit of this more limited review. The following provisions should, therefore, be regarded as the basic legal reforms which are needed, and not as a complete system to be adopted without regard to the mechanics of bringing the reforms into operation.

A Bill to amend the Law relating to the Public Trustee Office.

General Powers and Duties of Public Trustees

1.(1) Where the Crown, any public office, or any Court, corporation, (whether public or private), association, or any person can now or hereafter:-

a) appoint an executor, administrator, trustee, guardian, committee, manager, agent, attorney or liquidator; or,

b) create any trust and appoint a trustee for the purposes thereof under and subject to such powers, provisions and

conditions as are expressed and implied any such appointments may be made of the Public Trustee if he consents thereto.

(2) The provisions of this section shall not affect the operation of subsections two and three of section two of the principal act.

This clause is proposed as a replacement for the provisions of ss.2(1), (4) and (5) Public Trustee Act 1906. The wider powers would allow for matters involving greater spheres of activity such as work of a charitable nature to be undertaken. It is envisaged that the provisions of ss. 4-7 Public Trustee Act 1906 would be unaffected.

Protection of Persons Under Disability

2.(1) Where any person who is not of full mental capacity, and is unable to manage his own affairs (whether alone or in conjunction with any other person) is entitled under an agreement, compromise, settlement or otherwise to any money or damages, the Court may direct that the Public Trustee hold such money or damages upon trust subject to any directions or conditions imposed by the Court.

(2) Upon any such person becoming of full mental capacity and able to manage his own affairs while they amount is held on trust for his benefit under subsection one of this section, the balance of that amount and of the income therefore remaining in the hands of the Public Trustee shall be paid to such person except so far as the Court may have ordered before the payment is made that the whole or any part of that amount shall continue to be held in trust under that subsection.

(3) All money so paid to the Public Trustee shall be invested by him in the Common Fund (or notwithstanding the provisions of section eleven of this Act) in such other investments as are authorised by law for the investment of trust funds, or partly in the Common Fund and partly in such other investments as aforesaid as the Public Trustee shall deem fit having regard to the circumstances of the persons for whose benefit the money is so held.

This clause is inserted to assist persons under a mental disability; especially, where the disability does not warrant certification as required by the Mental Health Act 1959, or their family does not wish to take such steps, and yet assistance is required. Severely ill persons would be referred directly to the Court of Protection, thus preventing any encroachment upon jurisdiction.

Benefit Funds

3.(a) In any case where a fund is raised by public or private subscriptions for the benefit or relief of any person or class of persons, the fund may be placed in the Public Trustee Office to be administered by the Public Trustee and to be invested in the Common Fund.

(b) The Court may, on the application of the Public Trustee or any person claiming an interest in the fund, vary the scheme for administration and the mode of administration of the fund, or give directions on any point or question relating to the scheme or fund.

Powers and Duties Relating to Wills

4.(1) If any person wishes to make a will appointing the Public Trustee executor and trustee, whether solely, or jointly with any other person or corporate body, the Public Trustee may prepare the will.

(2) The Public Trustee may make such charge as he in his discretion think fit for the preparation of any will under the provisions of this section, subject to any regulations made under this or any other Act.

5. Where, under a will prepared by a solicitor, the Public Trustee is appointed joint executor and trustee with that solicitor, that, whenever practicable, the Public Trustee may employ that solicitor or his firm in the administration of the estate.

District Offices, Branches and Agencies

6.(1) The Public Trustee may from time to time establish and abolish district offices, branches of district, and agencies of the Public Trustee Office within England and Wales and may establish, define, abolish, alter or reconstitute districts at his discretion.

(2) The Public Trustee shall appoint a District Public Trustee in control of each district office, who shall have a seal of office, who shall have the same force and effect as the seal of the Public Trustee.

(3) Every person who is appointed under this section, whether or not he is placed under any other direction or control or inspection or supervision, shall be subject to the direction, control, supervision and inspection of the Public Trustee.

These provisions would necessarily require some form of regulation as to the control of the district offices in accordance with ss. 8(2), 8(3) and 14(1)(d) Public Trustee Act 1906. As these are matters of internal office procedure, these are not considered in detail.

Public Trustee Acting in Fiduciary Capacity may Receive Remuneration

7. Notwithstanding the provisions of any other Act or any rule of law prohibiting or limiting or regulating the right of any person acting in a fiduciary capacity to charge, demand, or receive payment or remuneration for so acting or determining the manner in which any payment or remuneration is to be ascertained or assessed, it shall be lawful for the Public Trustee when acting in a fiduciary capacity to charge, demand or receive such remuneration therefore by way of commission or otherwise as may from time to time be fixed or authorised by this or any other Act or by any regulations made under this or any other Act.

Although able to charge at present, this clause, based upon s. 100 Public Trust Office Act 1957 (N.Z.), is inserted in order to prevent any difficulties in permitting him not only to charge, but also to profit from his activities.

Reserve Funds

8. The Public Trustee may charge against the account of the Public Trustee Office such sums as the Public Trustee in his discretion may consider necessary or advisable to be reserved for the purpose of meeting any requirement, commitment, charges, expenses, loss or liability of the Public Trustee, whether present or future, actual or contingent, specific or general; and any sum or sums so reserved shall constitute a Reserve Fund or Funds which may be used for the purpose of meeting any requirement, commitment, charges, expenses, loss or liability in respect of which the sum or sums were reserved, or for the general purposes of the Public Trustee Office.

Many forms of a Reserve Fund may be adopted. For example, in New Zealand there are an Assurance and Reserve Fund, an Investment Fluctuation Reserve Fund together with a General Legal Expenses Reserve Fund. The nature of the funds and their uses would be for the Office itself to determine, and so only the bare concept is dealt with here. Changes in the mode of accounting would also doubtless be required.

Application of Profits

9.(1) Any surplus in the accounts of the Public Trustee Office for the financial year which ends with the thirty first day of March, 1979, or with that day in any year thereafter shall be transferred, as the Public Trustee shall determine, to any Reserve Fund or Funds which the Public Trustee may think fit to establish pursuant to section eight of this Act which may be invested in the Common Fund or otherwise as the Public Trustee in his discretion thinks fit.

(2) Any deficiency in the accounts of the Public Trustee Office in any year shall be provided out of the Reserve Fund or Funds as determined by the Public Trustee.

(3) The Public Trustee is hereby authorised to expend out of the Reserve Fund or Funds such sums as he may consider necessary for the protection of the securities in which money of the Common Fund is invested.

The investment of profits has been deliberately left open to allow maximum freedom for the Public Trustee; although if a stricter code is preferred, one might be tempted to adopt something on the lines of s. 23(4) Public Trust Office Act 1957 (N.Z.).

Liability of Consolidated Fund

10(1) The Consolidated Fund of the United Kingdom shall be liable, if the balances in the Reserve Fund or Funds are at any time insufficient to meet the Public Trustee's liabilities and commitments, to advance such sums as may be necessary to meet those liabilities and commitments.

(2) Money so advanced shall be repaid by the Public Trustee to the Consolidated Fund as soon as there are sufficient balances in the Reserve Fund or Funds available for the repayment.

With the introduction of Reserve Funds to protect securities, little liability is envisaged for the Consolidated Fund. It is, therefore, proposed to replace s. 7 Public Trustee Act 1906 with a clause as s. 25 Public Trust Office Act 1957 (N.Z.). whereby the Consolidated Fund acts as a guarantee to the Reserve Funds; but any advances are to be repaid, as soon as the Public Trustee has sufficient funds.

Common Fund

11(1) All capital money for the time being held by the Public Trustee, however arising, whether before or after the commencement of this Act, and whether directed to be invested or not, shall, unless expressly forbidden to be so invested, constitute one common fund (hereinafter referred to as the 'Common Fund'), to be invested at the Public Trustee's discretion, subject to any rules made under section fourteen of the principal Act relating thereto.

(2) Notwithstanding the provisions of this section, on application of a majority of all persons with a vested beneficial interest, or if such beneficiaries are infants, by their guardians, the Public Trustee may, having regard to the interests of all the beneficiaries and if he considers it expedient, order that all or part of the moneys belonging to the estate shall not be invested in the Common Fund.

(3) Any investments made from the Common Fund shall not be made on account of or belonging to any particular estate.

(4) Subject to the provisions of this Act and of the principal Act the interest payable to the respective estates the money of which constitutes the Common Fund shall be at a rate or rates as the Treasury with the sanction of the Lord Chancellor shall fix, and interest shall be credited to the respective estates half-yearly, namely on the thirty-first day of March and the thirtieth day of September in each year, or at such other times or times in each year (whether at longer or shorter periods than half-yearly periods) as the Public Trustee may from time to time determine, either generally or in any particular case or class of cases.

In order to operate this section, an Investment Board would have to be established, together with regulations as to power of investments, which could well include power to lend money on mortgages.

Special Investments not Guaranteed

12(1) Investments which do not form part of the Common Fund shall not be entitled to the protection afforded by section thirteen of this Act to investments of the Common Fund, and any loss or deficiency in respect of any such investments, or of the money received therefrom or arising from a realisation thereof shall be borne by the estate to which the investments or moneys belong or would belong if received or realised.

(2) If despite all reasonable efforts the Public Trustee is unable to make investments in accordance with the special directions in the trust instrument, or if there are no such directions, then in accordance with the provisions of the Trustee Act 1952, within one month of the receipt thereof, the Public Trustee may until the money may be so invested temporarily appropriate and allocate as an investment for the money, or any part thereof, one or more existing investments of the Common Fund.

(3) Any investment in the Common Fund while so appropriated and allocated as a special investment shall not be entitled to the protection afforded by section thirteen of this Act to investments of the Common Fund.

Deficiency in Common Fund to be made Good out of Consolidated Fund

13 The Consolidated Fund shall be liable to make good any deficiency in the Common Fund, should the Common Fund be insufficient to meet the lawful claims thereon.

Mode of Action of Public Trustee

14 The provision of section twenty-three of the Trustee Act 1925 are hereby deemed to apply to the Public Trustee.

This clause is designed as a replacement to s. 11(2) Public Trustee Act 1906, which has proved cumbersome, especially with the development of a competent administration department within the Office itself. Power to use outside help is retained, however, to allow the Public Trustee maximum freedom of action. Section 5 of this Bill would act as a special power, and is therefore a separate clause, rather than being herein incorporated.

Definitions

15 In this Act unless the context otherwise requires the expression "principal Act" means the Public Trustee Act 1906.

Other expressions have the same meaning as in the principal Act.

Repeals

16 The enactments specified in the Schedule to this Act are hereby repealed.

Short Title and Extent

17(a) This Act shall be cited as the Public Trustee (Amendment) Act.
(b) This Act shall not extend to Ireland or Scotland.

SCHEDULE

Enactments Repealed

Public Trustee Act 1906	sections 2(1), (4) and (5)
	section 7
	sections 8(4) and (5)
	sections 9(4) and (5)
	sections 11(1) and (2)

Morality, Law and Abortion

by Hugh V. McLachlan*

According to Brody:

> One of the most frustrating aspects of discussions about abortion is the way in which they rapidly turn into a discussion of the status of the foetus and of whether destroying the foetus constitutes the taking of a human life. Since these latter questions seem difficult, if not impossible, to resolve on rational grounds, frustration results. It therefore seems desirable to find aspects of the abortion problem that can be resolved independently of the status of the fetus problem. One such possibility is the question of whether there should be a law against abortions performed by licensed physicians upon the request of the mother (or perhaps the parents). There are, after all, many people who, while opposed to abortion on the grounds that it involves the taking of a human life, maintain that it would still be wrong (or at least inappropriate) for a state to legislate against such abortions.[1]

Brody discusses the claim that, even if abortion is immoral, it should not be illegal. He considers this claim to be the assertion of:

(1) It is wrong for **x** to perform an abortion upon **y**, even when **x** is a licensed physician and **y** a consenting mother (who may also have the consent of the father), and it is wrong because this act would be the taking of an innocent human life.

and

(2) It is wrong (or at least inappropriate) for the state, in the circumstances we find ourselves in now, to have a law prohibiting such abortions.[2]

He does not discuss the truth or falsity of (1) and (2) but their compatability. He considers various arguments which someone who accepts (1) might reasonably offer in support of (2) and concludes that '... no such argument seems forthcoming; so it looks as if the legal problem about abortion cannot be resolved independently of the status of the fetus problem'.[3] He argues that (1) and (2) are incompatible on the grounds that the arguments which might be used to support (2) are either inconsistent with (1) or else insufficient to support (2) if (1) is true. For instance, some arguments in support of legalised abortions point to social problems for which abortion offers a solution. In Brody's

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1. Brody, B.A., 'Abortion and the Law', The Journal of Philosophy, Vol. 68, no. 12 (1971), p. 357.

2. Ibid, p. 358.

3. Ibid, p. 369.

view, although these problems, such as that of unwanted and subsequently psychologically disturbed children, are serious '... they are not serious enough to justify the taking of innocent lives in order to solve them'.[4]

I shall examine Brody's claim that the question of whether abortion is immoral and whether it should be illegal are inseparable and his claim that in answering these questions there is an important problem of deciding the ontological status of the fetus.

II

Why should the status of the fetus be thought to be problematical and of crucial importance in the abortion debate? Why should it be thought that: 'The issue of abortion resolutely leads to the ontological question of when a fetus enjoys the status of a human person'?[5] People have tended to approach the question of the morality of abortion in the following way. They have asked whether or not the fetus is a person; they have tended to regard abortion as being akin to murder and to adopt an extreme conservative view on the question of the morality of abortion that one is never justified in having or promoting an abortion except, perhaps, to spare the life or guard the health of an expectant woman. On the other hand, if they think that the fetus is not a person, they have tended to regard abortion as being akin to tooth extraction and to adopt the extreme liberal view that, morally, abortion is not in need of a justification provided that the woman agrees to have one. Hence, it has been thought that one can settle the question of the morality of abortion by discovering whether the fetus is a person and that: 'Resolving this issue involves clarifying both the conceptual and operational definitions of being a human person'.[6] It has been thought difficult, or even impossible, to decide whether the fetus is correctly classified as a person, or as an embryo, or as an animal '... with great promise of becoming more than just an animal.'[7]

In my view, this approach to the question of the morality of abortion is misguided: 'A fetus is neither a person nor a human being; a fetus never becomes a person or a human being: it is or might become the body of one. In at least one respect, the question of the ontological status of the fetus is quite unproblematical ... A fetus is a partially developed human body....'[8] It is very curious to ask what rights fetuses have. We do not ask what rights fully developed bodies have; why should we attribute rights to partially developed ones? 'Rights are held by people, not by their bodies.'[9] One might think that, if the fetus is not a person, then the liberal view on the morality of abortion is established: that one is under no obligation not to have nor to

4. Ibid, p. 367.

5. Engelhardt, H.T. : 'The Ontology of Abortion', Ethics, vol. 84 (1973-4). p. 218.

6. Ibid, p. 229.

7. Ibid, p. 220.

8. McLachlan, H.V., 'Must We Accept either the Conservative or the Liberal View on Abortion?', Analysis, vol. 37, no. 4 (1977), p. 198.

9. Ibid, p. 198.

promote an abortion. To jump in this way to the liberal conclusion would be to assume that rights are due only to actual living persons and that in order for us to have duties regarding abortion, someone must possess corresponding rights. Both these assumptions can be challenged.[10] There are cases where we are morally obliged to act in a particular way where it is no one's right against us that we so act. Non-existent people can have rights against us. For instance, we can talk of the person whose body a fetus will or might have become having rights which correspond to our duties to act in particular ways:

> We can hold that the fetus is neither a person nor a human being nor the body of an actual living person or living human being without being committed to the view that abortions are never in need of a justification ... We might say that in some, although not necessarily in all, cases there is either a duty to abort or a duty not to abort where this duty corresponds to a non-existent person's right and/or we might say that there is simply either a duty to abort or a duty not to abort ... Yet, an extreme liberal might still maintain that when a woman seeks an abortion, such abortion is not in need of a moral justification. He might say that although it is logically possible that non-existent persons have rights, they do not have them in fact: and although it is logically possible that we have duties on other grounds either to promote or not to promote abortions, as it so happens, we do not. He might say that even if non-existent persons have rights, their rights are so weak that we are always justified in not upholding them if they conflict with a potential mother's wishes; and similarly that any other duties which there are pertaining to abortion are comparatively so trivial that a woman's wish to have an abortion will always justify her having one.[11]

III

Suppose that one were to adopt the extreme liberal view on the question of the morality of an individual's having or promoting an abortion. To be consistent, need one accept any particular answer to the question of whether abortion should be legal? I do not think so. Clearly, it would not be inconsistent to say that a woman need not justify her having an abortion and also say that abortion should not be illegal. Perhaps not quite so obviously, one might adopt the extreme liberal view on the question of the morality of abortion and yet maintain that abortions should **not** be legally obtainable.

It would not be inconsistent nor obviously unreasonable to maintain that, although it is not immoral to have or to promote an abortion, it

10. Ibid, pp. 199-200.

11. Ibid, p. 203.

should be illegal. The reasons why there should be a law against a particular activity need not be reasons why an individual person should not engage in that activity. For instance, suppose that there were no law nor convention governing the side of the road on which automobiles drove. In these circumstances, it would appear that one would be under no moral obligation to drive on a particular side of the road. Yet, there would be good reason for saying that it should be illegal to drive on a particular side of the road. Similarly, it could be argued that abortion should not be legal although it is not immoral to have or to promote an abortion. For instance, someone might argue that abortion should not be legal on the grounds that respect for human life might be lessened by the legalisation of abortion. The argument could run that a lessening in respect for human life might lead to evil consequences such as an increase in the murder rate. There is no inconsistency in adopting this view and also saying that, in the absence of any laws against abortion, no particular person is acting immorally in having or promoting an abortion. Perhaps the effect of any particular abortion on the general respect for life is so slight and unpredictable as to render not in need of justification the action of having or promoting an abortion.

IV

I think that it is quite uncontroversial to say that the conservative view on the morality of abortion is compatible with the view that abortion should be illegal. I shall look at the more interesting case where someone might want to claim that, although abortion is immoral, abortion should be legal and I shall argue that this claim is quite consistent.

Brody interprets the conservative view on the morality of abortion as: (1) It is wrong for x to perform an abortion upon y, even when x is a licensed physician and y a consenting mother (who may also have the consent of the father), and it is wrong because this act would be the taking of an innocent human life'.[12] This seems to me to express the conservative view too narrowly and not to illustrate the two different conservative stances on the morality of abortion. In (1), we have at least two claims: that abortion is wrong; and that it is wrong for a particular reason. In adopting the conservative view on the morality of abortion one need not consider abortion to be the taking of an innocent human life or consider that it is wrong for that reason. If we say that abortion is wrong and that we have a moral obligation not to have nor to promote an abortion, it is useful to indicate what we consider to be the nature of the obligation involved. One might say that we have an obligation which does not correspond to anyone's right or that we have obligation which does correspond to someone's right.

Let us consider first the case where the moral obligation involved is not thought to correspond to anyone's right. It seems clear that

12. Op. Cit. pp. 357-358.

not all behaviour which we consider to be immoral is behaviour which we would wish to see legally proscribed. We might consider, for instance, that we have a moral obligation to try to remain healthy and to try to develop to the full our socially useful natural talents without being committed to the view that it should be illegal not to do so. To say that, morally, we should try to be friendly and give at least some of our wealth to charity is not to say that unfriendliness and meanness should be crimes. Similarly, to say that it is morally wrong to promote or to have an abortion is not to commit one's self to the view that abortions should be illegal. We can say that people have a moral obligation not to have nor to promote an abortion and that this obligation should not become a legal one.

It is Brody's view that, if we say that abortion is wrong and that if we say so because it is the taking of a human life, then we cannot reasonably deny that abortion should be illegal: 'After all, if abortion is the taking of an innocent human life, it would seem as though the state, as part of its general role as a protector of human life, has an interest in prohibiting abortions to protect the life of a child'.[13] This argument is not convincing. Even if the state has 'an interest in prohibiting abortions', it does not follow that abortions should be illegal. It could be argued that the state has an 'interest' in reducing the size of the population but this would hardly justify making abortion compulsory in selected cases. Even if the state does have the role of protector of life, this is not its only role. One of its roles is to try to meet the requirements of members of society. One might offer a parody of Brody's argument and say: After all, if abortions are required by members of society, it would seem as though the state, as part of its general role as provider of the requirements of members of society, has an interest in legalising abortion to meet the requirements of members of society. It is not obvious that, if there is a clash between the demands of the state's role of protector of human life and its role of provider of human requirements that the demands of the latter should always take precedence. Furthermore, it is not clear what is involved in having the general role of protector of human life and whether the state has, or should have such a role. Does Brody mean that the state has a duty to protect the lives of **actually existing** human beings? If so, abortion would be relevant to the fulfilment of this duty only insofar as it might be necessary in order to protect the lives of those who are currently alive. If Brody means that the state has a duty to protect all **potential** human life, then his claim can be dismissed by a **reductio ad absurdum.** If preventing an abortion is thought to be protecting 'the life of a child', then forcing people to copulate when they might otherwise not have done so could equally be seen as protecting the life of a child. We would hardly morally applaud a state in which it was illegal not to have sexual intercourse when it was physically possible to do so. Hence, even if one argues that abortion is, in some sense, the taking

13. Ibid, p. 363.

or preventing of a human life, one is not committed to the view that abortions should be illegal.

It might be thought that the situation would be different where an obligation not to have nor to promote an abortion was considered to correspond to someone's right not to have his body aborted. It does not make sense to say that a fetus has rights since a fetus is merely a partially developed human body; but it does make sense to say that the person whose body a fetus might become can have rights. What if we were to say that we have obligation not to have nor to promote an abortion where such a person is said to have a corresponding right not to have his partially developed body aborted? Different moral issues might be thought to arise when the conservative view on the morality of abortion is expressed in this way. Nevertheless, I think that one could accept this view and also maintain that abortions should not be illegal.

> According to Mill:
> When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider to be a sufficient claim, on whatever account, to have something guaranteed to him by society we say that he has a right to it. If we desire to prove that anything does not belong to him by right, we think this done as soon as it is admitted that society ought not to take measures for securing it to him, but should leave him to chance, or to his own exertions ... To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.[14]

If we agreed with Mill's views of rights and considered that a person had a right not to have his body aborted, we would say that abortion should be illegal.

However, Mill's view of rights is debatable. It is not clear that to say that someone possesses a particular moral right is to say that what he possesses should be protected by law: that he should be accorded a corresponding legal right. Suppose that I promise someone that I will meet him at a particular place at midnight. We would say that I have an obligation to appear at midnight and that he has a corresponding right to my appearing. If the stipulated time arrived and I had decided to stay at home and watch television, then I would not have fulfilled my obligation and the person's right would have been violated. Although we would morally condemn my failure to appear, we would hardly be likely to want my non-appearing to be punished legally nor to say that I had committed what should be a crime and nor, on that

14. J.S. Mill, 'Utilitananism', Collins, London, (1962) at p. 309.

account, to deny that the person had a right to my appearing. Some people would claim that married people have a right against their spouses that they are sexually faithful. Yet, people who adopt this view need not also say that adultery should be a criminal offence. Similarly, one might adopt the conservative view on the question of the morality of abortion and say that the person whose body a fetus might become has a moral right not to have his body aborted without thereby claiming that abortion should be illegal.

There is, perhaps, a temptation to think that, if the person whose body a fetus might become has a right not to have his body aborted, then this right should be protected by the state on the grounds that the person concerned is quite powerless to protect it himself. I think that the temptation can be resisted.

Suppose that one were to promise a friend never to reveal some particular secret. Then we would have a duty not to reveal the secret and he would have a right not to have his confidence betrayed. Obviously, our dead friend would be powerless to protect his right. Nevertheless, this does not seem to be a reason for saying that it should be illegal to break our trust and violate our dead friend's right. Living people often have rights which they are powerless to defend but which we do not consider should be made legal rights. If I promise to meet someone at midnight, he could be quite powerless to influence whether I appear at the specified time and place. Yet, this seems no reason either for denying that the person has a moral right to my appearing or for saying that my non-appearing should be made a crime. Similarly, we could say that, although a person is quite powerless to protect his right not to have his body aborted, abortion should not be illegal.

V

Let us call the view that abortions should be legally available to all those who desire them the extreme liberal view on the morality of abortion law and the view that, at least in general, abortions should be illegal the extreme conservative view on the morality of abortion law. As we have seen, the extreme liberal view of the morality of abortion is quite compatible with either the extreme liberal or the extreme conservative view on the morality of abortion law. Similarly, it is quite consistent to adopt the extreme conservative view on the morality of abortion and either the extreme liberal or the extreme conservative view on the morality of abortion law. One would require different grounds for justifying, say, the liboral view on the morality of abortion than for justifying the liberal view on the morality of abortion law. Given that this is so, the abortion debate would be illuminated by a more widespread realisation on the part of the protagonists that there is not merely one but two basic and quite separate questions involved.

As we have seen, Brody suggests not only that the question of the morality of abortion and that of the morality of abortion law are inseparable but that they do not appear to be able to be settled rationally because of what he considers to be a problem of the ontological status of the fetus.

> One of the most frustrating aspects of discussions about abortion is the way in which they rapidly turn into a discussion of the status of the foetus and of whether destroying the foetus constitutes the taking of human life. Since these latter questions seem difficult, if not impossible to resolve on rational grounds, frustration results...it looks as if the legal problem about abortion cannot be resolved independently of the status of the fetus problem.[15]

Not only can the question of the ontological status of the fetus be settled rationally, but the answer is quite uncontroversial. A fetus is a partially developed human body. It might become the body of a living person. It is controversial and difficult to decide rationally at what stage a fetus becomes the body of a living person; but, since rights are due not only to living persons and not all obligations correspond to other people's rights it need not be thought necessary, nor even relevant to decide this issue when considering the morality of abortion. And similarly, there is no apparent reason why we need know anything more about the fetus than is common knowledge in order rationally to consider the question of whether abortion should be legal. The question is: are there better reasons for saying that abortion should be legal or for saying that it should be illegal? Why need we know anything about the fetus other than that it is a partially developed human body in order to consider the question? Even if we did know more about the ontological status of the fetus than we do, it is not clear if and how this would be relevant to the question of whether abortion should be legal. For instance, suppose that it were established that a fetus becomes the body of a living person, say, ten weeks after conception. I do not see why this would provide us with a good reason either for favouring or disfavouring the legalisation of abortion any more or any less than the establishment of the fact that a fetus becomes the body of a living person ten seconds, ten months, or ten years after conception.

15. Op. Cit., p. 357.