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EDITORIAL

The editorship of the *Nottingham Law Journal* may have changed but in all other respects it is business as usual. We remain committed to making the *Journal* a high quality publication and are as keen as ever to encourage submissions which fully reflect the diversity of modern day legal scholarship. Bearing in mind the nature of our mission here at Nottingham Law School, I am particularly keen for the *Journal* to develop a focus on the theory and practice of legal education. This is reflected in the Book Review and Nottingham Matters sections of the current issue. My hope is that, over time, the *Journal* will establish itself as an outlet for work in this important field. However, in the time-honoured phrase, this is entirely "without prejudice to the generality of the foregoing". The *Journal* is, and will remain, a general legal journal. I should add that our intention, starting with this issue, is to change the publication cycle from Summer/Winter to Spring/Autumn, the aim being to try and ensure that two issues appear within the calendar year. Finally, I would like to express my deepest thanks to the production team – Jane Ching, Kay Wheat, Tom Lewis and Lesley Comerie – for their unstinting support.

ADRIAN WALTERS

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EMBRYONIC STEM CELL RESEARCH: THE PRINCIPAL ETHICAL ISSUE – WHEN DOES LIFE BEGIN?

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INTRODUCTION

Embryonic stem cell research is perhaps the most controversial ethical issue of the new century. This is not surprising. It promises unprecedented potential benefits to human health but arguably comes at the expense of violating the most fundamental moral virtue - the right to life. The debate has become increasingly emotive. The Catholic Church has labelled stem cell research as cannibalism.[1] This has led perhaps the world's most famous moral philosopher, Peter Singer, to label the Church, which has over a billion followers, as irrelevant.[2]

The principal purpose of this paper is not to discuss all of the relevant moral issues in the embryonic stem cell debate. Considerations of space do not permit this and in any event there are numerous reports which *catalogue* the relevant issues.[3] Rather we attempt to identify the *crux* of the issues in the debate. In our view, the main issue is the point at which life commences. We offer some preliminary observations on this matter. This discussion appears in section four. In the next section, we provide a brief

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[1] See D. Wroe, "Human Cloning will be the Next Step: Churches", *The Age* (Melbourne), 6 April 2002.

[2] P. Singer, "Why we should ignore the Catholic Church on stem cells", *The Age* (Melbourne), 29 March 2002. It is noteworthy that Singer is hypocritical on this point. He argues that the position adopted by the Church is only relevant to those who *already* accept the moral and religious framework of the church. The same point equally applies to Singer's views. It will only strike a chord with those who *accept* a utilitarian position (*i.e.*, the theory adopted by Singer) or at least those who accept that moral judgments are the ultimate norms by which conduct is to be evaluated. It has never been established, however, that people are logically committed to this view. Some people merely refuse to engage in moral dialogue. If this is the case, no reason or logic can compel them to do otherwise. For a discussion concerning the limits of ethical discourse, see M. Bagaric, "A Utilitarian Argument: Laying the Foundation for a Coherent System of Law" (2002) 10 *Otago Law Review* 163.

[3] See for example J. Savulescu, "The Ethics of Cloning and Creating Embryonic Stem Cells as a Source of Tissue for Transplantation: Time to Change the Law in Australia" (2000) *30 Australian and New Zealand Journal of Law and Medicine* 492; House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Human Cloning: Scientific, Ethical and Regulatory Aspects of Human Cloning and Stem Cell Research* (August 2001) ("Andrews Committee Report"). This report is available on-line at http://www.aph.gov.au/house/committee/laca/humancloning/.contents.htm; Australian Health Ethics Committee, *Scientific, Ethical and Regulatory Considerations Relevant to Cloning of Human Beings* (1998); D. Nicol, B. Gogarty and D. Chalmers, "Human Cloning and Stem Cell Research" (2001) 10(3) *Australian Health Law Bulletin* 25; A. Bruce, "The Search for Truth and Freedom: Ethical Issues Surrounding Human Cloning and Stem Cell Research" (2002) 9 *Journal of Law and Medicine* 323.

overview of nature and potential benefits of stem cell research. This is followed by a discussion of the current legal position. In the final section, we offer some concluding remarks including some suggestions for law reform.

At the outset, it is important to note that the normative discussion of stem cell research is principally devoted to considering the arguments *against* the practice. We do not discuss at length the arguments in favour of the practice. This is for two reasons. First, as we detail in the following section, the possible good consequences are patently obvious. Secondly, and more importantly, we believe that the virtue of liberty should rank highly in moral debate.[4] This entails that all acts and practices should be presumed to be morally permissible unless sound reasons are provided to the contrary. The same point is made in the context of the cloning debate by Russell Blackford:

> In a modern liberal democracy ... there is an onus, which should not be met easily, on those who wish to use the state's power to suppress particular activities, techniques or investigations, however unpopular .... [S]ome rationally compelling justification must always be given for the enactment of legislative prohibitions.[5]

THE NATURE AND POTENTIAL BENEFITS OF STEM CELL RESEARCH

Nature of Stem Cell Research

Broadly there are two different forms of stem cell research. The first involves using stem cells obtained from embryos – either through (therapeutic) cloning or using surplus embryos from assisted reproductive technology (ART) programmes. In each case this involves destroying the embryo. The second involves using stem cells obtained from adults. The majority of scientists and ethicists agree that adult stem cell research is morally permissible, yet at this stage the science is unreliable, and the potential of such research is unclear. The advantage of adult stem cell research over embryonic stem cell research is that it does not involve the destruction of a foetus or any other entity. The principal focus of this paper is on embryonic stem cell research. Unless expressly indicated to the contrary, this is what we mean by stem cell research – we do not distinguish between cloned embryos and surplus ART embryos.

We acknowledge that many believe that there are stronger arguments for using excess embryos produced for IVF than using embryos deliberately created for use in research.[6] This paper does not, however, consider the persuasiveness of distinctions that can possibly be made between such practices. We contend that the principal issue

[4] The most famous statement of this principle is by J. S. Mill: "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant". (J. S. Mill, "Utilitarianism" in M. Warnock (ed), *Utilitarianism* (Fontana Press, Glasgow, 1986, first published 1859), at p. 135. The courts, too, have heavily endorsed the central role of personal liberty: "[T]he right to personal liberty is ... the most elementary and fundamental of all common law rights. Personal liberty was held by Blackstone to be an absolute right vested in the individual ... he warned 'of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any ... magistrate to imprison arbitrarily ... there would soon be an end of all other rights and immunities' ", cited in *R.* v. *Williams* (1986) 161 C.L.R. 278 at 292 (Mason C.J. and Brennan J.). More recently, see Lord Mustill in his dissenting judgment in *R.* v. *Brown* [1993] 2 W.L.R. 556 at 600.

[5] R. Blackford, "Thinking about Cloning: A Reply to Judith Thomson" (2001) 9 *Journal of Law and Medicine* 238 at 239–40.

[6] See, for example, the Andrews Committee Report, above, n. 3. This report cites other similar reports in the United Kingdom and United States. See also Australian Health Ethics Committee, above n. 3.

in relation to all embryo experimentation is the point at which life commences. Logically, it is only once this issue is resolved that subordinate moral issues and distinctions should be tackled.

Potential Benefits of Stem Cell Research

The promises of stem cell research are quite immense. The potential of embryonic stem cells lies in their "pluripotentiality", meaning that they have the ability to develop from undifferentiated cell mass into all or nearly all of the tissues in the human body. Scientists are currently trying to determine how to control the differentiation process so that embryonic stem cells can be used in the most therapeutically effective manner. The potential scientific and medical benefits of the pluripotentiality of embryonic stem cells are enormous. Embryonic stem cells have the potential to cure a number of cell-based diseases (such as Parkinson's, Alzheimer's, diabetes and heart disease) through utilising stem cell lines derived from research. Insulin-secreting cells, for example, could be used for the treatment of diabetes, and nerve cells could be generated for the treatment of Parkinson's disease. Embryonic stem cells could also potentially be used to develop tissue that can be transplanted into patients to repair failing organs (such as the liver or kidney).

Furthermore, it is expected that human embryonic stem cell technology will be important for its practical application in the area of drug discovery (as the stem cells can be used to measure how specific cell types respond to being treated with chemicals), and will be important for undertaking study into early stages of human development. According to a recent research paper prepared by the University of Wisconsin (U.S.A.), a much greater understanding of the early stages of development will also be important for determining what can be done to prevent birth defects, pregnancy loss and infertility.[7]

Research on embryonic stem cells is still, however, at its preliminary stage, and much further research is still necessary to determine how most effectively to control the differentiation of stem cells, and to make sure that the use of stem cells for a range of scientific, medical and commercial applications will be both safe and reliable.

Research into adult stem cells is also considered to have medical promise, but the orthodox medical view has been that the benefits are not likely to be as dazzling as those from embryonic stem cells. The main difficulties with research on adult stem cells are considered to be that their ability to regenerate is limited, they are much harder to isolate compared to embryonic stem cells, and they are difficult to control in a laboratory (making it difficult to obtain clinically significant amounts for research purposes).[8]

Recent findings, however, seem to indicate that the therapeutic promise of adult stem cell research may have been underestimated. As is noted in the Andrews Committee Report:

> There is growing understanding that adult stem cells may be more flexible than previously thought. Recent research has shown that adult stem cells can differentiate into developmentally unrelated cell types such as nerve and blood cells. . . . "Lineage defined progenitor cells [stem cells] in adult tissue may be more plastic than hitherto thought They might have the capacity to de-differentiate, or be reprogrammed becoming totipotent stem cells" (references omitted).[9]

[7] University of Wisconsin-Madison, "Embryonic Stem Cells", 2001. Available on-line at http://www.news.wisc.edu/packages/stemcells/?get=facts.

[8] See D. Nicol *et al*, above n. 3, at 30.

[9] Para 3·48.

In addition to this, there are also some possible advantages that adult stem cells may offer over embryonic stem cells. They could be harvested relatively simply and transformed in the laboratory and transferred back to the patient, thereby avoiding rejection problems.[10] Ultimately, however, it is too early to determine if adult stem cells offer the same promise as embryonic stem cells.[11]

CURRENT LEGAL POSITION

Before proceeding to explain why the law regulating stem cell research should be revised to address the issue of at what point human life commences, it is instructive first to outline the current state of the law in various jurisdictions. As the authors reside in Australia, the main focus with be the current position in Australia, however the position in the United States and Britain is also explored.

Overview

At the time of writing, the regulation of stem cell research in Australia is "confused, inconsistent and ad hoc".[12] There are only three states in Australia (Victoria, South Australia and Western Australia) with legislation in place dealing with research involving embryos. In the remaining states and territories (New South Wales, Queensland, the Australian Capital Territory and Northern Territory) where there is no legislative framework in place regulating embryonic research, regulation occurs through non-legislative means.[13] This primarily involves compliance with the Guidelines on Assisted Reproductive Technology (1996) produced by the National Health and Medical Research Council (NHMRC Guidelines).[14] It is the responsibility of research institutions to monitor compliance with these NHMRC Guidelines by establishing in-house institutional ethics committees. Infringement of a provision in the NHMRC Guidelines does not constitute an offence; rather, breaching the Guidelines may mean that the infringing persons will lose their funding from the NHMRC, or could have their names published in Parliament.[15] The recent Australian House of Representatives Committee (Andrews Committee) examining the regulation of human cloning and stem cell research, chaired by Kevin Andrews M.P., observed in its report that the loss of research funding by the NHMRC has not proven to have had much influence in terms of ensuring compliance with the NHMRC Guidelines.[16]

The Andrews Committee also observed that there is no legislative framework at a federal level regulating research into stem cells. The Andrews Committee observed that the only federal legislation that may be relevant to stem cell research is legislation

[10] Andrews Committee Report, para 3·61.

[11] See comments by American Academy for the Advancement of Science, submission to President Bush: http://www.aaas.org/spp/dspp/sflr/projects/stem/bushltr.htm, 6 March 2001.

[12] See Andrews Committee Report, para 9·42.

[13] See Chapter 9 of the Andrews Committee Report for a discussion.

[14] The most important guidelines in relation to the regulation of stem cell research are 6·2, 6·4 and 11. Guideline 6·2 relates to "therapeutic" research involving embryos (meaning doing something to the embryo with the intention of having a therapeutic outcome for the embryo), stating that: "Embryo experimentation should normally be limited to therapeutic procedures which leave the embryo, or embryos, with an expectation of implantation and development". Guideline 6·4 relates to "non-therapeutic" research (meaning research on the embryo which is not directed at the embryo's well-being but the well-being of some other technology), and specifies that such research should only be approved by an institutional ethics committee in "exceptional circumstances". Guideline 11 includes a list of practices that are considered "ethically unacceptable and should be prohibited". Included in this list is the development of human embryonic stem cell lines with the aim of producing a clone of individuals. See further, Andrews Committee Report, para 9·9-9·16.

[15] See Andrews Committee Report, para 9·5.

[16] See Andrews Committee Report, para 9·8.

dealing with products resulting from the research, such as intellectual property under the Patents Act 1990,[17] and the Privacy Act 1988 which would protect genetic information and samples from an individual derived from extracted stem cells.

Victorian position

Out of each of the three states with a legislative framework for regulation of embryo research in place, Victoria's is probably the least effective in dealing with stem cell research. The Infertility Treatment Act 1995 (Vic.), administered by the Infertility Treatment Authority (the ITA), deals mainly with the regulation of assisted reproductive technology, but also covers experimentation on embryos.

Section 3 of the Act defines "embryo" as "any stage of human development at and from syngamy", and "syngamy" is defined as "that stage of development of a fertilised oocyte where the chromosomes derived from the male and female pronuclei align on the miotic spindle". While section 22 of the Act sets out the conditions under which research into human embryos may be undertaken, and section 24 bans "destructive research" on embryos,[18] research into stem cells is not covered by the Act. As the ITA noted in its May 2000 *ITA News*, stem cells do not fall within the definition of embryo or gamete under the Act, and therefore the ITA has no statutory power under the Act to prescribe certain action or requirements regarding the use of stem cells in Victoria.[19]

South Australian position

South Australia's Reproductive Technology Act 1988 sets out a much clearer, though quite restrictive, system for the regulation of experimentation involving embryos. As in Victoria, the Act (which is administered by the South Australian Council on Reproductive Technology) mainly regulates assisted reproductive technology, but does set out a licensing procedure for those that wish to engage in experimentation involving embryos. Section 14 of the Act prohibits research involving "human reproductive material" except pursuant to a licence. Human reproductive material is defined widely under section 3 as "human embryo, human semen and human ovum", yet it appears, as in Victoria, that research involving stem cells is not regulated by the Act.[20] There are, however, more substantive provisions that do extend to regulating research into, and use of, stem cells contained in the Reproductive Technology (Code of Ethical Research Practice) Regulations 1995, made under the Act.[21]

Western Australia

As in Victoria and South Australia, Western Australia's Reproductive Technology Act 1991 deals predominantly with the regulation of assisted reproductive technology, though it sets out a licensing system for those who wish to carry out embryo research.

[17] Note, however, s. 18(2) of the Patents Act 1990 which prohibits patenting "human beings, and the biological processes for their generation". While there has been no judicial consideration of s. 18(2), in its submission to the Andrews Committee IP Australia stated that it would not grant patents for human beings, embryos, fertilised ova, or wholly biological processes that begin with fertilisation and end with the birth of a human being. See Andrews Committee Report, para 8·74.

[18] For the purposes of s. 24 of the Infertility Treatment Act 1995, destructive research is defined as "research on an embryo if it is unfit for transfer to a woman, or in the case of an embryo that is fit for transfer to a woman, the research would harm the embryo, reduce the likelihood of a pregnancy resulting from the transfer of the embryo or make the embryo unfit for transfer to a woman".

[19] See Andrews Committee Report, para 8·52.

[20] *Ibid.*, para 8·59.

[21] *Ibid.*, para 8·57.

The Act, administered by the Commissioner of Health on advice from the Western Australian Reproductive Technology Council, contains strict regulations, which means that very little embryo research is actually approved.[22]

Council of Australian Governments Agreement

Out of recognition of the fact that effective regulation of stem cell research cannot be achieved by way of the complicated and inconsistent system that exists at both a federal and state level in Australia at present, on 5 April 2002 the Council of Australian Governments (COAG) agreed that the Australian Government, plus the states and territory governments would introduce nationally-consistent legislation principally to regulate the use of stem cell research. The nationally-consistent legislation was originally expected to be implemented by the end of 2002 but, at the time of writing, it was still to be enacted. It will permit research involving the use of excess assisted reproductive technology embryos that would otherwise have been destroyed, but prohibit the creation of human embryos after 5 April 2002 for the purpose of stem cell research (a practice known as "therapeutic cloning"). For the purposes of the nationally-consistent legislation, "human embryo" means "a single living organism which has a mixed genetic origin as a consequence of combining cells derived from humans and other species".

The COAG agreed that research on embryos would only be allowed under a strict regulatory regime, requiring that the consent of donors be obtained (with the donors being able to specify certain restrictions on the way in which their embryos are used), and that the embryos to be used must have been in existence at 5 April 2002. The proposed nationally-consistent legislation is to be administered by the NHMRC. The NHMRC will be able to issue a licence for a person to use excess embryos from an assisted reproductive technology programme, even though the research or therapy would damage or destroy the embryo. For a licence to be issued, the NHMRC will need to be satisfied that the proposed research or therapy has the approval of an ethics committee established, composed and conducted according to NHMRC guidelines, and that:

(1) there is a likelihood of significant advance in knowledge or improvement in technologies for treatment as a result of the proposed procedure; and
(2) the significant advance in knowledge or improvement in technologies could not be achieved by other means; and
(3) the procedure involves a restricted number of embryos and a separate account of the use of each embryo is provided to the ethics committee and the national licensing body; and
(4) all tissue and gamete providers involved and their spouses or domestic partners, if any, have consented to research for each embryo used, including restrictions, if they wish, on the research uses of such embryos; and
(5) the embryo had been created prior to 5 April 2002.[23]

[22] See *ibid.*, para 8·64. Section 7 of the Act lists a range of offences, which includes conducting unapproved research or diagnostic procedures with an egg in the process of fertilisation or an embryo. Section 14(2) of the Act sets the requirement that embryo research must be intended to be therapeutic and not likely to harm the embryo, and s. 17(b) directs that the Reproductive Technology Council shall prohibit the development of any egg in the process of fertilisation or any embryo other than with a view to its future implantation into a particular woman.

[23] *Arrangements for Nationally-Consistent Bans on Human Cloning and Other Acceptable Practices, and Use of Excess Assisted Reproductive Technology (ART) Embryos*, Appendix 1 "Regulatory Regime Criteria for Research Uses of Excess Assisted Reproductive Technology (ART) Embryos". This document is available on-line at http://www.pm.gov.au/news/media_releases/2002/media_release1588.htm.

The regulation requiring all Australian governments to restrict the use at a national level of embryos created after 5 April 2002 will cease to have effect in three years once enacted (unless an earlier time is agreed by COAG) and the nationally-consistent regulations will be reviewed within two years. COAG also agreed to establish an Ethics Committee to report to COAG within one year on protocols to preclude the creation of embryos specifically for research purposes, and has required that the NHMRC report within one year on the adequacy of supply and distribution for research of excess assisted reproductive technology embryos which would otherwise have been destroyed.

On 27 June 2002, Australian Prime Minister John Howard introduced the Research Involving Embryos and Prohibition of Human Cloning Bill 2002 in the House of Representatives. This Bill is designed to reflect the principles agreed to by the COAG. On 29 August, the House of Representatives voted to amend this Bill by dividing it into two separate pieces of legislation: the Research Involving Embryos Bill 2002 and the Prohibition of Human Cloning Bill 2002. As the Research Involving Embryos Bill 2002 covers the regulation of stem cell research, attention will be given to this Bill.

Part 2 of the Bill deals with the "regulation of certain uses involving excess ART [assisted reproductive technology] embryos". An "excess ART embryo" is defined in clause 9 of the Bill as:

> (1) ... a human embryo that
> (a) was created, by assisted reproductive technology, for use in the assisted reproductive technology treatment of a woman; and
> (b) is excess to the needs of:
> (i) the woman for whom it was created; and
> (ii) her spouse (if any) at the time the embryo was created.
> (2) For the purposes of paragraph (b) of the definition of excess ART embryo, a human embryo is excess to the needs of the persons mentioned in that paragraph at a particular time if:
> (a) each such person has given written authority for use of the embryo for a purpose other than a purpose relating to the assisted reproductive technology treatment of the woman concerned, and the authority is in force at the time; or
> (b) each such person has determined in writing that the embryo is excess to their needs, and the determination is in force at the time.

Clause 7 of the Bill provides that "human embryo", for the purposes of the Bill, means:

> a live embryo that has a human genome or an altered human genome and that has been developed for less than 8 weeks since the appearance of 2 pro-nuclei or the initiation of its development by other means.

Division 3 of Part 2 of the Bill proposes to establish an Embryo Research Licensing Committee of the NHMRC which would have the primary function of determining applications for a licence authorising the use of excess ART embryos. It will be an offence to use to an excess ART embryo without a licence or in breach of a licence condition, and it will also be an offence intentionally to use an human embryo other than an excess ART embryo unless the use is part of an ART program carried out by an accredited ART centre.

At the time of writing, the Bill had been debated and passed by the House of Representatives, though it had yet to be passed by the Senate. It was, however, anticipated that there was sufficient support for the Bill to ensure that it would be

passed in the Senate and subsequently enacted. Given that the application of the Bill, if enacted, will be limited by the constitutional powers of the federal government,[24] the states and territories will have to introduce complementing legislation so that a truly national scheme can be implemented.

An evaluation of COAG's approach to the regulation of stem cell research therefore really must wait until legislation is passed by the federal government, states and territories in response to the nationally-consistent principles outlined by COAG. We can at least be certain, however, that COAG's approach does address the fundamental problem with the present system of regulation, being the inconsistency across the country as to the manner in which research into, and use of, stem cells is regulated. Indeed, the primary recommendation of the Andrews Committee was that a national uniform legislative approach was needed.[25]

Despite this, there are still a number of problems with the nationally-consistent regulatory framework proposed by COAG. The first is that although there is a rather wide definition of human embryo in the COAG agreement, this definition does not specify clearly when a human embryo comes into being. We believe that clear specification is necessary in order to ensure a degree of certainty for researchers as to whether their particular research or therapy project is regulated by the national legislation or not.[26] Secondly, the proposed national framework does not deal with the import and export of stem cells for research and therapeutic purposes. The Andrews Committee recommended in its report that the importation of embryonic stem cells should only be allowed where the derivation of the cell lines complied with the Australian regulatory framework.[27] We agree with the Committee, and believe that as surplus embryo research will be allowed under the national regulatory framework, there should be provisions in place which make it clear that the import and export of stem cells for research and therapeutic purposes will be allowed only if this complies with the nationally-consistent principles. Finally, we do not believe there to be any legitimate reason to distinguish between embryos for assisted reproductive technology purposes in existence prior to 5 April 2002, and embryos coming into being at any time thereafter that are surplus to the requirements of assisted reproductive technology programmes. In our view, the argument that this would facilitate therapeutic cloning in a disguised form is not convincing if regulations relating to assisted reproductive technologies are strictly monitored and adhered to. We also dismiss the argument that allowing the use of surplus embryos created after 5 April 2002 would somehow undermine the very notion of humanness and the principle of human dignity.

[24] Clause 4 of the Research Involving Embryos and Prohibition of Human Cloning Bill 2002 provides that the Bill will apply to the following:
(1)
(a) to things done, or omitted to be done, by constitutional corporations;
(b) to things done, or omitted to be done, in the course of constitutional trade or commerce;
(c) to matters within the legislative power of the Commonwealth under paragraph 51 (xxix) of the Constitution;
(d) to the Commonwealth and Commonwealth authorities;
(e) for purposes relating to the collection, compilation, analysis and dissemination of statistics;
(f) to matters within the legislative power of the Commonwealth under paragraph (xxxix) of the Constitution, so far as it relates to the matters mentioned in paragraphs (a) to (e) of this subsection.
(2) In this section:
constitutional corporation means a trading, foreign or financial corporation within the meaning of paragraph (xx) of the Constitution.
constitutional trade and commerce means trade or commerce:
(a) between Australia and places outside Australia; or
(b) among the States; or
(c) by way of the supply of services to the Commonwealth or to a Commonwealth authority.

[25] See Andrews Committee Report, at para 12·4.

[26] See D Nicol, *et al*, above, n. 3, at 30.

[27] See *ibid.*, 31; Andrews Committee Report, at para 7·121.

United States

The regulation of stem cell research in the United States has changed quite significantly since 9 August 2001 when the U.S. President, George W. Bush, announced his approval for research into about 60 genetically diverse lines of embryonic stem cells in existence.[28] The President agreed to allow federal funds, administered by the National Institute of Health (NIH), to be used for research on existing embryonic stem cell lines as long as, prior to this announcement:

(1) the derivation process (which commences with the removal of the inner cell mass from the blastocyst) had already been initiated; and
(2) the embryo from which the stem cell was derived no longer had the possibility of development as a human being.

In addition, the President established the following criteria that must be met in order for a particular research project to receive NIH funding:

(1) the stem cells must have been derived from an embryo that was created for reproductive purposes;
(2) the embryo must no longer be needed for these purposes;
(3) informed consent must have been obtained for the donation of the embryo; and
(4) no financial inducements were provided for the donation of the embryo.

While the President's funding plan was considered to be ambitious and quite revolutionary, it contains some obvious limitations. First, the President's plan only regulates stem cell research when the particular research project is seeking federal funding. If a research project does not require federal funding, then it does not need to adhere to the requirements contained in the President's plan. Secondly, the U.S. President's announcement is limited to stem cell lines derived from stem cells that have already been destroyed. Accordingly, the U.S. regulation of stem cell research is far more restrictive than the position in Australia under COAG's nationally-consistent principles, which allow for the damage or destruction of embryos so long as they are surplus to assisted reproductive technology procedures. Finally, although in his announcement the President acknowledged the enormous potential of research into umbilical cord placenta, adult stem cells and animal stem cells and devoted U.S. $250 million to such research,[29] he did not address how his government intended to regulate this research in the short term and then further into the future. We believe that this is a grave omission in the President's plan, particularly given the "great scientific progress"[30] which the President stated this research would generate.

United Kingdom

In the United Kingdom, a clear and workable system for the regulation of embryonic stem cell research was introduced by the Human Fertilisation and Embryology (Research Purposes) Regulations 2001, which came into force on 31 January 2001.[31] The Regulations, administered by the Human Fertilisation and Embryology Authority, set in place a licensing system for the purposes of:

[28] See further Andrews Committee Report, para 10·71–10·72; Bruce, above, n. 3, at 324.

[29] See the U.S. President's Remarks on Stem Cell Research. Available on-line at http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html

[30] *Ibid.*

[31] S.I. 2001/188. See Andrews Committee Report, at para 10·92–10·97.

(1) increasing knowledge about the development of embryos;
(2) increasing knowledge about serious disease; and
(3) enabling any such knowledge to be applied in developing treatments for serious diseases.

The advantage of these new regulations, compared to the Australian and United States position, is that the operation of the regulations is designed to be wide enough to cover all forms of stem cell research. Any type of stem cell research could be for one or more of the three purposes above (*e.g.*, it could be convincingly argued that adult or animal stem cell research will lead to increased knowledge about serious disease, or that embryonic stem cell research could increase knowledge about the development of embryos). Furthermore, the framework for regulation is not confined to publicly-funded research. There is no link between the regulation of research and the provision of funding. Any form of stem cell research requires a licence pursuant to the regulations, and therefore the regulations apply to all forms of stem cell research.

THE MORAL STATUS OF STEM CELL RESEARCH

In relation to most morally questionable practices, there are broadly two types of objections that can be raised. First, it can be argued that the practice is intrinsically wrong. Arguments along such lines are normally made against the background of a non-consequential (or deontological) normative theory.

The leading contemporary non-consequentialist theories are those framed in the language of rights. Following the Second World War, there has been an immense increase in "rights talk",[32] both in terms of the number of supposed rights that exist and in terms of total volume. Rights doctrine has progressed a long way since its original aim of providing "a legitimization of . . . claims against tyrannical or exploiting regimes".[33] There is now, more than ever, a strong tendency to advance moral claims and arguments in terms of rights.[34] Assertion of rights has become the customary means to express our moral sentiments. As Sumner notes: "there is virtually no area of public controversy in which rights are not to be found on at least one side of the question – and generally on both".[35] The domination of rights talk is such that it is accurate to state that human rights have at least temporarily replaced maximising utility as the leading philosophical inspiration for political and social reform.[36]

The other broad type of moral objection is that although an act does not necessarily violate any moral norms, it is undesirable because of the bad consequences that will follow from the act: either directly or more remotely. Consequentialist moral theories normally underpin such claims. There has been a range of consequentialist moral

[32] See T. Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing, Aldershot, 1996) at p. 161–88, who discusses the near universal trend towards Bills of Rights and constitutional rights as a focus for political choice. By "rights talk" we also include the abundance of declarations, charters, bills, and the like, such as the Universal Declaration of Human Rights (1948); the International Covenant of Economic, Social and Cultural Rights (1966); and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1966), that seek to spell out certain rights. Numerous examples of rights-based language did indeed exist prior to the Second World War, such as the Declaration of Independence of the United States (1776) and the Declaration of the Rights of Man and Citizens (1789); yet it is only in relatively modern times that such documents have gained widespread appeal, recognition and force.

[33] S. I. Benn, "Human rights – For Whom and For What?" in E. Kamenka and A. E. Tay (eds.), *Human Rights* (Edward Arnold, Melbourne, 1978) at pp 59, 61.

[34] Almost to the point where it is not unthinkable to propose that the "escalation of rights rhetoric is out of control": see L. W. Sumner, *The Moral Foundation of Rights* (Oxford, 1987) at p.1.

[35] *Ibid.*

[36] H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford, 1983) at p. 196–7.

theories advanced, such as egoism and utilitarianism. We believe that the most cogent of these theories (and certainly the most influential in moral and political discourse) is hedonistic act utilitarianism, which provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.[37] Given the diversity of human nature, there is obviously some degree of uncertainty concerning the precise nature of things that make people happy. John Stuart Mill suggested, for example, that liberty is crucial to human flourishing:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[38]

Recent empirical studies concerning subjective feelings of well-being suggest a surprising convergence in the things that make people happy. For example, a key to happiness seems to be companionship, which is far more important than material goods. Professor Lane has found that contrary to economists' belief that income (together with leisure) is the source of all good, evidence shows that companionship, which does not pass through the market, has higher utility and contributes more to well-being than does income.[39] It is suggested that our need for companionship is part of our biological endowment. If we ignore our biological need for each other, we risk physical and mental distress.[40] Also, the more challenged a person is, whether by a job, hobby or sport, the happier he or she is likely to be. In this regard, the freedom to pursue one's projects is central to happiness.[41]

Apart from noting that the notion of happiness is not as subjective and indeterminate as many have previously believed, the precise content of the things that make people happy is not relevant for the purposes of this paper. This is because the principal interest at stake in the context of the stem cell research debate, the right to life, is logically a precursor to enjoyment or fulfilment of all other interests.[42]

We now examine the principal objections that can be made against stem cell research in the context of each of these theories.

Non-consequentialist Arguments against Stem Cell Research

The first line of attack available to those who oppose stem cell research is to argue that the practice necessarily violates some important norm, making it inherently morally wrong. The claim that a certain practice is intrinsically morally wrong has been used with some degree of success by those opposed to euthanasia and abortion. It has been argued that euthanasia and abortion are wrong because they violate the right to life, of the patient and foetus, respectively. The important feature of this type of objection is that it does not rely on the potential incidental (undesirable) consequences of the respective practices to justify their wrongness. This ensures that the debate concerning the moral status of euthanasia and abortion does not automatically focus on the

[37] For an overview of the merits and disadvantages of the various utilitarian theories, see M. Bagaric, "A Utilitarian Argument: Laying the Foundation for a Coherent System of Law" (2002) 10 *Otago Law Review* 163.

[38] J. S. Mill, "On Liberty" in M. Warnock (ed.), *Utilitarianism* (Fontana Press, 1986, first published 1859) 126, 135.

[39] R. E. Lane, "Diminishing Returns to Income, Companionship – and Happiness" (2000) 1 *Journal of Happiness Studies* 103.

[40] See further, R. E. Lane, *Loss of Happiness in Market Democracies* (Yale University Press, 2000). But see R. A. Cummins, "Personal Income and Subjective Well-being: A Review" (2002) *Journal of Happiness Studies* 133 who argues that there is a stronger link between wealth and happiness.

[41] D. G. Myers, *The Pursuit of Happiness* (William Morrow and Co, 1992).

[42] See further the discussion below concerning the importance of the right to life.

possibility of appropriate safeguards to address incidental undesirable consequences stemming from the practices. Rather, supporters of the practices are forced first to overcome the threshold issue of whether the practices are bad *per se*.

In the context of the stem cell debate, there have been two principal criticisms made along these lines. The first is that the practice is objectionable because it violates the right to life, which is regarded as "the most basic and fundamental of all human rights".[43] Destroying stem cells, it is argued, is no different in principle to killing developed human beings. This sentiment was echoed in the submission by Pro-Life Victoria to the House of Representatives Standing Committee on Legal and Constitutional Affairs during its recent inquiry into the regulation of human cloning and stem cell research in Australia:

> If human beings are created for the purpose of experimentation and then destruction, this creation is itself objectionable and shows flagrant disregard for human rights and the value of human life.[44]

In a similar vein, it has been argued that:

> All embryos that result from the union of male and female gametes are created with a potential to create life. That is the core of our being. To fertilise an ovum just for scientific manipulation and [with that destroy] the embryo's only possible fate, denies that very essence of our humanity.[45]

If this argument is valid, it would constitute a significant blow to stem cell research. As was suggested above, the right to life is the most basic of rights. Logically, non-observance of the right to life would render all other human rights devoid of meaning.[46] Recognition of this is found in the fact that the "the intentional taking of human life is ... the offence which society condemns most strongly".[47] The House of Lords has declared that "this principle, fundamental though it is, is not absolute".[48] There are some well-established exceptions to the right to life, such as self-defence and war. However, stem research cannot be analogised with such practices. In the case of war and self-defence there is at least a perception that the other party is a wrongdoer.

The other main non-consequentialist objection to stem cell research is that it violates Kant's categorical imperative, which is the view that people should always act as if every action were to become a universal law. From this, it follows that we should treat others as ends given that that is how we regard ourselves, and never simply as a means.

> Every human being has a legitimate claim in respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being but must always be used at the same time as an end.[49]

It is argued that to engage in stem cell research is to treat another person as a thing or tool (to promote the health of another person) and not as a moral agent. To engage in stem cell research involves "treating a new human as a commodity like a drug or

[43] S. Joseph, "The Right to Life" in *The International Covenant on Civil and Political Rights and United Kingdom Law*, ed. D. Harris and S. Joseph (1995), 155.

[44] Andrews Committee Report, at p. 109.

[45] Editorial, "Embryo Farms Should Be Put on Hold", *The Australian*, 13 July 2001, cited in Bruce, above, n. 3, at 333.

[46] M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl, 1993), at p. 104.

[47] House of Lords, *Report of the Select Committee on Medical Ethics* vol. 1 (1994), at p. 13.

[48] *Airedale NHS Trust* v. *Bland* [1993] A.C. 789, [1993] 2 W.L.R. 316 at 367 per Lord Goff.

[49] I. Kant, *The Metaphysics of Morals* (M. Gregor, trans., 1996), at p. 209. According to Kant, the key criterion for ascribing moral duties is rationality, not personhood. Stem cells obviously lack the characteristic of rationality, and hence do not have ethical duties, but there is no reason in principle that they cannot have moral standing if they are considered members of the human species.

some other curative process ... and as such offends against the inherent right to life of the new human being, ignoring his/her own individual personality".[50] More emotively, this line of reasoning has lead to the charge of cannibalism: killing one person so that another can flourish.[51]

Consequentialist Arguments against Stem Cell Research

The most direct consequentialist attack that could be levelled against stem cell research is that it results in net diminution in utility because the happiness to the (ultimate, sometimes distant) patient will be outweighed by the unhappiness caused to the stem cell. This argument is obviously flawed. Quite simply a stem cell is incapable of having any experiences, let alone happiness. A narrow consequentialist argument (that is, one that only considers the interests of the parties directly affected) could only be made if the notion of happiness were extended from actual happiness to potential happiness. This would require the balancing of the potential happiness of the embryo against that of the potential patient. Such a balancing exercise, however, does not appear to be plausible. There is simply no coherent manner in which one can weigh the importance of potential happiness - the concept is so indeterminate to be vacuous.

A consequentialist attack on stem cell research can, however, be mounted if one looks beyond the interests of the parties directly affected. To this end, the slippery slope, or the dangerous precedent, argument is often invoked in relation to acts which in themselves are justified, but which have similarities with objectionable practices, and urges that in morally appraising an action we must not only consider its intrinsic features, but also the likelihood of its being used as a basis for condoning similar, but in fact relevantly different, undesirable practices.

The slippery slope argument has been criticised on the basis that it logically prevents change and advancement. It amounts to the principle, so the argument runs, that:

> You should not now do an admittedly right action for fear that you ... should not have the courage to do the right thing in some future case, which *ex hypothesi* is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.[52]

This, however, fails to recognise the real force behind the slippery slope argument, which lies in the human propensity to justify "progress" by analogising from one situation to another, and our fallibility in discerning the relevant and significant factors about the practices we are comparing. The slippery slope argument has been used with a large degree of success in the context of other medico-legal issues, such as euthanasia.[53] From the fact that suicide is not illegal it has been argued that assisted suicide is therefore permissible, hence so too should be passive euthanasia. Given that passive euthanasia is widely practised we should likewise sanction active voluntary euthanasia, because if we are going to stand by as the person dies anyway, surely we should hasten this to make the process as painless as possible. Opponents of euthanasia have then argued that from here involuntary euthanasia is but a short step away.

In the context of the stem cell research debate, it could be argued that stem cell research might promote (if not ingrain) a culture whereby all life is devalued. If the stringency of the prohibition against ending human life in one context is relaxed, by

[50] NSW Right to Life submission to the Andrews Committee Report, at p. 113.

[51] See Wroe, above, n. 1.

[52] F. M. Cornford, *The Microcosmographia Academica* (1908), at p. 23.

[53] See for example, M. Bagaric, "Euthanasia: Patient Autonomy versus the Public Good" (1999) 18 *University of Tasmania Law Review* 146.

permitting stem cell research, there is the risk that it may result in a diminution in the importance accorded to the right to life across the board. Thus legalising stem cell research may promote a culture that more readily tolerates killing human beings when it is convenient to do so. This would reduce the sense of security experienced by all members of the community. More narrowly, it has been suggested that allowing stem cell research may lead to cloning for reproductive purposes.

> Acceptance of such a process raises the ethical issues often referred to as "slippery slope" issues (that is, that in the acceptance of research on human embryos in order to produce desired tissues and organs an irreversible step may be taken that will lead to scientific advances that in turn will make the cloning of human beings more likely to be accepted).[54]

The Importance of the Commencement of Life Issue

Accordingly, there are three principal moral objections to stem cell research. The key aspect to note about these objections is that their persuasiveness largely turns on one issue: when does life begin?

This issue has figured prominently in the abortion debate. But it is arises even more acutely in the context of stem cell research. In the case of abortion, the issue could be feasibly circumvented by the fact that even if the foetus has a right to life this would not necessarily be decisive of the moral status of the practice. There was a *clear* countervailing interest: that of the mother. The capacity of the foetus to exist and continue to develop was contingent upon a duty being imposed upon the woman to carry the foetus for nine months or so.[55] The uncertainty regarding the existence and scope of such a duty allowed, to some extent at least, the right to life issue to be diluted or circumvented.

The community and legislatures do not have the same luxury in the case of stem cell research. The issue of when life begins is clearly the central issue in this debate. In order for the debate on stem cell research to advance in a transparent, informed and honest fashion this issue must be tackled head-on. This is so irrespective of whether one adopts a deontological or consequentialist normative theory. As we saw earlier, there are two key deontological arguments against stem cell research. The first is simply that it violates the right to life. A necessary (though, as discussed below, not necessarily sufficient) pre-condition for this is that the entity (in this case a stem cell) has a life. The Kantian objection also involves the same assumption; *people* (that is, entities in relation to which life has commenced) should not be used as means.[56]

The slippery slope argument can be undermined if a logical (or for that matter pragmatic) distinction can found between destroying embryos for stem cell research and killing (more) developed human beings. If such a distinction can be readily drawn, it would then be possible to quarantine the practice of destroying life or at least entities that have the potential for life to the practice of stem cell research. The most obvious manner in which to distinguish stem cell research from the killing of developed human beings is to assert that stem cells do not have a right to life, while (more developed) human beings do. If a distinction along such lines is not tenable, because stem cell research does violate the right to life, at the very least, the most tenable basis upon which to refute the slippery slope argument will have been thwarted.[57]

[54] Australian Health Ethics Committee, above, n. 3, para 3·17. See also Andrews Committee Report, at p. 114–115.

[55] See for example, J. Thomson, "A Defence of Abortion" in P. Singer (ed.) *Applied Ethics* (OUP, 1986) at p. 49, where she argues that a woman's right to determine what happens with her body is the most relevant consideration in determining the morality of abortion.

[56] The same point is also made by Blackford, above, n. 5, at 245.

[57] This would not necessarily mean that the slippery slope argument is sound since there may yet be other grounds upon which, as a logical or pragmatic matter, a distinction can be made.

So When Does Life Begin?

There are several points at which it could be claimed that life exists. Three of the most common views are that life begins at birth, at some point during the (normal) gestation process or at conception.[58]

Birth

The strongest argument in favour of birth is that this is the point where the being can to some extent enjoy an independent existence: at least insofar as it is no longer physically dependent upon its mother. This, however, does not seem to be a sound distinction. After birth, it is not assumed that people will lose their right to life if they are deprived of their capacity to live independently. For example, patients living with the assistance of respirators or other medical equipment do not have a diminished right to life.

Gestation

There is no obvious point during the gestation process that can be used to signify when life commences. Gestation is an ongoing gradual process. At no point during the process does the foetus have relevantly different attributes from those it had at a point marginally earlier in time. Despite this, there have been some attempts to identify a distinctive point at which the line can be drawn. In this regard, perhaps the most popular view is that life commences when "consciousness" begins. There appear, however, to be intractable problems with this proposal.

The first relates to identifying what exactly is meant by consciousness. Savulescu seems to equate it with the capacity to feel pain,[59] and notes that the structural development for this is not present in a foetus before 26 weeks.[60] Michael Tooley on the other hand sets the bar far higher. For Tooley, consciousness means that an agent is capable of desiring to continue existing as a subject of experiences and other mental states: a characteristic which is obviously not shared even by infants.[61] Thus, there are widely divergent views regarding the nature of consciousness, making it an inappropriate criterion for demarcating an event of such significance as the commencement of life.

Even if we accept Savulescu's minimum criterion for consciousness, it is not clear why the capacity to feel pain marks the point for the commencement of life. In all other circumstances the ability to feel pain is clearly not a *necessary* pre-condition for life. Plants and lower order animals do not feel pain, yet there is no question that they are alive. Further, human beings who have lost the capacity to feel pain through accident or illness are certainly not regarded as dead. It may be that the capacity to feel pain is a *sufficient* criterion for life, but this does not assist Savulescu. It still leaves unanswered the issue of what is the minimum condition necessary for life to exist. It seems that Savulescu makes the mistake of merging two not necessarily related issues: the point at which life commences and the criteria for a being to have a moral status.[62]

[58] Other options are mentioned by Savulescu, above, n. 3, at 502.

[59] Although he is somewhat cryptic on this point. See B. Tobin, "Reply to Savulescu: Why we Should Maintain a Prohibition on Destructive Research on Human Embryos" (2000) 30 *Australia and New Zealand Journal of Medicine* 498.

[60] Savulescu, above, n. 3, at 504.

[61] M. Tooley, "Abortion and Infanticide", in P. Singer (ed.), *Applied Ethics*, above, n. 47, at 69.

[62] As is discussed below, against the background of a utilitarian theory of morality, the capacity to feel pain is all important to one's moral status, but not in a manner which is necessarily contingent upon the right to life.

Conception

Finally, it could be argued that life commences at conception. As is noted by Savulescu, this argument has been extended to include a totipotent stem cell produced by cloning.[63] An argument that conception is a non-arbitrary point can be made on the basis that from this moment onwards the make-up of the entity is etched in stone. The entity is now unique, in that it differs from every other entity before it and after it. Some time must pass in order for this uniqueness to be *exhibited*, but it is submitted that lack of patent differentiation is not relevant to the moral status of a being. The fact that many baby boys look alike at birth, or that "all grown pigs look the same", is not a basis for diminishing the moral status of such beings.

Savulescu attacks the view that life begins at conception on several grounds. First, he argues that it implies that some current practices are like murder. One example he uses is abortion. This, however, is not a persuasive criticism. Morality is normative, not descriptive. The mere fact that a practice or activity does occur, no matter how frequently and how widely it is accepted, does not mean that it should happen. This is unequivocally demonstrated by human history concerning suppression of minority groups and women. Abortion might well be murder (or manslaughter). Further, in the case of abortion, as was indicated above, there is perhaps a countervailing principle that arguably overrides the right to life of the foetus – the right of the mother to bodily integrity.

Secondly, he argues that to destroy a zygote (prior to day 14) is akin to destroying an egg and a sperm that would have created an identifiable person. This is because of what he terms "logical problems" with the view that we begin to exist at conception. He elaborates on this by using several practical examples. One is the phenomenon of twinning.

> What happens when a zygote A divides into identical B and B* at day 2? When did B begin to exist? was B identical with A? Both B and B* cannot be identical with A, because this would imply that the twins B and B* are identical to each other - that is, that they are both the same thing. This implies that B and B* came into existence when A divided on day 2, not conception. Indeed Dame Mary Warnock said: 'the embryo hasn't decided how many people it is going to be'. Thus the Warnock Committee in the United Kingdom influentially concluded that embryo experimentation was justifiable until 14 days after conception.[64]

The process of twinning can, however, be coherently incorporated into the view that human existence commences at conception. The simple response is that B and B* both come into existence at conception. Whether or not twinning occurs is simply a biological process that is, presumably, pre-determined at the point of conception. The reality of the situation should not be confused with the issues of evidence and substantiation. The fact that at this point in time scientific knowledge is not sufficiently advanced to determine whether a zygote will remain the one entity or divide into two entities does not seem morally relevant.[65] Principle should not be trumped by the limits of current day scientific knowledge. This is especially the case where the exception being mooted (twinning) is extremely rare and is used in an effort to rebut a principle of wide application and considerable importance. Quite simply, the twinning example invites us to make "bad law on the basis of hard cases".

[63] Savulescu, above, n. 3, at 494.

[64] See Savulescu, above, n. 3., at 495. Savulescu also gives the example of two zygotes fusing after conception to form one enduring entity.

[65] See also Tobin, above, n. 50, at 500–1. Tobin makes the valid point that even if the asexual reproduction is accidental this does not change the biological fact that the original organism from which the cell separated was an established, unified and ordered whole.

Thus, the most coherent logical point at which life begins appears to be at conception. We do not deny that there are difficulties with this approach. The entity at this point obviously varies markedly from developed human beings. It has no consciousness (irrespective of how that that term is defined), no organs, and no capacity to maintain an independent existence. What it does have, however, from this point onwards is individuality or uniqueness and the building blocks for the development of life as we normally view it. Further, on matters pertaining to life and death, we believe that it is better to err on the side of conservatism.

Ramifications for Morality of Stem Cell Research

This analysis has significant ramifications for stem cell research. Devotees of a deontological view of morality must oppose the practice unless they can in some way circumvent or diminish the applicability of the right to life principle in the context of stem cells. This is not necessarily implausible. Perhaps it could be argued that the commencement of life and the right to life do not necessarily coincide. Eminent philosophers such as H. L. A. Hart have argued that in order for an agent to enjoy a right not only must he or she be capable of enjoying the relevant entitlement, but also be in a position to elect whether or not to exercise the particular right in question.[66] A similar point is made by Michael Tooley who argues that human life is not intrinsically valuable and that for a person to have a right to life he or she must be capable of desiring to continue existing as a subject of experiences and other mental states.[67] Alternatively, it might be argued that the right to life comes in different strengths: for example, being commensurate with a person's level of development. Developing these arguments further is beyond the scope of this paper. It is, however, along such lines that we believe that non-consequentialists will in future attempt to justify stem cell research.

The picture is less clear from the utilitarian perspective. The fact that a being is in existence is not a sufficient basis for attributing moral status to it. The criterion for extending moral standing to a being is its capacity to experience pleasure and pain. As was noted by Jeremy Bentham, in a passage which underpins much of the animal rights movement:

> The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as more conversable animal, than an infant of a day or a week or even a month, old. *But suppose they were otherwise, what would it avail? The question is not, Can they reason? nor Can they talk? but Can they suffer?* [emphasis added].[68]

Stem cells cannot experience pleasure and pain and hence their interests are not *intrinsically* relevant to the utilitarian calculus. As we noted earlier, however, stem cells may obtain moral standing in a derivative manner because the taking of life in one context may cheapen the value of life all around thereby leading to a net reduction in personal safety and sense of security. The amount of weight that this argument has on

[66] H. L. A. Hart, "Are there any Natural Rights?" (1955) LXIV *Philosophical Review Quarterly* 175.

[67] M. Tooley, "Abortion and Infanticide", in P. Singer (ed.), *Applied Ethics*, above, n. 47, 69.

[68] J. Bentham, *Introduction to the Principles of Morals and Legislation* (1789, 1948 ed.) Ch. 17.

the utilitarian scales will turn on the clarity with which it is possible to distinguish between destroying stem cells to assist (distant) others and sacrificing humans in other circumstances when it is serves the interests of others. The key question then becomes whether we compartmentalise taking life to the context of stem cell research? Or will giving the green light to stem cell research lead to a gradual erosion in the respect for life? The answer to this necessarily involves a large degree of speculation. It depends on untested human and societal traits.

In deciding whether a social experiment (controlled or otherwise) should be permitted, it is, however, important to look at the other side of the scales. What is to be gained? As was noted in the second section above, stem cell research is highly promising. If it is, however, likely that the same benefits can be derived in a manner that does not threaten diminishing the high regard paid to human life, then the risk should not be taken. This requires a detailed assessment of the likely benefits of adult stem cell research compared to the benefits of embryonic stem cell research. The scientific community is presently undecided on this. Perhaps it is worthwhile waiting for further evidence before we go any further with stem cell research.

It could be suggested that even if human life is deemed to commence at conception, this does not necessarily have significant ramifications for the stem cell debate because it could be argued that there remains the further issue of the status that such life should be given. It could for example, be argued that the importance attached to a "stem cell life", should be significantly less than that accorded to a newborn baby. However, the notion that the importance of life is variable is not one that the community ought readily to embrace as part of mainstream moral and social ideology. Once physical or mental development or attributes become a relevant foundation for measuring the importance of life, there is no coherent basis for limiting such an approach to exclude traits such as intelligence, age, wealth, skin colour, employment status or for that matter hair colour. This may foster beliefs that the lives of the poor and wretched are not as valuable as those of the rich and capable and that the interests of the clearly disadvantaged such as long-term prisoners and those with chronic mental and physical illnesses may be compromised to promote the interests of the better-off. While in the short term it may seem appropriate to grade the value of life, in the long run this is likely to cause more unhappiness than happiness.[69]

LEGAL REFORM AND CONCLUDING REMARKS

In his 9 August 2001 announcement on stem cells, U.S. President George W. Bush stated:

> Research on embryonic stem cells raises profound ethical questions, because extracting the stem cell destroys the embryo, and thus destroys the potential for life ... *At its core, the issue forces us to confront fundamental questions about the beginnings of life and the ends of science.* It lives at a difficult moral intersection, juxtaposing the need to protect life in all its phases with the prospect of saving and improving life in all other stages. As the discoveries of modern science create tremendous hope, they also lay vast ethical mine fields.[70]

[69] See further, K. Amarasekara and M. Bagaric, *Euthanasia, Morality and the Law* (Peter Lang Publishing, New York, 2002) Ch. 7.

[70] Available on-line at: http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html.

We share the sentiment that for progress to be made on the moral status of stem cell research, the issue of when life commences must be addressed. It is hoped that, unlike other moral issues, the issue will no longer continue to be placed in the "too hard basket".

The issue is a complex one due to the fact that from the point of conception development is a slow incremental process. Such processes do not readily lend themselves to the drawing of sharp lines. In light of this, we have suggested that the least arbitrary point at which life begins is conception. We believe that Parliament should, accordingly, introduce legislation stating that life begins from the moment of conception. To fail to do so would, in light of the importance of the issue to stem cell research, constitute an abdication of the leadership role for which parliamentarians are elected. The law is used in many situations to draw lines. The benefits of such a clear and succinct rule as to when life begins would, we would argue, far outweigh any possible negative implications that would flow from stating in law that life begins at conception.

Many commentators will obviously dispute not only the position we take as to when life commences, but also our recommendation that the question of when life commences be resolved through statutory initiative. As to the first point, we encourage debate, and invite commentators convincingly to argue an alternative proposition as to when life commences. As to the second point, we again encourage debate, but pose this question: if the law is used to define when life ends by stating when a person is considered to have died,[71] is there any logical reason why the law should not be used to state when life begins?

[71] See, for example, s. 41 of the Human Tissue Act 1982 (Vic). Section 41 provides that for the purposes of the law of Victoria, Australia, a person has died when there has occurred:
(a) irreversible cessation of circulation of blood in the body of the person; or
(b) irreversible cessation of all function of the brain of the person.

DOES JUSTICE PLAY DICE?

CAN LAWYERS PREDICT THE CHANCES OF SUCCESS IN LITIGATION?

*DAVID HIGHAM**

Can we, as lawyers, predict the chances of success in litigation? The starting point for most lawyers is to concur with Judge Hiller Zobel, Associate Justice of the Superior Court of Massachusetts, in the Louise Woodward case:[1]

> Should Defendant now be permitted to second-guess herself and her lawyers? If one regards the trial of a criminal case as a high-stakes game of chance where losers must accept their losses, the answer is, Certainly Not. Massachusetts, however, never has and does not now view Justice as a handmaiden to Tyche, the Goddess of Good Fortune. Of course chance plays a part in litigation, as it does in every aspect of life. A court, nonetheless, is not a casino. The only institutionalized luck in a courtroom is the random selection of the jury venire at the beginning of trial and the random choice of alternate jurors at the end.

THE FIRST LAW OF PROBABILITY

As practising litigators, we may hate the idea of reducing the chance of success or failure in litigation to a chance. That has more of the feel of the casino than of the practice of a learned profession. We do not however have the luxury of so lofty a view. We deal with damages for loss of a chance and we shall see that the courts have grappled with the laws of probability in loss of chance cases. Our clients always want to know what are the chances of winning their cases. Finally, the Access to Justice Act 1999 requires us to set the chance of success (or more correctly failure) in fixing success fees in Conditional Fee Agreements (CFAs). The practice direction[2] sets out the factors to be considered when assessing whether a success fee is reasonable: "11·8 (a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur". The success fee is reward for taking the risk of losing (or at least not getting an order for costs). What litigators call risk, statisticians called probability or chance.

To deal with chance in a way that has meaning and can be communicated, it has to be reduced to a measure. That measure is, whether we like it or not, a number. One represents certainty that an event will happen. Zero represents that the event is impossible and will not happen. The chance that a fair coin will show Heads when tossed is 0·5: we often use percentages instead. The toss of a coin is a 50% chance. There is no mathematical difference. If we are to deal with probability at all, we must accept the discipline. Words will not do. It does not help to say that there is a reasonable chance of Heads on the toss of the coin. To say that there is a 45–55% chance of Heads fudges the issue. It is not useful to say that our client has a better chance of winning than losing. The client needs to know how much better a chance.

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[1] *Commonwealth* v. *Louise Woodward*: 7 Mass. L. Rptr. 449 (1997), Superior Court of Massachusetts.

[2] C.P.R. P.D. 44 General rules about costs (2000) paragraph 11.

The client also needs to know what he has a chance of winning. Is it a substantial or a small sum? Both are important in his risk decision. I will explore other forms of probability later but for the present, a number and only a number will do.

There are well-founded objections to applying the laws of probability to unique and human events like litigation or trials. I shall explore those later. The courts however do apply the laws of probability in the cases on success fees and in lost chance cases. We shall therefore look at the laws of probability and how they apply to litigation.

THE SECOND LAW OF PROBABILITY – THE LAW OF LARGE NUMBERS

We can take our fair coin. We can also take the near 50% chance of red or black in roulette. We have a 50% chance of throwing Heads. That simple fraction is the First Law of Probability. That does not tell us what the next toss will produce. Even if we have just tossed five Tails in a row, the chance of the next toss producing Heads is still 50%. The idea that after a run of Heads, the chance of throwing Tails is greater is called the Gambler's Fallacy. The law of large numbers says that the more we toss the coin and keep a tally, the closer the results will be to 50% Heads and 50% Tails. There is a lower probability of five Heads and five Tails in ten throws than there is of 50 Heads and 50 Tails in 100 throws. It is a fallacy to suppose that, even in the long term, the proportion of Heads to Tails will be exactly 50/50. The probability of *exactly* equal throws is extremely low. The probability that the actual value is *near* 50% is extremely high. Roulette is slightly different: there are 37 possible results on each cast. 18 red, 18 black and one zero. In 37 throws there ought to be 18 red, 18 black and one zero where the bank takes all. The chance of zero is 2·7%. 37 throws may produce a different answer. 3,700 throws will produce an answer nearer to the expectation. The casino is in the long game: it is there for every throw, every night. It can reckon that 50% of the players will bet red and, over the long term, 50% black. They should cancel each other out. Over the long game, by the law of large numbers, the casino will take 2·7% of all the money bet on red and black. Some states allow a second zero (the double zero). In those states, the casino takes 5·4% "on average". "On average" is the expression we use to describe the law of large numbers. The Court of Appeal has used the law of large numbers in fixing success fees for routine Road Traffic Accident (RTA) personal injury cases. The wording of the practice direction suggests only that the risk in the present case can be considered, indeed that was the line taken at first instance in *Callery* v. *Gray*.[3] Claimant personal injury lawyers argued that a longer view should be taken and that success fees should be based on the Law Society Table and that the fee should reflect the fact that they win short and lose long. They have got their wish in principle, but the detail is a disaster. The Court of Appeal looked at the high average success rates of routine personal injury actions and, at first, fixed a maximum success fee of 20%. This had the merit of providing certainty and predictability. It was nothing but an application of the law of large numbers. It looks at what reward the court will allow the risk taker, taken over a broad range of cases.

Before we look at what the Court of Appeal has done in the later case of *Halloran* v. *Delaney*,[4] we need to explore whether lawyers can use the law of large numbers to

[3] *Callery* v. *Gray*, *Russell* v. *Pal Pak Corrugated Ltd (No. 1)*, [2001] EWCA Civ 1117, [2001] 3 All E.R. 833. The decision was affirmed in the House of Lords: [2002] UKHL 28, [2002] 1 W.L.R. 2000, H.L.

[4] *Halloran* v. *Delaney* [2002] EWCA Civ 1258, [2003] P.I.Q.R. P5, C.A.

predict prospects of success in litigation. The law of large numbers does indicate the long-term probability of a series of events all governed by the same rules. Over the long term, a fair coin will produce 50% Heads. A fair die will produce 1/6 sixes. A fair roulette wheel will produce 1/37 zeros. None of this tells you what the next throw or cast will produce: the odds are unchanged. Some kinds of litigation are repetitive enough to use the law of large numbers. I used to run my firm's debt collection practice. We dealt in high volumes. I learned from experience that if a client gave us a batch of debts that were 60 days old, we would recover a high proportion of them. The older the debts, the less success we had. The lowest recovery rate of all was for clients who selected the debts they sent to us, usually those that they had been chasing unsuccessfully for months. We could set our pricing by age of debt. We were applying the law of large numbers.

Lawyers taking on large numbers of similar RTA personal injury cases can do the same. Indeed, the application of experience to prediction is one application of the law of large numbers. The lawyer recognises the case as being similar to many he or she has run before and he or she will have an idea of the success rate of such cases. There is therefore nothing wrong with the principle of applying the law of large numbers to success fees. It is the actual application that is spectacularly wrong. First, even though RTA cases and debt collection cases are of a type, they are not as predictable or subject to mechanical rules as a die or a roulette wheel. The margin of uncertainty is greater. Second, the law of large numbers needs large numbers. An active personal injury practice may have hundreds, even low thousands of cases in a year. Compare this to a casino. A casino may have several roulette tables. Each round of betting and rolling takes less than two minutes. There will be hundreds of throws in a single night repeated nightly over a year. The roulette wheel is predictable. It obeys mechanical rules. Disputes between human beings do not.

A casino, using an American wheel, can bank on taking 5·4% of the take over the year and run the rest of its operation to make a profit from that figure. It also has, incidentally, the chance to make a profit from its bar and restaurant. The poor personal injury lawyer runs a far higher risk that he or she will have more failed cases than the law of averages will predict. He or she has to wait until the end of the case to be paid, the casino gets cash in advance when it sells the chips. The casino's profit margin is not subject, after the event, to detailed assessment. Nor does the casino have to explain and enter into a complicated written agreement with each client. The casino knows how the wheel works. The wheel is reliable. The lawyer has to investigate each case. And yet, the Court of Appeal in *Halloran* v. *Delaney* has decided that:

> in claims as simple as the present case [a "run-of the mill RTA case"] that were settled without proceedings judges should ordinarily allow an uplift of 5 per cent.

The reward for risk is less than that allowed to a casino using an American Roulette wheel. Finally to put this in perspective, I spoke recently to a lawyer who does CFAs. He told me his average fee for a case is £1,500. His 5% uplift gives him £75. That equates almost exactly to the non-recoverable time value of explaining the CFA agreement to his bemused client.

That is all on the law of large numbers. It is a tool for prediction but it must be applied properly and with some understanding of what it really means. Judge Zobel may say that the court is not a casino. The practice of lawyers running personal injury cases on CFAs certainly is: but not a casino anyone would want to own.

THE THIRD AND FOURTH LAWS OF PROBABILITY

"Math is hard. Let's go shopping", Barbie[5]

We can now move on to the Third and Fourth Laws of Probability. The courts have taken to applying the Fourth Law, as we shall see from some of the cases on loss of a chance.

These laws are best illustrated using dice. The third law is the law of addition. This applies where we want one result or an equally valuable alternative. The chance of throwing a two with one throw of a die is 1/6. The chance of throwing an even number with a single throw is the chance of throwing a two plus the chance of throwing a four plus the chance of throwing a six. $1/6+1/6+1/6=\frac{1}{2}=50\%$. This is what we already know. The events must be mutually exclusive and independent. The law of addition does not help us in predicting chances of success in litigation because alternative satisfactory outcomes are not usually mutually exclusive.

The fourth law is however much more significant. It is the law of multiplication. It answers the question; what is the chance of throwing say a three and then a four on successive rolls of the same die? The logic is an AND statement. The answer is that you multiply the probabilities of each event.

$1/6 \times 1/6=1/36=2{\cdot}8\%$. This is not however the full story. Here we wanted a three then a four in that order. Suppose we do not mind the order (or if we want a three and a four on a single roll of two dice). The probability of:

Result A: a 3 then a $4=1/36$
Result B: a 4 then a $3=1/36$

The probability of achieving either result A OR result B brings back the law of addition and we add the two probabilities $1/36+1/36=1/18=5{\cdot}6\%$. Twice the probability. It is important to note that, for the law of multiplication to apply, the two events must be truly independent of each other.

Let us look at how the courts have applied the law of multiplication. The courts have often had to assess the loss of a chance. The first and most famous case was *Chaplin* v. *Hicks*[6] where the court had to fix damages for a woman who, by breach of her agent's contract with her, had lost the chance of winning a beauty contest. This must have been more an exercise in judicial gallantry than a statistical exercise. In the more recent leading case of *Allied Maples,*[7] the court worked on the basis of a broad, non-mathematical assessment. There have however been some attempts to be more mathematical. There are three cases:

(1) *Mount* v. *Barker Austin* (*a firm*)[8] in 1998
(2) *Interleisure Limited* v. *Messrs Lamberts*[9] (*a firm*) in 1997;
(3) *Mohammed Hanif* v. *Middleweeks*[10] (*a firm*), a decision of the Court of Appeal in 2000

[5] Mattell Inc 1999.

[6] *Chaplin* v. *Hicks* [1911] 2 KB 786.

[7] *Allied Maples* v. *Simmons & Simmons* [1995] 1 W.L.R. 1602.

[8] *Mount* v. *Barker Austin (a firm)* [1998] P.N.L.R. 493.

[9] *Interleisure Ltd* v. *Lamberts* 1997 LTL 31 March 1997 (unreported elsewhere). Mr. Michael Harvey Q.C. sitting as a Deputy High Court Judge.

[10] *Mohammed Hanif* v. *Middleweeks* [2000] Lloyd's Rep. PN 920, C.A

An attempt was made in *Mount* v. *Barker Austin* but I am not sure the learned judge got his sums right in that case. *Interleisure* was a claim against solicitors for negligence in the drafting and negotiation of a lease depriving the claimant of the benefit of an upwards-only rent review clause. There were two chances:

(1) The chance that the tenants would have accepted the upwards-only clause

AND

(2) The chance that the tenants would have allowed the lease to continue rather than exercise a break clause.

The full loss was fixed at £383,006·36. The learned Deputy High Court Judge put the first chance at 75% and the second chance at 33·3%. He multiplied the two chances together; one third of three quarters=one quarter or 25%. He awarded 25% of £383,000·36=£95,750·09. In *Hanif* v. *Middleweeks*, the Court of Appeal accepted this "impeccable reasoning". *Hanif* was also a solicitors' negligence case. They had allowed the claimant's counterclaim against fire insurers to be dismissed for want of prosecution. The insurer alleged, in defence, non-payment of premiums, misrepresentation justifying avoiding the policy and that the claimant's partner had deliberately set fire to the night-club that was the subject of the policy.

There were therefore three factual issues. The judge at first instance assessed Mr. Hanif's chance of success on each at 80%, 60% and 25% and took the lowest (25%) as the chance of success and applied that to the damages. Middleweeks contended for the law of multiplication (80% × 60% × 25%=12%). The judge at first instance declined to do so on the grounds that:

> It seems to me the odds on the fraud issue are neither increased nor decreased by the chance of winning on the other two issues. They really do not, in my judgement, impinge on it and in the present case the other two issues could effectively be ignored.

It seems to me that the judge was saying that the insurer could have won its case on any one of the issues on its own and rightly chose the least favourable to Mr. Hanif. The Court of Appeal did not accept the law of multiplication. It found that there was interplay between the issue, *i.e.* that they were not truly independent. It looked at all the probabilities but went back to the *Allied Maples* method of taking a broad, and, I would say subjective, assessment and reduced the chance of success to 20%. I think both approaches were correct. If the events are truly independent, the law of multiplication applies. If not, we are in the realms of conditional probability or Bayes' Theorem. We should leave it to broad assessment and Pierre Simon: ". . . the theory of probabilities is at bottom only common sense reduced to calculus . . ."[11]

True independence of factual issues is rare in civil litigation. Take for instance a case of misrepresentation. The claimant may have to prove two issues:

(1) That the misrepresentation was made;
(2) That he or she relied on it.

A 50% chance of proving each gives a theoretical 25% chance of success. In fact, if the judge accepts the claimant's evidence on the first issue, he or she will have categorised the claimant as a reliable witness and the defendant as unreliable. He or she is more likely, having found for the claimant on the first issue, to find for that claimant on the second. I think however that the law of multiplication is a useful factor to consider. The more apparently separate things a party has to prove, the more rapidly

[11] Pierre Simon, Marquis de Laplace, *A Philosophical Essay on Probabilities* (Dover Publications, 1996).

the chances of success diminish. Often, a defendant has to win on a single issue to win the whole case. The defendant's chance of winning is the claimant's chance of losing.

Where the law of multiplication is helpful is in controlling the chance of success by Part 36 payments. Suppose, in a tort case, that the claimant has a 70% chance of winning on liability and causation and, having done so, has a 100% chance of proving some loss. The claimant's overall chance of success is 70%. The defendant pays in £100,000. If the claimant has only a 50% chance of beating £100,000 damages, the claimant's chance of an effective win is now 70% × 50%=35%.

SUBJECTIVE PROBABILITY AND RISK TAKING

"It is hard to make predictions, especially about the future" – Yogi Berra.[12]

We have two problems to resolve:

(1) The laws of probability (or the theoretical chance) cannot be applied to a unique future event, for instance prospective litigation.
(2) The human mind is not a good probability calculator, otherwise who would buy a lottery ticket or play roulette?

The answer to the first problem is to allow that subjective probability is a useful tool. The answer to the second is to recognise that the human mind does make logical if unscientific risk decisions. Neither of these two concepts that I am about to explore really allow one to calculate or assess, after the event, the proper reward to be paid to a lawyer who takes on a CFA, where the reward is to be calculated by reference to "the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur". We can make useful and meaningful, subjective assessments of probability. Having done so, the decisions we make are as much conditioned by our wish to take risk as our assessment of the chance.

I can illustrate this quickly. Would we spend £1 against the tiny probability of winning an enormous sum on the Lottery? Many do and few of us would think it a silly risk to take. Who, however, would sell his or her house, to invest the entire proceeds in lottery tickets? What we are doing is assessing what is called the utility of the benefit, the chance of success times the value of the success. A small chance of a big win has small utility. We balance that against the negative utility of the risk. The almost certain risk of losing £1 is trivial. The slightly less certain risk of losing your house is not acceptable. Human beings deal well and rationally with utility, we do it every day in decisions that we make. Our minds are not, however, good at dealing with risk in a statistical way.

In his book *How the Mind Works*,[13] Steven Pinker gives an example. I have adapted it slightly. Linda is 31, single, outspoken and very bright. She read philosophy. As a student she was deeply concerned with issues of discrimination and social justice and participated in demonstrations at World Trade Organisation conferences.

> Question A: What is the probability that Linda is an academic?
> Question B: What is the probability that Linda is an academic and is active in environmental politics?

[12] American Baseball Player (attributed).

[13] S. Pinker, *How the Mind Works*, (Allen Lane, The Penguin Press 1997).

People sometimes give a higher estimate to B than A. But it is impossible for A AND B to be more likely than B alone. The mind, on being given what is, in effect, an impossible question to answer, does its best and fits Linda to a recognised type. We match the facts to our experience. That is we make our best, subjective guess, informed by our experience and knowledge of the world.

Subjective probability is more akin to an expression of our confidence in a particular outcome than a statistical risk calculation. There is a famous example of subjective probability at work. John Piña Craven was the chief scientist of the United States Navy's Special Projects Office from 1958 to 1970. On 17 January 1966, a United States B-52 bomber collided with a flight refuelling tanker off the coast of Spain at Palomares. The B-52 was carrying nuclear bombs. In John Craven's words:

> It was three days before the Air Force realized that only 3 [of 4] bombs had hit the land and that the fourth had fallen in the Mediterranean. It was time to call in the Navy.[14]

It is a fact that it is very difficult but not impossible to find objects underwater. President Lyndon B. Johnson was not prepared to accept that the Soviets would find it impossible to locate the bomb. He told the Navy to find it. Enter John Craven.

On 24 January he enlisted the help of his most co-operative junior assistant and worked through the night. He listed seven possible events (outcomes). For instance that the bomb was still in the body of the aircraft. That it had fallen with two, one or no parachutes. His seventh result was a claimed sighting of what might have been the bomb by a Spanish fisherman. He and his assistant plotted their best estimate of the location of the bomb with a circle of error round each for all seven assumptions. He put these outcomes to a team of scientists, mathematicians and naval officers: indeed a bunch of people with a mix of skills and experience. He invited them to place a bet on each of the locations based on their subjective assessments. Craven took the results and analysed them. He used Bayes' Theorem but we need not be concerned with that. What he did was take all the bets as probabilities and divide them between each of the seven possible locations so that the probabilities of all of them added up to 1 (100%).

This is an essential technique of applying subjective probability, to identify all mutually exclusive outcomes, to assign a probability to each so that all probabilities add up to 100%. The best bet was an inaccessible undersea ravine. When they eventually got a Deep Submersible Recovery Vessel to the ravine, there was the bomb, in the first place they had chosen to look. It was recovered.

The Palomares bomb illustrates the principle of looking at all possible (or in this case) a set of most likely outcomes. Applying the best available analytical techniques was followed by some subjective guessing.

A second example is given by Gerd Gingerer in his book, *Reckoning with Risk.*[15] It illustrates the concept of subjective probability as a degree of belief. The story is the surgeon Christiaan Barnard's own account of his first encounter with Louis Washkansky. Mr. Washkansky was soon to be the first man to have a heart transplant. Barnard introduced himself, explained what he intended to do and said "there's a chance you can get back to normal life again". Mr. Washkansky did not ask what the chance was, how long he might survive, or anything about the operation. He just said he was ready to go ahead and turned back to the Western he was reading. Barnard was concerned and consulted Ann Washkansky. She did ask, "What chance do you give him?" Without hesitation or explanation, Barnard said "An 80 *per cent* chance". The operation went ahead and Mr. Washkansky died 18 days after it.

[14] J. P. Craven, *The Silent War*, (Simon & Schuster, 2001).

[15] G. Gingerer, *Reckoning with Risk*, (Allen Lane, The Penguin Press, 2002).

Two points come out of this story. The first the link between the expert's subjective assessment of probability and the client's (patient's) decision making. The latter is, in my view, more important. If any of us were in Mr. Washkansky's position, how would we have decided? Faced with death or an uncertain and novel operation that might save our life, each of us might require a different probability of success. What value of outcome would we want? Would 18 days extension of life be worth it to us? Our decision would be subjective, not objectively measurable, possibly not even logical but nevertheless sensible and rational. In legal terms, that is the privilege of the client. But in legal terms, under a CFA, the client does not take the downside risk of paying costs should the action be lost. The lawyer and after the event insurer remain interested in the objective chance of winning. There is another, crucial difference. In a case where the court must decide between this client's version of events and his or her opponent's, the client probably knows where the truth lies. If so, and if we assume that, usually, civil proceedings arrive at the truth, the client may better be able to assess his or her chances of success than his or her lawyers.

The second point is that subjective probability must look at all possible and independent outcomes. Dr. Barnard's assessment was subjective. As this was the first such operation, he could do nothing other than express as a chance of success, his confidence level in a successful result. There was no way anyone, not even a costs judge of the English Supreme Court, could say whether his assessment had been right or wrong. Whether, however, his assessment fell short of an effective use of subjective probability was in failing to consider all possible outcomes. We do not know what he defined as success. Was it surviving the operation or a return to normal life? Mr. Washkansky survived for 18 days. The operation was a success. Was it a result Mr. Washkansky would have regarded as a success? It had hardly increased his life expectancy. Instead of assessing 80% success, 20% failure, Dr Barnard might have assessed:

(1) Failure 20%
(2) Success and survival for 3 weeks only 60%
(3) Success and return to normal life 20%

Mr Washkansky might still have decided to take his chance but he would have had different factors to consider.

The first rational check on subjective probability is therefore to ensure that we consider all possible outcomes that are exclusive and include all possible. We must assign a probability to each and the probabilities must add up to 100%. A table illustrates how it should look.

Result	Percentage chance
Win and beat Part 36 payment	60%
Win but less than Part 36 Payment	10%
Lose	25%
Defendant insolvent before trial	5%
Total	**100%**

If any one chance is altered, perhaps by a further payment in, or if any new result is identified, all chances must be reviewed to ensure that they still add up to 100%.

When expert, in our context, lawyers make subjective predictions, they are prone to bias in ways that are recognised and described by William Ferrell of the University of Arizona.[16] A few examples, arising out of motivation, will demonstrate the problem:

(1) If the expert is in a position to affect the uncertain events, there may be a bias towards the outcomes that are intended to be produced;
(2) If the expert thinks that expertise entails being highly confident about predictions, then too little uncertainty about events can be expected.

Another involves structuring. The events must be so clearly defined that there will be no ambiguity about whether or not they have occurred. Finally, there is the matter of conditioning, that is, the expert's awareness of all relevant information and possible problems in using it. This is a big factor in litigation where predictions are most usefully made at the start of the process when there is never enough information available.

There are two ways of dealing with these biases. The first is to incorporate the views of all those involved in the case: the Palomares model. In my view we should involve the client, the Spanish fisherman, in this exercise. After all, like the fisherman, the client was there when the events happened. In the case of a dispute of facts, the client, and not his or her lawyers, knows what actually happened.

CALIBRATION

The second method of reducing error through bias or inexperience is to calibrate the lawyer. Calibration simply means recording the predictions and testing them, over the long term, against actual results. Research carried out by the Institute of Advanced Legal Studies,[17] suggests, on a fairly small sample of legal aid applications against results, that lawyers are pretty bad at prediction. One example, derived from legal aid applications for commercial cases, will illustrate the point.

Solicitor's prediction of chance of success	Percentage of cases succeeding
Very Good 80%+	**47%**
Good 60%–80%	34%
Average 50%–60%	30%
Impossible to say – seeking limited certificate	18%
No indication given	**46%**

Almost the same success rate was achieved in cases where lawyers did not give any indication as in the cases where they said they had 80%+ chance of success. This sample is unrepresentative and may be skewed by a desire to have legal aid granted. The prediction will also have been made soon after initial instructions and on inadequate information. This was, however, an exercise in calibration. Firms

[16] "Discrete Subjective Probabilities and Decision Analysis: Elicitation, Calibration and Combination" in G. Wright and P. Ayton (eds.) *Subjective Probability* (John Wiley & Sons Ltd., 1994).

[17] Institute of Advanced Legal Studies, Report of Working Group on the Comparative Study of Legal Professions: PEYRESQ 16–18 July 2000.

undertaking CFAs should, in my view, record their predictions and actual success rates collectively and individually. This will allow them to improve their predictions and allow for individual variation.

THE PROCESS OF SUBJECTIVE PREDICTION

It must be clear by now that the process by which any expert, including a lawyer, reaches his or her subjective view of the chance of success is personal, difficult to explain but rational and legitimate. It is not, in my view, capable of post event assessment by others, even a costs judge or a defendant seeking to argue up the chance of success to reduce the success fee he or she is now forced to pay. Most lawyers start from an analytical approach but the final decision is subjective. It is based on a feel for the case.

In *Henry V,*[18] the Archbishop of Canterbury makes a long and technical speech setting out the arguments, in Salic law, supporting King Harry's claim to the throne of France. At the end of the speech, King Harry simply asks, "May I in right and conscience make this claim?"

In his fascinating book, *Claims Analysis*, Mark Andrews takes a more scientific approach. In the criminal context, he suggests that the trier of fact compares the story received against the required normal (legal) behaviour and decides where the facts are sufficiently far from the norm to require a guilty finding.

> Legal decision making is the same. The advocate compares the expected result, as dictated by the law, against the real event, as expressed by the client. The attorney estimates whether the actions of the client are so far from what the law expects that the client must pay in some way.[19]

In civil actions with factual disputes, most judges are looking for the most likely set of facts and the set of facts that most closely accord with normal experience. The more ingenious our theory of the case, the greater the risk.

A few years ago, Anglia Polytechnic University, Litigation Protection Ltd. and Blake Lapthorn worked together on the Risk Assessment in Litigation Project (RAIL). The results are now published in David Chalk's book, *Risk Assessment in Litigation*[20] and in the RAIL risk assessment software. David Chalk interviewed Blake Lapthorn's litigators in detail to identify the factors they considered were indicators of strength or weakness in a claim. It surprised me then that most of the factors were subjective. Some were even illogical. They mentioned such things as whether there had been a change of solicitor and closeness to the expiry of the limitation period. Many of them said in different words that it was the attractiveness of the case. I think now that these subjective factors are valid and useful. I would describe the attractiveness of the case as whether the theory of the case has evidence that will hook the judge.

One example will illustrate the point. In a medical negligence case the claimant had suffered for years with an uncomfortable abdominal complaint. There was apparently no cure till he met a surgeon who said he could cure the problem with an operation. The operation was done, but with disastrous side-effects. The surgeon said he had warned the claimant about the side-effects but the claimant said he had not. The

[18] William Shakespeare, *Henry V*, I, ii 95, in S. Wells and G. Taylor (eds.) *The Complete Oxford Shakespeare Volume I* (Oxford University Press, 1987).

[19] M. Andrews, *Claims Analysis – Law, Logic, and Risk*, (Xlibris Corporation, 2002).

[20] D. Chalk LLM, *Risk Assessment in Litigation, Conditional Fee Agreements, Insurance and Funding*, (Butterworths Law, 2001).

patient kept a diary. On the day he saw the surgeon, he had recorded that he had gone for a long walk by the sea after the interview and had felt that his life was now worth living again and that a great burden had been lifted. It was that touch that rightly told the lawyer, Paul Fretwell of Blake Lapthorn, that his client's story was likely to be accepted. These bits of evidence are hooks to catch the judge. We rely on their subjective effect.

That medical example takes us back to Mr. Washkansky and his decision to allow the operation. The other side of subjective probability is the subjective acceptance of risk. Only patients or the clients of lawyers can decide how much risk they will take for how much hope of gain. Some will be risk takers and some will be risk averse. Their decision will be rational even if not logical. But it need not even be rational. It cannot be subject to later re-evaluation by others.

CONCLUSIONS

There is nothing wrong with either the subjective assessment of probability or the subjective assumption of risk. Both are valid exercises in decision making. When we make them for ourselves, we accept the consequences.

When the risk taker relies on the judgement of the professional to assess the probability of success of failure, the expert, lawyer or doctor, has a responsibility to do two things:

(1) To carry out the assessment carefully. I have suggested ways in which lawyers can improve their performance:
   a. Considering all outcomes;
   b. Eliminating bias;
   c. Calibration.
(2) Communicate the chance of success in a way that enables the client to take a subjective assessment of the risk.

The first problem with the CFA regime is that the person who stands to gain is the client and the person with the risk is the lawyer. They will have different attitudes to avoiding or taking risk. The client will find it easier to be a risk taker. His or her lawyer will remain risk averse. They are in conflict. This first problem is not important so long as only the lawyer and the client are involved, as happens under contingency fee regimes. The lawyer can take his or her chance of not getting paid against the prospect of a substantial and profitable payment out of the damages. The client can make a personal decision on whether to sacrifice 40% of his or her claim for damages against the chance of acquiring 60%.

The English CFA regime does not work. It does not work because the risk of paying the success fee lies with the unsuccessful defendant who has no choice in the decision. He or she is given an after the event opportunity to challenge the success fee. The decision is made by a fourth party, the court. Neither the defendant nor the court can indulge in subjective decision-making. They have to try to make sense of success fees using objective criteria. The only objective criteria available are the numerical rules of probability. One cannot mix the two. In short, lawyers can predict the prospects of success in litigation in a way that is useful and valid. What they cannot do is a sum in objective probability.

Does Justice play dice? No it does not, but the Access to Justice Act 1999 tries to make it do just that.

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CASE NOTES

The address for the submission of case notes is given at the beginning of this issue

SERVICE OF PROCEEDINGS ON FOREIGN COMPANIES: THE RELATIONSHIP BETWEEN THE COMPANIES ACT AND THE CIVIL PROCEDURE RULES

Sea Assets Ltd v. *PT Garuda Indonesia (No. 1)*

[2000] 4 All E.R. 371 (Q.B.D. (Comm. Ct.)), (Longmore J.)

Since 1 January 1993, the Companies Act has contained two parallel, although very similar, sets of provisions for service of proceedings on foreign companies. In simple terms, one regime deals with foreign companies with a branch office in the United Kingdom and the second with foreign companies that have a place of business in the United Kingdom but no branch office.

One problem with the "branch office" regime is the lack of a statutory definition of a branch. A further complication arises from the provisions in Part 6 of the Civil Procedure Rules 1998 ("CPR")[1] concerning permitted methods of service on companies. These issues, especially the latter, arose for consideration in the present case.

THE FACTS

The claimant, S Ltd, commenced proceedings in England against G, an Indonesian company with a branch in London. The claim related to promissory notes issued by G and subsequently dishonoured on presentation. G was subject to section 694A of the Companies Act 1985, which provided that service of process on an "oversea company" *in respect of the carrying on of the business of a registered branch* was "sufficiently served" if left at or sent to the address of the branch. The dispute in this case did not arise out of the carrying on of the business of G's London branch and accordingly S Ltd sought to serve G in accordance with CPR Part 6 which set out methods of service alternative to those specified in the Companies Act.[2] In particular, CPR r. 6.5(6) provided that any company other than one registered in England and Wales could be served at any place of business of the company within the jurisdiction. S Ltd therefore served proceedings at G's London branch on the basis that G was a company other than one registered in England and Wales and that its London branch was a place of business within the jurisdiction.

[1] S.I. 1998/3132.

[2] Detailed below.

G applied to have service set aside, contending that section 694A set out the statutorily required method for service on such a company and that CPR Part 6 was *ultra vires* to the extent that it purported to provide for an alternative method of service. Alternatively, G contended that it was a company registered in England and Wales within the meaning of rule 6.5(6) in which case it could only be served at its principal office or a place with a real connection with the claim, of which its London branch was neither.

THE STATUTORY PROVISIONS

These are contained in Part XXIII of the Companies Act 1985, entitled "Oversea Companies". Section 691 of the 1985 Act requires companies incorporated outside the United Kingdom that establish a place of business in Great Britain to lodge various documents with the Registrar of Companies and provide the Registrar with the name and address of a person authorised to accept service of proceedings on the company's behalf. Section 695 provides that proceedings against the company are sufficiently served if left at or sent to that address. Importantly, there is no requirement that the proceedings must relate to the carrying on of the company's business at that address.

Various additional sections of the Act were inserted by means of statutory instrument[3] in order to implement an EC Directive concerning disclosure requirements for company branch offices. Although the Directive applied only to EC companies, the new sections of the Act apply to all oversea companies. The two regimes are mutually exclusive.[4]

The parallel provision to section 695 (service on oversea companies with a place of business in the United Kingdom) is found in section 694A which provides that:

> (2) Any process or notice required to be served on a company to which this section applies in respect of the carrying on of the business of a branch registered by it under paragraph 1 of Schedule 21A is sufficiently served if-
> (a) addressed to any person whose name has, in respect of the branch, been delivered to the registrar . . ., and
> (b) left at or sent by post to the address for that person which has been so delivered.

CIVIL PROCEDURE RULES PART 6

CPR rule 6.2(2) provides that a company may be served by any method permitted under Part 6 as an alternative to those set out in sections 695 and 694A of the Companies Act. Rule 6.5(6) sets out permitted methods of service on various types of party in circumstances where no address for service has been given and no solicitor is acting for the party to be served.

In respect of a company registered in England and Wales, the permitted places of service are the principal office of the company or "any place of business of the company within the jurisdiction which has a real connection with the claim". In respect of "any other company" the permitted place is "any place of business of the company within the jurisdiction".

[3] Oversea Companies and Credit Financial Institutions (Branch Disclosure) Regulations 1992, S.I. 1992/3179.
[4] Section 690B of the 1985 Act.

THE COURT'S DECISION

Longmore J. determined that he was concerned with two questions. The first was whether section 694A of the 1985 Act was the only permissible method of service for oversea companies with a branch in the United Kingdom, or whether rules of court could provide for an alternative method of service.

The second question was whether, if the statutory provisions were not exclusive, CPR Part 6 entitled the claimant to serve proceedings at the defendant's London branch. This depended on whether the defendant was to be treated as a company registered in England and Wales by virtue of having a branch in London – in which case by virtue of Part 6 it could only be served at its principal office or a place of business within the jurisdiction with a real connection with the claim – or whether it was not so registered, in which case it could be served at any place of business within the jurisdiction. It was common ground that the London branch fell within the latter of these possibilities but not the former.

The first question: Exclusivity of Section 694A

Longmore J. accepted the defendant's argument that provisions relating to oversea companies with a place of business within Great Britain were expressly prohibited from applying to the "new" concept of oversea companies with a branch in the United Kingdom. However, he did not accept that it followed that the effect of the "branch office" provisions was that service could only be effected pursuant to section 694A. The section did not say so in terms, merely stating that proceedings in relation to the carrying on of the business of the branch were "sufficiently served" if served at the branch. That did not prevent some other statutory provision, whether original or subordinate legislation, from making other provision for service which is what the CPR had purported to do.

Longmore J. rejected the defendant's argument that the CPR provisions were *ultra vires*. That could only be the case if section 694A was the statutorily required method of service. Longmore J. decided that the statute was permissive, not mandatory. In reaching his conclusion, the judge relied on the dicta of Clarke L.J. in *Saab* v. *Saudi American Bank*[5] (which he accepted were not part of the ratio of the case):

> The importance of the new rule[6] is of course that it appears that the position has now reverted to what it was before section 694A was enacted, namely that process can be served on a foreign company with a place of business in, say, London without the necessity for establishing any link between the process and the business being conducted in London.

The second question: service under Part 6

The defendant argued that it was not open for the claimant to have used the "any other company" method of service in rule 6.5(6) since the effect of registration of the branch office was that the defendant was a company registered in England and Wales. The defendant's argument rested in part on the fact that the word "registered" rather than "incorporated" was used.

Longmore J. dealt with the point briefly, holding that an oversea company that complied with its obligations to submit particulars to the registrar and an address for service in relation to its branch did not become a company registered in England. It was a company whose essence was overseas.

Accordingly the defendant's application to have service set aside was dismissed.

[5] [1999] 4 All E.R. 321 at 324–325.

[6] *i.e.* CPR r. 6.5(6).

COMMENT

One of the questions left unanswered by this case is why section 694A requires the claim to be in respect of the business of the branch (it will be recalled that the parallel provision for companies with a place of business but no branch, section 695, contains no such restriction). Longmore J. described this as a new requirement in English law and stated that it was not immediately obvious why Parliament decided that all oversea companies with a branch should only be capable of being served with proceedings relating to the business of the branch while companies carrying on business in the Untied Kingdom other than at a branch could be served with any kind of proceedings. The judge went on to state that this was not a matter on which he needed to express a view since it was common ground that the defendant company in the present case did have a branch.

It is submitted that the distinction between section 694A and section 695 was in fact relevant. The fact that the defendant *had* a branch was not in any way determinative of the central issue in the case, which was whether section 694A was mandatory or permissive. That issue surely requires an analysis of the two parallel provisions and the reasons for the differences between them.

If the decision in *Sea Assets* is correct, one has to question whether the words "in respect of the carrying on of the business of the branch" in section 694A are left with any meaning. Since CPR rule 6.5(6) permits service on a foreign company at *any* place of business it has in the jurisdiction, it matters not (if the decision is correct) whether one serves at a branch or not and what the proceedings are about. In the aforementioned *Saab* v. *Saudi American Bank*, as we have seen, Clarke L.J. suggested that the position had "reverted to what it was before section 694A was enacted". Did the CPR draftsmen intend to override the effect of the statute in that way?

One might argue that the matter is rescued by the possibility of a stay due to *forum non conveniens*. Not necessarily: the facts of the present case, whereby the dishonoured promissory notes were payable in London, are such that permission to serve out of the jurisdiction would probably have been given. Although the outcome might therefore have been the same, the point is whether jurisdiction based solely on service on a foreign company should be so widely drawn as it was in *Sea Assets*.

In *Saab* v. *Saudi American Bank*, the court at first instance held that the claim in that case related "in part" to the carrying on of the business of the branch and that was sufficient for the purpose of section 694A. Longmore J. appears simply to have followed the *dicta* of Clarke L.J. in that case, which he accepted were *obiter*. There is no substantive reasoning to be found in his decision. Indeed, there is a similar lack of reasoning in relation to the second question. Although it is submitted that his conclusion "feels right", Longmore J. offers no explanation as to why an oversea company with a registered branch is not a company registered in England and Wales.

Finally, the two relevant notes in the White Book[7] should be considered. The first, at 6.2.6, merely recites the decision in *Sea Assets*. The second, at 6.5.5, states that:

> the use of methods of service allowed by the new rules as an alternative to those prescribed by the Companies Act 1985 should be exercised with caution where the consequences of failing to prove good service could be serious for the claimant ... Service using the statutory procedure is usually conclusive. However, the court will interpret Part 6 in accordance with the overriding objective. Service is not an end in itself but a means of bringing process ... to the attention of the company.

[7] *Civil Procedure* (Sweet & Maxwell, 2002).

Although headed "Service on *registered* companies" (emphasis added) the comment is of relevance to the present point.

It is submitted that the relationship between the CPR and the Companies Act is unclear. *Sea Assets* appears to be the only current authority on the point. It is clear that the point would merit further consideration.

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CARRY ON CALDWELL

R. v. *Aaron Roy G., Steven Michael R.*

[2002] EWCA Crim 1992; [2002] Crim. L. R. 926
(C.A. Crim. Div.) (Dyson L.J., Silberand J., Beaumont J.)

INTRODUCTION

The case of *R.* v. *G and R*[1] is the latest to raise the issue of the appropriate test to be applied to determine recklessness in cases where young persons are prosecuted for criminal damage under section 1 of the Criminal Damage Act 1971.

Section 1(1) of the Act provides that "a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence". Section 1(2) provides that a person who intentionally or recklessly destroys or damages any property, "intending ... to endanger the life of another or being reckless as to whether the life of another would be endangered" is guilty of an offence. Where the property is destroyed or damaged by fire, it is charged as arson.[2] The offence can be committed either intentionally or recklessly. The test for recklessness, established in *R* v. *Caldwell,*[3] has two stages. First, a person is reckless as to whether property is destroyed or damaged if he or she does an act which in fact creates an obvious and serious risk that property will be destroyed or damaged. Second, when the person does the act, he or she either has not given any thought to the possibility of there being any such risk, or has recognised that there was some risk involved and has nonetheless gone on to do it. This has become know as "the *Caldwell* test". It is sometimes referred to as objective recklessness, because a person may be liable, even though not aware of a risk, for failing to consider a risk that would be obvious to the "ordinary, prudent individual".[4]

THE DECISION IN *R.* v. *G and R*

G and R, who were aged 11 and 12 respectively, were camping out for the night. In the early hours of the morning, they entered the yard of a shop, opened up bundles of newspapers, and set some of them alight. They threw the burning newspapers under a large wheelie-bin, leaving them to burn. The bin caught fire, the fire spread to the shop and some adjoining buildings, causing approximately £1 million of damage. The boys first denied any involvement, but later admitted what had happened. They said, however, that they thought that the ignited newspapers would burn themselves out on the concrete floor, and that it never crossed their minds that there was a risk that the fire would spread to the building.

The boys were charged with arson, contrary to sections 1(1) and (3) of the Criminal Damage Act 1971, on the grounds that they caused damage to property, being reckless as to whether such property would be damaged. The trial judge directed the jury in accordance with the *Caldwell* test. Thus, for the purposes of deciding whether the boys

[1] *R.* v. *G and R* [2002] EWCA Crim 1992.
[2] Section 1(3).
[3] [1982] A.C. 341.
[4] *R.* v. *Caldwell* [1982] A.C. 341, per Lord Diplock, 354.

had been reckless as to whether property would be destroyed or damaged, the risk had to be obvious to the ordinary prudent individual, rather than to a person possessing the characteristics of G and R. The trial judge made it clear that no allowance was made by the law for the youth, lack of maturity or inability of the boys to assess the consequences of their actions.

The boys were convicted of the offence and sentenced to a one-year supervision order. They appealed, the basis of the appeal being that the judge was wrong to rule that the *Caldwell* test was the correct test to apply. He should have held either that it does not apply to children, or if it does, that it is incompatible with Article 6 of the European Convention on Human Rights. The Court of Appeal dismissed the appeal, holding that the decision in *Caldwell* was binding, and that therefore the judge had correctly directed the jury for the purposes of deciding whether the boys had acted recklessly. As for the human rights challenge, Article 6 was not concerned with the fairness of the provisions of substantive law, and therefore the appeal was also rejected on this ground.

CALDWELL RECKLESSNESS

The case of *R.* v. *Caldwell* was itself concerned with section 1(1) and 1(2) of the Criminal Damage Act 1971. The accused in that case set fire to a hotel, but claimed that when he did so he was so drunk that it did not occur to him that there might be anyone there whose life might be endangered. Caldwell's appeal to the House of Lords turned on the question of whether self-induced intoxication can be relevant to cases of intention or recklessness in relation to the endangering of life. Lord Diplock examined the states of mind that might constitute recklessness. On the one hand, a person may realise that some risk is involved, and on the other, a person "may not even trouble" to consider the possibility of a risk. He concluded that neither state of mind "seems ... to be less blameworthy",[5] and on that basis it was decided that recklessness should have a wider meaning than was originally thought. He decided[6] that recklessness therefore includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing,[7] but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was.[8]

This view accords with the law in relation to self-induced intoxication, as established by *R.* v. *Majewski*[9] some five years earlier. That case established that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary *mens rea*. An intoxicated person cannot be excused for being unaware of a risk, if that risk would have been obvious to him or her if sober. However, Lord Diplock's judgment is not expressed in a way that confines this definition of recklessness to cases of self-induced intoxication. It has a more general application.

[5] *Ibid.*, 352B.

[6] Lords Keith and Roskill concurred.

[7] This is subjective, or "*Cunningham*" recklessness. See *R.* v. *Cunningham* [1957] 2 Q.B. 396.

[8] This formulation of recklessness allows for the possibility that a person will not be reckless where thought is given to the risk, but the erroneous conclusion is drawn that there is no risk involved (see *R* v. *Reid* [1992] 3 All E.R. 673). This so-called "lacuna" or loophole was pleaded unsuccessfully in *Chief Constable of Avon and Somerset* v. *Shimmen* (1987) 84 Cr. App. R. 7.

[9] [1977] A.C. 443.

The extent of its application was tested the following year in *Elliot* v. *C*,[10] another criminal damage case. Here, the accused was unaware of the risk of damage not because she was drunk, but because she was a 14 year-old, who was below average intelligence. The lower court said that it was implicit in the decision in *Caldwell* that defendants should only be held to have acted recklessly where the risk would have been obvious to them, if they had given any thought to the matter. As it was found that *C* would not have been aware of the risk, no matter how much thought she had given to the matter, the case was dismissed. The Divisional Court reluctantly allowed the prosecutor's appeal, despite the fact that this was not a case of a "deliberate disregard" or "mindless indifference" to a risk,[11] but because they were "constrained by authority".[12] The court could find no reason to qualify Lord Diplock's speech to import an interpretation which would make a person reckless for giving no thought to an obvious risk, only where it would have been obvious to him or her if they had given thought to the matter.

This approach was confirmed in *R.* v. *R (Stephen Malcolm)*[13] in the following year. This case concerned a 15 year-old boy, and it was argued that the test of recklessness should be whether a person of the age of the defendant, and with his characteristics which might be relevant to his ability to foresee risk, would have appreciated the risk involved. The Court of Appeal was clear that it was not open to the court to accept this suggested modification to the *Caldwell* test. More recently, in *R.* v. *Coles*,[14] where a 15 year-old set a barn alight, the defence wished to call expert evidence from a psychologist on the capacity of the defendant to foresee the risks involved in his actions. The trial judge refused to allow this evidence, and rejected the defence submission that the test for recklessness should be subjective. The point of contention in the case was not in relation to the intention to damage the property, but in relation to the recklessness as to whether the lives of the defendant's two friends would be endangered by setting fire to a barn in which they were sleeping. The Court of Appeal dismissed the appeal, declining the invitation to reformulate the law on recklessness, because it had "so recently been confirmed, after full consideration, by a decision of the House of Lords".[15]

CRITICISMS OF CALDWELL

The *Caldwell* test has been subjected to much criticism since it was first handed down. In a commentary on the case, the late Professor J. C. Smith noted that it set back the law "concerning the mental element in criminal damage ... to before 1861".[16] Smith and Hogan noted that "*Caldwell*, as interpreted in *Elliott* v. *C*, appears to be a slippery slope to intolerable injustice with no obvious exit".[17] How can the *mens rea* of the defendant be the mental state of some non-existent hypothetical person? Surely the question should be whether the risk was an obvious risk to that defendant. Its "most damning moral indictment" is that defendants can be convicted without having

[10] [1983] 1 W.L.R. 939.

[11] *Elliott* v. *C* [1983] 2 All E.R. 1005, per Goff L.J., at 1011.

[12] *Ibid.* at 1010.

[13] (1984) 79 Cr. App. R. 334.

[14] (1995) 1 Cr. App. R. 157.

[15] *Ibid.*, per Hobhouse L.J. He was referring to the reckless driving case of *R.* v. *Reid* [1992] 1 W.L.R. 793, where the House of Lords endorsed the reasoning in *R.* v. *Caldwell* [1982] A.C. 341.

[16] *R.* v. *Caldwell* [1981] Crim. L.R. 392–396, at 393.

[17] Smith and Hogan *Criminal Law* 10th ed. (Butterworths, 2002), p.81.

had a fair opportunity to make their behaviour correspond with the law, because they lacked the capacity to foresee a risk.[18] It has been argued that, even if there is a presumption that defendants are capable of foreseeing the risks that the reasonable person would see as obvious, they should be able to present evidence that they were not at the time capable of doing so, provided that the incapacity was not self-induced.[19]

Professor Smith thought that the decision might have to be reversed by legislation,[20] but it has proved to be a durable rule. That it has existed for so long is probably due to the fact that it has not been given general application, and is now mainly confined to criminal damage cases. It did apply to the statutory offence of causing death by reckless driving,[21] but is no longer relevant in driving cases, as the earlier offence of reckless driving has now been replaced by causing death by dangerous driving.[22] It is not applicable to manslaughter,[23] assault[24] or rape,[25] and does not apply to offences against the person involving malice.[26] More recently, it has been held that subjective recklessness is required for the offence of causing annoyance by flying.[27] The undesirable effects of the decision have thus been mitigated to some extent. Notably, *Caldwell* has not been applied in a number of Commonwealth jurisdictions.

However, as in other cases before the Court of Appeal, the court in *R.* v. *G and R* felt unable to hold that the *Caldwell* test should not be applied. Like the other attempts to distinguish *Caldwell* or to persuade the court not to apply *Caldwell*, this too failed. The Court of Appeal was clear that all the previous authority supported the *Caldwell* approach, and it was not open to it to depart from a decision of the House of Lords.

HUMAN RIGHTS

Another approach adopted in this case was to argue the appeal on the basis that the *Caldwell* test was incompatible with the rights under the Human Rights Act 1998. The argument was based on Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial. Article 6(1) states that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .

This article sets the standard to be applied in determining whether a trial has been fair, including for example, providing access to a court. Defendants are to have, for example, adequate notice of the proceedings, a real opportunity to present the case and are entitled to a reasoned decision.

The defence argued that to judge the moral and legal culpability of a child by reference to the understanding and life experience of an adult is irrational and, therefore, unfair. Moreover, the *Caldwell* test is disproportionately harsh given the serious consequences that can potentially flow from a conviction under section 1 of the

[18] S. Field and M. Lynn "Capacity, Recklessness and the House of Lords" [1993] Crim L.R. 127–129, at 128.
[19] *Ibid.*, at 129.
[20] *R.* v. *Caldwell* [1981] Crim. L.R. 392–396, at 393.
[21] Road Traffic Act 1972 section 1. See *R* v. *Lawrence* [1982] A.C. 510.
[22] Road Traffic Act 1988 section 1.
[23] *R.* v. *Adomako* [1994] 3 All E.R. 79.
[24] *R.* v. *Spratt* [1990] 1 W.L.R. 1073.
[25] *R.* v. *S. (Satnam)* (1983) 78 Cr. App. R. 149.
[26] *R.* v. *Savage* [1992] 1 A.C. 699.
[27] *R.* v. *Paine* [1998] 1 Cr. App. R. 36.

1971 Act, which is detention for life. The Court of Appeal felt that these submissions were misconceived. Although Article 6 should be given a "broad and purposive interpretation",[28] it is concerned with the procedural aspects of trials, not with the fairness of the provisions of substantive law. The *Caldwell* test defines the mental element of the offence. It is "a matter of substantive law since it is part of the very definition of what constitutes the offence".[29] To come within the concerns of Article 6, the matter would have to be procedural, for example, the point at issue would have to concern the means by which the existence of such a mental element may be proved.

It is for Contracting States to choose how to define the essential elements of an offence, and Article 6 is not concerned with the fairness of substantive law.[30] Offences of strict liability, for example, do not violate Article 6(2), which provides that those charged with criminal offences "shall be presumed innocent until proved guilty according to law".[31] The Court of Appeal was quite clear therefore that the fairness of the test, as it applied to children, was not justiciable under Article 6, and the appeal was dismissed on this ground too.

CONCLUSION

Another attempt to challenge the effect of the *Caldwell* decision has been unsuccessful, so it is carry on *Caldwell*, until and unless the House of Lords addresses the issue and decides otherwise.[32] The Court of Appeal has certified a point of law for decision by the House of Lords, as follows:

> Can a defendant properly be convicted under section 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk but, by reason of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it?

The Court of Appeal declined to give leave to appeal, leaving it to the House to decide whether they wished to receive the appeal or not. It is to be hoped that the House of Lords does decide to revisit *Caldwell*, and reconsider the "important issue"[33] of the proper interpretation of section 1 the Criminal Damage Act 1971.

MARY SENEVIRATNE*

[28] *R.* v. *G. and R.* [2002] EWCA Crim 1992, [2002] Crim. L. R. 926, *per* Dyson L.J., para. 27.

[29] *Ibid.*, para. 28.

[30] *Z. and others* v. *United Kingdom* (2002) 34 E.H.R.R. The case concerned a negligence claim against a local authority for failure to protect the applicants from abuse by their parents. The negligence claim was struck out by the U.K. courts as disclosing no cause of action. The application to the European Court of Human Rights claimed that there was a breach of Article 6 because there was a denial of access to a court. It was held that there was no breach, because Article 6 was only concerned with procedural matters. The basis of the applicants' claim related to rules about the domestic law of negligence. That was a substantive matter, and the fairness of the provisions of the substantive law of the Contracting States was not a matter for investigation under Article 6.

[31] *Salabiaku* v. *France* (1991) 13 E.H.R.R. 379.

[32] Or the decision is reversed by legislation.

[33] *R.* v. *G. and R.* [2002] EWCA Crim 1992, *per* Dyson L.J., para. 4.

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ASSESSMENT OF DAMAGES IN FATAL ACCIDENTS: A QUEST FOR LEGAL CERTAINTY IN CONFLICT OF LAWS

Roerig v. Valiant Trawlers Ltd

[2002] EWCA Civ 21, [2002] All E.R. 961 (C.A.) (Simon Brown, Waller and Sedley L.JJ.)

INTRODUCTION

In the recent case of *Roerig* v. *Valiant Trawlers Ltd*, the Court of Appeal gave a ruling, which may be challenged from many perspectives. The case is of great importance. Its significance does not merely ensue from the diversity of crucial legal issues scrutinised in the ruling - ascertaining the proper law applicable to the assessment of damages in fatal accidents, issues of substance and procedure, establishing the existence of a contractual relationship, statutory construction and the mandatory nature of the Fatal Accidents Act 1976 ("FAA")[1] – but also from both the nature and importance of the litigation to litigants, beneficiaries, and insurers, who need, as Professor North put it, "as good a steer as possible as to what the outcome of the case would be".[2]

THE LITIGATION

The case involved a Dutchwoman, the dependant of a Dutchman, who brought an action on her own behalf and on behalf of their Dutch children in the English courts under the FAA. All claimants were nationals of and domiciled in the Netherlands. The Dutchman, who was employed by a Dutch company, died on an English registered trawler owned by the defendants, an English registered company.

At first instance, H.H.J. Reddihough, who delivered a ruling in favour of the claimants, applied English law in assessing damages for loss of dependency, according to which benefits that have accrued from the death should not be deducted pursuant to section 4 of the FAA.[3] The defendants challenged the ruling on the basis that under Dutch law, which should be considered the applicable law pursuant to section 12 of the Private International Law (Miscellaneous Provisions) Act 1995 ("PILA"), benefits must be deducted.

ANALYSIS OF THE JUDGMENT

The Court of Appeal, in agreement with H.H.J. Reddihough, ruled in favour of the claimants on the issues of the applicable law of the tort (English law), the characterisation of the rule enshrined in section 4 of the FAA as procedural, and the existence of a contractual relationship between the deceased and the defendants. Accordingly, the following four key issues demand analysis: (a) ascertaining the proper

[1] Fatal Accidents Act 1976 as amended by the Administration of Justice Act 1982 and the Damages for Bereavement (Variation of Sum) (England and Wales) Order S.I. 1990/2575.

[2] Dr. P. North, "Oral Evidence", Special Public Bill Committee Report (1994–95) Private International Law (Miscellaneous Provisions) Bill HL Paper 36, Session 1994–95 p. 36 (hereafter "SPBCR 1994–95").

[3] Section 4 provides: "In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded".

law of the tort; (b) the characterisation of the deduction of benefits, as a procedural or substantive issue; (c) the mandatory nature of section 4 of the FAA; (d) the existence of an employment contract with the defendants.

The Proper Law of the Tort: Certainty v Flexibility

The determination of the law applicable to the cause of action brought in respect of the Dutchman's death on board the English trawler fell to be decided in accordance with Part III of the PILA.[4] English law, being the law of the place where the tort occurred (*lex loci delicti*), was clearly applicable under section 11.[5] However, the defendants sought to rely on section 12 of the PILA, which provides for the displacement of the general rule laid down in section 11 in certain circumstances, to invoke the application of Dutch law.[6] This could be the case if it appears after consideration of all relevant factors and circumstances that it is substantially more appropriate to apply a law other than the *lex loci delicti* to the whole dispute or some particular issues arising thereunder (*dépeçage*).[7]

A consideration of the phrase "substantially more appropriate" unleashes the forces of fickleness.[8] In the Court of Appeal Waller L.J. stated that "substantially" is a key word. Displacement is exceptional and operates only in clear-cut or highly justified cases.[9]

In the instant case, the argument centred over the law applicable to the issue of assessment of damages. Is Dutch law substantially more appropriate to govern the issue of deduction of benefits? Section 12(2) sets out some relevant factors, which may be taken into account as connecting a tort with another country.[10] Nonetheless, these factors do not constitute an exhaustive list and fail to offer any guidance on the weight to be attached to a particular set of factors or combinations thereof.[11]

[4] The Act has been subject to rigorous debate, especially part III. See SPBCR 1994–95.

[5] Section 11 of the PILA states: "(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delicti in question occur.
(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being-
(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury; . . ."

[6] Section 12(1) of the PILA states, "If it appears, in all the circumstances, from a comparison of— (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
(b) the significance of any factors connecting the tort or delict with another country,
that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country".

[7] The Law Commissions were opposed to implementing the concept of dépeçage ("splitting up" the case and deciding different issues pursuant to different laws. In principle it operates within the context of determining the applicable law in contracts). *Private International Law: Choice of Law in Tort and Delict* (Law Com. No.193 and Scot. Law Com. No.129, 1990), para. 3·52 (hereafter "Com. Report 193, 1990").

[8] The flexibility provided under section 12 with its current wording renders it vague, uncertain, and unpredictable. It appears that accounting for flexibility is usually at the expense of certainty and predictability to a considerable extent. See P. B. Carter, "Written Evidence", SPBCR 1994–95, p.13; Memoranda by J. G. Collier p. 14, J. J. Fawcett p. 16, R. Fentiman p. 27, C. G. J. Morse p. 45.

[9] SPBCR 1994–95, Written Evidence, Memorandum by R. Fentiman p. 26; C. G. J. Morse, "Torts in Private International Law: a New Statutory Framework" (1996) 45(4) I.C.L.Q. 888, 899; Mayss, A. (1996) "Statutory Reform of Choice of Law in Tort and Delict: A Bitter Pill or a Cure for the Ill?", Web Journal of Current Legal Issues, University of Newcastle upon Tyne: http://www/ncl.ac.uk/~nlawwww/1996/issue2/mayss2.html; L. Collins and Specialist Editors (eds.), *Dicey & Morris on Conflict of Laws*, 13th ed. vol. 2(London, 2000) (hereafter "*Dicey & Morris*") at p. 1553.

[10] Section 12(2) states, "The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events." Concerning examples of factors relating to the parties, and the events constituting the tort and their ramification see C. G. J. Morse, *op. cit.*, at p. 899; *Dicey & Morris* vol. 2, *op. cit.*, at pp. 1552–1553.

[11] J. Blackie, "Choice of Law in Delict and Tort: Reform at Last!" (1997) 1(3) Edin. L.R. 361, 367.

The factors that connected the tort with England were that the events causing the death and the actual death took place on an English registered trawler and the defendants were an English registered company. The court also found that there was a legally binding contract between the deceased and the English company.[12] Accordingly, the Court of Appeal ruled that it could not be substantially more appropriate to displace English law in favour of Dutch law regarding the assessment of damages.[13]

Taking into consideration that the outcome of the comparative balancing of factors should not be based on a mere quantitative analysis of the factors, but rather a qualitative one, and the fact that there is nothing in the wording or framework of section 12 that hampers accounting for factual connections, parties' expectations and the underlying policies of the competing legal rules under the general principle and the exception,[14] it could be argued that it was substantially more appropriate to apply Dutch law. The deceased was under the supervision of a Dutch fishing master, an employee of a Dutch company who was responsible for both paying his wages and making contributions towards his social security. The English trawler was on a Dutch fishing expedition, the deceased paid Dutch taxes, Dutch National Insurance and Dutch social security contributions. The deceased's dependants suffered their loss of dependency (pecuniary and non-pecuniary) in the Netherlands and would receive there many benefits amongst which were a payment under Dutch labour law, a state pension for surviving relatives and a widow and orphans' pension from the workers' pension fund for the Offshore Fishing Industry.[15] Thus, displacement of the general rule in favour of Dutch law would reflect the expectations of both the deceased and his dependants. Nonetheless, section 12 of the PILA requires a comparison of the significance of the factors that connect the tort with both countries. However, due to the non-exclusivity of the factors mentioned in section 12(2) and the inclusion of the notion of *dépeçage* in section 12, it would be justifiable to assume that consideration should be given both to the factors connecting the tort and those connecting the issue with both countries when deciding to apply a law other than the one applicable under section 11 to an issue in dispute.

Accordingly, it is submitted that, although English law may have been appropriate regarding the issue of liability, it was substantially more appropriate to apply the Dutch rule on the deduction of benefits. On the facts, the Dutch company supplied labour to the defendants in return for payment, thus it could be argued that the deceased's work on board the English trawler was coincidental. He could have been working on board any other foreign vessel, depending on the contract between his Dutch employer and any contractor. It would be inappropriate for the Dutch employer to subject its employees to different rules every time they worked on a foreign vessel, especially when they remained bound by their contracts with their Dutch employer.

Assessment of Damages, Deduction of Benefits: Substance or Procedure?

Should the rule on deduction of benefits be considered a procedural issue governed by the law of the forum (*lex fori*) or a substantive issue governed by the applicable law

[12] [2002] 1 All E.R. 961 at 976.

[13] *Ibid.* at 967.

[14] Professor R. Fentiman, *op. cit.*, at p. 28 is of the opinion that such a view is undesirable as it could promote more uncertainty and difficulty. However, the considerations of justice which section 12 was designed to protect coupled with considerations of flexibility encourage taking into consideration such factors, especially because the wording or policy is capable of supporting such view. Accordingly, the test of substantial appropriateness based on a relatively balanced comparison of all factors could be considered an imported crystallisation of the "*Comparative Impairment*" thesis of William Baxter, which is considered a further development of the "interest analysis" thesis attributed to Brainerd Currie. See B. Currie, *Selected Essays on the Conflict of Laws* (Durham: Duke University Press, 1963); W. F. Baxter, "Choice of Law and the Federal System" (1963) 16 Stanford L. R. 1.

[15] According to the evidence given by Mr. Van Der Zwan, [2002] 1 All E.R. 961 at 964.

(*lex causae*)?[16] The distinction between substance and procedure is by no means unambiguous: "There is no preordained dividing line between them which can be discovered by logic alone".[17] In *Boys* v. *Chaplin*,[18] Lord Pearson stated, "I do not think there is any exact and authoritative definition of the boundary between substantive and procedural (or adjectival or non-substantive) law".[19]

Consequently, any attempt to provide a just and reasonable distinction should be made on a case-by-case basis, and by taking into consideration the factual context, the purpose of such distinction, and its consequences.[20] Nevertheless, case law has provided some guidelines. In *Poyser* v. *Minors*, Lush L.J. defined procedural issues as:

> The mode of proceedings by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product.[21]

In the Australian case of *Stevens* v. *Head*,[22] Mason C.J. stated that procedural rules are: "those rules which are directed to governing or regulating the mode or conduct of court proceedings".[23] More recently, in another Australian decision, *John Pfeiffer Pty Limited* v. *Rogerson*, Callinan J. stated:[24]

> What should be regarded as procedural are the laws and regulations which are reasonable and necessary, in the *lex fori* for the conduct of the action only; that is to say the laws and rules relating to procedures such as the initiation, preparation, and the prosecution of the case, the recovery processes following any judgment and the rules of evidence.

It appears that the primary objective of ascertaining such a distinction is to avert any inconvenience in conducting the trial in an outlandish manner.[25] Rules relating to damages are partly procedural and partly substantive.[26] Whilst remoteness and heads of damage are substantive, measurement and quantification of damages are procedural.[27]

The claimants contended that deduction of benefits pertains to the quantification of damages and was thus a procedural issue governed by English law (section 4 of the FAA).[28] Conversely, the defendants sought to rebut the claimants' argument on

[16] Section 14 (3)(b) of the PILA provides that nothing in this part authorises questions of procedure to be determined otherwise than in accordance with the law of the forum.

[17] P. North and J. J. Fawcett, *Cheshire and North's Private International Law*, 13th ed. (London, 1999) (hereafter "*Cheshire and North*"), at p. 70. Similarly, see *Dicey & Morris*, vol. 1, *op. cit.*, at p. 157.

[18] [1971] A.C. 356.

[19] *Ibid.*, at 395.

[20] *Cheshire and North, op. cit.*, at p.71; *Dicey & Morris*, vol. 1, *op. cit.*, at p. 158. Similarly see the *dictum* of Scarman J. in *Re Fuld's Estate (No. 3)* [1968] p. 675 at 695.

[21] [1881] 7 Q.B. 329, 333. Similarly see the *dictum* of La Forest J. in *Tolofson* v. *Jensen* [1994] 3 S.C.R. 1022 at 1072.

[22] (1993) 176 C.L.R. 433. An Australian case dealing with the capping of damages, which was decided by a narrow majority of four to three.

[23] The learned judge had previously expressed the same view in the earlier case of *McKain* v. *R W Miller & Co (South Australia) Pty Ltd* (1992) 174 C.L.R. 1 at 26–27.

[24] (2000) 203 C.L.R. 503 at para. 100.

[25] *Dicey & Morris*, vol. 1, *op. cit.*, at p. 158.

[26] *Boys* v. *Chaplin* [1971] A.C. 356 at 379.

[27] C. G. J. Morse, *op. cit.*, at p. 895; B. J. Rodger, "Ascertaining the Statutory Lex Loci Delicti: Certain Difficulties under the Private International Law (Miscellaneous Provisions) Act 1995" (1998) 47(1) I.C.L.Q. 205, 206; *Cheshire and North, op. cit.*, at p. 85–88; *Dicey & Morris*, vol. 1, *op. cit.*, at p. 170–171.

[28] [2002] 1 All E.R. 961 at 968. They relied on the following: (a) a passage from *Dicey & Morris*, vol. 2, *op. cit.*, at p. 1532 (treating the deduction of social security benefits as a rule for the quantification of damages and thus procedural); (b) the opinion of Hodgson J. at first instance in (*Coupland* v. *Arabian Gulf Oil Co* [1983] 1 W.L.R. 1136, 1149) where he considered the deduction of social security benefits a rule for the quantification of damages; (c) the *dictum* of Garland J. in *Edmunds* v. *Simmonds* ([2001] 1 W.L.R 1003, 1011) where he ascertained that quantification of damages was purely procedural. Their argument appears to be in conformity with the *dictum* of Holland J. in the case of *Hulse* v. *Chambers* [2001] 1 W.L.R. 2386, where he ascertained that the assessment of damages was a procedural matter for the English court, falling within section 14(3)(b) of the PILA.

the basis that a general contention that quantification or calculation is for the *lex fori* is misleading.[29] Waller L.J., with whom Sedley L.J. and Simon Brown L.J. agreed, after acknowledging the struggle of the courts in determining the borderline between substance and procedure, rejected the view expressed in the Australian decision of *McKain* v. *R W Miller & Co (South Africa) Pty Ltd*,[30] and relied, in order to ascertain the procedural nature of the rule, on *Stevens* v. *Head*,[31] a case concerning the capping of damages (not deduction of benefits), and on the English case of *Caltex Singapore Pte Ltd.* v. *BP Shipping Ltd.*,[32] in which Clarke J., though accepting that rules on limitation of liability are *prima facie* substantive, relied on the former decision to decide on their procedural nature.

It is submitted that the court ought to have decided this issue differently. Firstly, rules on deduction of benefits neither pertain to the manner of conducting the trial of a case nor would their application cause procedural inconvenience. The need to consider classification of the issue based on its purpose and consequences calls for classifying deduction of benefits as a substantive issue subject to the rules of the *lex causae*. They should not be considered purely pertinent to the quantification of damages. Although the deduction of the benefits affects the overall amount of damages, it is not directly related to the quantification of damages, which deals with the method of calculation or assessment, the currency in which damages are paid, and the requirement of assessing the damages once and for all (save in cases where provisional damages are awarded in personal injury cases).[33] This merely means that if the *lex causae* (Dutch law pursuant to section 12 of the PILA) requires certain deductions to be made, this rule should be upheld and applied, after which the court is free to give the appropriate compensation. Secondly, English courts should refrain from following the *dicta* in cases like *Stevens* v. *Head*,[34] as financial restrictions on damages recoverable for non-economic loss should not be treated as procedural.[35] It has been questioned whether this approach is consistent with the authorities or desirable in terms of policy. Thus it has been suggested that procedural rules relating to the quantification of damages should be restricted to rules relating to the method or assessment.[36] Thirdly, in *John Pfeiffer Pty Limited* v. *Rogerson*,[37] the High Court of Australia overruled *Stevens* v. *Head,* stating that the *lex loci delicti* should be applied by courts in Australia as the law governing all questions of substance including the existence, extent or

[29] *Ibid.*, at 969–970. They relied on the following: (a) an analogy with a different passage from *Dicey & Morris*, vol. 2, *op. cit.*, at p. 1533 (treating issues of mitigation of damage as substantive); (b) assessment of damages should be regarded as an exercise in calculating and reconciling a balance sheet consisting of debit and credit entries; (c) section 4 of the FAA constitutes an exception to the common law rules, and the latter with their exceptions are part of the substantive law. Accordingly, the Dutch rule should be considered substantive as well.

[30] (1992) 174 C.L.R. 1. In that case the Chief Justice opted for classifying the measure of damages for personal injury as a substantive issue.

[31] (1993) 176 C.L.R. 433. This case was decided by a majority of four to three and had been criticised as encouraging forum shopping, not overall convincing as the majority neither discussed the merits of the conventional distinction between heads of damages and quantification nor cited any authority for that distinction, and gave no reasons for a distinction without difference between the rules for determining contractual rights and obligations arising from the proper law of the contract and the rules governing assessment of damages in transnational torts. B. R. Opeskin, "Statutory Caps on Damages in Australian Conflict of Laws" (1993) 109 L.Q.R. 533, 538; M. Jefferson, "Quantum of damages in tort" (1994) 12 (Sum) S. L. Rev. 16.

[32] [1996] Lloyd's Rep. 286.

[33] *Cheshire and North, op. cit.*, at p. 87–88; *Dicey & Morris*, vol. 1, *op. cit.*, at p.171.

[34] (1993) 176 C.L.R. 433.

[35] *Dicey & Morris*, vol. 2, *op. cit.*, at p. 1533.

[36] *Dicey & Morris*, vol. 1, *op. cit.*, at p. 172.

[37] (2000) 203 C.L.R. 503. The case concerned a carpenter who sued his employer in the Supreme Court of the Australian Capital Territory for damages for personal injury suffered in a workplace accident that occurred in New South Wales in 1989.

enforceability of remedies, rights and obligations.[38] Fourthly, extending the scope of procedural issues under English law in this context may be partially due to the former "double actionability" rule (the cumulative application of the *lex loci delicti* and the *lex fori*) established in *Phillips* v. *Eyre*,[39] under which the foreign *lex loci delicti* only determined whether there existed a civil liability of the kind which the plaintiff was seeking to enforce in the forum. Finally, one could argue for an analogy with Schedule 1, Article 10(1)(c) of the Contracts (Applicable Law) Act 1990.[40] The adoption of this in a tortious context would result in a mitigation of the common law rules that treat assessment or quantification of damages as purely procedural issues, leaving the *lex causae* to govern issues of assessment of damages in so far as they raise questions of law.[41] Since the contracts applicable law orbit and the torts applicable law orbit tend to merge due to the enactment of the PILA, which embraces the principle of the proper law (section 12), one could argue that this constitutes an opportunity to adopt a new approach to this vexing issue.[42]

Treatment of Benefits: Policy Considerations and Overriding Effect

In order to ascertain the procedural nature of the English rule on the deduction of benefits, the court settled for treating deduction of benefits as an issue "bound up both with policy considerations and with the way in which damages under the particular head are to be assessed overall".[43] This raises the following question: what is the nature (whether pertaining to public policy, or bearing a mandatory overriding nature) of both the English rule expressed in section 4 of the FAA, and the Dutch rule, which pursuant to the expert's statement, calls for a deduction of benefits received?[44]

If the English rule reflects a public policy principle it will exclude the application of the Dutch rule (if applicable under section 12 of the PILA), as being repugnant to the prevailing fundamental principles of the forum. If the former is considered a mandatory overriding norm it will override the Dutch rule and claim direct application to the dispute falling within its scope.

[38] *Ibid.*, at 544. It was further ascertained that the terms of section 151 G of the Workers Compensation Act 1987 (NSW) were clearly part of the substantive law of the state of New South Wales, and that provisions which affected the substantive entitlements of one party and the obligations of the other were not simply procedural (para. 134). In the case of *Régie National des Usines Renault S.A.* v. *Zhang* [2002] H.C.A. 10 (14 March 2002), the appellant submitted that the holding of the majority in *John Pfeiffer Pty Limited* v. *Rogerson* (2000) 203 C.L.R. 503 that the *lex delicti* should govern all questions of substance to be determined by all Australian courts in cases of torts committed in Australia, should be applied equally in respect of acts or omissions committed outside Australia, and that the double actionability rule in *Phillips* v. *Eyre* should be overruled.

[39] [1870] L.R. 6 Q.B. 1. However, the double actionability rule is still relevant for cases of defamation. See ss. 9(3), 10, 13 of the PILA 1995.

[40] Article 10 (1)(c) of the Rome Convention on the Law applicable to Contractual Obligations 1980 reads as follows: "The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular: . . .
(c) within the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law . . ."

[41] *Dicey & Morris*, vol. 1, *op. cit.*, at p. 170

[42] The tendency towards convergence of principles in this field could be envisaged in the European Commission's Green Paper regarding a Consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations. The general rule regarding torts would be the law of the country where the loss is sustained (Art.3(1)), or the law of the common habitual residence of the parties (Art. 3(2)). However, the exception providing for the application of the proper law is stated in Art. 3(3). Art. 9(5) concerning the scope of the applicable law provides that the measure of damages in so far as prescribed by law shall be governed by the applicable law (*lex causae*). Art. 11(1), with an innovative breakthrough in the field of non-contractual obligations, embraces the principle of autonomy of choice and permits the parties to choose the applicable law expressly and not to the detriment of third parties. EC Commission (3 May 2002), "Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations", EC Commission, Europa: http://www.europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm.

[43] [2002] 1 All E.R. 961 at 972. Emphasis added.

[44] *Ibid.*, at 963–964.

If the Dutch rule is a mandatory one, and the English corresponding rule (applicable under section 11 of the PILA) is not, its application, as a foreign mandatory rule, could be frustrated if English courts followed the policy expressed in the British reservation to Article 7(1) of the Rome Convention on the Law Applicable to Contractual Obligations.[45] However, section 14(4) of PILA refers to rules of law in general without excluding the possible application of foreign mandatory rules.[46] Nevertheless, if English courts construe section 14(4) narrowly and limit its effect to the forum's mandatory rules, as advocated by many writers, they would be burying any hope for a further pro-internationalistic approach, which is in the interests of justice and consistent with the aim of private international law.[47] If both the Dutch rule and the English rule are mandatory, no doubt the forum's mandatory rule should prevail.

Concerning section 4 of the FAA, Waller L.J. used the term public policy in the context of referring to the treatment of benefits in cases of personal injury.[48] He relied on Lord Reid's statement in *Parry* v. *Cleaver*: "The common law has treated this matter as one depending on justice, reasonableness and public policy".[49]

It is submitted that the use of the doctrine of public policy in this context is both undesirable and inappropriate. Firstly, apart from the fact that this issue was discussed in the context of determining the procedural nature of the rule, reference was made to common law rules in personal injury cases (not fatal accidents cases).[50] Secondly, *Parry* v. *Cleaver* was a domestic case.[51] Thus, the use of the term "public policy", which operates to exclude the application of a foreign repugnant rule that infringes the prevailing fundamental socio-legal norms of a society, is out of context. Public policy was used to denote the underlying policy considerations of the statute and not public policy as a method of rejection of a repugnant foreign law rule. Finally, a glance at other passages of Waller L.J.'s *dictum* reveals that he intended to deal with the issue from the perspective of mandatory rules. He stated:[52]

> What we do know is that under the Fatal Accidents Acts dependants, even foreign dependants, can bring their proceedings, and that as a matter of policy in the framework of the Act as a whole, it has been provided by s 4 of the 1976 Act that no benefits of any kind shall be deducted.

Later he added:

> Surely then, simply as a matter of statutory construction [the mandatory character of any norm is a matter of statutory interpretation and construction],[53] once an action is brought

[45] Article 7(1) states: "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application".

[46] Section 14 (4) of the PILA states: "This Part has effect without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable."

[47] See, for example, C. G. J. Morse, *op. cit.*, at p. 901; *Cheshire and North, op. cit.*, at p. 652; *Dicey & Morris*, vol. 2, *op. cit.*, at p. 1559. If foreign mandatory rules are to be given effect, proper drafting and criteria are crucial in order to achieve justice, flexibility, and certainty to the best possible extent.

[48] [2002] 1 All E.R. 961 at 970.

[49] [1970] A.C. 1 at 13.

[50] The learned judge probably sought guidance in determining the underlying policy of deduction.

[51] [1970] A.C. 1. The plaintiff, a police constable, contributed part of his earnings in respect of pension rights. While on duty, he was injured by the defendant's negligence as a result of which he was discharged from the police force and given a police ill-health award for life. It was held that in computing damages for loss of earnings, the award was not deductible, although it would have to be brought into account in respect of the loss of retirement pension.

[52] [2002] 1 All E.R. 961 at 973.

[53] Words between brackets added.

> in reliance on the provisions of that Act then the sections which refer to assessments . . . simply apply.[54]

Could the English rule against deduction be construed as an expression of a preponderant policy that classifies it as an overriding mandatory rule? The FAA does not provide any guidance on this matter, as it contains no provision regarding its mandatory nature and overriding effect. Therefore, it is a matter of statutory construction to determine its effect.

It would be much easier to infer its overriding effect, if the FAA contained a provision regarding its territorial scope.[55] Nonetheless, it remains a burdensome task for the courts to determine its ambit and territorial scope of application in view of the specific policies expressed therein. On such basis, English courts should consider whether there is a compelling interest for its application in transnational relationships regardless of the normal applicable law under the choice of law rules.[56]

Could section 7(3) of the FAA be taken as providing a territorial scope for the Act?[57] If the answer is in the affirmative, could this mean that it was intended to be applied to all wrongful acts resulting in death, when occurring in England and Wales, and regardless of the applicable law of the tort? It is true that section 7(3) mandates the non-application of the Act to Scotland and Northern Ireland, but this territorial limitation, as obvious from the wording of the provision, is probably due to the fact that both Northern Ireland and Scotland have their own laws for fatal accidents.[58] If it was intended to provide a clear territorial ambit in a sense that it could be interpreted to have an overriding effect, Parliament could have stated that this Act shall apply to all incidents occurring in England and Wales and giving rise to claims under this Act.[59]

It is true that the FAA is available for the benefit of foreigners. However, is that sufficient to confer a mandatory nature on the 1976 Act? It is submitted that such a conclusion would go beyond the purpose and nature of mandatory norms. It would result in an undesirable magnification in the scope of mandatory rules, which would then encompass all rules applicable to foreigners. The availability of the Act to foreigners requires a prerequisite governance of English law.

Section 4 was incorporated into the Act to implement the recommendations made by the Law Commission and the Royal Commission on Civil Liability and Compensation for Personal Injury, but the very broad wording of the section has generated a wider rule of non-deduction than appears to have been intended. The section therefore enables the claimant to be doubly compensated where there is arguably no justification

[54] [2002] 1 All E.R. 961 at 973.

[55] *Cheshire and North, op. cit.*, at pp. 581, 650; *Dicey & Morris*, vol. 2, *op. cit.*, at p. 1559.

[56] Audit, after stating that determining the applicability of mandatory norms is a process of statutory interpretation, adopted an "interest analysis" approach where he ascertained that: "The solution therefore ought to be reached by considering the purposes and policies underlying the competing rules, then evaluating the significance of the relevant contacts against those policies. In doing so, a court should give a moderate and restrained interpretation of the interests of the forum, if any." B. Audit, "A Continental Lawyer Looks at Contemporary American Choice of Law Principles" (1979) 27 Am. J. Comp. Law 603. Similarly, see F. Vischer, "General Course on Private International Law" (1992) 232 Rec. des Cours, 160.

[57] Section 7(3) states: "This Act shall not extend to Scotland or Northern Ireland".

[58] The Fatal Accidents (Northern Ireland) Order 1977, S.I. 1977/1251 (NI 18) and Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.

[59] See, for example, the wording of the Carriage of Goods by Sea Act 1971, which gave effect to the Hague-Visby Rules with a limit of liability, which provided that the rules are applicable "to every bill of lading relating to the carriage of goods between ports in two different States if: (a) the bill of lading is issued in a contracting State or (b) the carriage is from a port in a contracting State . . ."

for ignoring the benefits, which he or she has received.[60] Section 4 of the FAA adopts a clear policy of total disregard of benefits when assessing damages. However, the preponderance of this policy as having a full overriding effect (*i.e.* the application of section 4 regardless of the applicable law) is doubtful.[61] Thus, it would be wise to construe it as a domestic mandatory rule that is applicable only if English law is the applicable law.

Concerning the Dutch rule, it is obvious that there is no sufficient evidence regarding its nature. However, the expert witness, with regard to the Dutch policy of deducting the benefits received by victims or their dependants from compensation, stated:

> The reasoning behind this is that society provides for its victims and their dependants to an acceptable and reasonably high minimum, which is usually elevated by provisions arranged by the industry they are/were working in.[62]

This reasoning seems insufficient to decide on the nature of the Dutch rule. Thus it would be wise to assume that it does not have a complete overriding effect and will only be applied if Dutch law is the *lex causae*.[63]

Existence of Contractual Duties: A Fiction or Reality

The claimant, after admission of liability, amended her claim to add a claim in contract. It was further contended that the proper law of the contract of employment between the deceased and the defendants was English law.[64] Since the court ruled in favour of the claimant on practically all the issues, it did not provide extensively detailed scrutiny regarding the contract of employment.

The deceased's principal contract of employment was with the Dutch company (Diepzee). This was certain and could not be challenged.[65] Nonetheless, it was found that, when boarding the English trawler, the deceased had to sign a crew agreement, which provided for employment with the English company, the defendants. Should the crew agreement signed by the deceased be considered a truly binding contract? After considering the alternatives, the Court felt that there was no reason to exclude the intentions of the parties to enter into another legally binding contract whose applicable law is English law.[66] The negative repercussions of this view would have been amplified if the court had ruled in favour of the defendants on the other issues.

It is submitted that the existence of a legally valid and binding contract of employment between the deceased and the defendants was a fiction and cannot be supported. Firstly, the reason for signing the crew agreement was section 25 of the Merchant Shipping Act 1995 (MSA), which imposes an obligation on persons employing seamen on U.K. ships to obtain an agreement in writing, on pain of a criminal fine and detention of the vessel. Only the Secretary of State can grant an exemption from the above requirement. Accordingly, it seems that in order to avoid

[60] *Claims for Wrongful Death* (Law Com. Report No. 263), Law Commission: http://www.lawcom.gov.uk/library/lc263/lc263.pdf. In paras. 1·8-1·9, 5·2-5·3, 5·6-5·8, 5·21–5.22, 5·41–5.42 the Law Commission recommended that the present section 4 should be repealed, and that there should once again be a statutory list of the types of benefit which should be disregarded in the assessment of damages, as the deduction of collateral benefits in the assessment of damages where they meet the same loss is supported by policy arguments and consistent with the purpose of the law of torts.

[61] In case of doubt it is better to construe mandatory rules and public policy principles narrowly for the sake of certainty and preservation of the normally applicable foreign law.

[62] [2002] 1 All E.R. 961 at 964.

[63] It is unlikely that English courts will apply foreign mandatory rules, unless considered part of the *lex causae*.

[64] [2002] 1 All E.R. 961 at 965.

[65] *Ibid.*, at 965, 974. There was no appeal on this point. The court certainly accepted the findings of the trial judge regarding this contract.

[66] *Ibid.*, at 965, 976.

criminal liability and detention of the vessel, the defendants sought to establish a fictitious formal legal situation by demanding the signature of the deceased to the crew agreement. Secondly, as a proof of the absence of any intention to create a real binding contract of employment, when the deceased signed the agreement there appeared next to his signature in the column headed "rate of wages": "as agreed", that is the wages would be paid by the Dutch company who supplied the labour to the defendants in return for payment.[67] This shows that the defendants intended to have no financial obligations, as an employer, towards the deceased, who was already employed by another company. Thirdly, there was overwhelming evidence that the contract of employment was with the Dutch company, which explains the court's acceptance with hesitation that the crew agreement constituted a binding contract. Thus, the uncertainty surrounding the purpose and nature of the alleged English contract would, on such a basis, render a ruling in favour of the claimants unjust as well as unreasonable.

CONCLUSION

The following conclusions arise from the decision in this case. Firstly, the determination of the applicable law of the tort under sections 11 and 12 of the PILA merits further consideration in order to achieve a balanced equation between considerations of certainty and flexibility that promote justice and reasonableness. Secondly, the classical dichotomy between substance and procedure has caused and continues to cause numerous problems. In the present case, deduction of benefits was swinging between both concepts until it was regrettably considered procedural. Thirdly, the overwhelmingly tangled issue of mandatory rules warranted more attention from the court, as it could have been a decisive matter. Finally, the issue of the existence of an English contract of employment definitely deserved more detailed scrutiny, as its impact on the ruling would have been noticeable had the case been decided as otherwise suggested. It is hoped that in the future English courts will adopt a broader and more flexible approach in view of all the circumstances and factual context of the case.

MOHAMED ABDEL WAHAB*

[67] *Ibid.*, at 974.

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BOOK REVIEWS

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

FAMILY AND IMMIGRATION LAW

Putting Children First

by JANE COKER, NADINE FINCH and ALISON STANLEY

London, Legal Action Group 2002, xxiii + 286pp., Paperback, £24·00,
ISBN 19-033-0711-2

This book addresses important, difficult and sensitive questions that are located at the interface between Immigration Law and Family Law. Its expressed aim is "to provide immigration practitioners with the tools needed to argue family law issues successfully in an immigration context". That such issues can arise in an astonishing variety of circumstances is clearly demonstrated by the book's list of contents. There are materials devoted to (among other things) child adoption; divorce; domestic violence; unmarried parenthood; section 8 orders and public law orders under the Children Act 1989; and local authority support (including accommodation) for children in need. The relevance of these matters to nationality, asylum claims, entry clearance applications, administrative removal under section 10 of the Immigration and Asylum Act 1999 and deportation is considered. The EU/EEA and ECHR dimensions are also addressed.

This is an extraordinarily complex and demanding framework for immigration practitioners – especially when the significance of non-statutory Home Office instructions and concessions is taken into account – and this book will prove very helpful to them in their work. The boxes containing case examples are a particularly good feature. Nor should the 13 appendices, containing key extracts, be overlooked. It must be stressed, however, that this is a practical handbook, written by practitioners for practitioners. It is not an academic treatise and neither its structure nor its style should be judged on that basis. There can be no doubt that as a practical work of reference, the book will be well regarded and frequently used by advisers in the field. The areas of law covered never stand still, of course (a fact sometimes painfully appreciated by the present reviewer) and a future edition will need to reflect the changes introduced by the Nationality, Immigration and Asylum Act 2002 and the Adoption and Children Act 2002.

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LAWYERS FIRST AND TEACHERS SECOND?

Effective Learning and Teaching in Law,

edited by R. BURRIDGE, K. HINETT, A. PALIWALA and T. VARNAVA

London, Kogan Page, 2002, xiv+2210 pp., Paperback, £19·99,
ISBN 0-7494-3568-2

This book is published in association both with the Times Higher Educational Supplement and the Institute for Learning and Teaching in Higher Education (ILTHE) and is edited by a group based at the UK Centre for Legal Education in Warwick, whose overall aim is expressed on its website as "promoting the development of learning and teaching in legal education at both the academic and vocational training stages".[1] Given the number and diversity of educational programmes within this sector, the editors have taken on a vast task in taking on as the aim of the book as a whole that of promoting "an approach to legal education that is founded on the development and recognition of the law teacher as a professional educator"[2] and in seeking to achieve all of this in a compact paperback.

It is perhaps for that reason that the content is so heterogeneous, comprising in nine chapters the revision of legal education (chapter one); an introduction to teaching methods within the "active" and "experiential learning" canon (chapter two); discussion of assessment (chapter three); innovative use of electronic resources (chapter four); a case study demonstrating teaching of ethics using a reflective model (chapter five); the Human Rights Act (chapter six); law teaching for other programmes (chapter seven); the impact of ADR on legal education (chapter eight) and overall change in the context of legal education (chapter nine). The focus is on the academic stage of legal education, with explicit references to the vocational stage appearing in any detail only in the description in chapter four of use of electronic resources in the Scottish Diploma in Legal Practice and chapter five's discussion of a component of the Bar Vocational Course in England and Wales. To a vocational teacher, this emphasis is perhaps most marked in chapter eight, whose concept of the law classroom as focused on a litigious "model of conflict"[3] founded in Donald Schön's paradigm of "technical rationality"[4] would be belied to some extent by an examination of the place of ADR in the BVC and LPC curricula.

As a collection of essays, the text does not and, it is suggested, cannot, set out to be a teaching manual (although some chapters, in particular chapter seven on service teaching for non-law disciplines do give checklists and guidelines that are of more practical value) or even to expound systematically or in detail any particular educational theory or group of educational theories. A contribution from the student perspective, whilst difficult to obtain, might have been an illuminating contribution.[5]

[1] U.K. Centre for Legal Education, University of Warwick: http://www.ukcle.ac.uk/about/index.html.

[2] Preface, p. xi.

[3] p. 167.

[4] See Schön, D.A., "Educating the Reflective Legal Practitioner", (Fall, 1995) 2 *Clinical Law Review*, 231, *Educating the Reflective Practitioner*, (Jossey Bass, 1987), *Educating the Reflective Practitioner*, presentation to 1987 meeting of the American Educational Research Association (http://www-pcd.stanford.edu/other/schon87.htm, accessed 23rd January 2002); *The Reflective Practitioner*, (Ashgate, 1983). Inaccuracies in Schön's idea of what goes on in a law classroom in the U.S. at least have, however, been identified: Neumann jr., R.K., "Donald Schön, the reflective practitioner and the comparative failures of legal education", (Spring 2000) 6 *Clinical Law Review*, 401.

[5] In its absence, perhaps the most vivid subjective description of the process of undergoing a legal education process remains that in Turow, S. *One L (the turbulent true story of a first year at Harvard Law School)*, (Warner Brothers, 1988). In this jurisdiction, valuable and contemporary student perspectives are set out in Boon, A., and Whyte, A. (University of Westminster, 2002), "Legal Education as Vocational Preparation?: perspectives of newly qualified solicitors", http://www.ukcle.ac.uk/research/boon.html.

It does, however, provide, embedded in the various discussions and examples, an introduction to many of the shiny names of what might be called the school of professional education although, and particularly in the context of the Law Society's Training Framework Review[6] with its suggestion that a competency-framework for legal education might be appropriate, the work of Michael Eraut[7] might be a notable omission.

The underlying intent of the editors is one of raising awareness, not about law or legal practice which are taken as givens, but of education: for those of us who teach, our "other" profession. A key comment is made in chapter one:

> The development of legal education in the United Kingdom is hindered by the absence of professional identity amongst law teachers and their ambivalence about whether they are a subset of the legal or HE teaching professions.[8]

This dilemma, whilst clearly not confined to those involved in legal education as opposed to other fields of professional education, is one of particular significance to lawyers. Keeping up with one's substantive field as a lawyer is difficult enough without also seeking to remain informed about changes and developments in educational theory. It takes a certain humility, on the part of the law teacher, to recognise that there is work on "professional" education from which one can learn in many other fields, notably nursing and, not surprisingly, teaching. Perhaps the fact that participation in PGCHE and similar programmes are increasingly required of new lecturers will help to redress that balance, at least in new entrants, to whom this text might provide a helpful bridge between in-depth study of theory and practice in a generic higher education context and application in the legal field. For the old hand, for whom a context-specific discussion might be more palatable, whatever ideas, arguments or law-specific debates might be prompted by a reading of the various essays, signposts are given towards educational theories established in general or other contexts such as those of Bloom, Kolb, Boud *et al*, and Schön as well as a (re)introduction to the small range of specialist journals and texts dealing with legal (generally, in this jurisdiction, with academic legal) education. A collection of essays, however carefully compiled, and however fascinating its descriptions and examples can only provide a taster or a gateway into a wider world. Those of us who teach are doubly professionals: if this text reminds us of that and leads even some of us to pursue that "other" (and by implication generally subsidiary) profession with the vigour with which we keep up with the law reports, it will have met, and perhaps even exceeded, the editors' intentions.

JANE CHING*

[6] Law Society of England and Wales, (2001), *Training Framework Review Consultation Paper*, Law Society of England and Wales, http://www.lawsociety.org.uk/dcs/pdf/trainingconsultation.pdf. See also Boon, A. and Webb, J., *Report to the Law Society of England and Wales on The Consultation and Interim Report on the Training Framework Review*, 1st February 2002 also at the Law Society website.

[7] Eraut, M., *Developing Professional Knowledge and Competence*, (1994, Falmer).

[8] p. 15.

* MA (Cantab.), ILTM, Solicitor, Reader in Course Design and Curriculum Development, Nottingham Law School. Whilst the opinions and errors in this piece are entirely my own, I am grateful to my colleague Joy Davies for her assistance and much valuable discussion in the course of preparation of this review.

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NOTTINGHAM MATTERS

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

"THE CASE-MANAGEMENT CONFERENCE", A SMALL GROUP SESSION DELIVERED AT NOTTINGHAM LAW SCHOOL BAR VOCATIONAL COURSE DURING THE ACADEMIC YEAR 2001/2002

RICHARD PAYNE[*]

ORIGINS OF THE SMALL GROUP SESSION ON CASE MANAGEMENT.

1. At the end of the academic year 2000/2001 a lacuna had been identified in the composition of the Bar Vocational Course at Nottingham Law School. It came about because of the increasing importance of a new procedure which had been introduced into the conduct of civil litigation two years previously by the Civil Procedure Rules 1998, but which had not yet been addressed by the course.
2. The new procedure had arisen out of the concept of "case management", which was the single most important recommendation to emerge from the "Access to Justice" Reports[1] (which themselves were the precursor to the Civil Procedure Rules.) This recommendation was based on the conclusion that the problems in the civil justice system could be remedied if many detailed changes were made to existing practices and procedures, and that those changes could only be rendered effective in the context of a "managed system of dispute resolution".
3. The recommendation had been implemented in the 1998 rules, in particular by Rule 1·4, which set out the Court's duty to manage cases, and in Rule 3·1 which prescribed the court's general powers of management. Rules 26 to 29 applied the powers to stages in litigation, supplemented by Guides and Practice Directions which were published for use in the specialist courts.
4. By mid 2001, judicial control of litigation had been in operation for more than two years, and the case management conference attended by the parties and the judge, had become an established procedure in daily use in the courts for all types of case except small claims. Consequently it was likely that the post-graduate students on

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[1] *Civil Procedure* (Spring 2001, Sweet and Maxwell): 1·4.1.

the course would encounter the experience of attending with their pupil masters/ mistresses a case management conference at an early date in their professional careers.

5. Against that background the introduction into the Bar Vocational Course of a teaching session on case management had become a pressing necessity.

THE PROJECT

6. The new session on the case management conference which was required to plug the gap in the curriculum, was commissioned at a staff planning meeting held in the Summer term 2001, to be included in the timetable as a new entrant on Thursday 21 February 2002. The only immediate action at that time was to set aside the day for the whole school of 96 students to be taught in four sessions of four groups of 6 students in each group.

AIMS, OBJECTIVES, LEARNING OUTCOMES, AND RESOURCES.

7. The remit for the aims and objectives of the session was that the students were required to be made aware of the purpose and effect of the Rules, and the place of the "single most important" feature called case management, in the conduct of civil litigation. The learning outcomes were to be that the students should be equipped with sufficient knowledge of the subject to be ready for pupillage in the chambers of a set of barristers.[2]
8. No particular format or content for the teaching and learning was prescribed, and it was left to the newly-appointed tutor who was made responsible for the session, to design a suitable presentation and to produce any necessary materials.
9. The resources available for delivery of the session were a sufficient number of classrooms, and tutors, to cover the whole school within one day in groups of six students per class. Materials available were principally that each student was equipped with a copy of the White Book, which is a practitioners' textbook containing all the necessary Rules of practice and procedure.

OPTIONS CONSIDERED FOR THE DESIGN OF THE SESSION.

The first plan.

10. The first draft of a possible structure for the session drew upon lines which have been described by Biggs (1999: 21) as the level 1 theory of teaching, namely the view of university teaching as transmitting information which is so widely accepted that delivery and assessment systems the world over are based on it.[3] At first, this was regarded as the most appropriate means to deliver a coherent presentation of the necessary information.
11. What was envisaged was that the tutor in the session would speak to the students, taking them through a logical explanation of the rules and their application, amplified by use of the white board to write up suitable headline points for

[2] *BVC Re-Validation Requirements and Guidelines version 11* (2001) London: The General Council of the Bar.

[3] Biggs, J. *Teaching for Quality Learning at University,* (1999) Buckingham: SRHE and Open University press.

the students to copy. The presentation would be accompanied by a handout, containing the main features of the tutorial, with sufficient space for students to annotate the text. In conclusion, the tutor would accept questions from the students arising from the material discussed.

12. By this means, the tutor would be able to relate the subject matter to the wider context of the course, and to the place of the case management conference in civil litigation generally
13. The session would fit into the timetable and the students would have the benefit of contact with the tutor in small groups of six students.
14. The usefulness of this design of the session was reconsidered and evaluated in the light of the worrying statement by Biggs (1999: 22) that the level 1 theory is totally unreflective, and (worse) that it doesn't occur to the teacher to ask the key generative question: "What else could I be doing?"

The second plan

15. In the light of such consideration, the first proposal as described above underwent a process of evolution into a more complex session with greater involvement of the students. What emerged amounted to a by-pass of Biggs' level 2 theory of learning (1999: 22), and went straight on to level 3, (1999: 24) thereby adopting the prescription that:

> Level 3 is systemic. Good student learning depends both on student-based factors-ability, appropriate prior knowledge, clearly accessible new knowledge- and on the teaching context, which includes teacher responsibility, informed decision-making, and good management.

16. In this second stage of the planning, it was intended that prior to the session, the students would be given instructions that they should read the appropriate rules and editorial commentary in the White Book.[4] Then in the session, the tutor would first explain the significance and effect of the rules, thereby putting the case management conference into the wider context of the conduct of civil litigation generally. Since the students already had some knowledge of the context from other parts of the course, it was felt that they would readily be able to assimilate and make use of the new information.
17. Having acted for a short time as what Biggs (1999: 21) calls "the knowledgeable expert, the sage-on-the-stage", the tutor would then distribute a prepared set of questions to be answered in writing individually by the students. The session would conclude with directed questions by the tutor to the students to give and discuss their answers.
18. It was anticipated that the usefulness of this second proposal would be that the students could be proved to have read and been shown the salient features of the subject, and their application to the task would have been assured by the written exercise. Finally they would have had the opportunity to participate in a discussion, which would widen their knowledge by the introduction of points of view expressed by their colleagues.
19. As with the first plan, the timetable would accommodate the delivery of the second plan without the need for any adjustment.
20. Accordingly, a draft edition of the second plan was prepared during the summer of 2001, and left to be completed at a later stage.

[4] *Civil Procedure* (Spring 2001, Sweet and Maxwell).

The third plan.

21. When the second plan had lain fallow for a month or two, and the student cohort of 2001/2002 had become established early in the first term of the course, the whole subject of the new session was revisited, originally with the intention to crystallize the draft proposals and write them out as teaching materials for students and tutors.
22. On this occasion it occurred to the tutor that even though plan two was an improvement on plan number one, the second plan was itself failing to take an opportunity to add a major leap of imagination to the delivery of the whole course. This reflection arose from the nature of the course, which is to prepare the students for a career of which large parts are comprised of contests of public advocacy, the important word being "contests", not simply speeches. Having remembered this priority, the tutor embarked on the construction of plan three.
23. The basic structure of the latest scheme, when it emerged, was far from traditional, and its usefulness was untried and experimental. Now it was intended that after design and delivery of the session materials, the function of the tutor would become the equivalent of a football team coach, while the students would occupy the whole field of play, including the position of referee. The way this was proposed to work was as follows.
24. Administratively, the classroom format was that the session would engage every student in a replica of a courtroom performance of a case management conference. To achieve this, the students would be allocated into trios, in which two students would "represent" their respective clients, and the third student would be the judge. The trios would be assembled from unfamiliar groups, to give realism to the encounters. This was a practical proposition without any alteration to the timetable, since the students could be shuffled between groups without disturbing the time of their class.
25. Substantively, the teaching and learning materials were assembled in three sets, designed to be appropriate for each side of the case, and for the judge. The case study bundle of documents was common to all parties. The study itself was constructed to incorporate a cross section of topical legal issues, commonly arising in case management conferences at court. Preparation of their cases would involve the students in research into the facts and law and the application of the Rules of practice and procedure to their findings. The function of the judges was fully explained, and required them to master the case so as to be able to intervene, to clarify issues and to control the proceedings, as well as give a reasoned decision at the end of the submissions.
26. A potential problem, was that for administration, since there were six students programmed to attend each class, it was necessary to run two "hearings" simultaneously in each classroom. However, by careful arrangement of the tables and seating, and the avid engagement of each trio in its own tasks, fears on this score were dispelled.
27. In order to ensure that the student body was fully prepared for the innovative small group session of the case management conference, a new explanatory lecture was added to the timetable, to take place about 3 weeks in advance of the small group sessions.
28. As a final incentive to the students to prepare thoroughly and aim to win the contests by persuading the judge to decide in their favour, a scoring system was devised to enable comparison of performance across the school, followed by the jocular award of a "Top-gun" certificate to the winner. This caused a great deal of interest among the students.

THE PERFORMANCE OF PLAN THREE

29. On 21 February 2002 all 96 students on the course attended at their appointed times and engaged in the simulation of the Case Management Conference. The classes were each of six students, sub-divided into two trios, each comprising a Judge, counsel for the Claimant and counsel for the Defendant. The furniture in the rooms was arranged to provide two Court "stations", back to back, which prevented any interruption or annoyance of one Court by the other.
30. The study materials occupied the students with five separate legal issues to be resolved in one hour, giving about five minutes for each advocate to speak on each problem, plus time for the Judge to give the result with reasons. The decision whether to decide each point in turn, or to reserve judgment to the conclusion of the arguments, was left to the individual Judges. Clocks were provided, although the majority of students used their own watches to keep the exercise within the time limits. The Judges proved to be competent to maintain discipline, and to intervene when necessary to ask questions and to control the advocates. No report was received of any significant over-run.
31. At the end of the legal arguments, and when the last judgment had been delivered, there was a plenary session within each class. Each student in turn was asked to report on one point which had been learned, and one surprise which had been encountered.

USEFULNESS OF THE DELIVERY METHOD.

32. Although the nature of teaching is to be wary of apparent success, and to look constantly for faults to correct and improvements to be made, it did appear that the method of engagement of the student body in learning by doing, was useful and appropriate for the particular task. In one sense the chosen design had much to do with Problem Based Learning, as explained by Biggs (1999:207):

> PBL in effect simulates everyday learning and problem-solving. The problems are, however, carefully selected, so that by the ends of the programme, the learner is expected to cover perhaps less content than is covered in a traditional programme, but the nature of the knowledge so gained is different. It is acquired in a working context and put back to use in that context.

33. Another reason to believe that the selected method of delivery of the required knowledge is useful, is that the described method used in the Nottingham Law School case management small group session corresponds closely to the theme of "modernism", as used by Corrigan et al (1995).[5]

> The new modernist theme is therefore the all-round development of personal skills which enables people to be active consumers of knowledge and skilful users of occupational competencies,

which is exactly the purpose of the third plan.

[5] Assiter, A. *Transferable Skills in Higher Education*, (1995). London: Kogan Page (1995: Corrigan, P. Hayes, M. Joyce, P. at page 36).

THE STRENGTHS AND WEAKNESSES OF THE METHOD

34. The first strength of which there can be no doubt, is that the session did achieve its objective to raise the awareness of all the students of the purpose and effect of those Rules which were expressly incorporated in the case study. The reason for confidence in this assertion is that each student was obliged to become engaged in research of the particular topics, in anticipation of challenge by a competitor and scrutiny by a judge, and that those encounters did in fact take place. So it is a reasonable inference that the students must have been made aware of the subject matter.
35. In the context of the limitless subject matter of the case management conference, the design of the session is consistent with the prescription for Problem Based Learning, as explained above by Biggs. In other words, no design of a package of teaching and learning could cover everything that can arise in a case management conference, so the selected sample of topics is sufficient to enable the students to acquire the necessary skill and knowledge to be able to adapt their learning to other situations.
36. An indicator of strength is that the reports by the students of their experience were all favourable and enthusiastic. A common remark was, "can we do it again in another session?" Consequently, if enthusiasm of the students in the use of the subject matter is a measure of strong teaching, then the method gains a high score. However, if the purpose of the exercise is to transmit knowledge, then without a controlled test against delivery of the same information by a sage-on-the-stage, no-one can truthfully state that the method is a success.
37. Another useful strength of the method, is that assuming it was successful, then the one lesson usefully delivered several major components of the BVC course, namely legal research, fact management, negotiation and advocacy.
38. A weakness is the large consumption of tutor time in research and preparation of suitable case study materials, which are likely to require revision from year to year.
39. As mentioned above, and in common with most educational theories, there is no objective standard of measurement of the success of the project. Consequently, a weakness of the session is that its evaluation is only based on student reactions of enthusiasm, motivation and engagement. Whether these are true indicators of strength in teaching and learning is open to question.
40. Both a strength and a weakness is the relatively low level of tutor engagement in the session itself. However on reflection it is felt that the presence of a tutor in the room during the session is beneficial. The reason is that it did appear to have a stabilizing effect on what turned out to be many brisk and well argued encounters, between well prepared and competitive students.

FUTURE PRACTICE

41. All members of the staff who participated in the session regarded it as a success worthy of repetition next year. So it does seem likely to become a fixture and has been included in the timetable together with a preceding "warm-up" lecture.[6]

[6] For other references, see Assiter, A. *Transferable Skills in Higher Education*, (1995, London: Kogan Page); (1995: Corrigan, P. Hayes, M. Joyce, P. at page 36); Biggs, J. *Teaching for Quality Learning at University*, (1999, Buckingham: SRHE and Open University press); BVC Re-Validation Requirements and Guidelines version 11 (2001, London: The General Council of the Bar); *Civil Procedure* (Spring 2001, Sweet and Maxwell): 1·4.1.

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EDITORIAL

WHERE ARE WE GOING WITH ACCESS TO JUSTICE?

The Access to Justice Act 1999 marked a clean break with a state-centred approach to access to justice for citizens. Before the act the theoretical aspiration of the state was for a comprehensive system of civil and criminal legal aid and advice. However, Legal Aid had never been free at the point of delivery for most citizens, unlike the National Health Service, and it had been increasingly squeezed between a cash limited fund and declining eligibility on income grounds. Stephen Orchard, the departing Chief Executive of the Legal Services Commission – hardly a shrinking violet when it came to controlling lawyers' costs – summed up the position in his valedictory address in apocalyptic terms:

> We are approaching crisis point – not just in crime, but there is a huge potential for problems in family, as well. If government is not very careful, it will find itself in the same position as with the health service, where it has had to bung in buckets of money to put right years of neglect.[1]

Like the NHS this might have suggested a future of increasing delays for cases to be taken (like operation dates) to stretch out the limited funds and avoiding breaking the cash limit. However, unlike some aspects of health (like hip operations) there is a limit to the time that a defendant who is sued, or a claimant facing a limitation period, can hang around waiting for advice or representation: queuing, even in pain, is not an option.

In the Access to Justice Act the government proposed a radical way to fund civil claims to avoid what seemed an inevitable clash between rising expectations and cash limits: the conditional fee recoverability scheme. This transferred the risk of cases from the state (the Legal Services Commission) to lawyers and clients. Claims were to be taken on a "no win no fee basis". The lawyers' incentive for taking the risk – the success fee or mark up on costs – and the client's protection against paying costs if the case was lost (the After the Event insurance premium) became recoverable from the loser *in addition* to damages and base costs. Hurray! The circle is squared! Clients take no risk! Everyone is happy! All pigs are flying! The problem is that no one obtained a blanket assurance from the payers, largely multi-national liability insurers, that this UK domestic reform was acceptable. They took the view that they had not reserved against such a quantum jump in the costs of each case. Furthermore, the new scheme created a space into which intermediaries, the claims management companies (regarded by some as "claims farmers") such as Claims Direct and the Accident Group, could drum up business. Faced with more cases and more cost *per* case the insurers declared

[1] *Independent Lawyer*, May 2003, p.4.

war: all points of dispute, some matters of principle but others merely nit-picking or plainly daft, were taken in order to obfuscate, delay and generally frustrate the normal process of paying lawyers for winning cases.

The costs war is currently entering a period of cautious cease-fire as first Claims Direct and then the Accident Group collapsed, removing a huge tranche of future cases from the system. The Court of Appeal has also reminded payers that unless the points they raise are of material substance they will not succeed. However, there is a more worrying aspect to the current truce. While the government seems content with the new scheme and the Legal Services Commission is proposing to extend conditional fees to education cases, claimant lawyers are licking their wounds. Many lawyers have suffered badly through their involvement with the "claims farmers", taking on cases that they might otherwise have declined and finding that their previous relationship with insurers, robust but not unreasonable when paying solicitors' charges, has changed to outright hostility. Traditionally, English lawyers are risk-averse, used to being paid no matter whether the case is won or lost, and insistent that security of income guarantees their professionalism. The Access to Justice Act plunged them into a new world of risk taking: many have not found the water to their liking. In this Neo-Darwinian experiment in access the fittest will survive – the factory firms and niche practitioners – but the costs war has had an insidious effect on all lawyers' attitude to conditional fees. If cases carry *some* risk of failing on the law or facts but *inevitably* fail to guarantee lawyers orderly payment for their work then it is hardly surprising that lawyers will only take the safest bets. Claims which need some effort to investigate; cases which carry an element of risk and good cases against aggressive opponents may well be put to one side in favour of a safety first policy. If so the Act may have produced an extension of access which is wide but shallow. More citizens, particularly the middle classes ineligible for legal aid, may approach solicitors for help but a high proportion will be turned away. Access to justice? Well, yes. A satisfactory replacement for legal aid? Hardly.[2]

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[2] J. Peysner, "Finding Predictable Costs" C.J.Q. (Forthcoming)
J. Peysner, "Costs in Personal Injury Cases: Searching for Predictable Costs" (2002) 2/02 J.P.I.L. Issue 166.
J. Peysner, "Turning into Trouble", casenote on *Sarwar* v. *Alam*, (2001) 10(2) Nott. L.J. 64.
J. Peysner, "What's Wrong with Contingency Fees?", (2001) 10(1) Nott. L.J. 22.
J. Peysner, and A. Walters "Event Triggered Financing of Civil Claims: Lawyers, Insurers and the Common Law", (1999) 8(1) Nott. L.J. 1–22.

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ARTICLES

HUMAN BODIES, INHUMAN USES: PUBLIC REACTIONS AND LEGISLATIVE RESPONSES TO THE SCANDALS OF BODYSNATCHING

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INTRODUCTION

Doon the close and up the stair
But an' ben wi' Burke an' Hare
Burke's the butcher
Hare's the thief
Knox the man who buys the beef![1]

Burke and Hare rank amongst the most well known of Britain's serial killers due to the abhorrent nature of their crimes: murder and profiting from the sale of their victims' bodies. And yet, despite their fame, Burke and Hare were certainly not the only resurrectionists[2] who committed murder, nor does the evidence indicate that murder was their only means of procuring bodies for sale. However the public outrage that ensued was such as to ensure that their names were branded into the public consciousness to the exclusion of other resurrectionist misdemeanours.[3] While they are often credited with prompting the legislative changes regarding the use of corpses for the teaching of anatomy,[4] it will be seen that debate had been continuing for some time on this matter. Legislative change had been contemplated before these crimes came to light, but the new crime of "Burking",[5] together with the resulting public panic, increased the pressure to amend the law.

The disgust with which the public regarded these crimes, and the growing public realisation of the precise nature of anatomists' practices, is not something consigned to

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[1] Adam Lyal, *Witchery Tales, The darker side of old Edinburgh* (Moubray House Press, Edinburgh, 1988). An extract from a popular song after the Burke and Hare scandal which probably has its origins in the verses commonly published in the penny broadsheets.

[2] "Resurrectionists" or "resurrection men" being the term given to those engaging in the removal of recently buried corpses from the graveyard for the purpose of sale to anatomists and lecturers of anatomy. Frequently the resurrectionists would in fact be medical students themselves.

[3] Note, here the term "misdemeanours" is not being used in its legal sense.

[4] Ball, J. M., *Sack-'em Up Men*, (Oliver & Boyd, 1928) p. 72.

[5] See for example the comments of Mr. O'Connell in the debates in the Commons on the Anatomy Bill in February 1832; ". . . it was much better to risk the chance of some indecencies being committed with respect to dead subjects than to risk the chance of the living being converted into dead subjects by the atrocious practice of Burking." Hansard 1832 Vol. 10 col. 378.

history. Medical science continues to develop, anatomists continue to need bodies, and bodysnatching, albeit of body parts as opposed to whole corpses, still occurs. The main distinction between the periods is that today's resurrectionists are exclusively the medical men themselves, for example, the pathologist at the Royal Liverpool Infirmary, and the practitioners at Bristol Royal Infirmary. Unlike their 19th century peers, today's resurrectionists do not need to resort to murder. The moral outrage surrounding these "new" resurrectionists is equally strong as that provoked by Burke and Hare in the 19th century, if not more so, since today we have a developed "rights-based" culture and a clear expectation of consensual medical practices.

The similarities between the moral panics arising from the bodysnatching scandals in both 19th and 20th century Britain will be explored and examined, together with the medical justifications. The legislative consequences will also be considered, since both eras have produced suggestions for reform.

THE 19TH CENTURY

The story of Burke and Hare's unorthodox methods of obtaining bodies for the anatomy lecture halls of Edinburgh broke at the beginning of November 1828. The *Evening Courant* published its account of the affair on 3 November, with broadsides[6] quickly following it up thus:

> An account of a most Extraordinary circumstance that took place on Friday night . . . , in a House in the West Port, Edinburgh, where an Old Woman of the name of Campbell is supposed to have been Murdered, and her Body Sold to a Medical Doctor.[7]

Thereafter the press became bored with the affair with little by way of coverage until the actual trial of William Burke and his mistress, Helen M'Dougal, for murder, with William Hare acting as King's Witness. The *Glasgow Courier* reported:

> In the absence of any political news of any importance we have devoted a considerable portion of our paper of today in giving a full report of the trial before the High Court of Justiciary, of Burke and Hare.[8]

The Edinburgh *Evening Courant* ran the report of the trial on 25 December 1828, providing its readers with a full account of the legal argument and the summing up to the jury.[9] The *Caledonian Mercury* provided two full pages of report on the same day.[10]

The trial, by the standards of the day, was lengthy, lasting "above 24 hours" with "55 witnesses called",[11] and resulted in a guilty verdict for Burke and one of not proven for M'Dougal. Burke was sentenced to death with his execution date set for 28 January 1829. The remainder of the "participants" in the crime were set free. When the time came for Burke's public execution he had confessed to at least 16 murders,[12] although in reality it is likely that the number was somewhat less. Burke's execution

[6] Broadsides consisted of a one-page "news" sheet, the accuracy of the news often being in doubt. These broadsides are often referred to as broadsheets, half or quartersides, reflecting the actual size of the paper used. They invariably cost one penny, although the same publishers would often reprint the information, with additional new material in more expensive pamphlets.

[7] *Extraordinary Occurance, and Supposed Murder etc. Edinburgh 3d Nov, 1828* held in National Library of Scotland: West Port Murders, Vol. IV, Miscellaneous, L. C. 1573 (1).

[8] Extracted in MacGregor, G., *The History of Burke and Hare and of the Resurrectionist Times* (1884) (Thomas Morison Glasgow and Hamilton Adams & Co, London, 1884) p. 114.

[9] *Per* West Port Murders, Vol. V, Miscellaneous, L.C. 1574 (16), National Library of Scotland.

[10] A collection of cuttings chiefly from Edinburgh newspapers, relating to the Burke and Hare murders (1828–1841) National Library of Scotland R.Y.III.a.6(1).

[11] *Per* West Port Murders, Vol. IV, Miscellaneous, L.C. 1573 (15), National Library of Scotland.

[12] See for example *The Official Confessions of William Burke* (1829, Shillies Library) in National Library of Scotland, West Port Murders, Vol. IV, L.C. 1573 (30), one of the many "True or Official Confessions" allegedly made by Burke before his execution on 28 Jan 1829.

was, by all accounts, a particularly popular event. Thousands crowded the streets of Edinburgh to witness his hanging, and when, ironically, his body was publicly dissected, competition for viewing was fierce.

While the mainstream press might have misjudged the public's thirst for knowledge, (at least until they ran out of news of the political events in Silestra which had until then dominated the press), the penny broadsides were more than happy to oblige. These popular news-sheets provide an interesting insight into the more mainstream view of the affair, aimed as they were at the less well educated of the population who would not read a more traditional newspaper. Frequently these broadsides and subsequent pamphlets took the form of verses and rhymes and they often claimed to be reporting directly from the mouths of the criminals, the victims' relations, or other "involved" parties. What is interesting, and will be explored below, is the similarity between the nature of the public outcry in the Burke and Hare situation and that evidenced through the media in the Alder Hey scandal over a century later.

THE 20TH CENTURY

The bodysnatching scandal of the modern era is equally well known, concerning as it did, the removal and retention of body parts of children dying in various NHS hospitals across England and Scotland. The main focus of the scandal was the Alder Hey Hospital in Liverpool, and to a certain extent, the Bristol Royal Infirmary. As with the Burke and Hare case, the initial public realisation of the nature of medical practices following death and *post mortem* in these institutions appeared somewhat low key. The Bristol Royal Infirmary was initially subject to inquiry because of a high mortality rate in children undergoing heart surgery. The surgeons concerned had been referred to the General Medical Council (GMC) with respect to their poor performance, and were found guilty in 1998 of professional misconduct. The complainants who had precipitated this disciplinary action also called for a Public Inquiry. An Inquiry was announced on 18 June 1998.[13] In the GMC hearing evidence was given as to the retention of body parts by the Infirmary but media coverage was not extensive at this stage. It was primarily following the Inquiry and disclosure by Professor Robert Anderson that Alder Hey was custodian of one of the largest collection of hearts in the UK[14] that the media interest arose. This intensified considerably after an Inquiry into the situation at Alder Hey was announced.[15] One area of great concern in both cases was the fact that body parts, not restricted to hearts, were being retained and that many parents did not believe they had ever consented to the retention of their child's organs or body parts.[16] This led to sensationalist coverage in the press that mirrored the reaction to Burke and Hare.

In addition, the relevant inquiries (as supposedly had been the case following the Burke and Hare murders) supported the call for amendment of the legislation covering

[13] For full terms of reference of the public inquiry see Chapter 1, para. 14, *Learning from Bristol: the report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995*, CM 5207, HMSO, London.

[14] See Chapter 3, para. 1.1, *The Royal Liverpool Children's Inquiry Report* (London: HMSO, 30 January 2001).

[15] The inquiry being announced on 3 December 1999 by Lord Hunt, Parliamentary Under Secretary of State. For full details of the term of reference see Chapter 1, para. 4.1, *The Royal Liverpool Children's Inquiry Report*, *ibid.*

[16] It is interesting to note that the majority of parents involved with the Bristol Royal Infirmary Inquiry had indeed completed and signed a consent form. Indeed in the *Interim Report*, Part II, para. 43, the panel states that of the 265 *post-mortems*, 220 "were coroners' *post-mortems* for which consent and, hence, a signed consent form [was] not required. In relation to the 45 hospital *post-mortems*, the Inquiry has verified that in all but three cases parents' written consent was given; there was no suggestion in these three cases that consent was not obtained. In a further case, whilst the consent form was missing, the parent recalls giving consent". What the issue here concerned was the fact that those parents did not understand, or have explained to them, the meaning of the consent documentation that they signed.

the use of body tissue and organs for medical purposes after death. Before reflecting on the legislative consequences of these scandals, the similarities of the public outrage will be considered.

THE PUBLIC OUTRAGE

The reaction of the media, in both cases the printed press, reflects the nature of the public's perception of these scandals, and demonstrates the repugnance of society to "unlawful" and "unnatural" acts being carried out by the medical profession. There are also clear similarities in both cases in relation to the responses by the medical profession itself in justifying its actions and responding to the criticism of medical practices. These similarities will be considered below, focussing on the image created of the victims, the perceptions of the perpetrators, media response to the medical perpetrators, and the justification provided by the medical profession for its acts.

The Victims and Perpetrators

Despite the difference in numbers of victims between the two affairs, the image of them portrayed in the media is strikingly similar. In the early 19th century, where immorality was closely linked in the public mind to alcohol abuse,[17] the description of Burke and Hare's first known victim was of a good, but poor woman, who was in the wrong place at the wrong time. The *Newgate Calendar* cites the evidence of one William Noble, to the effect that Mrs. Campbell had on the afternoon before her murder "begged for charity" and was "quite destitute" but was also "sober",[18] suggesting that, although poor, Mrs. Campbell had a good moral character. This perception is endorsed in the broadsides, "the old woman, it is said, *with reluctance* joined in the mirth, and also partook of the liquor" (emphasis added),[19] again suggesting the victim's moral character.

Their second known victim was equally perceived to be of a good moral character, albeit that he was classed as an idiot, and went by the name of "Daft Jamie".[20] Jamie, (James Wilson), had allegedly been lured to his death after encountering Burke in the Grassmarket when Jamie was seeking the whereabouts of his mother.[21] The description of his character is almost eulogistic:

> Jamie was for many years (before he fell a victim) never known to be absent a day, forenoon, afternoon nor evening, (or even at any other time, if he got notice that there were a sermon) from Mr. Aikman's Chapel, it was astonishing how regularly he attended that place of worship.

He was also described as a "poor, harmless good natured idiot"[22] and was supposedly well known to those medical students who observed his dissection, a fact

[17] See for example Balfour, C. L., *Women and The Temperance Reformation*, (London, 1849) and Harrison, B., *Drink and The Victorians: The Temperance Question in England 1815–1872*, (Faber and Faber, London, 1971).

[18] The *Newgate Calendar*, extracted from www.exclassics.org/newgate/ng601.htm on 7 March 2003.

[19] *Extraordinary Occurance, and Supposed Murder etc., op. cit.*

[20] Burke and Hare were never charged with the murder of Daft Jamie, but the circumstantial evidence was such that in all likelihood the pair did kill and sell his body to Dr. Knox.

[21] *A laconic narrative of the life and Death of James Wilson, known by the name of Daft Jamie. To which is added a few Anecdotes* (published W. Smith, 1829) held by the National Library of Scotland in West Port Murders, Vol. IV, Miscellaneous, L.C. 1573 (5).

[22] Extract from press cutting, *The Edinburgh Murders (Further Particulars)* in West Port Murders, Miscellaneous, Edinburgh City Library, YRA 637.

that caused great concern due to their failure to report the murder: "[I]f any of them had been possessed of the smallest feeling, they would have given notice to the Captain of Police".[23]

Unlike many of their fellow resurrectionists, Burke and Hare claimed they had never disinterred a body to sell to the anatomists:

> "You have been a resurrectionist (as it is called) I understand?"
> "No. Neither Hare nor myself ever got a body from a churchyard. All we sold were murdered save the first one which was that of the woman who died a natural death in Hare's house . . ."[24]

Hence, if this so called confession is true, the term "resurrectionist" does not, in reality, apply. However, the purpose of their crime, the sale of a body to an anatomist, highlighted the immoral practice that had been tolerated by the law enforcers until that date:

> So long as the resurrectionists confined their activities to the filching of dead bodies, their illegal acts, although exciting disgust and horror, did not approach the magnitude of crime.[25]

Thereafter, "filching" dead bodies and selling them lost the tacit acceptance of the law enforcers.

The murderers, and also the anatomist Dr. Knox, who received and paid for the bodies, were roundly condemned for their immoral behaviour and for their "monstrous Crimes".[26] Certain media interests pressed for the prosecution of Dr. Knox, the "learned butcher",[27] as "a receiver, or accessory after the fact" since without the existence of the trade in bodies, "we should not hear of these bloody murders and hardened wretches".[28] Indeed Dr. Knox was

> [In] the eyes of many . . . a greater criminal . . . and outspoken and unthinking people went the length of declaring that these misguided men were but instruments in his hands obeying his behests.[29]

Despite the lack of legal action against Dr. Knox, the public did take matters into their own hands and shortly after the discovery of these "events", there occurred a "popular tumoult" whereby an effigy of Dr. Knox was hanged from a tree, then burnt, and a riotous crowd assembled outside Knox's premises in Surgeon's Square.[30] Although questions were asked in parts of the media about Knox's involvement, and this small section of the media classed him equally a perpetrator; since Knox was seen to be just as much a "butcher" as Burke and Hare, it will be seen later that the general media coverage of Dr. Knox's role was far more circumspect.

The sentiments about the moral worth and harmless innocence of the known victims of Burke and Hare and the insensitivity of the medical profession are echoed in the Bristol Royal Infirmary and Royal Liverpool Children's Hospital inquiries, although here much of the rhetoric is linked to the perceptions of the perpetrators. The fact that

[23] *Ibid.*

[24] *Life and transactions of murderer Burke and his Associates*, National Library of Scotland, R.Y. III. a. 6(26), date unknown.

[25] Ball, J. M., *Sack-'em up men*, (Oliver & Boyd, 1928) at p. 72.

[26] Press cutting, newspaper unknown, 4 January 1829, National Library of Scotland, R.Y. III. a. 6(30).

[27] *Ibid.*

[28] Press cutting, newspaper and date unknown, National Library of Scotland, R.Y. III. a. 6(30).

[29] MacGregor, G., *op. cit.* at pp. 234 and 235.

[30] Edinburgh Evening Courant, "A Full and Particular account of the Riot which took place in Edinburgh on Thursday last, also of the hoax played off on a celebrated Doctor", date unknown, National Library of Scotland R.Y. III. a. 6(10).

the "victims" were all children increased the level of outrage felt at the desecration of their bodies. While it could be argued that these children were not victims in the Burke and Hare sense, since they all suffered congenital medical difficulties and did not technically die *via* deliberate killing, the actions of the medical profession are throughout castigated as being "criminal", hence making the term "victims" a useful one to use. In the *Report of The Royal Liverpool Children's Inquiry* the view of the parents of one of the victims is explained thus:

> They describe the hospital as having stolen their daughter's body which was "as white as driven snow. It was reduced to skin and bone by predators and it must never happen again".[31]

Another family "discovered their beautiful daughter's heart had been one of those removed by Birmingham Children's Hospital without consent".[32]

In the Royal Liverpool Children's Inquiry a parent commented: "Medical research must not be carried out at the expense of *innocent* children"[33] (emphasis added).

There are numerous examples from the media coverage and the inquiry reports themselves to support this notion of criminality, and the horror and revulsion the removal of organs caused:

> They are angry at the deceit, grotesqueness and obscenity of removing without their knowledge or consent their daughter's brain, heart and lungs.[34]

> It is mutilation.[35]

> Hearts, while medically just wonderful pumps, are the organs to which we attribute love. To steal them from children is repugnant.[36]

> [The father] has slammed the actions of the doctors in the case as "barbaric". The couple eventually won their legal battle. It is the first case in Scotland where parents have got back a child's "stolen" organ.[37]

> Their daughter was abused and treated like a piece of meat.[38]

> This is symptomatic of pathology practice, which was barbaric ... this is Scotland's holocaust – our children were ripped open and their organs experimented on.[39]

> In my opinion what they did was barbaric. It is like something out of Burke and Hare.[40]

As these extracts demonstrate, there are common themes - the revulsion felt due to the theft of body parts, the callousness of the medical profession and the dislike of use of body parts for medical research: themes that all arose in the Burke and Hare era. Not only was the public reaction to the news of the scandals similar, the media vilification (or lack of it) of the medical men concerned; the justification of the medical profession for its actions and the expressed knowledge of the medical profession as to the relevant legislation, all show a striking resonance.

[31] Chapter 14, *The Royal Liverpool Children's Inquiry Report, op. cit.*, at p. 421.

[32] *Birmingham Post*, 9 March 2000, p. 13.

[33] *Per* note 31 at p. 423. .

[34] *Per* note 31 at p. 423.

[35] *Daily Mail*, 8 March 2000 at p. 41.

[36] *Birmingham Evening Mail*, 11 February 1999 at p. 2.

[37] *Sunday Mail* (Scotland), 12 December 1999 at p. 9.

[38] *Per* note 31 at p. 427.

[39] *Sunday Mirror*, 4 February 2001 at pp. 4 and 5.

[40] See note 37.

The Media Response to the Medical Men

Although the medical men concerned in both eras have come in for criticism through the media, the methods employed and the extent of the vilification has been very limited. While Dr. Knox was seen, in some quarters, as being as much a butcher as Burke and Hare, the general approach was to do nothing more than to allude to his involvement, especially in the lead up to the trial and its immediate aftermath. Even when reporting on the "popular tumoult" of the Edinburgh public, the reference was to an "Effigy of a *certain Doctor*, who has been rendered very obnoxious to the public by recent events"[41] (emphasis added). Elsewhere references are still allusory:

> "To whom were the bodies so murdered sold?"
> "To Dr. —. We took the bodies to his rooms in —— —— and then went to his house to receive the money from him."[42]

> After a search, the body was found yesterday morning in the lecture room of a *respectable practitioner*.[43] (emphasis added)

> Against —, the medical practitioner, who had purchased many of the bodies from Burke and his companions, the curses were loud and deep.[44]

Despite this latter claim, the curses must have been voiced through means other than the press since the Edinburgh *Weekly Chronicle* was stated to have commented: "With regard to Dr. Knox too much delicacy and reserve have been maintained by . . . the press".[45] Indeed, the reserve continued into the other means of disseminating information – the broadsides and the songsheets – which referred to his involvement thus:

> Men, women, children, old and young
> The sickly and the hale
> Were murder'd, pack'd up, and sent off
> To K—'s human sale.[46]

Exactly why Knox was rarely named is not clear. Presumably everyone in Edinburgh would have known who was being referred to, so there would have been need to name him. But equally, because Knox was known to be the "respectable practitioner" of the reports, what reason was there to keep his name out of the media? Also, the coverage of Burke and Hare's misdemeanours spread further than Edinburgh alone: publications from Glasgow and London were common, and there were also other publications outside the immediate timescale. Arguably, this caution or reserve existed because of Knox's position: he was an eminent surgeon and anatomical lecturer of the day and deserved respect, as did many others of his situation and class. This reverence is something that still persists today, with the ready acceptance of things done and said by the medical profession.

While respect for medical practitioners continues today, the media are less likely to grant an elevated status to their actions and to refuse to "name and shame": the only circumstance when this is likely being where there is a risk of defamation claims being

[41] See note 30.

[42] *Life and Transactions of murderer Burke and his Associates*, author and date unknown, National Library of Scotland, R.Y. III. a. 6(26).

[43] See note 5.

[44] Author unknown, *The Murders of the Close: A Tragedy of Real Life*, (Cowie and Strange, Paternoster Row and Fetter Lane, London, 1829) at p. 169.

[45] MacGregor, *G., op. cit.*

[46] Wag, Phil., *A Timely Hint to Anatomical Practitioners, and their Associates – The Resurrectionists, A New Song* (Tune: Macpherson's Farewell), date unknown, published W. Smith, National Library of Scotland, West Port Murders, Vol. IV, Miscellaneous, L.C. 1573 12.

brought. However, it is interesting to note the paucity of press coverage for the modern day "bodysnatchers" by reference to the actual perpetrators. As the scandals in Bristol and Alder Hey were unfolding, individual practitioners were not being targeted for criticism – the references are to "they", "the doctors", "the hospital" or "the pathologists" – even though in some cases the surgeons involved were known and were capable of being named. Even after the respective inquiry reports were published, there was very little individual criticism, and interestingly, the inquiries themselves were reserved in their comments. The *Bristol Royal Infirmary Inquiry Interim Report* comments thus:

> 27 . . . There was, however, a long-standing habit among *pathologists* (emphasis added) of taking and keeping human material, other than that required to establish the cause of death, for other purposes; for example research or education. . .it was common among *pathologists* to keep human material. . . .
> 57 . . . blame has a proper role where there is personal misconduct. But where, as here, it was a system which was responsible, and a system which needs to be changed, blaming any individual is not only unfair and unhelpful; it is positively counter-productive.[47]

Hence, despite the ability to recognise individuals who were remiss in their practice, for example Mr. Dhasmana, who despite being advised in 1992 to seek clarification from the parents of children dying during surgery that tissue could be retained following *post mortem*, stated "lately there has been some oversight on my part to discuss the matter with parents and relatives and therefore consent was not taken by my junior staff"; or Mr. Wisheart, who despite receiving and acknowledging the advice given, "neither accepted the basis of [this advice] nor agreed to vary his conduct",[48] the press did not "go to town". The main aspect of press coverage was the fact that the surgeons in question were disciplined for poor surgery, not for their poor communication with parents, or for their failure to comply with guidance issued from their employers that resulted in retention of organs without the knowledge of the deceased's parents.

The Alder Hey scenario was slightly different, in that the evidence to the Inquiry demonstrated that the actions of one pathologist alone contributed to the wholesale removal and retention of body parts, and yet here too, the response of the media was muted. In the inquiry report itself it was stated:

> Within a week of taking up the Chair Professor van Velzen issued an instruction in the Unit that there was to be no disposal of human material. The technical staff soon realised that Professor van Velzen's clinical practice in the removal and retention of organs was unlike anything they had seen before. Until now pathologists had retained sections only of the relevant organs and returned everything else to the body except heart/lungs and possibly brains in relevant cases. Professor van Velzen removed every organ in every case and retained every organ in every case.[49]

As with the Bristol Royal Infirmary Inquiry, the Alder Hey process sought to minimise the "blame" that could attach to other doctors:

> We heard no evidence from any doctor that parents were ever told that they would be burying the body without the brain or heart. The doctors themselves were *ignorant* of Professor van Velzen's practice of removing all the organs for fixation, so they could not have explained this to the parents. (emphasis added)[50]

[47] *Bristol Royal Infirmary Inquiry Interim Report* (London: HMSO, May 2000).
[48] *Ibid.*, at para. 40.
[49] Chapter 10, *The Report of The Royal Liverpool Children's Inquiry, op. cit.*
[50] *Ibid.*

Despite this clear recognition of one sole perpetrator, van Velzen, the media were again muted in their response. *The Express* ran the story thus:

> The doctor who stripped body parts from dead babies went into hiding last night as the enormity of the horror at Alder Hey hospital was exposed. Professor Dick van Velzen, 51, the man responsible for one of the biggest scandals in British medical history, was dubbed a monster for not expressing a single word of regret.
> Now he is facing prosecution after a Government Report branded him a liar and a thief . . .
> [The Health Secretary] was scathing of van Velzen, who had "lied to parents, lied to other doctors . . . He falsified statistics and reports."[51]

Despite the inclusion of sensationalist language, the underlying tone is still somewhat respectful and belies the moral panic that was created when the scandal of body part retention first broke. *The Guardian* was even more circumspect, and simply reported the main findings in relation to van Velzen's activities, again despite previous sensationalist reporting during the lead up to the final report.[52] When van Velzen was suspended by the GMC, *The Guardian* described him as a "composite of Burke and Hare, with a dash of Hannibal Lecter and a smattering of Mengele thrown in" but still went on to ameliorate such criticism by commenting that

> the professor, for all his flaws, is hardly a necromancer. Nor has he killed anyone. In hoarding body parts without consent, he was only doing, albeit on a grander scale, what other doctors did.[53]

The outrage at van Velzen's activities was short-lived, the press having moved on within a matter of weeks to the next big issue: the seeking of monetary compensation from the hospitals concerned.

Obviously the reasons behind this reluctance to "name and shame" the relevant medical practitioners can only be guessed at. Whatever the reasons, it is remarkable that the media in both eras have, by and large, respected the medical profession and published relatively little on its misdeeds. Rather, they have provoked a wide public outrage that is aimed at the actions of "doctors" in general without specifically targeting the moral panic on those few practitioners who were involved.

THE MEDICAL JUSTIFICATION

In seeking to justify the actions that they took, the medical practitioners in both eras again show surprising similarities, despite the fact that different legal regimes existed and the nature of medical training between the two time frames was significantly different.

At the time Dr. Knox was conducting his anatomy lectures in Edinburgh, the legislation governing the use of corpses for anatomical uses was the Act of Geo. II which directed that "the bodies of murderers shall be given up to be anatomized".[54] As a consequence the Select Committee on Anatomy of 1828, established to consider the problems faced by anatomists, found that the number of subjects available from this source was "so small in comparison to his total wants, that the inconvenience

[51] *The Express*, 31 January 2001, p. 6.

[52] *The Guardian*, 31 January 2001, p. 3.

[53] *The Guardian*, 4 February 2001 www.society.guardian.co.uk/alderhey/comment/.

[54] As stated in the *Report from the Select Committee on Anatomy* (House of Commons, London, 22 July 1828) at p. B2.

which he would sustain from its repeal would be wholly unimportant."[55] The numbers claimed necessary for a student to be fully versed in the workings of the human body, and hence to be able to practise competently varied only slightly from witness to witness. For example, Sir Astley Cooper suggested:

> If he be afterwards to practise surgery, I should say three bodies are required, two for anatomical purposes, the other for operations on the dead; less would be insufficient. . .[56]

whereas William Lawrence Esq. stated:

> I should think it desirable that a student who is going through his education as a professional man, more particularly if he is to practise surgery, should be able to employ three or four bodies annually for dissection and other purposes. A smaller number than that might be considered to be barely sufficient.[57]

Despite these differences as to how many bodies were needed *per* student, all witnesses were agreed that anatomy, and the study of it, was critical to becoming an effective practitioner, and without anatomy, practitioners would be a danger to their patients:

> . . . you must employ medical men, whether they be ignorant or informed; but if you have none but ignorant medical men, it is you who suffer from it; and the fact is, that the want of subjects will very soon lead to your becoming the unhappy victims of operations founded and performed in ignorance.[58]

> ". . . what degree of importance [do] you attach to dissection, both as regards the practice of surgery and of medicine?"
> "There can be no knowledge of surgery without it, and very little knowledge of medicine".[59]

> [Dissection] is of the highest importance. . .nothing in life, I believe, that can be considered as more important; it is the foundation of all medical knowledge.[60]

The clear message was that dissection, and the supply of bodies to use for dissection, was crucial for medical education.

As to the level of knowledge of the legal provisions underpinning the supply of bodies, again most of the witnesses showed a surprisingly homogenous lack of understanding.

> "The law does not prevent our obtaining the body of an individual if we think proper; for there is no person, let his situation be what it may, whom, if I were disposed to dissect, I could not obtain . . ."
> "What have professional men generally understood to be the law on the subject of receiving into their possession, for the purpose of dissection, the bodies of persons who have been disinterred; have they known that for so doing they were indictable for a misdemeanour?"
> "Until I read the charge of Baron Hullock, I did not understand that a surgeon was exposed to any danger from dissection, therefore I have never concealed dissection in my

[55] *Ibid.*

[56] Minutes of Evidence, *Report from the Select Committee on Anatomy*, 22 July 1828, *ibid* at p. 17.

[57] *Ibid*, at p. 33.

[58] *Ibid* at p. 16.

[59] Benjamin Collins Brodie, Esq., Minutes of Evidence, *Report from the Select Committee on Anatomy*, 22 July 1828, *op. cit.* at p. 23.

[60] John Abernethy, Esq., Minutes of Evidence, *op. cit.*, at p. 28

> own house ... I did not then know that I was amenable to the law ... We did not consider, until of late, that it was a misdemeanour to have a body in our possession".[61]

In response to a question of the knowledge of anatomy professors on the legal position of having disinterred bodies in their presence, and the fact that this was a misdemeanour, Caesar Hawkins commented, "I believe it did not occur, it did not to myself, and probably not to others".[62]

As for Dr. Knox, he also claimed no knowledge of, or breach of, the law. In March 1829 (notably after the Select Committee Report), Knox wrote to the *Caledonian Mercury* with evidence as to his innocence; this evidence being from a "Committee" established to assess his liability. The report concluded:

> It appears, in evidence, that Dr. Knox had formed and expressed the opinion (long prior to any dealing with Burke and Hare) that a considerable supply of subjects for anatomical purposes might be procured by purchase, and without any crime, from the relatives or connections of deceased persons in the lower ranks of society.
> In forming this opinion. . .the Committee cannot consider Dr. Knox to have been culpable. They believe there is nothing contrary to the law of the land in procuring subjects to dissect in that way ...[63]

This misconception as to the legal provisions was not confined to the medical men themselves – surprisingly perhaps, even magistrates did not know it was a misdemeanour to possess a body for dissection unless it was the body of a murderer, as was indicated by one Thomas Halls in his evidence to the Select Committee:

> "You are one of the police magistrates for Bow-street?"
> "Yes."
> "Have you considered the state of the law as it affects persons having possession of dead bodies, whether they are guilty or not of any offence?"
> "I should conceive that the mere possession of bodies for the purpose of dissection was not an offence."[64]

With this level of knowledge among law enforcers,[65] it is perhaps not surprising that the medical men carried on their dissections in blissful ignorance of their own misdeeds!

The claims of benefiting medical science and lack of knowledge of the law are to be found in the Bristol Royal Infirmary and Alder Hey reports as justification for the actions of the profession, together with a desire to spare the deceaseds' relatives additional grief. As indicated earlier, the *Interim Report* from Bristol highlighted the common practice of retaining human material for a range of purposes and cites one pathologist thus:

> Many of these conditions are rare and no two hearts with a given condition are quite the same. So, by keeping quite a large number, a very large number from the perspective of

[61] Sir Astley Cooper, Minutes of Evidence, *Report from the Select Committee of Anatomy*, *ibid* at pp. 18 and 19. The reference to Baron Hullock refers to an indictment for conspiracy to procure a disinterred body for the purposes of dissection: *R.* v. *Davies and another*, reported in *The Times*, 19 May 1828 and included in the Appendices to the Select Committee Report.

[62] Minutes of Evidence, *op. cit.*, at p. 46.

[63] Communication from Dr. Knox to the Editor of the *Caledonian Mercury*, dated 17 March 1829, National Library of Scotland, R.Y. III. a. 6.

[64] Minutes of Evidence, The *Report from the Select Committee on Anatomy*, *op. cit.* at p. 93.

[65] It is not unreasonable to assume a working knowledge of statutory law for a stipendiary magistrate at this point in time. Although for some time the magistrates attached to the nine police offices in London had no legal background, being aldermen *etc.*, after Robert Peel became Home Secretary in 1822 he adopted the practice of appointing lawyers as police magistrates. See further Bentley, D., *English Criminal Justice in the Nineteenth Century* (Hambledon Press, London, 1998).

> people who are not pathologists, it is possible to provide somebody who wishes to study a particular anomaly a range of examples that would take them many years to see in their own practice.[66]

The *Interim Report* goes on to conclude that:

> taking and using human material were important for medical development, research and education was seen by the medical-scientific community as sufficient justification in itself.[67]

The Alder Hey report endorses this reasoning for keeping substantial collections of body parts; in Chapter 2 stating for example:

> There can be no doubt that the use of the heart collection has been invaluable in terms of research, education and training ... Heart specimens have also been used to ... develop methods of diagnosis in life, to develop operations and techniques ... [and] the most compelling evidence of the value of the collection was the dramatic reduction in the mortality rate following complex cardiac surgery.[68]

However, despite these benefits the report points out that "the value and benefits generally ... does not in itself justify the collection".[69]

With regard to legal knowledge, the medical profession was equally lacking, although the lack of clarity of the legal regime itself could be seen to provide some form of excuse. The primary Act called into question where *post mortem* examinations, whether for the coroner or for the hospital itself, are concerned is the Human Tissue Act 1961 although the precise details of the Act are not important here. In the *Interim Report* from Bristol the lawfulness, and legal knowledge of the medical practitioners was considered in the following manner:

> As regards the lawfulness of the practices adopted ..., the overall impression ... is that, while the law was recognised as having some relevance, it was not clearly understood ... It is no wonder that a kind of professional folklore developed which served the role of the real law ... Practice had developed ... which suited the interests and needs of those involved: the medical professionals. Pathologists and clinicians largely held the view, if they ever gave their mind to it, that the law was something remote, far removed from the realities of their daily practice.[70]

Equally, the Alder Hey Inquiry was

> surprised at the general ignorance of the medical profession concerning the provisions of the Human Tissue Act 1961. No doctor could remember having read it ... [N]one had any training in the legal requirements at undergraduate level and nor did they receive any training in their various clinical posts.[71]

The paternalistic approach of the practitioners in both hospitals, in claiming that detail was not given about *post mortems* in order to protect parents from the realities of the examination, and through a desire not to upset the parents any further at a time of grief was noted, but also seen as a reason self-serving to the profession, and was certainly no excuse for failing to comply with the law.

The use of paternalism by the profession, and the concern to ensure the development of medical knowledge in both eras is not unexpected. However, the disregard of legal provisions is of more concern. In both time periods, the lack of adherence to the law

[66] *Per* Professor Berry, *Bristol Royal Infirmary Interim Report, op. cit.* at para. 27.

[67] *Ibid* at para. 31.

[68] The *Report of The Royal Liverpool Children's Inquiry, op. cit.*, at paras. 6.1 to 6.6

[69] *Ibid*, at para. 5.1

[70] *Bristol Royal Infirmary Interim Report, op. cit.*, at paras. 58 and 59.

[71] *The Report of The Royal Liverpool Children's Inquiry, op. cit.*, Chapter 10 at para. 7.2.

was blatant, whether or not linked to a desire to do good to the greater number, and that ignorance should be used as a justification should only add to the moral panic that these scandals caused.

LEGISLATIVE RESPONSES

The Anatomy Act 1832

> Exposure of [Burke and Hare's] crimes aroused public sentiment to such an extent that the Parliament, which had long ignored the prayers and petitions of anatomists and surgeons for the legalisation of anatomical study, was compelled to act.[72]

Although this statement by J.M. Ball is a popular view of the consequences of the Burke and Hare case, the extent to which it is valid can be questioned. The public outrage at the crimes of Burke and Hare was considerable, as indeed the actions of the public at Burke's hanging illustrates. The fact that the actions of "true" resurrectionists had been known for some time is evidenced in the 1828 *Report of the Select Committee on Anatomy*, which highlights the cause of some of the difficulties in procuring suitable bodies:

> "To what particular cause do you attribute the present difficulty of obtaining a supply?"
> "To the vigilance of the public in watching all the depositories of the dead."[73]
> "To what do you ascribe the increase of the difficulty?"
> "In a great measure to the increased severity with which magistrates act in case of any discovery, and partly also because those constant discoveries which take place, increase the prejudices of the people against dissection generally, and cause greater vigilance in endeavours to prevent exhumation."[74]

Hence, to return to J. M. Ball, the actions of the resurrectionists invited disgust and horror on the part of the public, and whilst not necessarily seen as significant enough to create a moral outrage in themselves, were clearly significant enough to impede the supply of human bodies to anatomists. The increasing need for bodies to dissect was such that the resurrectionists could make a more than decent living from the task, the cost of corpses having risen dramatically as demand outstripped supply. Indeed, anatomists were even paying the fines imposed by the more vigilant magistracy, or supporting the families of convicted bodysnatchers.[75] Hence pressure to reform the legislation was coming from two sides, the public who disliked the practice and the anatomists who could not afford the inflated prices, and whose students were commonly studying abroad in countries where the supply of bodies was less restricted.

The first real sign of action to address the difficulties being experienced was in April 1828 when the Select Committee on Anatomy was established. The committee was charged with inquiring

> into the manner of obtaining Subjects for Dissection in the Schools of Anatomy, and into the State of Law affecting the Persons employed in obtaining or dissecting Bodies.[76]

This Select Committee commenced its inquiries on 28 April and the report was published on 22 July 1828: well before the actions of Burke and Hare had been

[72] Ball, J. M., *op. cit.*.

[73] John Abernethy, Esq., Minutes of Evidence, *The Report from the Select Committee on Anatomy*, *op. cit.* at p. 30.

[74] Caesar Hawkins, Esq., Minutes of Evidence, *ibid*, at p. 40.

[75] See for example the evidence of Sir Astley Cooper and Joseph Henry Green, Esq. contained in the Minutes of Evidence, *ibid*, at pp. 17 and 36.

[76] *Report from the Select Committee on Anatomy, ibid*, at p. 3.

discovered. As has been seen earlier, the Committee was clear that the dissecting of bodies, other than those provided after hanging for murder, was unlawful. However, throughout the Minutes of Evidence, the questions were primarily focussed not on the illegality of the anatomists' actions, but on how to improve the supply of bodies, with the options of importing them from abroad, or using unclaimed bodies from workhouses or public hospitals being the favoured approaches. Despite recommendations for the repeal the Act of Geo. II which caused "more evil than good" and for the House to consider if "it would be expedient to introduce ... some legislative measure"[77] to increase the supply of bodies from the workhouse, it was some eight months before a proposal was made in the House of Commons to introduce a Bill. In so doing, Mr. Warburton made reference to what "had so lately occurred in Edinburgh" and to the requirement for legislation to exonerate the medical profession and prevent its being implicated by the wrong doings of "either resurrection-men, or a class of villains whose atrocities had been so very recently brought to light".[78] Leave to introduce the Bill was granted. However, the Bill that was introduced – which made it unlawful to disinter a body; required licensing of schools of anatomy and made provision for unclaimed bodies from workhouses and hospitals to be given up to such schools – did not succeed. In the Lords, the Archbishop of Canterbury, whilst noting the inconveniences that resulted from the then state of the law, hoped that it would not proceed further and that a new Bill would be introduced which was "less offensive to the feelings of the community, and therefore less objectionable".[79] After more debate the Bill was withdrawn by the Lords in June 1829, having successfully completed its passage through the Commons.

Mr. Warburton waited over two years before seeking leave to reintroduce a Bill for Regulating Schools of Anatomy, with leave being given on 15 December 1831.[80]

This Bill differed somewhat from the one introduced in 1829, and when it finally completed its passage through Parliament, it included provisions of a similar thrust to parts of the current Human Tissue Act 1961 and Anatomy Act 1984, but what is perhaps most interesting is the cause that precipitated the government's action.

On 5 November 1831, John Bishop and Thomas Williams were apprehended and detained on suspicion of murder and subsequent sale of a body to King's College, London. The inquest into the death of this adolescent heard evidence from the porter at the dissecting room of King's, who confirmed that he had been offered a body for the purposes of dissection. The body had been bought for nine guineas, and on subsequent examination by the anatomist, signs of an unnatural death were found. Bishop, Williams and another, May, were tried for murder on 2 December 1831, and were accused not just of the murder of the boy, but of a woman who was presumed sold for dissection. The accused were convicted of murder, and Bishop subsequently confessed to the murders, with Williams alone, for the purpose of sale, but denied murder in relation to the some other 500/1000 bodies that they had sold for dissection. Bishop and Williams were executed outside Newgate gaol, with May's sentence being commuted.[81] The fact that "Burking" had been discovered so close to home has been suggested as the real reason for introducing the Bill for Regulating Schools of Anatomy at this time, rather than the events in Edinburgh three years earlier:

[77] *Report from the Select Committee on Anatomy, ibid.*, at p. 12.

[78] *Per* Mr. Warburton, Hansard, New Series (Commons) Vol. XX 6 Feb – 30 March 1829 at cols. 998 to 1000.

[79] Hansard, New Series (Lords) Vol. XXI 31 March – 24 June 1829 at cols. 1170–1171.

[80] Hansard, 3rd Series (Commons) Vol. IX 6 Dec 1831 – 6 Feb 1832 at cols. 300 to 307.

[81] See note 16.

> . . . the fact remains that Government did nothing for the relief of the medical profession or for the furtherance of anatomical study until after crimes, like those committed in Edinburgh, had aroused the citizens of London.[82]

The validity of this claim can be seen in the debates in Parliament on Warburton's new Bill:

> Something must be done to put an end to the dreadful practices which had recently occurred;[83]
>
> . . . was not the Legislature, therefore, bound to guard against the repetition of such atrocious crimes as had been lately committed, by reducing the temptation to commit them?[84]
>
> . . . it [was] a matter of great regret that some bill had not been brought forward to prevent the practice of "Burking"; a practice which had been carried on of late to such an extent, that he was surprised it had not come under the special notice of Ministers;[85]
>
> An ordinary murderer hides the body, and disposes of the property. Bishop and Williams dig holes and bury the property, and expose the body to sale.[86]

The Bill for Regulating Schools of Anatomy did this time succeed in becoming the Anatomy Act 1832 on 1 August 1832. The Act required all schools to register and gain a licence to practise; permitted persons in lawful custody of bodies to allow them to undergo anatomical examination after death (unless the nearest known relative objected) and removed any criminal liability of an anatomist who was in possession of a body for the purposes of dissection. Burke and Hare therefore provided a catalyst for the change in the law, but did not precipitate it.

The Human Tissue Act 1961 and the future

As indicated before, the inquiries into these scandals of the 20th century identified a lamentable lack of knowledge of, or concern by practitioners for, the legal provisions governing the practice of removal and retention of body parts. While so doing, the Bristol Royal Infirmary Inquiry did acknowledge that the legislation on this issue was vague and difficult to understand, but did not allow that fact to condone all the practices of the medical practitioners. In both situations, the main concern was the removal and retention of human material without the consent or understanding of the "victims" parents during both coroner's and hospital *post mortems*, and this resulted in the moral outrage demonstrated through the media. Both reports called for a review of the legislation, and, in response to that and to the public reaction, the government produced a consultation document in 2002 to consider the options.[87]

With regard to the actual legal provisions in place, *post mortems* carried out for the purpose of a coroner's inquiry are covered by the Coroners Act 1988, and those requested by the hospital are covered by the Human Tissue Act 1961. The former category of *post mortem* does not rely on the consent or failure to object by a relative; the coroner has a legal duty to act in specified circumstances as laid down by the Act and associated regulations. The latter form of *post mortem*, because it is not required by law, is governed by the Human Tissue Act 1961, which again does not rely on consent, but on the objection of the deceased's relatives where there is no clear evidence

[82] Ball, J. M., *op. cit.*, at p. 163.

[83] Mr. Hunt, Hansard, 3rd Series (Commons) Vol. IX, 6 Dec 1831 – 6 Feb 1832 at col. 302–303.

[84] Mr. Hume, *ibid.*, at col. 580.

[85] Mr. Hunt, *ibid.*, at cols. 582–583.

[86] Mr. Macaulay, Hansard 3rd Series (Commons) Vol. X 7 Feb – 8 March 1832 at col. 834.

[87] *Human Bodies, Human Choices: The law on Human Organs and Tissue in England and Wales* (London: HMSO, 2002).

of the wishes of the deceased.[88] In the presence of a "rights-based" culture, where consent to medical procedures is seen as crucial to validate the actions of the medical practitioner, the scenario where intervention is linked to active objection is seen as problematic. The *Bristol Royal Infirmary Interim Report* questioned whether the law of consent applies at all, arguing that it should as it is so closely connected to the deceased victims' medical treatment. If it does, the issue is then whether the same level of information provision should apply, *i.e.* is there a law of informed refusal, and what are the obligations of the medical profession to communicate this information? The Alder Hey Inquiry, while focussing on the issue of what was required of the profession in establishing whether there was an objection, concluded:

> "... the wording of the Human Tissue Act 1961 differs from the concept of *informed consent*, in practical terms there had to be informed consent for the next of kin at least for there to have been compliance with the Act in the overwhelming majority of cases;[89]

and recommended that

> The Human Tissue Act 1961 be amended to provide a test of fully informed consent for the lawful post mortem examination and retention of parts of the bodies of deceased persons.[90]

The *Issacs Report*,[91] concerning as it did, the unlawful retention of adult brains, also called for amendments to the Human Tissue Act 1961. This report recommended that the term "lack of objection" be replaced with the phrase "with consent of". Interestingly however, this Report implies that any existing permission granted by the deceased themselves is irrelevant. The consultation exercise on the legislation announced in July 2002 has sought to address these concerns and recommendations. The issues for debate include the amendment of the 1961 Act to ensure that consent of parents or relatives be obtained for the retention of organs or tissue following *post mortem*; whether the same requirements should apply to the death of an adult, and how consent should inform the use that is actually made of these retained parts of human material. The conclusions from this consultation exercise include the need for adherence to the wishes of the deceased, where known, and where there is no such expression, for consent to removal and retention to be granted by a person nominated by the deceased, or failing that, someone close to the deceased.[92] Although it is early days on the reform road for the Human Tissue Act 1961, since no replacement legislation has been formulated and will only be done when Parliamentary time permits,[93] some of the proposals have been implemented in any event by hospitals changing the structure of the consent forms for *post mortem*. It is not clear, however, whether such changes would prevent similar scandals in future. The ability of relatives to obtain information and make an informed decision in the aftermath of death will still be questionable – all the parents involved in Bristol were found to have given consent to the *post mortem*, but did not know what it meant – and even if informed consent is given, it will not automatically prevent a pathologist acting in the manner of Professor van Velzen. Indeed, it is questionable whether there is in fact any real distinction between the ability to object in the current law and a requirement to

[88] See further Part III to the *Bristol Royal Infirmary Inquiry Interim Report* for a fuller explanation as to the workings of the legislation and the identified problems.

[89] *The Report of The Royal Liverpool Children's Inquiry, op. cit.*, Chapter 10 at para. 10.

[90] *Ibid.*, Chapter 10 at para 11.1.

[91] HM Inspector of Anatomy, HMSO, May 2003 at p. 21.

[92] *Human Bodies, Human Choices: Summary of responses to the consultation report* (London: DoH, 2003) at p. 35.

[93] *Per* Sir Liam Donaldson (12 May 2003), Department of Health Press Release, www.info.doh.gov.uk.

consent. Surely for both to be valid, there has to be the provision of information to enable objection or consent to take place? Amendments to the legislation may provide some reassurance to the public and assuage the panic of the 1990s, but can only do so if workable and enforceable. Given human sensitivity to death, and particularly to the death of a child, informed consent would seem to be storing up problems some of which have already been identified: such as how much information needs to be given and how quickly. In the absence of clear legal requirements this will no doubt produce yet another bodysnatching scandal in the future.

CONCLUSION

It is often said that we learn by experience, and yet, as the above has illustrated, the human experience seems to be one of repeating, or permitting, the same mistakes. In the early 19th century, scientific knowledge and the desire to improve medical practice, despite being a laudable goal, was allowed to override popular feeling until it reached the stage where public outrage boiled over. The anatomists were required to admit a lamentable lack of knowledge of the law, and blatant disregard for that law. As a consequence, however, the anatomists eventually got the legislative regime they desired with the implementation of the Anatomy Act 1832. The 20th century anatomists and medical practitioners again demonstrated their woeful ignorance of the law and their adherence to a paternalistic approach to communication with patients and their next of kin. Unlike their peers of yesteryear, they may not get a law they want, since the reforms that are underway remove the scope for paternalism and continue to enforce the patient rights culture in medical practice. But will the changes remove the excuse of "we didn't understand?", and "medical science necessitated our actions"? Given this illustration of the way in which history repeats itself, the answer must be no.

NOT SEEING THE WOOD FOR THE TREES – RISK ANALYSIS AS AN ALTERNATIVE TO FACTUAL CAUSATION IN *FAIRCHILD*

*ROBERT WEEKES**

INTRODUCTION

In our common law of tort it is invariably from chestnuts, and not acorns, that grow the great oaks of legal principle. The recent House of Lords decision in *Fairchild*[1] might seem merely another branch to the apparently sturdy trunk of factual causation in negligence. The chestnut in question is that of double causation: how to attribute tortious liability amongst several candidates, when all have breached their duty of care, but when none can be proven to have caused the damage in question? The classical illustration is that of the accidental shooting party, in which several huntsmen negligently fire their weapons but the claimant is struck by just one shot.[2]

This article examines the jurisprudence of double causation and charts the incremental development of the concept of risk analysis. It argues that this approach, as given its clearest expression in *Fairchild*, may appear correct on the merits of the case, but nevertheless is profoundly inconsistent with existing principles of negligence. It is an unfortunate example of missing the wood for the trees. *Fairchild* uproots the delicate accommodation of law and fact that is demanded by proof of factual causation.

Firstly, it is argued that drawing a distinction between questions of fact and law provides no principled justification for risk analysis. This is because the double causation conundrum is premised on the very unavailability of material fact. Secondly, it is contended that the scope of potential application of risk analysis cannot be subject to any coherent limitation, beyond the unpredictable judicial determination of legal policy. The House of Lords itself failed to agree upon conditions that could contain risk analysis. Risk renders the question of legal causation redundant and replaces it with a concept that is designed to be limitless. Thirdly, it is argued that risk analysis only reiterates the test for imposing a duty of care. The consequence is the judicial creation of a no-fault liability scheme for damage that is caused by more than one actor or activity.

THE AMBIT OF THE PROBLEM

Trends ancient and modern mean that the phenomenon of double causation is no longer confined to the simple and uncommon facts of the shooting party. Firstly, the relatively recent growth of medical and scientific knowledge (accompanied by judicial willingness to entertain increasing amounts of expert evidence)[3] has facilitated finding

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[1] *Fairchild (suing on her own behalf) etc.* v. *Glenhaven Funeral Services Ltd and others etc* [2002] UKHL 22, [2003] 1 A.C. 32.

[2] *E.g., Summers* v. *Tice* 199 P.2d. 1 (1948) (Supreme Court of California); *Cook* v. *Lewis* [1951] S.C.R. 830, [1952] 1 D.L.R. 1 (Supreme Court of Canada); *Litzinger* v. *Kintzler* (Cass. Civ. 2e, 5 June 1957, D 1957 Jur. 493) (*Cour de Cassation*).

[3] The Civil Procedure Rules 1998 have recently sought to limit this trend by measures for the appointment of joint experts: CPR, rr. 35.1, 35.4(1), 35.7(1).

those factual causes of many industrial, pharmaceutical and surgical injuries. Secondly and conversely, severe limitations as to this knowledge continue to exist.[4] Therefore, it is commonly possible to identify the physical or primary cause of the injuries to the claimant, but not, in turn, to pinpoint which secondary agent or activity was responsible for this primary cause.[5] It is of course these secondary agents and activities that belong to the insured employers, manufacturers and surgeons.

The asbestosis and mesothelioma litigation[6] exemplifies the extent and the exigencies of such tracing of causes into causes.[7] The medio-scientific orthodoxy accepts that the risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled; that the greater the quantity of dust and fibre inhaled, the greater the risk. But is not known whether the condition may be caused by a single fibre, or a few fibres or many fibres.[8] Hence the joined cases of *Fairchild* involved a claimant who had worked as a lagger handling asbestos materials daily, and who became a docker regularly loading and unloading asbestos cargoes. Another claimant built packing cases lined with asbestos, and later was employed as a builder, slicing sheets of asbestos to repair factory roofs. In each circumstance the relevant employer had breached her common law and/or statutory duties of care towards her employee.

An analogous problem of double causation could arise in the context of tobacco litigation. Cigarette smoke causes a series of mutations which may, together, give rise to lung cancer. It is not currently possible to state that a final cancerous mutation was caused either by "a molecule of tar from one cigarette", or by the cumulative consequence of decades of smoking.[9] In theory, a litigant having smoked a single cigarette from Manufacturer B. ought to fail to prove factual causation against Manufacturer A., whose products she had smoked all her life.

Hence the law of tortious liability consistently threatens to outstrip the limits of forensic evidence. This gave rise to the critical question, answered once in *McGhee* and now reconsidered in *Fairchild*: "[w]hether, in the special circumstances of such a case, principle, authority or policy requires or justifies a modified approach to proof of causation".[10]

JUDICIAL APPROACHES TO DOUBLE CAUSATION

Wardlaw

The pre-*Fairchild* approach to double causation less resembles a sturdy oak than a thicket of judicial *dicta*. The modern jurisprudence commences with the case of *Bonnington Castings Ltd.* v. *Wardlaw*,[11] in which Lord Reid deftly proposed the concept of "material contribution" as an alternative to factual causation.

[4] "As the boundary of knowledge increases, so does the area of uncertainty", Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054 (1978), vol. 1, at para. 1449.

[5] "[The] Medical Research Council said that while future research was likely to establish more causal relationships it would reveal increasingly complex interactions which would heighten the problems of causation in the individual case", *ibid.* at para. 1364.

[6] Both asbestosis and mesothelioma are illnesses of the lung that result from exposure to asbestos dust. Asbestosis is the more common condition. No causal connection has been proved between these two conditions. See *Bryce* v. *Swan Hunter Group plc and Others* [1987] 2 Lloyd's Rep. 426, 436–438 (Phillips J.). Asbestosis cases do not engender the same level of difficulty of double causation as mesothelioma litigation, as the former disease is cumulative, *i.e.*, the likelihood of suffering the disease and its severity increase proportionate to the duration and amount of exposure to asbestos fibres.

[7] "The 'elephantine mass of asbestos cases' lodged in state and federal courts, we again recognize, 'defies customary judicial administration and calls for national legislation' ": *Norfolk & Western Railway Co* v. *Ayers et al*, U.S. (slip opinion at 28–29) *per* Ginsburg J. citing *Ortiz* v. *Fibreboard Corp*, 527 U. S. 815 at 821 (1999).

[8] N. 1 above at 113 (expert evidence of Dr. Rudd on the limits of the available knowledge concerning mesothelioma).

[9] N. 1 above at 13.

[10] *Ibid.* at 2, (Lord Bingham).

[11] [1956] A.C. 613 The decision was almost immediately followed by the House of Lords in another pneumoconiosis case featuring almost identical facts: *Nicholson* v. *Atlas Steel Foundry & Engineering Co. Ltd.* [1957] 1 W.L.R. 613.

The plaintiff had contracted pneumoconiosis as result of inhaling silica dust. The dust came from two sources, only one of which had been held to involve a breach of duty by the employer. The scientific evidence could not distinguish between the "guilty" dust and the "innocent" dust as a cause of the disease. Lord Reid both affirmed and extended the orthodoxy. "[T]he employee must in all cases prove his case by ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty *caused or materially contributed* to his injury".[12]

However, for a contribution to be material it need not have caused the balance of the *illness*. As Lord Reid observed:

> A contribution which comes within the exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the *de minimis* principle but yet too small to be material.[13]

Factual causation is accordingly divided into two stages and severely attenuated. First, the activity must *probably* have been a material contribution to the illness. Second, this activity must have made more than a *de minimis* contribution. A material contribution does not prove that the activity probably *caused* the damage. It merely proves that an activity *probably made more than a de minimis contribution.*

Yet it is questionable whether the novel concept of material contribution was necessary to resolve the matter of causation on the facts of the *Wardlaw* case. The available evidence showed that pneumoconiosis was a cumulative condition: it was caused by a gradual accumulation of silica dust in the lungs inhaled over a period of years.[14] Therefore, *both* the sources of dust did in fact *cause* the disease. This approach has since been applied to the notoriously difficult issue of the causation of psychiatric injuries.[15]

McGhee

The revolution actually began in a brick kiln in Scotland. A majority of the House of Lords in the case of *McGhee* v. *National Coal Board* approved the approach of "material contribution".[16] However, the *ratio* of the House in *Fairchild* may be little more than a lengthy footnote to two paragraphs of the judgment of Lord Wilberforce, in which *Wardlaw* was distinguished, the concept of contribution rejected, and risk analysis accepted.

The pursuer had developed dermatitis as a result of contact with brick dust. The Board did not breach its duty towards its employee in exposing him to the dust. However, it admitted a breach in failing to provide showers to remove the dust at the end of the working day. The medical evidence could not show how dermatitis of this type developed. Upon appeal to the House of Lords, Lord Reid adopted a "broader view of causation" and held that the absence of showers "added materially to the risk that this disease might develop". Material contribution had not only been affirmed but also joined by the concept of material increase in risk. Yet Lord Reid regarded any distinction as being purely terminological:

[12] *Ibid.* at 620.
[13] *Ibid.* at 621.
[14] *Ibid.* at 621.
[15] *Page* v. *Smith (No. 2)* [1996] 3 All E.R. 272; *Vernon* v. *Bosley (No. 1)* [1997] 1 All E.R. 577.
[16] [1973] 1 W.L.R 1. See discussion at p. 23, below.

> The legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defended did made a material contribution to his injury.[17]

Lord Simon gallantly clung to the concept of "substantial contribution" and deduced a general rule to this effect from *Wardlaw*. He further considered that: "Material reduction of the risk" and "substantial contribution to the injury" were "mirror concepts".[18] Lord Salmon also held that any difference between contribution and creation of risk was a semantic one:

> In the circumstances of the present case, the possibility of a distinction existing between (a) having materially increased the risk of contracting the disease, and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, far too unreal to be recognised by the common law.[19]

However, unlike in the case of *Wardlaw*, there was simply no evidence that the breach of duty had contributed to, let alone necessarily caused, the disease. As Lord Wilberforce observed: "to bridge the evidential gap by inference seems to me something of a fiction, since it was precisely this inference which the medical expert declined to make".[20] Therefore, his Lordship appeared to accept that causation could only be supplied by recognising *risk* as a concept independent of contribution:[21]

> [I]n the absence of proof that the culpable addition had, in the result, no effect, the employers should be liable for an injury, *squarely within the risk which they created* and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default.[22]

The Court of Appeal has since affirmed that the approach in *McGhee* is not limited to factual uncertainty concerning gaps in medical knowledge about the cause of injuries or diseases but could instead be applied to other types of factual uncertainty.[23]

Wilsher

In the case of *Wilsher* v. *Essex Area Health Authority*,[24] both the Court of Appeal and the House of Lords offered their preferred opinions of *McGhee*.

A claim was made in negligence in respect of a prematurely born baby who had developed the condition retrolental fibroplasia ("RLF"). The Court of Appeal held that this condition could have been caused by a number of different agents, including the administration of excess oxygen in breach of the duty of care. The risk of suffering RLF was held to be increased by this breach of duty. The majority considered that the

[17] *Ibid.* at 4–5.

[18] *Ibid.* at 8. See also the similar reasoning of Lord Kilbrandon, *ibid.* at 10.

[19] *Ibid.* at 12–13.

[20] *Ibid.* at 7.

[21] The equation of risk and material contribution had earlier been suggested by the House of Lords in *Nicholson*, n. 11 above, 622: "It seems to me to follow that the respondents' failure to provide adequate ventilation must increase the risk to which the workmen are exposed. Reading the evidence as a whole, I think it establishes that (to use the language of Lord Reid in *Wardlaw*'s case) 'on a balance of probabilities the breach of duty caused or materially contributed to' the injury" (Lord Cohen). However, the facts of the case were held to show that the contribution made by the defendants to the risk was also a contribution to the cause of the disease.

[22] N. 16 above at 7.

[23] *Fitzgerald* v. *Lane* [1987] 2 All E.R. 455.

[24] [1988] A.C. 1074.

increase in risk was sufficient to establish causation. Mustill L.J. (as he then was) distilled a principle of general application from the judgment of Lord Wilberforce in *McGhee*:

> If it is an established fact that conduct of a particular kind creates a risk that injury will ensue; and if the two parties stand in such a relationship that the one party owes a duty not to conduct himself in that way; and if the other party does conduct himself in that way; and if the other party does suffer injury of the kind to which the risk related; then the first party is taken to have caused the injury by his breach of duty, even though the existence and extent of the contribution made by the breach cannot be ascertained. If this is the right analysis it seems to me that the shape taken by the enhancement of the risk ought not to be of crucial significance.[25]

However, the House of Lords rejected the risk analysis and accordingly found that causation was not established. Lord Bridge held that *McGhee* had "laid down no new principle of law whatever". The House in that case had merely taken "a robust and pragmatic approach to the undisputed primary facts of the case" and thus made "a legitimate inference of fact that the defender's negligence had materially contributed to the pursuer's injury".[26] Somewhat paradoxically, the House further approved the distinction that had been formulated by the dissenting judgment of Browne-Wilkinson V-C. in the Court of Appeal in *McGhee*. This was principally, that an increase of risk could be regarded as equivalent to making a material contribution where a single noxious agent was involved, such as the brick dust in *McGhee*, but not where a number of agents might have caused the damage, as in *Wilsher*. Accordingly, an arbitrary distinction between cases involving single and multiple agents was created in the jurisprudence of double causation.[27]

The decision might be regarded as erroneously conflating the concepts of primary and secondary causation.[28] The primary cause of the pursuer's dermatitis in *McGhee* was accepted to be brick dust. The secondary cause, namely whether the condition developed, either as a result of contact with the dust in the kiln; or from exposure to the dust whilst cycling home without the benefit of a shower; or as a consequence of both incidents, was not proven. The primary cause of the RLF in *Wilsher* was, however, unknown and several candidates existed. Yet, in both cases, the material facts were the same, namely that more than one potential cause of the condition existed, and only one of these causes had been committed in breach of the duty of care. The possibility that one cause may be considered primary, and another secondary, is relevant to the factual question of what caused the condition. Lord Hoffmann appeared to accept the arbitrariness of this distinction in *Fairchild*.[29]

Nevertheless, this slight leave of judicial senses is understandable. The House of Lords in Wilsher was confronted by a dangerous development in the Court of Appeal. Lord Mustill L.J. had elevated the analysis of risk, as an approach independent from that of material contribution, from an obiter dictum of Lord Wilberforce to an established means of finding factual causation. Surgical procedures commonly create a multitude of risks whose extent and effects cannot be measured. As Lord

[25] [1987] Q.B. 730 at 771–772.

[26] N. 24 above at 1090.

[27] This approach was explained and affirmed by Lord Bingham in *Fairchild*: "It is one thing to treat an increase of risk as equivalent to the making of a material contribution where a single noxious agent is involved, but quite another where any one of a number of noxious agents may equally probably have caused the damage", n. 1 above at 7.

[28] See discussion of these concepts at p. 19, above.

[29] *Ibid.* at 62: "the arbitrary exception of single-employer cases", and *ibid.* at 72.

Hoffmann observed, the mere creation of clinical risk should not be susceptible to litigation.[30]

It is submitted that these two contrary trends from the decisions in Wilsher; the acceptance of risk analysis as a substitute for factual causation and the flawed attempt to limits its scope, were to dominate the decision of the House in *Fairchild.*

FAIRCHILD – CERTAIN PROBLEMS IN PRINCIPLE

The Court of Appeal[31] in *Fairchild* eschewed the jurisprudence of double causation and applied the conventional "but for" test. Accordingly, in the absence of scientific evidence, the mesothelioma of the claimant could not be attributed to the breach of duty of care owed by either employer or by both employers acting together.

Material Contribution

In reversing the decision of the lower court, the House of Lords failed to agree upon a principle that could either serve to explain the double causation jurisprudence or to limit its scope. Following an extensive survey of domestic, continental, Commonwealth and U.S. authority, Lord Bingham revived the concept of material contribution:

> [I]t seems to me just and in accordance with common sense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making a *material contribution* to the contracting by C of a condition against which it was the duty of A and B to protect him.

The theoretical justification merely amounted to balancing the inequity that would result to either employer or employee: "I am of the opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim". Lord Nicholls openly accepted that this decision required a "value judgment" that was reliant upon "instinctive notions of what justice requires and fairness demands".[32]

Risk Analysis

However, Lord Hoffmann endorsed the terminology of risk, holding that it was: "[S]ufficient both on principle and on authority, that the breach of duty *contributed substantially to the risk* that the claimant would contract the disease".[33] The principled justification proffered was notably more ambitious. Lord Hoffmann held that causation was a question of fact that was governed by conditions of law:

> The question of fact is whether the casual requirements which the law lays down for that particular liability have been satisfied ... Before one can answer the question of fact, one must first formulate the question ... The causal requirements for liability often vary, sometimes quite subtly, from case to case. And since the causal requirements for liability are always a matter of law, these variations represent legal differences, driven by the recognition that the just solution to different kinds of case may require different causal requirement rules.[34]

[30] *Ibid.* at 72: "It is true that actions for clinical negligence notoriously give rise to difficult questions of causation. But it cannot possibly be said that the duty to take reasonable care would be virtually drained of content unless the creation of a material risk of injury were accepted as sufficient to satisfy the causal requirements for liability" (Hoffmann L.J.).

[31] [2002] 1 W.L.R. 1052 (Brooke, Latham and Kay L.JJ.).

[32] N. 1 above at 40, *c.f.*: *Fitzgerald* v. *Lane* [1987] 2 All E.R. 455 at 464 *per* Nourse L.J.: "A benevolent principle smiles on these factual uncertainties and melts them all away".

[33] *Ibid.* at 47 (emphasis added).

[34] *Ibid.* at 52.

Nevertheless, the tribunal is one of both fact and law.[35] It is capable of examining the available evidence, then framing the legal requirements in order to generate an answer that can be proved on this evidence. Lord Hoffmann emphasised the fluidity between the available evidence and the legal criteria of causation:

> [I]f it is thought just and reasonable to impose a duty to take care to protect someone against harm caused by the informed and voluntary act of another responsible human being, it would be absurd to retain a causal requirement that the harm should not have been so caused ... Thus the causal requirements are always adapted to conform to the grounds upon which liability is imposed. Again, it may be said that this is no more than common sense.[36]

Therefore, the purportedly "legal" norms that govern factual causation have no fixity of content. The application of the concepts of "but for" causation, material contribution, and/or risk analysis, is actually determined by "common sense" or "grounds of fairness and justice".[37] Abandoning factual causation on account of the merits of the matter should properly be reproached as "backwards reasoning"[38] or hard-case logic.[39] Accordingly, the legalistic approach of Lord Hoffmann actually resembles the instinctive *ratio* of Lord Nicholls, though is bereft of its economy and clarity.

Nevertheless, the approach of Lord Hoffmann might be supported on two distinct grounds. First, it reaffirms the distinction between questions of law and fact in the determination of the tribunal. Second, it acknowledges the perennial significance of a "doctrine" of common sense in the judicial finding of factual causation.

The allegation that purportedly legal conditions are malleable and modified in order to give rise to desired factual answers cannot lie against a tribunal which enshrines a clear distinction between law and fact. As Clarke L.J. has stated: "The assessment of questions of this kind are essentially jury questions which have to be determined on a broad basis, so that it will only in the rarest of cases that recourse need to be had to the burden of proof".[40]

The tribunal of law is obliged to frame the appropriate legal conditions governing the factual question of causation. The tribunal of fact answers the "jury question" by asking itself whether the factual evidence satisfies, on the balance of probabilities, these legal conditions. As Hart and Honoré stated: "All those issues which are on our analysis genuinely causal should be submitted to the jury or trier of fact provided there is some evidence before it or him which could form the basis of a finding".[41]

However, this analytical approach cannot dispense with the problem which gives rise to the conundrum of double causation, namely, the absence of evidence upon which the tribunal of fact could rely in order to find the legal conditions of causation satisfied. As Hart and Honoré acknowledged: "whether such evidence exists is admittedly a question of law for the court".[42] It is a question that emphatically requires

[35] See also p. 29 below.

[36] N. 1 above at 57.

[37] *Ibid.* at 54.

[38] The process whereby the justice of imposing liability is first considered, before moving "backwards" to fix the conditions that would either impose or deny such liability.

[39] N. 1 above at 36: "When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law" (Lord Nicholls) *c.f.*: *Wilsher*, n. 24 above at 1092 (Lord Bridge).

[40] See also *Thompson* v. *Smiths Shiprepairers (North Shields) Ltd.* [1984] 1 Q.B. 405 at 443 D (Mustill J.) where the apportionment of damages in a double causation case was regarded as a "jury question".

[41] Hart and Honoré, "Causation in the Law" (2nd ed., Oxford, 1985), p. 428.

[42] *Ibid.*

consideration of legal policy.[43] If the tribunal of law holds that factual causation can be satisfied by evidence of risk rather than factual cause, it is making an inference that is unsupported by evidence.[44] The necessity of drawing such an inference is not denied, but actually rendered more apparent, by a clear separation of the functions of finding fact and law.

Nevertheless, the substance of such an inference might be provided simply by judicial notice of the "common sense" of imposing liability. This concept is no foreigner to the field of factual causation.[45] The "ordinary usage criterion" of Hart and Honoré finds that an activity or actor is the factual cause of harm if in ordinary language it would be spoken of as being "a cause".[46] Accordingly, Lord Hoffmann's approach might be a compelling explanation of exactly *why* legal criteria can be abandoned in factual causation – and therefore it is a necessary precursor to the ordinary usage rationale of Lord Nicholls.

Yet this criterion is also inapplicable to the phenomenon of double causation. As Wittgenstein taught, ordinary usage expresses the limits of our knowledge within the limits of our language. Accordingly, it is credible to speak of asbestos fibres as being *a* cause of mesothelioma. It is not possible to identify *which* fibre or fibres caused the mesothelioma in question.[47] The most that might ordinarily be said, as Lords Wilberforce and Hoffmann appear to have realised, is that the fibres created a "risk" that damage would[48] result. The language of risk is itself a concession that factual cause cannot be proved.

Inferential Approach

Lord Hutton rejected the principle of material increase in risk, and instead *inferred* from the existence of the risk that the breach of duty *caused* the disease: "I consider that this approach, whereby the layman applying broad common sense draws an inference which the doctors as scientific witnesses are not prepared to draw, is one which is permissible".[49] This reliance on "broad common sense" is perplexing. Expert evidence is tendered for the purpose of proving or disproving matters which are beyond the ordinary knowledge, sense and experience of the tribunal of fact.[50] Thus when causation is beyond the powers of even the experts, the inferential approach amounts to deliberately uninformed guesswork.

For this reason, the approach was expressly rejected by Lord Wilberforce in *McGhee*.[51] Nevertheless, it can credibly be defended on the fact-sceptical ground that

[43] "[T]he problems of legal policy involved in determining the proper scope of statutory or common law rules, the types of damage for which the law provides a remedy, and the appropriate allocation of risks in different branches of the law, so far as they come within the function of the courts, fall more naturally to the judge than to the jury", *ibid.* at 429.

[44] See criticism of Lord Wilberforce in *McGhee*, n. 20 above and accompanying text.

[45] See, *e.g.*, *Alphacell Ltd* v *Woodward* [1972] A.C. 824, 847 *per* Stuart-Smith L.J.: "I consider ... that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory".

[46] An act being the cause of harm; "if it is an intervention in the course of affairs which is sufficient to produce the harm without the cooperation of the voluntary action of others or abnormal conjunctions of events".

[47] To cross the Rubicon from being a general cause to being a specific cause of the damage is identical to that which afflicts the drawing of a material inference, see p. 26 below.

[48] This inferential approach may therefore be regarded as a refined, or, alternatively honest, version of risk analysis. It relies upon the existence of risk in order to found causation, but unlike the doctrine of "risk analysis" developed in the speech of Lord Hoffmann in *Fairchild*, and by Lord Wilberforce in *McGhee*, it concedes that an inference must then be drawn from this risk: a risk *per se* is not sufficient for factual causation.

[49] N. 1 above at 100.

[50] The common law rule that opinion evidence is inadmissible is subject to the exception that allows an expert witness to state her opinion on matters within her expertise, if this is expertise that the court does not possess: *Buckley* v. *Rice-Thomas* (1554) Plowd. 118, 124 (Saunders J.); *Folkes* v. *Chadd* (1782) 3 Doug K.B. 157.

[51] See n. 20 above and accompanying text.

proof, like risk, is a concept that is calibrated by degrees. Factual causation requires the inquiry "Has x caused y?", but also scrutiny of the question, "Can we know whether x has caused y?" Inference does not permit an affirmative answer to the second question, yet it necessarily[52] allows such an answer to the first.[53] Public and private law measure proof by reference to a "standard" and proof is required not to have certainty but a specified degree of "sufficiency". Accordingly, where it is possible to state only that there is a risk of x having caused y, factual causation may be "proved".[54] On this basis, factual causation is not itself a "fact" but a *legal* finding of fact, which may in turn be derived from a probability (or risk) of causation having occurred in fact.[55]

The rejoinder to this epistemological defence is simple: the doctrine of inference, as properly construed and applied by tribunals of fact, is not equivalent to the approach of Lord Hutton in *Fairchild*. The doctrine only operates where sufficient and sufficiently unambiguous evidence is presented from which to infer causation. In the absence of such evidence, the trier of *fact* is obliged to find that causation is not proven. However, risk analysis expressly mandates a finding of causation where the evidence attributing causation to either A or B or A and B is inconclusive.

However, the inferential approach is likely to lead to rulings that are sound in law. This is because such an inference constitutes a finding of primary fact. Therefore, as Lord Bridge observed in *Wilsher*, the inference will be unassailable by the Court of Appeal, unless the trial judge has misdirected himself or the finding is clearly contrary to the available evidence.[56]

Moreover, the inferential approach has a sound provenance in negligence. Where there is insufficient evidence to provide proof of negligence, the doctrine of *res ipsa loquitur* discharges the burden of proof of breach of duty and causation on the behalf of a claimant. The principle could not apply to the facts of *Fairchild* as it could not be proved that the "thing" (asbestos) causing the damage was under the exclusive control of either defendant.[57] This is the reason that the conundrum of double causation arose. In *Wilsher* the thing causing the damage could not be identified, and in any case, the presence of putative causes that could have caused the damage without negligence runs counter to the second condition for application of the principle.[58] Accordingly, the inferential approach to factual causation may be properly regarded as the uncircumscribed application of *res ipsa loquitur*. It is inference that requires only proof of duty and breach.

Limiting Factors

As discussed above, the reasoning of the House was required not only to provide a principled basis for the imposition of liability in double causation cases, but also to find

[52] "Necessarily" as the doctrine of inference is introduced as a mechanism for finding factual causation where an objectively correct answer is not proved by the evidence. If the evidence states unambiguously x has caused y then the question "Has x caused y?" is supererogatory and there is no need to *infer* from the evidence that x has caused y.

[53] An alternative means of expressing this statement in ordinary language may be that x having caused y is accepted without "proof" that x has caused y. This statement appears confusing on account of the logical absurdity that has crept into conventional language that speaks of "sufficiency" and "standards" of proof.

[54] "If there is a conflict of evidence, the jury or trier of fact will have to make up its mind on the causal issue and in doing so to take account of the incidence of the burden of proof and of the standard of proof appropriate to the litigation. It is not for the expert to give evidence that the standard of proof is satisfied: *Dahl* v. *Grice* [1981] VR 513": Hart and Honoré, *op. cit.*, at n. 41 above, p. 411.

[55] This is a longstop defence of risk analysis. It rests on the epistemological premise that knowledge is not, or cannot be known to be, objectively certain.

[56] N. 24 above at 1082.

[57] *Scott* v. *London and St Katherine Docks Co.* (1865) 3 H & C 596 (Erle C.J.)

[58] *Ibid.*

a means for limiting the ambit of its application. Consistent with his merits-based reasoning,[59] Lord Nicholls could not establish guidelines for limiting risk analysis in double causation: "Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific".[60] Lord Hoffmann likewise left his purported principle as expressly amenable to development and application.[61] Nevertheless, his Lordship found five criteria in the facts of *Fairchild* that would ring-fence risk analysis.[62] Lord Bingham supplied six more specific conditions.[63] Finally, Lord Rodger formulated still six more criteria but regarded them as merely necessary and not always sufficient.[64]

By definition the concept of risk is a limitless one. The meaning of a factual cause is binary: a given activity either causes or does not cause the damage in question. The limit of a factual cause is where a given activity does not result, in whole or in part, in the certain damage. Risk, however, is defined by degree. It cannot be limited by reference to whether or not the damage in question resulted. A risk which is proven to have resulted in damage is of course a risk that has been realized, or more properly, "a cause".

Tortious risk analysis is precluded from examining the results of actions. A risk which materialises is no longer a risk but a determinate act. In the context of double causation, risk analysis does not consider the consequences of the risk.[65] The *Fairchild* approach would impose liability on an actor who may have not intended to *create* a risk, may have failed to *foresee* a risk, and/or accidentally *omitted* to take precautions against a risk. It is not necessary that this accidental risk should have caused some damage, merely that some certain damage exists.[66]

The House of Lords in *Hotson* v. *East Berkshire Health Authority* recognised this problem with regard to quantum and not liability, when seeking to quantify damages for loss of a chance.[67] The House required the claimant to prove that the chance (or risk) of not developing the relevant disability, had the breach of duty not occurred, exceeded 50 per cent.[68] This limit is of course not wholly arbitrary, but corresponds to

[59] Or, perhaps, "meritocratic" reasoning.

[60] N. 1 above at 43.

[61] *Ibid.* at 74.

[62] *Ibid.* at 61.

[63] *Ibid.* at 2.

[64] *Ibid.* at 170.

[65] With regard to conventional factual causation we might state that $A \rightarrow (causes) \rightarrow D$, where A=determinate factual activity and D=damage. However, with regard to risk analysis, $A \rightarrow R + D$ is equal but not identical to $A \rightarrow (causes) \rightarrow D$, where R=a risk of D occurring being greater than *de minimis*. The inferential approach, as criticised by Lord Wilberforce in *McGhee*, permits the finding that $A \rightarrow R + D$ is equal and identical to $A \rightarrow (causes) \rightarrow D$. Risk analysis accordingly looks to the existence of damage and the existence of risk. Conventional causation regards the causal *relationship between* the damage and the (risky) activity concerned.

[66] Of course, unless certain and substantial damage existed, for which damages could therefore be recovered, there would be only a minor motive for the claimant to pursue litigation in tort.

[67] Note that "chance" is an identical concept to "risk" but is regarded as operating in a different time frame. Loss of a chance here denotes the calculation whether the activity in question might have caused damage to the claimant *in the future, i.e.*, whether the claimant was deprived of a chance of future recovery from injury or illness by the activity. "Risk" denotes the calculation whether the activity might *already* have caused damage to the claimant. Both concepts are hypothetical enquiries into causation where factual causation is impossible to prove.

[68] [1987] A.C. 50.

the civil standard of proof of fact on the balance of probabilities.[69] Nevertheless, it should be noted that the calculation of risk is often so difficult that judicial findings of risk and application of this limit are, nevertheless, arbitrary.[70]

In *Hotson*'s case, at first instance and in the decision of the Court of Appeal, the extent of the loss of chance or risk was ascertained to be 25 *per cent* and the plaintiff's damages were discounted by this amount. In *Bryce* v. *Swan Hunter*, the facts of which are materially identical to *Fairchild*, Phillips J. (as he then was) remarked *obiter* that this approach to the quantification of damages might be applied to issues of liability, and thereby provide a "radical development in the law of tort" as an alternative to factual causation in *McGhee*.[71]

The House in *Fairchild* did not hear any argument on this issue of apportionment of damages amongst the employers in breach of their duties.[72] However, it is submitted that the *Bryce* approach could not rationally have been approved for the following plain reason: risk in *Fairchild* was regarded as equivalent to causation, thereby completing the ingredients of the tort and permitting all damage incurred to be attributed to this "cause".[73] When it has been found that, as a matter of fact, *a* caused *b*, it would be nonsensical to discount damages on the basis of a risk that *a* might or might not have actually caused *b*. Accordingly, the House rejected such a limitation on liability or quantum premised on the level of risk as judicially ascertained. Yet the logic of the criticism of Lord Wilberforce runs counter to this approach:the equation of risk and factual causation draws the very inference that cannot be supported by the factual evidence.[74]

The common law of negligence has instead long since developed a means of limiting liability within the concept of causation itself. As Hart and Honoré have explained, causation is properly to be regarded as a bifurcated question:

> The single question typically confronted by courts: "Was this harm (*Y*) the consequence of this act or omission (*X*)?" is divided into two questions. *First*: "Would *Y* have occurred if *X* had not occurred?" *Second*: "Is there any principle which precludes the treatment of *Y* as the consequence of *X* for legal purposes ?" ... [T]he first half of the bifurcated question is said to be concerned with a question of fact and the second half with questions of law or legal policy. So when a negative answer is forthcoming to the question "Would *Y* have occurred if *X* had not?" *X* is referred to not merely as a "necessary condition" or *sine qua non* of *Y* but as its "cause in fact" or "material cause".[75]

[69] However, it is unclear why this limit of 51 *per cent* proof should be acceptable in the field of factual causation but not in that of quantification of damages for negligence. Note the comments of the court in *Malec* v. *J. C. Hutton Pty Ltd* (1990) 92 A.L.R. 545, 549: "[Where proof] is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent chance of occurring".

[70] See, *e.g.*, *Bryce* v. *Swan Hunter Group plc.* [1987] 2 Lloyd's Rep. 426, 442 *per* Phillips J.: "While medical science may seldom permit a precise evaluation of risk in percentage terms, Courts are often faced with the requirement to make findings as to risk notwithstanding, and do so – often on the basis of little more than informed guesswork".

[71] *Ibid.* at 442.

[72] N. 1 above at 117.

[73] As Laleng, Feeny and Cooper have observed, it is difficult sensibly to apportion liability amongst employers in *Fairchild*: "The main difficulty in arguing for apportionment is the concept of mesothelioma as an 'indivisible' disease. In other words, it is not cumulative in effect (the injury does not get worse as exposure increases) nor in cause (there does not appear to be a dose-response that triggers the condition)". Charles Feeny, Per Laleng, Doug Cooper, "Mesothelioma, Asbestos and Causation", (2003) 52 J.P.I.L. 1 at 12.

[74] It may be argued that the *Bryce* approach to causation could constitute an acceptable limiting condition on the scope of risk analysis. This approach would regard the fact that risk is defined by degree as a virtue, which would enable the apportionment of damages amongst employers, (or the limitation of damages where risk is attributed to activities that are both in breach and not in breach of duty, *c.f.*: *Wilsher*, n. 24 above). In contradistinction, the *Fairchild* approach appears to regard the gradation of risk as a vice, as it is a logical obstacle to the equation of risk analysis with factual causation.

[75] N. 40 above at 110.

Therefore, where the primary question of *factual* causation admits too broad a category of claimants, the second question of *legal* causation can serve to diminish this group. However, the bifurcation of the question of causation cannot limit the scope of risk analysis for two reasons. Firstly, to ask initially whether a risk was created is to obliterate the question of legal causation. It renders tautologous any inquiry as to the existence of a *novus actus interveniens*. The conundrum of double causation is premised on the basis that at least one other activity or actor may (or may not) constitute the cause in fact of the relevant damage. The adoption of the risk analysis approach in order to answer the first question amounts to an admission that a fully-fledged *novus actus* may indeed exist, but cannot be proven. Once risk analysis is accepted, the bifurcated question of causation becomes unitary.

Secondly, any alternative limiting condition as derived from legal policy is necessarily uncertain. Several policy arguments were adduced in both *McGhee* and *Fairchild* for the imposition of tortious liability on an employer who created a workplace risk.

Employers are in a position to undertake preventive action against foreseeable damage, and the creation of the risk of such damage is one of the very risks from which an employer's duty of care is intended to protect employees.[76] The imposition of liability on a reduced standard of factual causation encourages employers to take reasonable precautions to minimise such risk. Moreover, an employee should not be penalised on account of being unable to prove what is scientifically unprovable.

Causation should also not be denied on account of there being two or more potential tortfeasors, where the court might have been prepared to draw the relevant inference had there been only one potential cause. The employee should not be deprived of a remedy on account of being exposed to more tortious conduct, rather than less.

However, the contrary proposition is equally pertinent. The employer is penalised on account of there being more tortious conduct, rather than less. The tort of negligence places the burden on proof on the claimant, and requires proof of causation. Upon proof of breach, risk analysis effectively shifts the burden of proof onto the employer and requires that he or she prove causation was attributable to another actor or activity.[77] The very justification for introducing risk analysis is that this burden of proof cannot be discharged by the claimant. The burden with which the employer is suddenly saddled is equally difficult to discharge, and discharge is rendered even less possible by the obligation to prove a negative fact: that the employer did *not* cause the damage in question.

Moreover, the employer is deprived of the dual safeguards of the burden of proof and the proof of causation without notice. The threat of risk analysis would oblige an employer to predict both the involvement of other actors and activities in causing future damage to an employee, and that such actors and activities should present difficulties in proof extending beyond future forensic analysis. As Hart and Honoré have observed:

> [I]f such a category of wrongdoing were to be introduced, it would constitute an arbitrary form of strict liability, since [the] defendant could often not know in advance whether his conduct was likely in the outcome to present difficulties of proof to a potential victim.[78]

[76] N. 16 above at 7 (Lord Wilberforce), n. 1 above at 41 (Lord Nicholls). See also: Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 5th ed., (Butterworths, 1993), at p.358: "Underlying many judgments about how risks should be allocated lies the notion that a person who 'creates' a risk should be made to bear the cost of the risk; and the idea of 'creating' a risk is often based on causal concepts".

[77] The shifting of the burden of proof from claimant to defendant was a hazard that Lord Bridge arguably perceived in *Wilsher* and sought to avoid by finding that the *ratio* of the decision still required proof by the claimant on the balance of probabilities, although the court might take a "robust and practical approach" to drawing any necessary inference: n. 24 above at 1090.

[78] N. 40 above at 425.

Ultimately, as the Court of Appeal recognised in *Fairchild*, risk analysis may impose liability on an innocent employer and therefore run counter to the most central principle of legal policy.[79] As Lord Bingham accepted in the House of Lords, this possibility is rendered more likely:

> [W]here all the employers potentially liable are not before the court. This is so on the facts of each of the three appeals before the House, and is always likely to be so given the long latency of this condition and the likelihood that some employer potentially liable will have gone out of business or disappeared during that period.[80]

Furthermore, as Stuart-Smith L.J. has observed, a finding of causation against Employer A would place him in the same position *vis-à-vis* Employers B and C as the employee of A, B, and C: "[If the defendants] cannot prove anything against another, the defendant or defendants against whom the plaintiff chooses to execute will be unable to recover from the others".[81] The double causation conundrum applies equally to the liability of the employers to the employee as to their liability *inter se*.[82]

As a recent report by the Department of Work and Pensions suggests, an increase in the potential "long-tail" liability of manufacturing employers and their insurers, as a result of relaxing the rule of factual causation, may generate further increases in premiums for all such employers, old and new.[83]

These policy propositions apply equally to the use of risk analysis in order to find factual causation and to the limitation of such analysis. The fine balance between these arguments might suggest that double causation is simply insoluble as a matter of policy or principle.[84] Peter Cane has expressed exasperation:

> Within the tort system, there is no way of escaping this problem. The complexity of the issue of causation which arise in such cases . . . may suggest that we have here reached the limits of the practical utility of tort law as a system of compensating victims of personal injury.[85]

A FUNDAMENTAL INCONSISTENCY BETWEEN RISK ANALYSIS AND THE PRINCIPLES OF NEGLIGENCE

There is a danger, once more, of losing the wood for the trees. In *Fairchild*, the House of Lords unanimously found factual causation was proved. The different criteria of causation included the making of substantial contribution, the increase of risk and the drawing of inference. The core principles were denoted as common sense, fairness, and justice: commendable qualities for any judicial decision but providing scant guidance for a solution to the problem of double causation.

[79] N. 30 above at 103.

[80] N. 1 above at 33.

[81] *Holtby* v. *Brigham & Cowan (Hull) Ltd* [2000] P.I.Q.R. 293 at 300 (Stuart-Smith L.J.).

[82] In the form of seeking contribution in separate and subsequent proceedings under the Civil Liability (Contribution) Act 1978, s. 1 or in the form of a Part 20 claim during the currency of the original proceedings.

[83] Department of Work and Pensions (2003) "Review of Employers' Liability Compulsory Insurance – First Stage Report", at pp.45–47: http://www.dwp.gov.uk/publications/dwp/2003/elci/dw2583_employers_review.pdf.

[84] The conclusion of Jonathan Morgan that the House failed to consider or explain its policy considerations with sufficient clarity is therefore perplexing. The proper objection would seem to be that the fully explained policy considerations were simply irreconcilable and thus could neither justify risk analysis nor limit its scope of application: Jonathan Morgan, "Lost Causes in the House of Lords: *Fairchild* v. *Glenhaven Funeral Services*" (2003) 66 M.L.R 277 at 279.

[85] N. 76 above at 97.

The inconsistency between risk analysis and the common law of negligence is in essence a simple one.[86] The mere imposition and breach of a duty of care is of course not tortious. Risk analysis allows such a breach to become tortious by making a judicial approximation of risk to causation. The inconsistency of this development with the discrete negligence doctrines of *res ipsa loquitur*, "loss of a chance" and *novus actus interveniens* has already been discussed.

However, another hazard can be highlighted which rends the entire fabric of the tort. It is a defect that actually tends towards the *consistency*, rather than inconsistency, of risk analysis with other elements of negligence. The defect is principally, that risk analysis is already conducted when imposing the duty of care. As Lord Oaksey emphasised in *Bolton* v. *Stone*, the content of the duty is determined by the foreseeability of risk:

> [A reasonable person can] foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are very likely to happen.[87]

Lord Reid affirmed that the risk must be "substantial" in order to oblige the actor to avoid it.[88] The magnitude of the risk is determined by reference to its likelihood of materialising and the potential severity of damage should it occur. The degree of care is also determined by the size of the risk.[89]

The introduction of risk analysis as an alternative to factual causation requires no additional scrutiny. The duty of care is imposed on account of there being a foreseeable risk. Failure to take precautions against this risk is an inevitable breach. However the existence of this risk alone may also now amount to causation. Lord Simon adverted to this possibility in *McGhee*:

> In this type of case a stark distinction between breach of duty and causation is unreal . . . [an] employer should have foreseen that failure to take the precaution would, more probably than not, substantially contribute towards injury: this is sufficient prima facie evidence.[90]

The theoretical consequence of the reliance on risk analysis is the (occasional) transformation of negligence into an essentially inchoate tort. The political and pragmatic consequence is the creation of a *de facto* no-fault liability scheme in respect of damage that may be attributable to more than one actor or activity. As Hart and Honoré surmised: "[c]ollective responsibility is substituted in effect for responsibility based on causation".[91] In the case of *Sindell* v. *Abbott Laboratories*, the Supreme Court of California famously advocated such a policy as a response to the double causation conundrum. Where the plaintiff was unable to identify which of several companies had

[86] Risk analysis is also inconsistent with pre-eminent principles of public law. The Law Commission has recently analysed the following problem, which is familiar to criminal law : Person A and person B are accused of murdering the deceased person C. No eye-witness testimony or forensic analysis indicates the identity of the perpetrator. A and B propose to run cut-throat defences. The prosecution can seek to prove any or all of the following theories: (i) A killed C; (ii) B killed C; (iii) A and B acting in a joint enterprise killed C. Each of the above possibilities requires proof of causation of the death of C at the hand of either A, B, or both acting together. None would allow A and B to be found liable on the basis that their behaviour towards C created a risk of the death of the latter which in fact materialized. Theories (i)–(iii) are alternative means of causation, but not alternatives to causation. (Law Com No. 279: Children: Their Non-Accidental Death or Serious Injury (Criminal Trials) A Consultative Report (April 2003) available at: <<www.law.com.gov.uk/files/lc279.pdf>>).

[87] [1951] A.C. 850 at 863, *c.f.*: *Fairchild*, n. 1 above at 133: "Questions of the risk or increased risk of causing harm are more frequently considered in relation to issues of foreseeability and fault" (Lord Rodger).

[88] [1951] A.C. 850, 867.

[89] "The law in all cases exacts a degree of care commensurate with the risk created", *Read* v. *J. Lyons & Co Ltd* [1947] A.C. 156, 173 (Lord Macmillan).

[90] N. 16 above at 8.

[91] *Op. cit.* at n. 40 above at p.102.

manufactured the drug responsible for her disease, the majority held that factual causation need not be proven. The manufacturers of the drug were held as collectively insuring, in proportion to their market share, those who were injured by using the drug.[92]

The provision of such a collective insurance scheme in respect of negligent damage or injury may be a positive development. Yet it is emphatically a matter of policy.[93] It is incompatible with the constitutional role or expertise of the judiciary. As Lord Hoffmann has recently observed in another asbestos case:

> [Whether or not one should have an action in tort] is a matter of national policy. Some countries, like New Zealand, do not believe in actions in tort for personal injuries. The Accident Insurance Act 1998 provides a no-fault compensation scheme instead ... The question of whether a common law action for damages is the most sensible way of providing compensation for accident victims is controversial.[94]

The stark difference between the *Sindell* and *Fairchild* approaches is that the former sought to apportion liability amongst the defendant manufacturers. As discussed above, the House rejected such an approach and Lord Hoffmann distinguished the *Sindell* approach.[95] Consequently, the *Fairchild* decision is vulnerable to the allegation of double injustice: it mandates no-fault liability *and* omits any apportionment that might soften its rigour.

CONCLUSION

The conventional negligence audience does not enjoy magic tricks. It sees the rabbit go into the hat. It observes that the hat contains the rabbit. It watches the rabbit being pulled out of the hat. It is all rather predictable. The *Fairchild* audience also sees a rabbit and a hat. It watches the rabbit go into the hat. It accepts that the hat is empty. *Et voìla*, it cheers the rabbit being pulled out of the hat. It is a good trick. But it is only a trick because there is no provable causal connection between the empty hat and the rabbit departing from it. The audience looks only to the fact that the rabbit once went into the hat, making it quite possible that it will later pop out of it.

The Court of Appeal in *Fairchild* approved the dictum of Lord Steyn in *Frost* v. *Chief Constable of Yorkshire* that: "[O]ur tort system sometimes results in imperfect justice, but it is best that our common law can do".[96] To deprive a claimant of compensation on account of the limits of scientific knowledge is undoubtedly harsh. To reward the employers who have consistently disregarded the safety of their employee is more so.

Yet risk analysis is no adequate alternative to factual causation in negligence. It is profoundly inconsistent with the principles for attributing liability in tort. It is a limitless concept that renders negligence a tort in law, but not necessarily in fact.

[92] *Sindell* v. *Abbott Laboratories* (1980) 607 P. 2d. 924 at 942. (Richardson J. dissenting).

[93] *Ibid.* at 943: "[T]he problem invites a legislative rather than a judicial solution" (Richardson J. dissenting). See also *Wilsher*, n. 24 above at 1092: "But, whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases" (Lord Bridge).

[94] *Matthews* v. *Ministry of Defence* [2003] UKHL 4 at 25, [2003] 2 W.L.R. 435.

[95] N. 1 above at 74.

[96] [1999] 2 A.C. 455 at 491 as cited by the Court of Appeal in *Fairchild*, n. 31 above at 103.

The proper consequence of the decision in *Fairchild* should be impetus for legislative rather than judicial consideration of a no-fault liability scheme, however limited.[97]

[97] As the US Supreme Court in another asbestosis case warned: "[C]ourts ... must consider the general impact ... of the general liability rules they ... create", *Metro-North Commuter Railway Co* v. *Buckley* 521 U.S. 424 (1997) at 438.

A PRESUMPTION OF LEGAL REPRESENTATION FOR WITNESSES AT JUDICIAL INQUIRIES

NATHAN WILLMOTT[*]

INTRODUCTION

The setting up of a judicial inquiry is now a fairly standard governmental reaction where an apparent failure in a matter of public importance has occurred. The process may at first sight be viewed as a simple and innocuous – although costly – tool to maintain public confidence, establish the truth and provide an opportunity to improve procedures for the future. A royal commission into the work of judicial inquiries in 1966 under Lord Salmon considered that inquiries are necessary:

> to preserve the integrity of our public life without which a successful democracy is impossible. It is essential that on the very rare occasions when crises of public confidence occur, the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed.[1]

Undoubtedly, the formation of a judicial inquiry also has the politically desirable side-effect of deferring difficult questions about the reasons for the crisis of public confidence, pending the inquiry's report (by which time much of the attention of the media is likely to have moved elsewhere).[2] Recent examples of judicial inquiries have covered such diverse subjects as the cause and handling of BSE, the activities of Harold Shipman, the death of Victoria Climbié, the closure to new business of Equitable Life and – for an unprecedented second time – events in Northern Ireland on Bloody Sunday, 30 January 1972.

Unlike court judgments, the findings of judicial inquiries do not change the legal rights and obligations of those parties to whom the inquiry relates. However, the proceedings and subsequent findings of such inquiries do have a serious impact on individuals' reputations and careers, and the evidence provided can also act as a catalyst for civil or criminal proceedings to be brought. As a result, despite the purely "inquisitorial" character of judicial inquiries, the denial of adequate procedural protections can in practice lead to serious consequences for the witnesses on whose evidence the inquiry's report is based.

STATUTORY AND NON-STATUTORY FORMS OF INQUIRY

Investigations into urgent matters of public importance can be conducted using a variety of procedures, including:

a *Ad hoc* inquiries given statutory powers under the Tribunals of Inquiry (Evidence) Act 1921 (referred to in this article as "the 1921 Act");

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[1] *Report of the Royal Commission on Tribunals of Inquiry* (1966, Cmnd. 3121), at para. 28.

[2] Winetrobe notes that "the idea that inquiries, especially royal commissions, can be a way of kicking a difficult issue into the long grass, has a long pedigree". See B. Winetrobe, "Inquiries after Scott: the return of the tribunal of inquiry" [1997] *Public Law* 18 at p. 29.

b *Ad hoc* inquiries conducted without any legal power to obtain evidence;
c *Ad hoc* investigations by Select Committees of Parliament;[3]
d Investigations by the Parliamentary Commissioner for Administration (also known as the Parliamentary Ombudsman[4]) under the Parliamentary Commissioner for Administration Act 1967;
e Inquiries set up and conducted pursuant to one or more specific Acts of Parliament and limited to the particular subject-matter of the Act(s). These include, for example, planning inquiries conducted pursuant to s. 79 of the Town and Country Planning Act 1990 and inquiries into medical issues under section 84 of the National Health Service Act 1977. Such inquiries are in most cases subject to the procedural provisions contained in the Tribunals and Inquiries Act 1992;
f Other mechanisms such as DTI investigations into companies, reviews by professional bodies or departmental investigations.

These alternative methods of establishing an inquiry are not mutually exclusive and often a number of separate investigations will run in parallel. For example the recent Equitable Life affair has led to a Treasury Select Committee investigation and report,[5] a Financial Services Authority independent report published by Her Majesty's Treasury through Parliament,[6] an *ad hoc* non-statutory inquiry under the Scottish judge Lord Penrose,[7] an investigation and report by the Parliamentary Commissioner for Administration[8] and also reports by various professional bodies. Further inquiries could even follow at a later date. Equally, in many cases where there has been a failure of major national significance, inquiries will be taking evidence in parallel with (or at the very least under the threat of) civil and/or criminal proceedings against those responsible, by which time witnesses may already have provided evidence on several occasions which may later be used in cross-examination against them.[9]

WHEN WILL A WITNESS BE PERMITTED LEGAL REPRESENTATION?

This article focuses on the evidence-gathering procedures adopted by the two most wide-reaching types of inquiry, namely *ad hoc* public inquiries with statutory powers under the 1921 Act, and the equivalent inquiries run on a non-statutory basis (*i.e.* those listed at (a) and (b) above). In this article these two types of *ad hoc* inquiries are

[3] The predominant machinery for investigating urgent matters of public importance prior to the 1921 Act (which was enacted to provide an independent machinery for inquiries in reaction to the ineffectiveness of the Marconi Parliamentary Inquiry in 1913, which divided on party political lines). See G.W. Keeton, "Parliamentary Tribunals of Inquiry" [1959] *Current Legal Problems* 12.

[4] Not to be confused with the office of Parliamentary Commissioner for Standards (currently Philip Mawer), whose role is to investigate the activities of M.P.s rather than the selected government departments and public bodies who are listed in the 1967 Act.

[5] Report published on 29 March 2001 (H.C. 272).

[6] Ordered by the House of Commons to be printed on 16 October 2001 (H.C. 244)

[7] The inquiry was announced on 31 August 2001. Its is expected to be published in the autumn of 2003. (*The Times*, 9 July 2003).

[8] Published on 30 June 2003 (H.C. 809–1).

[9] Equitable Life has, for example, publicly stated that the decision whether to sue the financial regulators of the company will be taken on the basis of the contents of the *Penrose Report*.

collectively referred to as "judicial inquiries".[10] Although all of the different types of inquiry listed above have in common the fact that their reports are not determinative of legal rights and obligations, the extent to which statute prescribes the procedures they are required to follow in taking evidence varies considerably. However, the judicial inquiry may fairly be described as the predominant tool in the UK for investigating matters of national importance following an apparent failure by one or more public bodies. This article therefore concentrates on the procedural protections afforded to those witnesses giving evidence to such inquiries and, specifically, the extent to which those witnesses are entitled to legal representation when giving evidence to the inquiry.

Despite the proliferation of judicial inquiries in recent years and the gravity of the issues on which that they are required to report, there remains considerable uncertainty as to the procedural protections to which witnesses are entitled. In particular, the extent of an individual's right to have a legal representative attend the inquiry's hearings and make representations on behalf of the witness has for many years been extremely unclear. As discussed in more detail below, the Human Rights Act 1998 (in particular the "fair trial" protections under Article 6 ECHR) does not provide the certainty to witnesses on the question of legal representation that may at first sight be expected.

Rather, subject to constraints on the exercise of its discretion, the judicial inquiry itself is free to determine the procedure that it will follow in running the inquiry, including the issue of whether to allow legal representation when taking evidence from witnesses. The exception to this general rule – which forms the underlying subject matter for this article – is the fact that in determining what procedure to adopt, the inquiry is required to exercise its discretion in choosing an appropriate procedure in accordance with its duty of fairness to witnesses, and in taking that decision it must give due weight to all relevant factors. Failure to do so may render the inquiry's choice of procedure subject to challenge by way of judicial review.

The way in which the courts have interpreted this duty of judicial inquiries, and in particular the extent to which the court has been willing to intervene to substitute its own views as to fairness for that of the judicial inquiry, has developed substantially in a number of recent cases.

OVERVIEW OF ARTICLE

This article considers the practicalities of the work of judicial inquiries and in particular the various factors that inquiries will be required to take into account when assessing what is an appropriate procedure to adopt. While every inquiry is different and therefore has to give varying weight to particular factors depending on the particular circumstances, this article identifies four key propositions that will apply to all judicial inquiries. These are summarised below and considered in detail in the four main

[10] Many judicial inquiries are now set up on a non-statutory basis, with the threat that if the inquiry does not receive the evidence it requires on a voluntary basis it will subsequently be provided with statutory powers of compulsion under the 1921 Act. See, for example, the announcements of the Bingham Inquiry into BCCI and Penrose Inquiry into Equitable Life. One reason for this may be that a resolution of both Houses of Parliament is required for the 1921 Act to apply. Equally, subject to issues of legal representation, witnesses before 1921 Act inquiries are, by virtue of section 1(3), provided with the same immunities and privileges as if they were witnesses in civil proceedings in the High Court. Accordingly, the *sub judice* rules would apply to prevent other investigations such as Parliamentary Select Committee hearings from taking place. The limitations under the 1921 Act as to when hearings may be held in private may be a further factor in preferring a non-statutory inquiry (although *c.f. R* v. *Secretary of State for Health, ex parte Wagstaff* [2000] U.K.H.R.R. 875).

sections of the article. The author submits that the four propositions combine to create a presumption that inquiries should allow legal representation for all witnesses before all judicial inquiries, which may be rebutted in exceptional circumstances.

The four key propositions are as follows:

1. Judicial inquiries are "masters of their own procedure" and are not required to provide witnesses with Article 6 ECHR "fair trial" protections; but, in determining the procedure to be followed, they are constrained by a common law duty to adopt a procedure that is fair to witnesses;

2. Any decision of a judicial inquiry which denies legal representation to witnesses will therefore be subject to challenge if, taken in the round, it is contrary to the duty of fairness to witnesses. Courts in the last five years have taken a far more interventionist approach to the issue of fairness of procedural decisions of judicial inquiries – particularly where human rights may be interfered with;

3. In assessing whether fairness to witnesses requires legal representation to be granted, the judicial inquiry is required to take into account a range of factors – and give appropriate weight to those factors that assist the inquiry in achieving its objectives as against those which may detract from their achievement;

4. In practice it will only be in exceptional cases that the prejudicial impact on witnesses in being denied legal representation when giving evidence to the inquiry would be outweighed by the procedural benefits to the inquiry in denying legal representation entirely. Judicial inquiries are therefore in practice required to proceed on the basis of a *presumption* that legal representation will be permitted to all witnesses, which may be overturned where there are compelling countervailing circumstances. However, in all cases the extent of the representation permitted (including the time allowed by the inquiry for representations to be made, re-examination of the witness by the legal representative and/or whether cross-examination of other witnesses can take place) are relevant factors and should be subject to close judicial oversight by the inquiry.

THE FIRST PROPOSITION: FAIR PROCEDURE

When the Tribunals of Inquiry (Evidence) Bill was introduced to Parliament in March 1921, its purpose was described as being:

> to make provision with respect to the taking of evidence before and the procedure and powers of certain tribunals of inquiry.

The Bill (and subsequently the 1921 Act) contains powers for compulsion of physical and oral evidence from witnesses and provides that witnesses shall have the "same immunities and privileges as if he were a witness in civil proceedings before the High Court or the Court of Session". Beyond this, there is only one part of the very short Act that prescribes any type of procedure to be followed by inquiries. This is contained at section 2(a), which prevents the inquiry from conducting its proceedings in private "unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given".[11]

As a result, judicial inquiries (whether provided with 1921 Act powers or set up without any statutory basis) are not subject to any direct statutory restrictions on the procedure that they adopt in taking evidence and preparing their report. Rather, the

[11] The provisions of the 1921 Act relating specifically to legal representation of witnesses are discussed below.

1921 Act leaves the inquiry to be the master of its own procedure and to determine on a flexible basis what it considers to be appropriate to the subject-matter and circumstances of the inquiry. However, despite the limited procedural protections contained in the 1921 Act itself, judicial inquiries are potentially subject to two overriding regimes:

a the procedural protections contained in the Human Rights Act 1998; and
b the common law duty of fairness arising from natural justice requirements.

These are considered in turn below.[12]

Human Rights Act 1998 and Article 6 ECHR

A judicial inquiry with powers under the 1921 Act will be a "public authority" within the meaning of the Human Rights Act 1998, s. 6(3) and therefore under a duty not to act in a manner that is inconsistent with rights conferred by the European Convention on Human Rights. This has been confirmed by the Divisional Court, who held that an inquiry constituted under the 1921 Act:

> ... is, plainly in our view, a public authority within s. 6(3)(b) of the Human Rights Act. We accept [counsel for the applicants] submission that the Tribunal's functions are those of public not mutual governance, its relationship with witnesses is created by rules of law independently of the volition of the Tribunal or the witnesses, and the Tribunal possesses powers to determine how others should act. ... Accordingly, the Tribunal has to comply with the Human Rights Act and this court has jurisdiction to entertain the present application.[13]

The application of the Human Rights Act 1998 to non-statutory judicial inquiries has not yet been tested by the courts although it appears likely that where the inquiry has been set up by the government to investigate a matter of urgent public importance, the conduct of the inquiry would constitute the exercise of "functions of a public nature" within the meaning of s. 6(3)(b) of the 1998 Act.

Although judicial inquiries therefore appear to be subject to duties imposed under the 1998 Act in the conduct of the inquiry, the Article 6 ECHR "fair trial" provisions are unlikely to apply directly to witnesses before the inquiry. Article 6(1) ECHR provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ...

The functions of judicial inquiries often include determining conflicts of evidence and to report publicly on the inquiry's view of events. This public report will often be treated in practical terms as a conclusive record of the relevant facts,[14] yet the inquiry's conclusions will not be determinative of any person's civil rights and obligations.

The European Court of Human Rights has interpreted Article 6(1) fairly restrictively. The test applied by the ECtHR is that for Article 6(1) to apply the proceedings must

[12] A right to legal representation for witnesses may potentially also be claimed on grounds that legitimate expectation has arisen: see, *e.g. R.* v. *IRC, ex parte MFK Underwriting Agents* [1990] 1 All E.R. 91 and *R.* v. *Secretary of State for Health, ex parte Wagstaff* [2000] U.K.H.R.R. 875 at p. 895. Consideration of these grounds is beyond the scope of this article.

[13] *The Queen on the application of the Widgery Soldiers* v. *Lord Saville and Others,* [2001] EWHC Admin 888 at paras. 5 and 6.

[14] The Widgery Inquiry's 1972 report into the events of Bloody Sunday is the one notable exception, evidenced by the need to set up a second inquiry with identical terms of reference in 1998.

be "directly decisive" of civil rights and obligations, and that a "tenuous connection or remote consequences do not suffice for Article 6(1)".[15]

This test was applied in *Fayed* v. *United Kingdom*,[16] where the ECtHR was required to consider whether an investigation conducted by inspectors appointed by the Department of Trade and Industry under the Companies Acts was subject to Article 6(1). As with judicial inquiries, the DTI inspectors' report is not determinative of civil rights, although in practice the content of the report will have a considerable impact on whether subsequent criminal and/or director disqualification proceedings are brought. It was argued by the applicants that:

> ... one of the objects of the inquiry by the Inspectors was to make findings as to whether the applicants were guilty of misconduct and the central conclusion of the report was that the applicants had dishonestly misled the authorities. Even though the Inspectors' role may in theory have been investigative, the manner in which they performed their functions in the present case was in fact determinative. The Inspectors' report, published to the world at large, had the force of a judgment convicting the applicants of dishonesty. The result of the inquiry was thus directly decisive for the applicants' civil right to a good reputation. In short...the Inspectors' report effectively determined their civil right to reputation without any of the procedural guarantees of Article 6(1) being respected.[17]

The court rejected these submissions, stating that it was satisfied that the functions performed by the DTI Inspectors were, in practice as well as in theory, essentially investigative:

> The Inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be dispositive of anything. They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation. The purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative.[18]

The court's reasoning in relation to DTI Inspectors' investigations – principally that the fact that the report may damage reputations and lead indirectly to other action is not sufficient for Article 6(1) to come into play - appears equally to apply to the work of a judicial inquiry. Accordingly, subject to a major shift in the jurisprudence of the ECtHR, witnesses before such judicial inquiries would not be entitled as of right to rely on Article 6(1) ECHR to obtain minimum procedural protections.

Common law duty of fairness

However, whilst the judicial inquiry is the master of its own procedure and is not required to provide Article 6(1) ECHR protections to witnesses, the common law does impose on the inquiry a duty of fairness to witnesses which extends beyond the strict parameters of Article 6(1).

The duty derives from the *audi alterem partem* rule of natural justice and applies to all investigatory bodies, whether or not their conclusions are determinative of civil

[15] *Le Compte, Van Leuven and De Meyere* v. *Belgium* (1982) 4 E.H.R.R. 1, where it was held that a disiplinary tribunal suspending individuals from practising medicine was subject to Article 6(1).

[16] *Fayed* v. *United Kingdom* (1994) 18 E.H.R.R. 393.

[17] *Op. cit.*, at para. 57.

[18] *Op. cit.*, at para. 61. It should be noted that the decision was also reached on public policy grounds: *ibid*, para. 62.

rights and obligations.[19] The position was clarified in a number of important judgments of the Court of Appeal (presided over by Lord Denning M.R.) in the late 1960s and 1970s. The scope of the duty of fairness and the flexibility of the obligation in different circumstances was summarised in the context of an investigation and report by the Race Relations Board in 1975:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. . .In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it.[20]

Five years previously, in *Re Pergamon Press* the Court of Appeal had confirmed that the duty of fairness extended to investigatory bodies whose decisions were not determinative of legal rights and obligations. It had been argued by counsel for the DTI inspectors that:

> in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply.[21]

Lord Denning M.R. roundly rejected this argument:

> I cannot accept counsel for the inspectors' submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings . . . They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report . . . But this should not lead us to minimise the significance of their task.[22]

In identifying the wide repercussions of investigations of this nature (including the potential for ruining reputations and careers and providing the basis for legal proceedings to be brought) the court concluded:

> Seeing that their work may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, although they are not judicial, nor quasi-judicial, but only administrative.

Lord Denning M.R.'s judgment in *Re Pergamon Press* therefore made it clear that the "duty of fairness" emanating from the rules of natural justice extended well beyond the more restrictive scope would have been the case under the "fair trial" rights of the ECHR. The application of the duty of fairness to investigations is now treated as beyond argument and was recently confirmed by the Court of Appeal in the context of a challenge to the procedural decisions of Lord Saville's 1921 Act judicial inquiry into the events of "Bloody Sunday". In giving the judgment of the court, Lord Woolf M.R. confirmed that:

> . . . while [the inquiry] is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts. This is because there is an implied obligation on the tribunal to provide

[19] Following the decision of Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40 which extensively reviewed the earlier authorities and concluded that the previous distinction made between judicial and non-judicial bodies to determine whether natural justice applied was no longer good law.

[20] *R.* v. *Race Relations Board, ex parte Selvarajan* [1976] 1 All E.R. 12 *per* Lord Denning M.R. at p. 18.

[21] *Re Pergamon Press Limited* [1970] 3 All E.R. 535, C.A. *per* Lord Denning M.R. at p. 538.

[22] *Ibid.*

> procedural fairness. The tribunal is not conducting adversarial litigation and there are no parties for whom it must provide safeguards. However the tribunal is under an obligation to achieve for witnesses procedures which will ensure procedural fairness.[23]

The use of the term "fairness" has been preferred to the expression "contrary to the rules of natural justice" principally because the duty to be fair is wider in scope than that in adversarial proceedings.[24]

Judicial inquiries will therefore be subject to a legal duty of "fairness" to witnesses in conducting the inquiry. The following section considers how this duty is applied to the issue of legal representation when an individual is giving evidence to the inquiry.

THE SECOND PROPOSITION: JUSTICIABILITY OF DECISIONS DENYING LEGAL REPRESENTATION

The 1921 Act expressly permits inquiries to deny legal representation

The Tribunals of Inquiry (Evidence) Act 1921 is very clear as to the flexibility that judicial inquiries should have in determining whether or not the witnesses that are required to attend before it should be entitled to legal representation. Section 2(b) provides that inquiries with powers under the 1921 Act:

> shall have the power to authorise the representation before them of any person appearing to them to be interested by counsel or solicitor or otherwise, or to refuse to allow such representation.

The brief consideration of the Bill (which was introduced to Parliament at midnight and passed all its stages in two brief late night sittings) notes the existence of these "drastic" powers, although no amendment was tabled to require the inquiry to allow legal representation in certain cases.[25] In complaining that the Bill should not be rushed through Parliament without due consideration and a proper opportunity to consider amendments to the Bill, Mr. Rawlinson M.P. made the following point:

> Then there is the power to exclude the public from these tribunals, and to prevent people interested from being represented by solicitors or counsel. That comes home to one, but apart from the professional point of view it is a serious matter to prevent the persons interested from being represented by professional advisers when these people are not capable of putting their own case.[26]

Another M.P., Mr. Macquisten, added that:

> It is one of the glories of our courts that every man can appear for himself and does not need to employ counsel or solicitor if he be capable of appearing for himself. Of course, he generally makes a mistake in doing so, and it is always said that the man who is his own counsel has a fool for a client.[27]

In unsuccessfully inviting the government to amend the Bill on this point, Mr. Rawlinson M.P. complained:

[23] *R.* v. *Lord Saville and Others, ex parte A. and Others* [1999] 4 All E.R. 860, C.A. at p. 871–872.

[24] See *R.* v. *Race Relations Board, ex parte Selvarajan* [1976] 1 All E.R. 12, C.A. at pp. 20–21.

[25] The main objections made on the floor of the House of Commons appeared to be in relation to the late hour at which the Bill was introduced, and whether trade union representatives should also be referred to alongside "counsel or solicitor" at Clause 2(b).

[26] Hansard, H.C. Second Reading, 1920/21 [139], 191.

[27] *Ibid.*

> Those are very wide terms indeed, much wider than anything else which exists at present, and so many representations have been made from the Law Society and the Bar Council and other bodies on this point, that to leave the Bill in this very vague and unsatisfactory state would be, I think, unwise.[28]

The Bill was, however, given Royal Assent later the same day and therefore provided that 1921 Act inquiries would have full discretion as to whether or not to allow witnesses legal representation when giving evidence to the inquiry in person. Equally, there are no express statutory provisions that would restrict an equivalent non-statutory judicial inquiry from reaching its own decision to exclude legal representation for witnesses (although, in practical terms as discussed further below, this may well have an impact on the individual's decision as to whether to attend to give evidence to a non-statutory inquiry).

It should be noted that this wide discretion under the 1921 Act in the case of urgent matters of public importance contrasts with the position of subject-specific inquiries where, in many cases, individuals are expressly granted the right to legal representation.[29] This leads to the illogical situation that witnesses whose evidence is relevant to an urgent matter of public importance have substantially inferior rights to procedural safeguards than witnesses before "lesser" subject-specific inquiries.

The discretion to permit or deny legal representation must be exercised in accordance with natural justice duty of fairness

Despite the broad discretion conferred on judicial inquiries under the 1921 Act as to whether or not to allow witnesses the protection of legal representation when giving evidence, the exercise of this discretion remains subject to the overriding legal duty to be fair in all the circumstances. The law presumes that in conferring such a wide discretion on judicial inquiries, Parliament intended it to be exercised in accordance with obligations of fairness.[30]

The issue of legal representation as an element of the duty of fairness has been judicially considered in relation to a number of different types of investigating bodies.[31] In determining whether or not such bodies have complied with the flexible duties of fairness, the courts have taken a variety of views over the last four decades. These appear to have reflected differences in opinion as to whether it was beyond the court's proper role to interfere with decisions of the relevant body made in good faith.

In *Pett* v. *Greyhound Racing Association (No. 1)*, Lord Denning M.R. expressed a progressive view in favour of legal representation in cases where a person's reputation or livelihood might be at stake. Rejecting an appeal from an injunction preventing an inquiry into allegations of doping from continuing unless the trainer was allowed legal representation, he said:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses on the other side. He may be tongue-tied

[28] *Ibid.*

[29] See, for example, rule 11(3) of the Electricity Generating Stations and Overhead Lines (Inquiries Procedure) Rules 1987, which provides that "[a]ny person entitled or permitted to appear may do so on his own behalf or be represented by counsel, solicitor or any other person".

[30] See *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; see also H.W.R. Wade and C. F. Forsyth, *Administrative Law* (Oxford, 8th edition, 2000), at pp. 525–526. Lord Bridge in *Lloyd* v. *McMahon* [1987] A.C. 625 stated at p. 702 that:

> "... it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

[31] It appears, however, that the first ever challenge to procedural decisions of a 1921 Act inquiry was in 1999: See *R.* v. *The Bloody Sunday Inquiry, ex parte B. and Others* (unreported, 16 March 1999), Q.B.D.

> or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. . . . If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.
>
> I am aware that Maugham J. once expressed a different view . . . All I would say is that much water has passed under the bridges since 1929. The dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. . . The dictum does not apply, however, to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor.[32]

In contrast, when the same case proceeded to trial Lyell J. held that legal representation before the stewards' inquiry was not essential to a fair dispensation of justice and refused to require the inquiry to permit legal representation.[33]

Shortly afterwards, Lord Denning M.R. heard a further appeal on the issue of legal representation in the context of an appeal to the Football Association from the findings of a commission of inquiry into the activities of Enderby Town football club.

> When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. It is master of its own procedure; and, if it, in the proper exercise of its discretion, declines to allow legal representation, the courts will not interfere. . . But I would emphasise that the discretion must be properly exercised.[34]

In commenting on the position in the *Greyhound Racing Association* case Lord Denning M.R. confirmed that "[t]he long and short of it is that, if the court sees that a domestic tribunal is proposing to proceed in a manner contrary to natural justice, it can intervene to stop it".

However, following these initial decisions in favour of legal representation for witnesses being permitted as an element of the duty of fairness, the issue of representation has been the subject of very few reported cases over the last four decades. One reason for this may have been the near universal practice of judicial inquiries in favour of allowing legal representation in practice. The procedure at judicial inquiries formed the subject of a royal commission in 1966 under the chairmanship of Salmon L.J., which made 50 recommendations.[35] These included six "Cardinal Principles" that all 1921 Act inquiries should observe, and pressed for amendments to the 1921 Act to be made to give statutory effect to various of the recommendations. These included that:

> [the witness] should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the hearing (the fourth cardinal principle); and

[32] *Pett* v. *Greyhound Racing Association (No. 1)* [1969] 2 All E.R. 545, C.A. at p. 548.

[33] Lyell J. noted in *Pett* v. *Greyhound Racing Association (No. 2)* [1969] 2 All E.R. 221 that "[i]t seems to me that [legal representation before a tribunal] arises only in a society which has reached some degree of sophistication in its affairs". It should, however, be noted that a further brief law report in relation to the case at [1970] 1 All E.R. 243 records that prior to a pending appeal from Lyell J.'s decision the Court of Appeal was informed that "the defendants had made new rules permitting trainers to be legally represented at inquiries, that the proposed inquiry into the alleged drugging of the plaintiff's dog would be held under these new rules, that the plaintiff would accordingly be permitted legal representation at the inquiry, and that therefore no issue remained between the parties".

[34] *Enderby Town F.C.* v. *Football Association* [1971] 1 All E.R. 215, C.A. at p. 217.

[35] (1966, Cmnd. 3121) and the subsequent report at (1969, Cmnd. 4078). The Government's response was contained in a White Paper (1973, Cmnd. 5313).

> [the witness] should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him (the sixth cardinal principle).[36]

These recommendations were not subsequently enacted, and the view subsequently taken has been that the procedures put forward in the *Salmon Report* lean too heavily towards an adversarial approach rather than the desired inquisitorial procedure.[37] Nevertheless, the *Salmon Report* provided a clear steer for judicial inquiries towards allowing legal representation of some degree for those who may be adversely affected. As Blom-Cooper noted in 1994:

> It has become an invariable feature of contemporary inquiries, whenever an individual is susceptible to potential criticism in the inquiry's report, to concede legal representation and to permit, within bounds, the cross-examination of witnesses.[38]

Equally the DTI Investigations Handbook, setting out procedure for company investigations (which formed the subject of the challenge in *Re Pergamon Press*), provides that legal advisers of witnesses are to be given an opportunity to question their clients if they wish to do so and to make representations on their behalf.[39]

What case law there has been as to the duty of fairness in the context of legal representation of witnesses has been in relation to domestic investigating bodies such as the Race Relations Board/Commission for Racial Equality. The approach taken by the courts when asked to quash decisions refusing legal representation in certain circumstances has been non-interventionist. There appears to have been little enthusiasm for applying the standards of fairness in practice and most applications to court were rejected on the ground that the duty of fairness had not been breached by the investigating body.[40]

The one exception arose in 1977 in the context of a National Coal Board public inquiry into whether opencast coal mining could begin at a site in Yorkshire. One of the objectors was denied the right to cross-examine other witnesses who had given evidence contrary to his position. In giving judgment, Sir Douglas Frank Q.C. (sitting as a deputy High Court judge) observed that in recent years there had been "increasing vigilance" over administrative acts and noted "how ready the courts are to impute a rule of natural justice where there is merely a risk that an objector's case has been prejudiced by a procedural omission".[41] He held that a reasonable person viewing the matter objectively would consider that there was a risk that injustice or unfairness would result if a person adversely affected by a proposal was denied cross-examination of a witness who had given evidence contrary to his case. The inquiry's procedural decision was quashed and remitted for reconsideration.

[36] *Ibid.*

[37] See, for example, the Council on Tribunals' advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers, dated July 1996 (published as Appendix A to the Council on Tribunals' Annual Report 1995/96) at para. 7.15.

[38] Sir Louis Blom-Cooper, "Witnesses and the Scott Inquiry" [1994] *Public Law* 1 at p. 1. For examples of judicial inquiries permitting legal representation to witnesses, see paragraph 10 of the *Report of the Inquiry into the closure of Vehicle and General Insurance Company Limited*, under James J. (15 February 1972); paras. 1.05 to 1.07 of H.H.J. Fay Q.C.'s Report of the Inquiry appointed by the Minister of Overseas Development into the circumstances which led to the Crown Agents requesting financial assistance from the Government in 1974; the *Rulings and Observations of the Saville Tribunal on the Matters Raised at the Preliminary Hearing on 20th and 21st July 1998*, dated 24 July 1998; *Procedural Notes* of the Victoria Climbié inquiry.

[39] *Investigation Handbook* published by the Department of Trade and Industry, 1990, para. 32.

[40] It should be noted, however, that the applications were as to a refusal to permit cross-examination of witnesses rather than an absolute denial of legal representation. Accordingly, a non-interventionist approach to such decisions may be more justifiable.

[41] *Nicholson* v. *Secretary of State for Energy* (1978) 76 L.G.R. 693, Q.B.D. at p. 700.

This willingness to intervene is very much out of line with the general approach taken by the court in the few cases on procedural fairness from 1970s to the mid-1990s.[42] The more typical line taken by the court during that period was to apply a fairly low threshold in determining what fairness requires and to maintain a general approach of non-intervention. For example, in *R.* v. *Commission for Racial Equality, ex parte Cottrell*[43], an application was made to quash the Commission's decision to refuse cross-examination of witnesses who had given evidence directly against the applicant in an investigation. The Court of Appeal noted the duty to be fair but considered that in the light of the type of investigation that was being conducted, the duty had been satisfied by the Commission:

> This point comes down to the decision whether in these circumstances the commission were, in the light of the rules of natural justice, obliged to allow their witnesses to be cross-examined ... As has frequently been said, and there is no harm in repeating it, all that the rules of natural justice mean is that the proceedings must be conducted in a way which is fair to the [applicant] in this case, fair in all the circumstances. All the circumstances include a number of different considerations.
> ... It is true that in the course of the investigation the commission may form a view, but it does not seem to me that that is a proceeding which requires in the name of fairness any right in the [applicant] in this case to be able to cross-examine witnesses whom the commission have seen and from whom they have taken statements.[44]

This non-interventionist approach continued into the early 1990s with the decision of the Court of Appeal in the *Crampton* case, rejecting leave for judicial review of the status of the Beverley Allitt inquiry.[45] Although the Secretary of State for Health had statutory powers to institute a full public inquiry under the National Health Service Act 1977, section 84, it was decided that a non-statutory judicial inquiry would be set up. This decision was challenged on a number of grounds, each of which (even at the leave stage) was firmly rejected by the Divisional Court, whose decision was upheld on appeal. The Court of Appeal appeared very keen to discourage challenges of this nature, stating that: "[t]he weight that [the Secretary of State for Health] attached to different considerations was a matter for her and her alone".[46] The unwillingness of the Court of Appeal to interfere with the Secretary of State's decision as to the proper form of the Allitt Inquiry contrasts markedly with the very different approach taken by the court in relation to a similar application made in relation to the Harold Shipman non-statutory inquiry, where a very different approach was taken by the court. This change of approach is discussed below.

The move towards an interventionist approach

As described above, following the publication of the *Salmon Report* the near universal approach of judicial inquires was to permit legal representation for witnesses. The one

[42] See *Enderby Town F.C.* v. *Football Association* [1971] 1 All E.R. 215, C.A; *R.* v. *Race Relations Board, ex parte Selvarajan* [1976] 1 All E.R. 12, C.A; *R.* v. *Commission for Racial Equality, ex parte Cottrell* [1980] 3 All E.R. 265, Q.B.D.; *Crampton and Others* v. *Secretary of State for Health* (unreported, 9 July 1993), C.A.

[43] *Ibid.*

[44] *Ibid., per* Lord Lane C.J. at pp. 270–271.

[45] *Crampton and Others* v. *Secretary of State for Health* (unreported, 9 July 1993), C.A.

[46] *Ibid.*, at p. 10 of the transcript.

notable and high profile exception to this approach, which led to considerable adverse comment,[47] was the non-statutory inquiry chaired by Scott L.J. into the Export of Defence Equipment and Dual-Use Goods to Iraq.[48]

Although accounts vary as to the extent of representation that was permitted by the inquiry,[49] the approach appears to have been that legal representatives were permitted to accompany witnesses at interview but had no right of audience, and no cross-examination of other witnesses took place.

Scott L.J. was the subject of substantial academic criticism for departing from the letter and spirit of the Salmon cardinal principles. As Lord Howe observed:

> There can be no doubting the importance of the questions that were rightly to be reviewed ... Yet in contrast to the procedures followed by every preceding comparable inquiry, it was very consciously decided that witnesses would be denied any legal representation, in the usual meaning of the word. "It is not anticipated," said the guidance from the Inquiry itself "that lawyers will be invited to address the Inquiry or to question witnesses".[50]

In response to such strong criticism, Scott L.J. took the unusual step of attempting to justify his approach in the 1995 Chancery Bar Association Spring Lecture. In addition, the *Scott Report* itself sought to explain why there had been a departure from the Salmon cardinal principles.[51] Given the complexity of the matters into which he was inquiring and the numbers of officials and Ministers from different Departments, as well as others, who were involved; Scott L.J. maintained that "it would be ludicrous to promise legal representation to each person or department who might have an interest in particular issues".[52] On the issue of cross-examination, he added:

> The Inquiry's published procedures did leave open the possibility for applications for leave to cross-examine particular witnesses to be made ... No application to cross-examine in respect of that evidence or any other evidence was, in the event, made. The procedure to which I have referred would, however, have allowed cross-examination if, in the particular circumstances, fairness to individuals affected by disputed evidence had seemed to require it. But a general facility for individuals or their lawyers to cross-examine witnesses whose evidence adversely affected them, was not, in my opinion, necessary in order to achieve fairness in my Inquiry.[53]

The issues raised by the *Scott Report* led to public consultation on the procedures to be adopted by judicial inquiries, conducted by the Lord Chancellor's Department. The Lord Chancellor subsequently asked the Council on Tribunals[54] to provide advice

[47] See Sir Louis Blom-Cooper, *op. cit.*; D. Woodhouse, "Matrix Churchill: a case study in judicial inquiries" (1995) *Parliamentary Affairs* 24; Lord Howe, "Procedure at the Scott Inquiry" [1996] *Public Law* 445; B. Winetrobe, "Inquiries after Scott: the return of the tribunal of inquiry" [1997] *Public Law* 18; V. Bogdanor, "Can Inquiries be Probing, Expeditious and Fair? Scott compared with earlier Inquiries" LSE Public Policy Group Seminar Series (October 1997); H. Grant, "Commissions of Inquiry – Is there a Right to be Legally Represented?" [2001] *Public Law* 377. The inquiry's defence of its choice of procedure, in addition to being contained at Part 1, Section B of the report, is made by Sir Richard Scott V.-C. in "Procedures at Inquiries – The Duty to be Fair" (1995) 111 L.Q.R. 596 and by the Secretary to the Inquiry, Christopher Muttukumaru in "The Quality of Fairness is not Constrained: The Procedures of the Scott Inquiry" (1996) 5 *Nottingham Law Journal* 1.

[48] *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, published pursuant to an Address of the House of Commons on 15 February 1996.

[49] See H.W.R. Wade and C. Forsyth, *Administrative Law, op. cit.*, at p. 975; Sir Louis Blom-Cooper, *op. cit.*, at p. 2; Lord Howe, *op. cit.*, at p. 446; Sir Richard Scott V.-C. *op. cit.*, at p. 604–606.

[50] Lord Howe, *op. cit.*, at p. 446.

[51] *Op. cit.*, at paragraphs B2.29 and B2.30.

[52] Procedural statement of the Scott inquiry dated 31 March 1993, quoted in Sir Louis Blom-Cooper, *op. cit.*, at p. 2.

[53] Sir Richard Scott V.-C. *op. cit.*, at pp. 609–610.

[54] A statutory body whose powers are set out in section 1 of the Tribunals and Inquiries Act 1992.

"on the procedural issues arising in the conduct of public inquiries set up by Ministers", which was published in July 1996.[55]

The Council on Tribunals considered a range of issues, including whether judicial inquiries should be statutory or non-statutory, the objectives an inquiry would seek to achieve, the membership of the inquiry, whether legal representation should be permitted and how the inquiry should report. In commenting on their advice, the Council on Tribunals noted that:

> Many, if not most, procedural issues arising in the conduct of public inquiries do so in the context of ensuring that persons who appear before the inquiry – or who have an interest in the outcome of the inquiry – are treated fairly by the inquiry in the giving of their evidence and in the manner in which their evidence is taken into account when the inquiry reaches its findings.[56]

On the issue of legal representation, the Council on Tribunals' advice suggested that a universal rule would not be sufficiently flexible, yet identified that fairness would normally dictate that representation be permitted:

> ... although legal representation should not be regarded as an automatic right, and the inquiry should prevent any abuse of the opportunity to be heard, it may be counterproductive to start from the position that legal representatives will only be heard exceptionally. The inquiry should be ready to exercise its discretion in favour of hearing legal representation and oral testimony, and allowing cross-examination whenever it seems appropriate.[57]

Since the publication of the *Scott Report* and the Council on Tribunals' advice, there has been a clear shift of approach by the courts when asked to review the procedural decisions of investigating bodies. Decisions in relation to two judicial inquiries – the Lord Saville "Bloody Sunday" inquiry and the Lord Laming inquiry into the criminal conduct of Harold Shipman – have significantly altered the extent to which courts are prepared to scrutinise procedural decisions of inquiries.[58]

In addition to the adverse reaction to Scott L.J.'s more restrictive approach to procedural safeguards, a number of further factors may have contributed towards this apparent change of judicial attitude. Firstly, the subject-matter of 1921 Act inquiries are inherently likely to be of greater importance than investigations by, for example, DTI inspectors or the Commission for Racial Equality (which formed the subject-matter of earlier challenges on the grounds of fairness).[59] The courts may, therefore, legitimately take a more interventionist approach in relation to matters of great public importance, although the need for this may arguably be reduced by the fact that those chairing the inquiries, in particular the Law Lord, Lord Saville, are correspondingly

[55] Council on Tribunals' advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by ministers (published as Appendix A to the Council on Tribunals' Annual Report 1995/96). The advice itself notes at para. 1.11 that, strictly speaking, the operation of judicial inquiries conducted on an *ad hoc* basis (as contrasted with subject-specific inquiries, such as planning inquiries) fall outside its remit. As the procedural issues that arose were similar it did, nevertheless, comply with the Lord Chancellor's request for advice.

[56] Council on Tribunals' Annual Report 1995/96, para. 1.26.

[57] *Ibid,* at Appendix A, para. 7.15.

[58] Note that following the successful challenge to the status of the Lord Laming inquiry into the activities of Harold Shipman, Lord Laming was replaced as chair of the inquiry by Dame Janet Smith D.B.E. Lord Laming was subsequently appointed as chair of the Victoria Climbié judicial inquiry on 12 January 2001.

[59] Note, for example, the comments of Lord Denning M.R. in differentiating between "tribunals dealing with minor matters" where legal representation may properly be excluded, and "tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import" where natural justice would require that legal representation be permitted: *Pett v. Greyhound Racing Association (No. 1)* [1968] 2 All E.R. 545, C.A. at p. 548.

more qualified to take appropriate procedural decisions.[60] Secondly, the scope for judicial review of the decisions of investigating bodies on the grounds of fairness has been widened and there is now considerably more room for the court to impose its own view of the relevant factors, rather than having to apply the *Wednesbury* unreasonableness test.[61] Finally, the courts in determining these applications have been required to consider Article 2 (Right to Life) and Article 10 (Freedom of Expression) ECHR rights when determining the proper conduct of the inquiry, both before and since the Human Rights Act 1998 came into force.[62]

Since January 1999 the High Court has on three occasions[63] quashed procedural decisions of the second Bloody Sunday Inquiry, and has also overturned a decision of the Secretary of State for Health in setting up the Harold Shipman Inquiry on a non-statutory basis. In the latter case, the court also indicated that it would also have been minded to quash the inquiry's decision to deny legal representation to certain witnesses as interested parties. These judgments have advanced considerably the jurisprudence on challenges to decisions of judicial inquiries.

The first two challenges to the Saville Bloody Sunday Inquiry were on the issue whether the inquiry was required, as a matter of fairness, to keep confidential the identity of the British soldiers who had fired rounds. On the first occasion, the Court of Appeal upheld the High Court's decision to remit the decision for re-consideration. Having reconsidered the position, the inquiry came to the same decision and this was again challenged. On the second occasion, the Court of Appeal took a more directive approach, holding that "[e]xamining the facts as a whole . . . we do not consider that any decision was possible other than to grant the anonymity to the soldiers".[64] The third successful challenge was as to whether the soldiers were required to travel to Londonderry to give evidence or whether as a matter of fairness they should be permitted to give evidence in Great Britain.[65]

The decisions give useful guidance as to the approach that the court will take in judicially reviewing an inquiry's decision on the grounds of fairness. The importance of respecting the inquiry's own assessment of the competing factors and the appropriate level of fairness to witnesses appears to have decreased at each successive hearing. In the first anonymity challenge, the Court of Appeal sounded a cautious note:

> I would emphasise that it would be quite wrong because on this occasion the Divisional Court exercised its jurisdiction to grant judicial review in relation to an interlocutory decision of a tribunal set up under the 1921 Act, to draw the inference that it is part of the normal role of the Crown Office or the Divisional Court to review interlocutory decisions of tribunals of this sort. Tribunals such as this often have the most difficult task to perform. They are set up without guidance as to the precise procedures which they have to follow. They have to work out that procedure for themselves.[66]

[60] Hadfield notes in "*R.* v. *Lord Saville of Newdigate, ex p. anonymous soldiers*: What is the Purpose of a Tribunal of Inquiry?" [1999] *Public Law* 663 at p. 677 that following the two challenges to the Saville inquiry's decisions on anonymity, 13 judges had been required to express a view as to the legality of decisions taken by a Law Lord. All of these judges were more junior to Lord Saville, yet 12 out of the 13 judgments concluded that Lord Saville had acted unlawfully.

[61] *R.* v. *Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All E.R. 509, C.A. *per* Lloyd L.J. at p. 531.

[62] The Human Rights Act 1998 came into force on 2 October 2000.

[63] Two of the decisions were appealed to the Court of Appeal and upheld.

[64] *R.* v. *Lord Saville and Others, ex parte A. and Others* [1999] 4 All E.R. 860, C.A. *per* Lord Woolf M.R. at p. 881.

[65] *The Queen on the application of the Widgery Soldiers* v. *Lord Saville and Others* [2001] E.W.H.C. Admin 888, Q.B.D. (venue challenge).

[66] *R.* v. *Lord Saville, ex parte B. and Others, The Times*, 15 April 1999, C.A. (first anonymity challenge) *per* Lord Woolf M.R. at p. 5 of the transcript.

The judgment emphasised that the judicial inquiry itself, rather than the court, will normally be better placed to make the decisions as to appropriate procedure:

> They will inevitably know much more about the problems of the particular area into which they have to enquire than can be known by a supervising court, such as the Crown Office Judge or the Divisional Court on an application for judicial review. Tribunals are entitled to determine their procedure for themselves. The courts should only interfere when there is some very good reason for them to do so . . . This is a special situation and normally this is an area in which the courts would be wise not to become involved.[67]

This appears to replicate the cautious approach taken historically, although in practice the court was satisfied in each case that it was appropriate to quash the judicial inquiry's procedural decisions. The Court of Appeal, in handing down judgment on the second anonymity challenge, observed that its jurisdiction to quash decisions of the judicial inquiry on the grounds of fairness arose on the same basis as that in *Re Pergamon Press*:

> Turning to the role of the courts on judicial review to ensure procedural fairness . . . Although we are here concerned with a very different type of inquiry from that being considered in the *Pergamon Press* case, it can equally be said of this tribunal that while it is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair. Whether a decision reached in the exercise of its discretion is fair or not is ultimately one which will be determined by the courts. This is because there is an implied obligation on the tribunal to provide procedural fairness. The tribunal is not conducting adversarial litigation and there are no parties for whom it must provide safeguards. However, the tribunal is under an obligation to achieve for witnesses procedures which will ensure procedural fairness.[68]

The approach taken by the court therefore appears illogical. It maintains that the judicial inquiry itself is best placed to determine what is fair in all the circumstances, yet the court is the body ultimately responsible for identifying what is and what is not fair, as a matter of law.

As the court appears to have moved towards assessing "fairness" as a question of law to be applied in all the circumstances, there has been a clear move away from reviewing the inquiry's decision against the test whether no reasonable tribunal could have taken such a decision in the circumstances.[69] The Court of Appeal in the second anonymity challenge quoted and applied the test that had been adopted since 1986 in reviewing the decisions of the Panel on Take-overs and Mergers:

> If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with counsel for Guinness that the decision to hold the hearing on 2 September is *not to be tested by whether it was one which no reasonable tribunal could have reached.* [emphasis added][70]

[67] *Ibid.*

[68] *R.* v. *Lord Saville and Others, ex parte A and Others* [1999] 4 All E.R. 860, C.A. *per* Lord Woolf M.R. at p. 871.

[69] The "*Wednesbury* unreasonableness" test derived from *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1947] 2 All E.R. 680, C.A.

[70] *R.* v. *Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All E.R. 509, C.A. *per* Lloyd L.J. at p. 531.

This, potentially, opens a wide channel for challenges to be made against procedural decisions of judicial inquiries. The court will reach its own decision on the facts as to what fairness requires. The margin of appreciation for the inquiry is therefore considerably narrowed, subject only to the court's approach as to the exercise of its overall discretion on judicial review:

> . . . subject to the courts confining themselves to their well-recognised role on applications for judicial review, it is essential that they should be prepared to exercise that role regardless of the distinction of the body concerned and the sensitivity of the issues involved. The courts must also bear in mind that they exercise a discretionary jurisdiction, and where this is consistent with the performance of their duty they should avoid interfering with the activities of a tribunal of this nature to any greater extent than upholding of the rule of law requires.[71]

The court therefore appears to be contemplating circumstances where, although on the court's own assessment of the relevant factors the procedure is unfair to witnesses; it should nevertheless refrain from quashing the inquiry's decision. This situation was interpreted by the High Court in the subsequent challenge to the Saville Inquiry's procedural decisions (on the issue of the venue for taking evidence) to mean that where the obligation to be fair to witnesses has been breached, "[t]he Tribunal's preliminary decisions can be quashed *if they cause real injustice*". [emphasis added][72]

Human rights: further restrictions on the exercise of the inquiry's discretion

Procedural decisions of judicial inquiries that may, in all of the circumstances, breach the inquiry's duty of fairness to witnesses will, therefore, be subject to considerably greater judicial scrutiny than would have been the case a few years earlier.

In addition to the wider standard of judicial review that will be applied in considering whether the duty of fairness has been satisfied, the court in the Bloody Sunday challenges identified a further restriction on the proper exercise of the judicial inquiry's discretion in determining the appropriate procedure to adopt.

Although the Bloody Sunday Inquiry decisions on anonymity that were subsequently quashed were taken prior to the coming into force of the Human Rights Act 1998, it was argued on behalf of the soldiers that the inquiry's decision to reveal the identity of the witnesses risked breaching their Article 2 ECHR right to life. Evidence was submitted to the court as to the security risks that the soldiers would face if their identities were to be revealed.

The Court of Appeal identified that where human rights are potentially being eroded, the scope of discretion legitimately available to the judicial inquiry was correspondingly reduced. In the second anonymity case, the Court of Appeal adopted the test formulated by Bingham M.R. in *R.* v. *Ministry of Defence, ex parte Smith.* On this test, the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.[73]

Accordingly, in the context of the second Bloody Sunday anonymity challenge it was held that:

> What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the decision-maker are curtailed. They are curtailed because *it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations.* In other words it

[71] *R.* v. *Lord Saville and Others, ex parte A. and Others* [1999] 4 All E.R. 860, C.A. *per* Lord Woolf M.R. at p. 869.

[72] *The Queen on the application of the Widgery Soldiers* v. *Lord Saville and Others* [2001] E.W.H.C. Admin 888, Q.B.D. (venue challenge) *per* Rose L.J. at para. 5.

[73] [1996] Q.B. 517, C.A.

> is *not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification.* Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Bingham M.R. in *Ex p. Smith* which is not in issue. [emphasis added][74]

The court will therefore apply a "sliding scale" approach, taking into account the degree of the interference with the right, as compared with the "significant countervailing considerations" that are relied on to justify reaching a decision that interferes with these rights. In applying this test, the court was not constrained by the fact that the Human Rights Act 1998 had not then come into force. These were factors to which the judicial inquiry needed to have close regard in any event.

Even so, the court expressly recognised that certain rights are significantly more fundamental than others, and the right to life undoubtedly is at the highest level. However, applying the sliding scale, "lesser" human rights are therefore also to be taken into account by judicial inquiries in taking procedural decisions that may interfere with those rights, and it will be necessary for the inquiry to demonstrate sufficiently significant countervailing considerations if those rights are to be denied.

The two challenges on the issue of witness anonymity in the Bloody Sunday Inquiry therefore considerably expanded the scope for challenges to procedural decisions of judicial inquiries where they were unfair to witnesses both (a) as to the test to be applied on judicial review and (b) as to the hurdle the inquiry must overcome if it wished to put in place procedures that interfered with human rights.[75]

It may reasonably be argued that the test to be applied where there is a potential interference with the right to life ought to be different from that to be applied to "lesser" human rights considerations, such as legal representation for witnesses.[76] As discussed above, the right of legal representation enshrined in Article 6 ECHR does not extend to witnesses before non-determinative tribunals. However, the Court of Appeal's decisions in the second Bloody Sunday anonymity challenge and the *Crampton* case were based on general human rights considerations and did not turn on whether or not such rights were specifically protected under ECHR (which at that time did not have direct legal effect in England and Wales). As a result, it may be argued that the court should treat the denial of legal representation as an interference with an individual's "right" to legal representation in this broad sense. Thus, in order to deny legal representation the inquiry must have sufficient countervailing considerations to justify the denial of the individual's "rights". Indeed, the view expressed in the *Salmon Report* was that there was:

> no reason why a witness who in the public interest is to be subjected to an inquisitorial form of inquiry and its attendant publicity should not be accorded *this elementary right of being represented* should he consider himself to be in peril. [emphasis added][77]

[74] *R.* v. *Lord Saville and Others, ex parte A. and Others* [1999] 4 All E.R. 860, C.A. *per* Lord Woolf M.R. at p. 871.

[75] The decision of the Court of Appeal in the second anonymity case was described by Sir Louis Blom-Cooper at [2000] *Public Law* 1 at p. 2 as highly undesirable on three grounds: "[f]irst, the decision trampled on the near-exclusive power of all public inquiries generally to regulate their own practice and procedure. Secondly, it dangerously replaced the self-denying ordinance of the judiciary to go beyond the strict application of the *Wednesbury* principle of irrationality, in favour of a judicially-assessed notion of 'fairness'. Thirdly, it ignored the limitations upon the applicability of the right to life guarantee, as expressed in Article 2 of the European Convention on Human Rights".

[76] Unless, in particular circumstances, the denial of legal representation were itself shown to cause a threat to an individual's right to life.

[77] 1966, Cmnd. 3121.

It was not clear following the Bloody Sunday anonymity challenges how far, if at all, the "sufficient countervailing considerations" test relevant in the context of interferences to the right to life would be applied in the context of such "lesser" human rights considerations as legal representation or freedom of expression.

However, less than a year after these challenges to the Bloody Sunday Inquiry's decisions on anonymity of witnesses, the Secretary of State for Health announced an inquiry under Lord Laming to investigate the activities of Dr. Harold Shipman. The inquiry was set up on 1 February 2000 under the general powers of the National Health Service Act 1977, section 2, and the Secretary of State announced later that its proceedings would be conducted in private. Lord Laming also decided that relatives of the victims of Harold Shipman who were to give evidence to the inquiry would not be provided with legal representation as they were unlikely to be the subject of criticism in the report. These two decisions, of the Secretary of State and Lord Laming respectively, were challenged separately by the Tameside Families Support Group (composed of relatives of the victims of Harold Shipman) and by bodies representing the press and the broadcast media.[78]

The issue that arose in this challenge was the potential interference with the freedom of expression of the victims' families under Article 10 ECHR because, without sufficient reason, the ruling curtailed their right to receive information from other witnesses and to impart information to the inquiry as a result (although again the decisions challenged and the inquiry itself preceded the coming into force of the Human Rights Act 1998).

The court explicitly followed the test laid down by the Court of Appeal in the second Bloody Sunday anonymity decision as to the need for the inquiry to show "sufficiently significant countervailing considerations" where an interference with human rights was involved. Acknowledging that the right to freedom of expression was of a considerably lower order than the right to life, Kennedy L.J. nevertheless held that the same principles applied:

> The justification offered for the curtailment of the freedoms identified in Art 10(1) does not seem to us to be persuasive and although, as Mr. Ullstein concedes, those freedoms are not as fundamental as the right to life, which was under consideration in *R.* v. *Lord Saville, ex parte A.*, they are important freedoms, curtailment of which is significant when examining the rationality of the decisions as a whole.[79]

Accordingly, the court held that in order for the interference with human rights to satisfy the duty of fairness placed on the judicial inquiry, "there must be a pressing social need for the restriction and it must be no more than is proportionate to the legitimate aim pursued".[80]

Kennedy L.J., in giving the judgment of the Divisional Court,[81] held that the decision to hold the inquiry in public was not supported by sufficient countervailing considerations and therefore quashed the decision, remitting it for reconsideration. The Secretary of State subsequently established the inquiry on a statutory basis under the chairmanship of Dame Janet Smith, the proceedings of which were then held in public.

The court also gave its preliminary views on the inquiry's decision not to order the funding of legal representation for those witnesses unlikely to be criticised in the report.

[78] *R.* v. *Secretary of State for Health, ex parte Wagstaff* [2000] U.K.H.R.R. 875, D.C. *per* Kennedy L.J. at p. 877.

[79] *Ibid,* at p. 901.

[80] *Ibid, per* Kennedy L.J. at p. 901 (applying the jurisprudence of the ECtHR).

[81] Note that it was Kennedy L.J. who in the previous year had given the judgment of the court in quashing the first procedural decision of the Saville Bloody Sunday Inquiry on the issue of anonymity (*R.* v. *The Bloody Sunday Inquiry, ex parte B. and Others* (unreported, 16 March 1999), Q.B.D.).

In stark contrast to the previous non-interventionist approach, Kennedy L.J. expressed the following view:

> ... in our judgment even if the decisions of the Secretary of State had been upheld the attack upon the decision of Lord Laming as to representation would be likely to have succeeded. It is not so much a question of parity between the families and other witnesses who can be represented by lawyers instructed by their professional associations, and who are likely to be so as they may be criticised. It is more a question of enabling the families to play their full part in this important Inquiry. If the job is worth doing it is worth doing well.[82]

A sea-change in the attitude of the courts in reviewing procedural decisions of judicial inquiries can therefore be discerned, that contrasts markedly with the approach taken by the Court of Appeal in 1993 in rejecting (at the leave stage) the challenge to the constitution of the Allitt inquiry. This new approach has led to substantial criticism from some commentators, who consider that it is now time for the government to step in to redress the balance in favour of the inquiry:

> The growing tendency to challenge rulings of tribunals, both procedural and substantive, prompts a thought. Is there not a case for curbing judicial intervention in public inquiries, by enacting a provision that denies access to the courts, except where the tribunal has exceeded its jurisdiction? After all, public inquiries need to investigate without unnecessary distraction from their allotted tasks. Judicial control should be remote and sparingly employed.[83]

In the absence of such measures, it is clear that judicial inquiries will now be required to make procedural decisions, including the decision as to whether or not to permit legal representation for witnesses, in the knowledge that the reasons it has taken into account in making the decision could be subject to close scrutiny by the courts (who, in appropriate circumstances, will substitute their own decision as to what fairness demands).

To be sure that any decision to deny legal representation to witnesses will not be subject to successful challenge, the judicial inquiry will therefore need to satisfy itself that there are sufficient countervailing considerations that justify any interference with the witness's human rights, including, it is submitted, the option to be represented by a lawyer. The next section of this article therefore seeks to identify the principal factors that may be relevant to this assessment, and to consider the relative weight that the judicial inquiry ought properly to attach to each.

THE THIRD PROPOSITION: FACTORS FOR DETERMINING WHETHER OR NOT TO ALLOW LEGAL REPRESENTATION

It has been seen that the judicial inquiry's procedural decisions, including any denial of legal representation, are subject to a legal duty of fairness to witnesses on the part of the inquiry. In the light of the recent case law, it is clear that the courts will now be ready to scrutinise the procedural decisions of judicial inquiries closely to assess whether they achieve such fairness. If the court considers that human rights are interfered with where legal representation is denied, the judicial inquiry will be required to demonstrate sufficient countervailing considerations to justify such an interference.

[82] *Op. cit.*, at pp. 904–905.

[83] Sir Louis Blom-Cooper, "Tribunals under inquiry" [2000] *Public Law* 1 at p. 2.

This section of the article considers firstly the overall approach of the court in weighing up the competing factors, then separates out the factors and considers the likely weight that ought properly to be afforded to each in determining what fairness requires.

Overall approach of the court in weighing up the competing factors

Judicial inquiries will normally be subject to a variety of competing pressures that will impact on the procedure that it wishes to adopt in investigating and preparing a report. There will be pressure both to provide a comprehensive and authoritative report and to complete the inquiry in as short a timescale as is reasonably practicable. The inquiry will wish to have an experienced team who can carefully obtain and review the relevant documentary evidence and interview all witnesses who may be of assistance, but, at the same time, to avoid incurring excessive cost. There will be a desire to probe witnesses for the truth and also to be fair to those who give evidence.

In considering the application for judicial review of the Secretary of State for Health's decision to commence a non-statutory inquiry into the offences committed by the nurse Beverley Allitt, the Court of Appeal set out the aims of such an inquiry:

> It is necessary to remind oneself of the objects of the inquiry, which are to ensure that the facts are fully investigated and all relevant lessons are learned, that all necessary changes are made and that public confidence in the paediatric services of this and other hospitals is restored in Lincolnshire and elsewhere. To that end it is essential that the inquiry should be searching, thorough and completely independent. It is essential that it should be conducted fairly. It is very highly desirable that the inquiry should be concluded as soon as reasonably possible consistent with the duty of full and fair investigation. It is highly desirable that the inquiry should not cost more than reasonably necessary to ensure a full and fair investigation. It is lastly essential that the inquiry should culminate in a full, fair, fearless, independent and objective report covering all matters falling within the terms of reference.[84]

In the earlier *Pergamon Press* case, the Court of Appeal recognised that different factors would result in a range of levels of fairness, with the consequence that the appropriate procedure should be assessed in the light of all the circumstances:

> In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. ... In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.[85]

This flexibility must be judged not only against the relevant circumstances of the case, but also in the light of developing views as to what "fairness" requires. In 1975, Kerr J. observed that

> ... in administrative procedures the question of [natural justice] had to be approached on broad lines. The test was whether a reasonable person, viewing the matter objectively, and knowing all the facts, would consider that there was a risk that injustice or unfairness had resulted. It was a question of fact and degree in administrative procedures, whether the rules of natural justice had been broken.[86]

[84] *Crampton and Others* v. *Secretary of State for Health* (unreported, 9 July 1993) *per* Lord Bingham M.R. at p. 11 of the transcript.

[85] *Re Pergamon Press Limited* [1970] 3 All E.R. 535, C.A. *per* Sachs L.J. at p. 541.

[86] *Lake District Special Planning Board* v. *Secretary of State for the Environment* [1975] J.P.L. 220, *per* Kerr J.

Two years later this approach was followed in *Nicholson* v. *Secretary of State for Energy*, where the judge suggested that:

> the views of a "reasonable person" vary according to the climate of public opinion at the time. Undoubtedly public opinion in relation to administrative acts has altered considerably over recent years, and its development has taken the form of increasing vigilance[87]

Accordingly the duty of fairness to be applied in particular circumstances may become more (or equally less) demanding to reflect the standards expected by public opinion at that time.

The breadth of factors that judicial inquiries are now required to take into account in considering the question of procedural fairness was clearly illustrated in the context of the recent challenges to the second Bloody Sunday Inquiry. Blom-Cooper has expressed the view that the court had focussed disproportionately on the issue of fairness to witnesses, to the exclusion of others with an interest in the proceedings:

> . . . since in public inquiries there are no parties, but only participants who possess differing interests in the procedure of the tribunal and substance of its report, fairness cannot be unidimensional. Fairness to the soldiers must be weighed against fairness, at least, to the families of the deceased demonstrators and survivors of Bloody Sunday at Londonderry, if not to society in general.[88]

The view that fairness is not a unidimensional concept is consistent with the test that was applied by the Court of Appeal in the second challenge to Lord Saville's Inquiry's decisions in relation to anonymity of witnesses:

> Mr. Coyle in his submissions stressed that procedural fairness must be viewed in the round and fairness to the former military witnesses was only one dimension of the question posed; it was also necessary to consider the interests of the dead and injured and the public interest. With this submission we are in agreement.[89]

In summary, there is no shortcut to identifying and weighing up each of the relevant factors when the inquiry is considering whether or not to exercise its discretion to deny legal representation to witnesses. The view expressed by Lord Denning M.R. in 1970, albeit in the context of DTI Inspectors' investigations, remains equally valid today:

> So many are the permutations and combinations which may arise in an investigation that it seems to me quite plain that it is impracticable and, indeed, ill-advised to attempt to lay down a set of rules applicable to all witnesses at all times.[90]

Key Factors

Although the test of "fairness" must be applied against the unique factual circumstances of each inquiry, it is the author's view that there are a number of key factors common to all judicial inquiries that will be relevant and should, therefore, be taken into account in weighing up the demands of fairness in any particular case. There will often be other, more specific, factors that the inquiry will need to take into account although, in practice, save in exceptional cases, these are likely to be of lesser significance.

The following is a list of the key factors that the author considers will be relevant in all cases to the issue whether witnesses should be allowed some form of legal representation when giving evidence if the inquiry's duty to be fair is to be met:

[87] (1978) 76 L.G.R. 693, Q.B.D. *per* Sir Douglas Frank Q.C. (sitting as a deputy judge) at p. 700.

[88] Sir Louis Blom-Cooper, "Tribunals under inquiry" [2000] *Public Law* 1 at p. 2.

[89] *R.* v. *Lord Saville and Others, ex parte A. and Others* [1999] 4 All E.R. 860, *per* Lord Woolf M.R. at p. 872.

[90] *Re Pergamon Press Limited* [1970] 3 All E.R. 535, C.A. *per* Sachs L.J. at p. 542.

a The nature and purpose of the inquiry;
b Whether the witness is at risk of being criticised in the report, and what the practical and legal impact of being criticised in the report would be for that individual;
c Whether the witness is attending to give evidence voluntarily or under compulsion;
d Whether the inquiry is to take its evidence in public or in private;
e The extent of complexity of the issues under consideration by the inquiry;
f Whether the individual may be incapable of giving proper evidence without legal representation;
g The extent to which allowing legal representation to witnesses would impact negatively on the legitimate objectives of the inquiry;
h The extent to which allowing legal representation to witnesses would assist the inquiry in achieving its legitimate objectives; and
i Whether the questioning of witnesses will be by counsel to the inquiry.

Each of these factors is considered below, together with an assessment as to their impact on whether or not fairness requires that legal representation of witnesses be allowed.

Nature and purpose of the inquiry

To receive powers under the Tribunals of Inquiry (Evidence) Act 1921, there must have been a resolution of both Houses of Parliament confirming that the inquiry is into a matter of urgent public importance. By definition there is no equivalent requirement in respect of non-statutory inquiries, although, in practice, such inquiries are instituted by government (and a senior judge allocated to chair the inquiry) only where there is a matter of public importance that requires investigation. The terms of reference of an inquiry routinely set out the inquiry's purpose, which may take a number of forms. These have been categorised in a variety of ways, although the three main descriptions are advisory, investigative and adversarial.[91]

In practice, the definition of the nature and purpose of the inquiry is a useful guide to two factors: (a) whether individuals are at risk of being criticised in the report, and (b), if they are, what the practical and legal impact of any such criticism would be. Clearly, in a purely advisory inquiry, such as the recent Royal Commission on the Reform of the House of Lords under Lord Wakeham or the Independent Commission on the Voting System under Lord Jenkins, individuals are considerably less likely to be criticised than in a more adversarial inquiry into a public failing.[92]

However, the definition of the nature of the inquiry also assists in identifying the weight to be given to other factors, such as the proper level of costs to be incurred and an appropriate time period within which the inquiry should complete its report. The greater the public importance of the events under investigation (and therefore the increased potential impact of its findings, both on the witnesses themselves and on the public generally), the more vital it is that the report is fair to all witnesses and produces a report that is authoritative and comprehensive.[93] Accordingly, the focus on procedural fairness to witnesses will be correspondingly increased.

[91] See, for example, M. Harris, "Fairness and the Adversarial Paradigm: An Australian Perspective" [1996] *Public Law* 508.

[92] An example of a more adversarial subject-matter is the Parnell Inquiry in 1936 (with powers under the 1921 Act) into allegations of a leak by an M.P. prior to the Budget of information which had been used for individual financial gain. In that case, the inquiry permitted all witnesses to be represented and to cross-examine other witnesses as they desired.

[93] Although, of course, investigations into matters that are not of great public importance may nevertheless have significant consequences for the individuals concerned.

Is the witness at risk of being criticised in the judicial inquiry's report? What would the practical and legal impact of criticism of the witness be?

The extent to which the witness is at risk of being criticised in the judicial inquiry's report, and the impact that this will have on the individual, are perhaps the most important factors for the inquiry to take into account in determining whether or not legal representation should be permitted. The impact that the inquiry's proceedings and report has on the witness will be a key issue for the inquiry to take into account in determining what fairness requires. The position was summarised by Lord Denning M.R. in the context of an investigation by the Race Relations Board:

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.[94]

There will be quite a number of instances where the activities of individuals working for a particular body are clearly at risk of being criticised right from the outset. For example, the employees of Haringey Social Services were, from the outset of the Victoria Climbié inquiry, at substantial risk of being criticised in the report. The same is clearly true of the soldiers who had fired live rounds on Bloody Sunday, who have been the focus of very damaging allegations in both of the subsequent inquiries. Given the level of criticism that these individuals could face, in applying the principle of fairness it would be thought that the inquiry would lean towards the grant of legal representation (and in both cases those at risk of being criticised were indeed permitted legal representation).[95]

An individual's reputation itself is a matter that warrants protection in the context of an investigation. For example, the Privy Council held in *Rees* v. *Crane* that the manner in which serious charges of impropriety were investigated against a Trinidad and Tobago judge, in particular making public the fact that representations on the issue of his proposed removal from office were to be made to the President of Trinidad and Tobago,[96] breached the duty of fairness that was owed to him:

> The nature of the broad categories of complaint in the present case is also a relevant factor in deciding what fairness demanded. ... It is true, as the appellants contend, that a decision to make a representation is not itself a punishment or penalty and that the eventual dismissal requires two further investigations. That, in their Lordships' view, is too simplistic an approach in resolving the present questions. There was obviously considerable publicity for the decision to make a representation even if the detailed charges were not publicised.[97]

However, the task of identifying at the outset of an inquiry whether or not a particular individual is likely to be subject to criticism can be a difficult one. The inquiry begins its investigation, in theory at least, with a blank sheet of paper. A review of the relevant documentation prior to any interviews taking place may well expand the list of those at risk of receiving blame in the inquiry's report, but it may only be at the interview stage itself that it begins to become apparent that particular individuals may be blameworthy. As Sachs L.J. explained in *Re Pergamon Press* the investigating body faces two particular problems:

[94] *R.* v. *Race Relations Board, ex parte Selvarajan* [1976] 1 All E.R. 12, C.A. at p. 18.

[95] *Rulings and Observations of the Saville Tribunal on the Matters Raised at the Preliminary Hearing on 20th and 21st July 1998*, dated 24 July 1998; *Procedural Notes* of the Victoria Climbié inquiry.

[96] The judge could only be removed from office on the grounds of "inability to perform the functions of his office ... and/or misbehaviour": *Rees* v. *Crane* [1994] 1 All E.R. 833, *per* Lord Slynn at p. 836.

[97] *Ibid.*, *per* Lord Slynn at pp. 845–846.

> first, that it may well only emerge at quite a late stage in the investigation whether there may be ground for criticising a director or other witness; secondly, that at all stages . . . the inspectors may be faced with difficult and delicate problems as to how to hold the balance between the public interest and that of an individual who may in due course be criticised.[98]

The Parnell inquiry in 1936 into whether information about the forthcoming Budget had been leaked by an M.P. for personal financial gain was a situation where particular individuals were clearly potentially subject to criticism in the report. This in itself created certain difficulties in relation to implications of culpability:

> Where the witness is also a person whose conduct is under suspicion, his situation is extremely difficult. If he is legally represented at the start of the inquiry, the public will draw inferences from the fact. If he is not, his case may be prejudiced before he is legally represented. If he is represented while the inquiry is in progress, his counsel are seriously prejudiced by lack of preparation.[99]

There are certain judicial inquiries of an advisory nature where the subject-matter reasonably leads to a view that there is no material likelihood that any witness is likely to be criticised in the inquiry's report. In these circumstances, fairness is far less likely to dictate that witnesses must be allowed legal representation at the inquiry's hearings.

In contrast, however, the subject-matter of the judicial inquiry may be one in which – as with virtually all judicial inquiries set up to investigate a public failing of some description – the finger of blame may be pointed at one or more of the witnesses. In these cases it will inevitably be extremely difficult to identify at an early stage who is, and who is not, properly the subject of blame. Rather, there will be some who are closer to the issues at stake and some who are further away from them, although in the course of the proceedings different people may be implicated in different ways. For example, an individual who has had no hand in a particular course of action may subsequently be criticised for failing adequately to monitor another's behaviour, or for failing to put in place appropriate procedures.

Accordingly, the approach of many inquiries in the past – namely to allow legal representation to those who are "likely to be adversely affected" by the report – can be seen to be over simplistic. The approach taken by Lord Woolf M.R. in the context of reviewing the Bloody Sunday inquiry's procedural decisions was that:

> The tribunal has however the great advantage of its uniquely distinguished membership. It has also the advantage of the quality of the tribunal's own legal team and the fact that it has been able to make legal representation available to those *likely to be directly affected by its activities.* [emphasis added][100]

The Council on Tribunals in providing advice to the Lord Chancellor on the procedure to be adopted at judicial inquiries framed the issue in terms of the degree to which the witness' "interests" are involved:

> The inquiry chairman should have power to authorise persons to be represented either at public expense or privately, for part only of the inquiry, having regard to the extent to which their interests are involved in what the inquiry is currently investigating.[101]

Even where an individual is not expressly criticised in a judicial inquiry's report, there may be a legitimate concern that the evidence provided by the witness could

[98] *Re Pergamon Press Limited* [1970] 3 All E.R. 535, C.A., at p. 542.

[99] G.W. Keeton, "Parliamentary Tribunals of Inquiry" [1959] *Current Legal Problems* 12, at pp. 24–25.

[100] *R. v. Lord Saville and Others, ex parte A. and Others* [1999] 4 All E.R. 860, C.A., at p. 869.

[101] Council on Tribunals' advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers, (published as Appendix A to the Council on Tribunals' Annual Report 1995/96), at p. 26.

nevertheless lead to civil and/or criminal proceedings being brought as a consequence. In such cases, even though there may be no criticism of an individual levelled by the inquiry, the potential negative implications for the witness are likely to lead to the conclusion that fairness would require him or her to be permitted legal representation when giving evidence to the judicial inquiry.

If an individual is denied legal representation at the outset and then becomes a potential subject of criticism, or gives evidence publicly which may lead to civil or criminal proceedings being brought against them, it will often be too late for the position to be rectified. The risks have been magnified by the speed of communication that inquiries are now able to employ. For example, the website of the BSE inquiry boasted that transcripts of the evidence provided to it were being published within "a few hours" of the evidence having been given.[102]

It can therefore be seen that in all but purely advisory inquiries, there will be a wide range of individuals which is potentially subject to negative ramifications as a result of the inquiry's work: whether through being directly or indirectly criticised in the report, or through having given evidence which may lead to the bringing of civil or criminal proceedings. Unless a judicial inquiry is able to say with a considerable degree of certainty prior to commencing a witness interview that he or she is not at any risk of criticism, or that the evidence will cover areas which may lead to civil or criminal proceedings, then the strong presumption should be in favour of legal representation.

Is the person attending voluntarily or under coercion?

One of the main differences between 1921 Act inquiries and non-statutory judicial inquiries, is that 1921 Act inquiries have the power to:

a Require witnesses to attend to give evidence under compulsion of law; and
b Requires witnesses to give evidence on oath, with the penalty of contempt of court if false evidence is given.[103]

It may, therefore, be felt that those who have been compelled to give evidence before a 1921 Act judicial inquiry should be afforded greater protection than those who attend without legal compulsion before a non-statutory inquiry. Certainly a sufficiently well-advised individual asked to give evidence to a non-statutory inquiry is in a far better position to negotiate specific procedural safeguards as a condition of his agreement to attend. This view has been expressed by Grant, who notes:

> The potential risk to reputation is compounded where commissions are entrusted with coercive powers. Dependent upon the particular jurisdiction undertaking the inquiry, a person may be denied the right to claim privilege against self-incrimination.[104] Evidence can form the basis from which further investigations are undertaken by prosecutorial authorities or civil litigants. The evidence provided at an inquiry and the report can be used to assist in subsequent proceedings. In addition notice of any defence that a witness

[102] Note of Procedure of the BSE Inquiry, para. 1346, at www.bse.org.uk. The extent of public interest in evidence that an inquiry collects is reflected by the fact that over 160,000 witness statements and almost 86,000 transcripts were accessed from the website, which received over one and a half million visits.

[103] Conversely it is unlawful for a non-statutory inquiry to take evidence from witnesses on oath, as a result of section 13 of the Statutory Declarations Act 1835. The *Scott Report*, *op. cit.*, at para. B2.38 records the fact that the inquiry had intended to take evidence on oath before its attention was drawn to this provision. The report declares at para. B2.41 that Sir Richard Scott "did not believe that any of the witnesses likely to be invited to give evidence would be inclined to give less truthful evidence unsworn than he or she would have given if on oath".

[104] This includes judicial inquiries in England and Wales.

> may wish to rely upon may be disclosed. In the interests of fairness those considerations could be taken to dictate that a person should be able to appear by way of counsel in case such threats arise.[105]

However, to state that these risks are avoided in the case of non-statutory judicial inquiries would be to overlook the practical position for witnesses in many cases. Firstly, the reality is that many non-statutory inquiries are set up with the underlying threat of compulsory powers if voluntary co-operation is not forthcoming. The announcement of the Penrose Inquiry into Equitable Life stated that:

> [t]he Inquiry is being established on a non-statutory basis. We hope everyone concerned will be able to co-operate fully and frankly. However, the Government will, if necessary, establish a statutory basis for the Inquiry.[106]

This mirrored an earlier Parliamentary statement by Michael Heseltine in the context of the Scott Inquiry where he stated:

> Lord Justice Scott knows that if he feels unable to obtain satisfactory evidence or answers, he is free to ask the Government to convert the inquiry into a 1921 Act inquiry. If he asks, the Government will agree to his request.[107]

Accordingly from the outset witnesses are aware that if they do not co-operate on a voluntary basis, the judicial inquiry:

> a could be provided with statutory powers and compel the witness to co-operate under force of law; and/or
> b may subject the individual to express or implied criticism (either in the report itself or more generally) for refusing to attend and give evidence.[108]

Furthermore, judicial inquiries are often set up without recourse to statutory powers in cases where it is known that individuals will, in practice, be compelled to attend to give evidence by other means: normally by reason of their employment. Examples include civil service employees involved in the Scott Inquiry, the Bank of England employees involved in the inquiry into the collapse of BCCI under Lord Bingham M.R. and the Financial Services Authority and civil service staff involved in the Penrose Inquiry. Equally, as emphasised above, the very failure of an individual to attend to give evidence may be portrayed, particularly in the press, but also by the judicial inquiry itself, as evidence of apparent culpability.[109]

Certainly Scott L.J., in commenting on the procedures of his own judicial inquiry, took the view that:

[105] H. Grant, "Commissions of Inquiry – Is there a Right to be Legally Represented?" [2001] *Public Law* 377, at p. 388.

[106] H.M. Treasury Press Release, 31 August 2001.

[107] H.C. Deb., Vol. 214, c.651, 23 November 1992. See also *Crampton* v. *Secretary of State for Health* (unreported, 9 July 1993), C.A., where, in the context of a challenge to the non-statutory status of the Beverley Allitt inquiry, the Court of Appeal referred to the fact that Sir Cecil Clothier Q.C. (a member of the inquiry team) had confirmed that he "did not think the inquiry would require compulsory powers to carry out a full and effective inquiry, but added that if he did require such powers he would approach the Secretary of State and ask her to confer them under section 84 [of the National Health Service Act 1977]. She, for her part, has indicated that if such a request is made she will accede to it."

[108] The *Scott Report*, *op. cit.*, at paragraph B1.25 notes that "of those invited to give evidence to the Inquiry only three have declined to do so. In none of the three cases was the evidence likely to have added anything of significance to evidence supplied from other sources".

[109] For example, when Carole Baptiste, a social worker who had been involved in the protection of Victoria Climbié, declined to comply with a summons issued by the Victoria Climbié inquiry. Counsel to the inquiry, Neil Garnham Q.C. publicly stated that he had advised the inquiry chairman, Lord Laming, that "[i]t would be open to you, sir, to draw every proper inference contrary to Ms. Baptiste as you see fit in the light of her failure to attend".

> [s]o far as procedures to be adopted for the purposes of fairness are concerned, however, it is difficult to discern any necessary difference between statutory inquiries, *i.e.* those set up under the 1921 Act, and other *ad hoc* inquiries, such as my own.[110]

The question of whether or not an individual has been compelled to attend the inquiry, and therefore deserve greater procedural protection, should therefore be viewed in practical terms rather than on the more narrow legal issue of whether or not the witness would be in contempt of court for failing to attend.

Is the inquiry to take its evidence from the witness in public or in private?

Having identified that the availability of statutory powers for a judicial inquiry should make little difference to the appropriate level of fairness to witnesses, Scott L.J. went on to say:

> More significant differences, from a procedural point of view, may be whether or not the Inquiry is to conduct its proceedings in public, whether the Inquiry has been set up to investigate specific identifiable issues or whether the function of the Inquiry is to investigate a more diffuse area of concern.[111]

Whether or not the hearings are being held in public, the first of these factors will have a considerable impact on the potential negative ramifications to the witness in giving evidence. Judicial inquiries that hold their proceedings publicly are now widely reported, and an individual who has made apparently prejudicial comments at a public hearing (which may, for example, be through a simple error) are routinely subject to adverse comment in the press. The correction of an error later in the proceedings would, in practice, be likely to receive considerably less publicity and therefore a witness may be prejudiced even if there is no adverse comment in the report itself. As Scott L.J. observed:

> [t]here is no doubt that a public hearing, particularly where the circumstances that have led to the setting up of the Inquiry have been the subject of publicity and media interest, exposes witnesses to considerable pressures. Their evidence, which, as I have said, may at the end of the day be of only marginal relevance or weight, may be picked over, analysed and criticised by news reporters and others, whose purposes in doing so may have little in common with the Inquiry's purposes. Is that fair to witnesses?[112]

This risk is clearly avoided where proceedings are held in private, as the only evidence that the public will have to reach a view on will be that which the judicial inquiry chooses to publish (normally having received representations on the draft report from those who are subject to criticism in it).

Accordingly, a further factor to be taken into account in assessing fairness to the witness would be whether or not the giving of evidence is in public (including the degree of exposure it will receive, such as whether it is being televised live, transmitted over the internet or it is simply open to the public). Where evidence is to be provided in public, this will be an additional factor weighing in favour of legal representation being permitted.

Are the issues raised by the judicial inquiry complex?

A more obvious factor for a judicial inquiry to take into account is the complexity of the issues that are the subject of its investigation. The evidence to be given may be complex for a range of reasons, including:

[110] Sir Richard Scott V.-C., *op. cit.* at p. 600.

[111] *Ibid.*

[112] *Ibid.* at p. 615.

a The nature of the issues that form the subject-matter of the inquiry;
b The quantity of documentary evidence relating to each of the issues that the witness will be required to give evidence on; and
c The nature of any legal issues that arise in relation to the evidence to be provided.

The more complex the points that the witness will be required to give evidence on, the more important it will be for the witness to have the benefit of legal representation when giving evidence, to ensure that the evidence is presented to the inquiry accurately. Where simple factual issues are at stake, the traditional view in the context of domestic tribunals has been that they are likely to be more productive where lawyers are excluded:

> ... in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game. But I would emphasise that the discretion must be properly exercised.[113]

Where the subject matter of the inquiry is complex, the inquiry may not understand the issues fully (and therefore not immediately appreciate the questions that they should be asking to draw out the relevant evidence). In these cases, legal representatives may be best placed to simplify the issues for the benefit of the inquiry team, and to bring out any points that may have been misunderstood by the inquiry through re-examination of the witness.

Equally, where the documents relevant to issues to be covered by a witness's evidence are voluminous, the witness is likely to rely more heavily on his legal representatives in making sure that the relevant materials are brought to the inquiry's attention and referred to in sufficient detail. Where an inquiry, in examining a witness has failed to refer to key documents – either as a result of misunderstanding an issue or through inadvertent omission - the witness' legal representative is best placed to refer to such documents during the course of the examination, to ensure that the witness covers any points that may have been missed. With the inevitable pressure in giving factual evidence it is unreasonable to expect the witness himself to identify and raise further relevant documents and/or provide evidence on issues that have not been asked for by the inquiry team.

By way of example, therefore, witnesses such as those who gave evidence on complex actuarial issues in the Equitable Life inquiry, or detailed scientific matters in the BSE Inquiry, may be expected to rely to a far greater extent on their legal representatives to bring out all relevant evidence to the inquiry. This contrasts with witnesses giving evidence on more straightforward factual matters.

Might the witness be incapable of providing proper evidence without legal representation?
Certain categories of witness, for example young persons or those who suffer from mental disability, are inherently more likely to require the protection that legal assistance affords than other witnesses in the same situation. The inquiry will therefore need to consider whether, in the light of all the other circumstances of the case, fairness demands that more vulnerable witnesses should be permitted legal representation when

[113] *Enderby Town F.C.* v. *Football Association* [1971] 1 All E.R. 215, C.A., *per* Lord Denning M.R. at p. 217.

giving evidence, even though they would otherwise be refused it. This factor does, of course, link closely with the question of the complexity of the issues on which the individual will be required to give evidence.

To what extent would legal representation of the witness impact negatively on the objectives of the inquiry?

Fairness to witnesses is not, of course, the sole consideration for a judicial inquiry to take into account when determining the procedure for taking evidence and in particular whether to allow legal representation. Whilst legal representation of witnesses is not directly in conflict with the principal purpose of an inquiry, namely to establish the truth (indeed, legal representation in many cases facilitates the inquiry establishing the truth), it remains appropriate for the inquiry to conduct its work efficiently, with appropriate expedition and without undue expense. The need for an inquiry to conduct its work efficiently inevitably pulls in the opposite direction to the objective of fairness to witnesses and the production of an accurate and comprehensive report. In determining the procedure to be adopted, the judicial inquiry will be required to reconcile these conflicting considerations in such a way as to retain the necessary fairness to witnesses.

However, the extent to which the desire to act expeditiously and without undue expense may legitimately erode the duty to be fair is not at all clear. The Court of Appeal considered the issue in *Crampton*. One ground that was pursued by the applicants in that case was that the relative cost of a statutory inquiry had been a major consideration for the Secretary of State. On this issue (and taking a non-interventionist approach) the Court of Appeal commented:

> ... it is said that in view of the seriousness of the questions raised the Secretary of State gave undue weight to the question of cost. To my mind the Secretary of State might well have been at fault had she treated cost as the only consideration but she cannot be said to have erred in considering cost to be a material consideration. It is an undoubted truth that a statutory inquiry conducted in public would last longer and cost more and the money so spent would of course otherwise be available for the care of patients. This was pre-eminently a matter for the judgment of the Secretary of State.[114]

In considering the same issue in the context of the appropriate balance to be struck at his inquiry, Scott observed:

> It is not, I think, an oversimplification to say that the objects to be served by procedures, for Inquiries as for litigation generally, are likely to be threefold; first, the need to be fair and to be seen to be fair to those whose interests, reputations, or fortunes may be adversely affected by the proceedings; second, the need for the proceedings to be conducted with efficiency and as much expedition as is practicable; third, the need for the cost of the proceedings to be kept within reasonable bounds. While the second and third of these desiderata should never be allowed to submerge the need to be fair, nonetheless there is an inevitable tension between, on the one hand, the requirements of fairness and, on the other the need for an efficient process.[115]

[114] *Crampton and Others* v. *Secretary of State for Health* (unreported, 9 July 1993), C.A. *per* Lord Bingham M.R. at p. 11 of the transcript.

[115] Sir Richard Scott V.-C., *op. cit.*, at p. 597. It is, however, clear that Scott L.J.'s decision to refuse "active" legal representation at the hearings was due to the cost and delay that this would cause. Para. B2.18 of the report, *op. cit.*, states that "the participation in the Inquiry's procedures of lawyers acting for all those who might be at risk of criticism in the final Report would, in my opinion, have unacceptably lengthened the duration of the Inquiry and substantially increased its costs".

It is clear that the cost of major judicial inquiries can be substantial and a large proportion of this is legal expenses.[116] The Council on Tribunals, in its advice to the Lord Chancellor's Department noted that "[t]hose concerned to set up and conduct inquiries are likely to agree in general terms the importance of effectiveness, fairness, speed and economy". Its advice continued:

> [t]he extent to which these four objectives are met for a particular inquiry will be determined by decisions taken early on as to the setting-up, procedure and powers of the inquiry. *Suffice it to say that the objectives of effectiveness and fairness should not, as a matter of principle, be sacrificed to the interests of speed and economy.* [emphasis added][117]

In imposing restrictions on legal representation for witnesses appearing before his inquiry, Scott L.J. argued (less than convincingly, it is submitted) that the issues of efficiency, expense and expedition had not overridden the duty of fairness. Rejecting the approach taken in the then most recently held 1921 Act inquiry (the Crown Agents Inquiry) where legal representation, including extensive cross-examination of other witnesses was permitted, he added:

> I am, however, in no doubt that a comparable approach in my inquiry was not necessary in order to achieve fairness and would, if adopted, at best have extended the oral hearings by years rather than months and, at worst, might have prevented the inquiry from completing its task at all.[118]

The judicial inquiry does therefore have a duty to keep its costs within reasonable bounds, although what is reasonable will depend on the specific circumstances and in particular the importance and scope of the matters being investigated.

Equally, reasonable expedition is necessary as the judicial inquiry should avoid undue delay in reporting on the matter under investigation. Yet inquiries whose investigations are completed in a suspiciously short amount of time are also at risk of failing to meet the objective of reporting authoritatively and comprehensively. For example, Lord Widgery's 1921 Act inquiry following the events of Bloody Sunday was completed (and the report published) in less than three months.[119] The report itself states that its value would "largely depend on its being conducted and concluded expeditiously".[120]

The report attracted substantial criticism and its consequent lack of authority (particularly as to the reliability of the conclusions reached by Lord Widgery) led in 1998 to an unprecedented second 1921 Act inquiry having to be set up with identical terms of reference to investigate the same issues, some two and a half decades later. The Prime Minister in announcing the second inquiry stated that "I have been strongly advised, and I believe, that there are indeed grounds for such a further inquiry. We believe that the weight of material now available is such that the events require re-examination".[121] As Lord Woolf M.R. said of the second inquiry:

> The relatives of some of the dead and injured have never accepted the findings and conclusions of the Widgery Report. Rightly or wrongly, vigorous criticism of that Report

[116] For example, the first four years of the current Bloody Sunday inquiry reportedly cost £52 m and the total cost of producing the report has been estimated at £100 m (*The Independent*, 16 January 2002).

[117] Council on Tribunals' advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers, (published as Appendix A to the Council on Tribunals' Annual Report 1995/96), at para. 2·9.

[118] Sir Richard Scott V.-C., *op. cit.* at p. 609. See also para. B2.18 of the *Scott Report, op. cit.*

[119] The events of Bloody Sunday took place on 30 January 1972; *Lord Widgery's Report* was published on 18 April 1972 (H.C. Paper 220, 1971–72).

[120] *Ibid.*

[121] Hansard, 305 H.C. Official Report (6th Series) cols. 501–503, 29 January 1998.

> and the procedures of the tribunal have been made over the years by a number of commentators.[122]

Walsh identified the issue of the short amount of time taken to conduct the investigation as the reason for the lack of authority of Lord Widgery's report:

> In short, it is difficult to avoid the conclusion that as a result of its undue haste in conducting its investigation into the most serious allegations that have been made in peace-time against agents of the State, the Widgery Tribunal severely compromised its own capacity to achieve one of the most vital incidents of its task, namely to inspire public confidence in the truth and fullness of its findings.[123]

It is therefore submitted that it would be wrong for the inquiry to give undue prominence to the need for expedition, efficiency and lack of expense in determining whether or not fairness demands that witnesses be granted legal representation. Rather, sufficient time and resource needs to be dedicated towards providing a full and fair report. Equally, the delays and costs that legal representation of witnesses may give rise to can be kept within appropriate bounds through proper judicial supervision.

In criticising the decision of the Scott Inquiry to deny legal representation, principally due to the anticipated extra cost and delay, Lord Howe observed that these grounds:

> certainly carried very little weight by the time his finished work was made public. The sheer scale of the report, inconclusive as it is, as well as the duration of the process, certainly does not suggest that Sir Richard has found an uniquely successful was of expediting such proceedings.[124]

Conversely, as starkly illustrated by the second Bloody Sunday Inquiry and the Shipman Inquiry, substantial additional costs and delays can be incurred as a result of legal challenges to the inquiry's procedural decisions that are made where fairness to witnesses is denied by the inquiry.

Would legal representation bring benefits to the judicial inquiry's work?

The value that legal representation of witnesses brings to the work of judicial inquiries is substantial, yet is conventionally overlooked. It should not be assumed that, simply because the legal representative is acting to protect the interests of his or her client, this will result in a distortion of the truth. Rather, the legal representative will assist the inquiry to establish the truth by:

a the proper testing of the evidence as against the underlying documents and/or the oral evidence of other witnesses;
b highlighting to the inquiry and correcting any errors of fact;
c ensuring that all relevant questions are asked of the witness and all relevant information exposed;
d identifying the real issues that are relevant to the witness's evidence and through this clarifying and simplifying the work of the inquiry;
e ensuring that any misleading questions from the inquiry are clarified in order that it is clear what the evidence relates to;

[122] *R.* v. *Lord Saville and Others, ex parte B. and Others* (unreported, 30 March 1999, C.A.).

[123] D. Walsh, (January 1997) "The Bloody Sunday Tribunal of Inquiry – A Resounding Defeat for Truth, Justice and the Rule of Law", pp. 8–9 at www.cain.ulst.ac.uk.

[124] Lord Howe, "Procedure at the Scott Inquiry" [1996] *Public Law* 445, at p. 450.

f assisting the witness and the inquiry in taking them to relevant materials that may have been overlooked;
g identifying information that may be obtained from third party sources; and
h ensuring that witnesses are more relaxed, have sufficient time to consider the questions and provide full responses.

Collectively, these benefits lead to the conclusion that the denial of legal representation is likely, in practice, to operate *against* the core objective of the inquiry in seeking to establish the truth.

Furthermore, it should not be assumed that legal representation necessarily delays the inquiry in completing its work. In this context, Blom-Cooper notes:

> There is, however, some profit in querying the proposition that legal representation equals prolixity and protracted proceedings ... But it is not the representation that causes the dilatory procedure. Indeed, experience indicates that counsel for parties are often able to sift the wheat from the chaff and to distill the crucial issues. They can, and do, facilitate rather than handicap the process of inquisition.[125]

This view was shared by Lord Howe, who noted the comments of Sir David Calcutt Q.C. that "[w]here counsel can properly and responsibly exercise some restraint, competent representation often leads to a saving of time".[126] Lord Howe also quoted a report of Michael Davies J. into the appropriate form of inquiry for hospital complaints:

> ... an inquiry cannot be properly conducted if key witnesses before it are not adequately represented. Persons whose evidence is vital – whether as complainant, complained against or otherwise – must therefore be legally represented not simply to protect their own interests, which may or may not be at risk, but to assist the Inquiry to reach a fair and just conclusion.[127]

The assistance that legal representatives bring to an inquiry's work was expressly recognised by the court in relation to the Shipman Inquiry.[128] The decisions subject to challenge were those of the Secretary of State (as to the non-statutory status of the inquiry) and of the inquiry itself under Lord Laming (as to the refusal of legal representation for witnesses who were unlikely to be criticised).

Although the decision of the Secretary of State was quashed on other grounds, Kennedy L.J. went on to consider the position in relation to legal representation. In identifying the positive contribution of legal representation to the inquiry process, Kennedy L.J. expressed the preliminary view that:

> even if the decisions of the Secretary of State had been upheld the attack upon the decision of Lord Laming as to representation would be likely to have succeeded. It is not so much a question of parity as between the families and other witnesses who can be represented by lawyers instructed by their professional associations, and who are likely to be so as they may be criticised. It is more a question of enabling the families to play their full part in this important Inquiry. If the job is worth doing it is worth doing well.[129]

[125] Sir Louis Blom-Cooper, "Witnesses and the Scott Inquiry" [1994] *Public Law* 1 at p. 2. The same point is forcibly made by the Council on Tribunals in its advice to the Lord Chancellor in July 1996, *op. cit.*, at para. 7.14.

[126] Lord Howe, "Procedure at the Scott Inquiry" [1996] *Public Law* 445, at p. 452 (quoting from a lecture given by Sir David Calcutt at Gresham College on 18 January 1994).

[127] HMSO (1973) for DHSS and Welsh Office.

[128] *R.* v. *Secretary of State for Health, ex parte Wagstaff* [2000] U.K.H.R.R. 875, D.C.

[129] *Ibid.* at pp. 904–905.

Who will conduct the questioning of the witness?

Finally, where the judicial inquiry retains counsel to the inquiry to question witnesses, a risk arises (to a large extent dependent on the approach in relation to questioning) that the witness will be in a significantly disadvantageous position from that of the inquiry. Where the inquiry takes a truly inquisitorial approach, the problems that this causes are likely to be reduced.

However, where the line of questioning from counsel to the inquiry becomes more aggressive or hostile, the witness may be unable to protect him- or herself adequately without legal representation. There is little prospect of a "level playing field" between the questioner and the witness in these circumstances, a situation made worse by the fact that the inquiry is likely in most cases to have access to a far wider range of documents than the individual witness.[130] As Grant notes:

> It is arguable that unfairness to witnesses arises from the fact that a commission is nearly always assisted by its own legally qualified counsel. It is usual for a team of lawyers to be at the commission's disposal to prepare and adduce evidence and make submissions, whereas any person appearing must seek leave of the commission to be entitled to legal counsel.[131]

It can therefore be seen that there are a variety of factors that the inquiry must take into account in assessing whether fairness requires legal representation to be allowed. Certain issues, such as whether legal representation will cause delay and additional expense to the inquiry, are far from straightforward and the many benefits that legal representation brings must not be overlooked by the inquiry. In the circumstances of each inquiry there may be other relevant factors, although it is submitted that those discussed above will normally be the key issues for the inquiry to assess.

THE FOURTH PROPOSITION: THE PRESUMPTION THAT LEGAL REPRESENTATION SHOULD BE PERMITTED

We have seen that judicial inquiries have a duty to be fair to witnesses, and that in assessing what is fair in relation to allowing legal representation for witnesses, inquiries are required to weigh up each of the relevant factors for and against permitting legal representation. To the extent that the court considers that denying legal representation to a witness constitutes a potential interference with the witness's human rights, the inquiry will be required to demonstrate sufficient countervailing considerations to justify such an interference. In any event, it is clear that the court may in practice substitute its own view of what is "fair in all the circumstances" rather than restrict its review of the inquiry's decision to a test of *Wednesbury* unreasonableness.

It is the author's view that, save in exceptional cases, the weight of the factors will lean heavily in favour of allowing some degree of legal representation to witnesses when giving their evidence to the inquiry. Where a judicial inquiry is charged with reporting on a public scandal or disaster, it is clear that individuals will be at risk of criticism. The identity of those who may be the subject of criticism (and equally those who will be free of criticism) will not be clear to the inquiry until near the end of its

[130] Although as a separate element of the duty to be fair the judicial inquiry may be expected to forward to the witness the documents that it will put to him in sufficient time for him to prepare.

[131] H. Grant, "Commissions of Inquiry – Is there a Right to be Legally Represented?" [2001] *Public Law* 377, at p. 389.

work. Those witnesses who are not to be criticised may nevertheless expose themselves to public criticism and/or potential legal proceedings as a result of the process of giving evidence. As Grant observes:

> While public inquiries are not courts of law and cannot make enforceable decisions, they nevertheless may and do have negative ramifications which need to be safeguarded against. Reputation is a right which the law has recognised as justifying protection. Persons who appear before an inquiry, perhaps merely to provide useful information, may nevertheless find themselves prejudicially affected by evidence, or findings, or comment. This, taken with the publicity that such proceedings may attract, may be put forward as a justification for the extension of legal representation to all persons so appearing.[132]

These factors taken together weigh strongly in favour of the individuals being permitted legal representation. As described above, even factors that at first sight may be thought to operate against the achievement of the inquiry's objectives, will in fact provide substantial assistance to the inquiry and facilitate the achievement of its objectives. Legal representation may assist the inquiry in a variety of ways, for example, by highlighting and clarifying the relevant issues and testing the evidence sufficiently rigorously.

The drawbacks to the judicial inquiry's objectives in permitting legal representation, namely the time taken up by it and the extra costs incurred, can relatively simply be kept under proper control by robust judicial supervision of the inquiry. As the Council on Tribunals has observed, "it is clearly undesirable that there should be mass legal representation throughout the course of the inquiry".[133] This is reinforced by the comment in *Nicholson* that:

> I think that an inspector is entitled to refuse to hear or at least to deny cross-examination by objectors who intentionally engage in irrelevancies and repetition, and also by those whose objection is not to the proposed development as such... In summary, in my judgment an objector who could be a person aggrieved has the right to cross-examine witnesses who have given evidence contrary to his case, provided that his questions are directed to that evidence and are not repetitive, irrelevant or directed to a purpose contrary to the [inquiry].[134]

Proper control of the advocates, including, where appropriate, the imposition of restrictions on the time allowed for re-examination of a witness or the confining of cross-examination of other witnesses to situations where there is a direct conflict of evidence, ought properly to prevent the fact of legal representation from delaying or increasing the cost of the inquiry by a material amount.

Blom-Cooper would encourage legal representation, but under the rigorous control of the inquiry:

> [Legal representatives] can, and do, facilitate rather than handicap the process of inquisition. The nub of the problem is the time taken in the often wearisome process of cross-examination. Inquiring bodies have found it anything but easy to contain the amplitude of counsel's forensic skills or just sheer loquacity. Lawyers (or rather advocates) nurtured in a system which accommodates a tendency to verbosity and is essentially alien to the inquisitorial process are inclined – over-inclined – to indulge their appetite for

[132] *Ibid.* at p. 388.

[133] Council on Tribunals' advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers, (published as Appendix A to the Council on Tribunals' Annual Report 1995/96), at paragraph 7.15.

[134] *Nicholson* v. *Secretary of State for Energy* (1978) 76 L.G.R. 693, Q.B.D., at p. 702.

> lengthy questioning. But the solution lies with the tribunal. Since there is no right to cross-examine, the inquiring body can limit the scope of the questioning. It is easier said than done. Yet it is possible with firm handling of the advocates.[135]

In defending the low level of protection to witnesses granted in his inquiry, Scott L.J. questioned the benefits to the process brought by legal representation:

> Examination in chief by a witness's own lawyer? Why cannot witnesses simply submit a preliminary statement? This is now a common practice in civil litigation. Re-examination by a witness's own lawyer? Why cannot the witness, instead, submit whatever supplemental witness statement he wishes? Lawyers or the witness can play whatever role in the preparation of these statements the witness may wish.[136]

Scott L.J.'s views overlook the greater impact that evidence has when received direct from the witness, rather than in the form of a statement prepared with the assistance of a lawyer. Where an inquiry has failed to raise relevant issues with the witness and has therefore come away with less than the full picture, a witness statement submitted some weeks afterwards is very unlikely to redress this imbalance. The inquiry will inevitably have moved on to new witnesses and new issues, and the content of a supplemental witness statement will rarely carry the same weight that a concise re-examination of the witness would have, if it were permitted to take place immediately following the questions put by the inquiry itself. Criticising Scott's procedural rules denying legal representation, Lord Howe agrees that appropriate checks must be maintained on the role of the advocates:

> Everyone would agree with Sir Richard in rejecting "the proposition that cross-examination of witnesses should *automatically* be allowed to every person affected by the witnesses' evidence". For this reason one has to emphasise that my complaint about the Scott procedures has been much more about the denial of the right to representation than of the right to cross-examine. For, of course, in these as in any other proceedings the proper scope for cross-examination would have had to be sensibly limited, either by self-restraint on the part of the advocate or by judicial ruling, if necessary. But few of us, I think, would follow Sir Richard to his conclusion that we should regard this principle as an "unnecessary implant" from procedures designed for adversarial proceedings. [emphasis in original][137]

It is submitted that the court's increased supervisory role over procedural decisions of judicial inquiries will, rightly, have the effect of rendering the approach taken by Sir Richard Scott indefensible, save in exceptional circumstances. Rather, the focus of the inquiry's attention ought properly to be on the appropriate level of judicial oversight of the advocates appearing before it.

CONCLUSION

The vast majority of individuals faced with the prospect of having to give evidence to a judicial inquiry on a matter of urgent public importance, would be likely to feel considerable cause for concern. This will be so whether or not they are likely to be the subject of criticism, although if they do feel in some respect culpable the degree of concern will be significantly greater.

[135] Sir Louis Blom-Cooper, "Witnesses and the Scott Inquiry" [1994] *Public Law* 1, at p. 2.
[136] Sir Richard Scott V.-C., "Procedures at Inquiries – The Duty to be Fair" (1995) 111 L.Q.R. 596, at pp. 611–612.
[137] Lord Howe, "Procedure at the Scott Inquiry" [1996] *Public Law* 445 at p. 448.

One of the first questions that a prospective witness will ask of his or her legal representative will be whether, when the time comes to give evidence, he or she will be accompanied by his or her lawyer. Had he or she been accused of a minor criminal offence, the answer would be very straightforward: the individual would have an entitlement to legal representation. Yet, for those involved in apparent failings of urgent national importance, the historical position has been entirely uncertain. Until recently, it has not been possible to provide the witness with any clear advice whether legal representation will be permitted, save to identify that there is no absolute right to be represented and that the courts have repeatedly emphasised that "the inquiry is the master of its own procedure".

The requirement to provide evidence to an inquiry (through legal or, more often, moral compulsion) compromises an individual's liberty, for the sake of the public good in reporting the truth. The process of giving evidence, in addition to being a highly stressful event, can lead to serious consequences for an individual. These include:

a criticism by the press and other media in the course of the inquiry's work;
b criticism by the inquiry itself in the body of its report;
c damage to an individual's career prospects; and/or
d subsequent civil or criminal proceedings pursued as a result of the information provided to the inquiry.

Consequently the power of the inquiry to refuse legal representation for witnesses when they go through the ordeal of having to give evidence has been a substantial cause for concern. Although the vast majority of judicial inquiries have in fact chosen to grant the necessary procedural protections to witnesses, those that have not – in particular the denial of legal representation by the Scott inquiry – have until recently been able to proceed with an unrivalled degree of autonomy.

However, with the development of the duty of fairness over the last four decades and the recent judicial shift in favour of much closer scrutiny of the procedural decisions of public inquiries, particularly where human rights are threatened, the advice that may be provided to witnesses can now be more definite. It can be seen that the weight of each of the relevant factors discussed above falls heavily in favour of legal representation. In the light of this, and against a background of a substantially increased level of scrutiny of judicial inquiries' procedural decisions by the courts, it is the author's view that judicial inquiries will now be required to apply a presumption that legal representation of witnesses be permitted.

Only where there are sufficiently strong countervailing circumstances outweighing the benefits that legal representation may bring to the inquiry's work, should legal representation be denied. The circumstances where this is the case will, in all likelihood, be rare as an assessment of the relevant factors will usually weigh in favour of legal representation. As the Council on Tribunals advised the Lord Chancellor in 1996:

> ... it should not be assumed that hearing legal representatives will necessarily add significantly, or at all, to the length of the inquiry, provided the inquiry itself retains overall control. Opening statements and the like from lawyers can help to distil issues and eliminate misunderstandings ... Being taken through the evidence in chief can put a witness at ease, enabling him to give of his best when being questioned by the inquiry. Cross-examination of other witnesses may sometimes be the most effective way of resolving conflicts of evidence. Re-examination can be a much quicker way of clarifying outstanding points than the submission of additional written statements.[138]

[138] Council on Tribunals' advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers, (published as Appendix A to the Council on Tribunals' Annual Report 1995/96) at para. 7.14.

The court itself may be reluctant to lay down a rebuttable legal presumption in favour of permitting representation for witnesses before all inquiries, preferring instead to consider the factors relevant to each case in the particular circumstances. However it is submitted that judicial inquiries themselves, when choosing the procedures that they will adopt, will be required to grant legal representation unless (exceptionally) there are sufficiently strong countervailing factors against allowing representation. Given the recent appetite of the courts to intervene where fairness to witnesses is not met, judicial inquiries will, in practice, be required to operate from a strong presumption in favour of allowing legal representation for all of the witnesses who give evidence to it.

The development of such a presumption in favour of legal representation of witnesses is consistent with the approach recommended previously by the Council on Tribunals. It advised that "the inquiry should be ready to exercise its discretion in favour of hearing legal representatives and oral testimony, and allowing cross-examination whenever it seems appropriate".[139] The circumstances where it will be inappropriate to deny legal representation, given the factors that weigh so heavily in its favour, ought properly to be rare.

As a result, so long as inquiries apply appropriate control over advocates during the course of the evidence-giving sessions, allowing legal representation for all witnesses should assist the achievement of each of the objectives of the judicial inquiry. Time limits spent on re-examination can be set; issues ripe for cross-examination can be laid down. The inquiry will then be able to investigate and report in an authoritative and comprehensive manner, with a procedure that is fair to all witnesses. Inquiries will be completed expeditiously, efficiently and without undue expense. The potential for legal representation threatening the achievement of the objectives of the inquiry, in particular the issues of time and cost, can then be avoided entirely.

As a result, to deny legal representation to witnesses in anything other than exceptional circumstances, would be to deny the procedural fairness to which each witness is entitled. As the Saville Inquiry has learnt, the failure to put in place procedures that ensure fairness to witnesses can result in decisions of the inquiry, taken in good faith, being quashed by the court and remitted for reconsideration. The restrictive approach taken by Scott L.J.'s inquiry less than ten years ago appears now to be unsustainable. If this new interventionist approach of the courts leads judicial inquiries in the future to pay increased attention to procedural protections for witnesses, including adopting a presumption in favour of allowing legal representation, then it will have achieved a desirable objective.

[139] *Ibid.*

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CASE NOTES

The address for the submission of case notes is given at the beginning of this issue

IN THE SHADOW OF *BOSMAN:* THE REGULATORY PENUMBRA OF SPORT IN THE EU

Deutscher Handballbund eV v. *Kolpak*

Case C-438/00 (European Court of Justice)
(Judges Edward, La Pergola, Jann, von Bahr and Rosas.)

INTRODUCTION

The sporting world was shaken to its core with the judgment of the European Court of Justice (ECJ) in the case of *Union Royale Belge des Sociétés de Football Association (Asbl)* v. *Jean-Marc Bosman.*[1] In an Article 234 EC reference from a Belgian court, the ECJ effectively remodelled football's transfer system by ruling that the requirement that a player having reached the end of a playing contract be the subject of a transfer fee before he was allowed to move clubs was, in effect, incompatible with the free movement provisions embodied in the EC Treaty. Significantly the ECJ also chose to condemn a rule placing limitations on the number of "foreign" players deployed by any one club. This regulation, known as the "3+2" rule, was promulgated by the Union of European Football Associations (UEFA), which oversees club and international competitions operating in Europe. The ECJ's first major foray into the rules of the sporting world has generated a number of subsequent cases before the court in respect of the imposition of transfer "windows" and national team selection policy.[2] In addition the Commission of the European Communities has actively pursued further amendment of the football transfer rules, though by means of negotiation with the footballing authorities rather than litigation. *Deutscher Handballbund eV* v. *Kolpak* represents a further expansion of the sphere of influence of Community law in the field of sporting regulation.

THE FACTS

The case concerned a Slovakian professional handball player, Maros Kolpak. From March 1997 Kolpak had been employed as a goalkeeper by the German handball team TSV Ostringen eV Handball in the German League. The Deutsche Handballbund

[1] Case C-415/93, [1996] All E.R. (EC) 97.

[2] *Jyri Lehtohnen and Castors Canada Dry Namur-Braine* v. *Fédération Royale Belges des Sociétés de Basketball*, Case C-176/96; *Deliège* v. *Liège Francophone de Judo et Disciplines Associées ASBL*, Cases C-51/96 and C-191/97.

(DHB), the body that organises national handball league and cup competitions in Germany, had issued Kolpak with a player's licence marked with an "A". The significance of this mark was that, under the rules adopted by the DHB (the *Spielordnung*) nationals of non-EU states or of states with which the EU had not made agreements pertaining to freedom of movement under Article 39 EC were restricted as to the extent to which they could participate in league and cup games. This restriction took the form of a quota, forbidding participating teams from fielding more than two players with an "A" licence. Kolpak was issued with such a licence as a result of his Slovak nationality. He made a request to the DHB that the "A" marking be removed from his licence and when this was refused he brought an action before a Regional Court in Dortmund challenging the DHB's decision. Kolpak succeeded at first instance but the DHB subsequently appealed against this decision to the *Oberlandsgericht*, which in turn made an Article 234 EC reference to the ECJ.

The ECJ was asked to determine whether the Association Agreement between the European Union and Slovak Republic should be interpreted in such a way as to render the restriction based on nationality unlawful. Article 38(1) of the Association Agreement states *inter alia*:

> [t]reatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.

Rule 15 of the *Spielordnung* did make provision for players falling within the auspices of the free movement provisions under Article 48 EC (now Article 39) to be treated in precisely the same manner as German and other EU nationals. However, the German court was of the opinion that this did not apply to Kolpak, as he was a Slovak national and thus governed by the Association Agreement between the European Union and Slovak Republic and not by Article 39 EC. Therefore, on a strict interpretation of the *Spielordnung*, Kolpak was correctly treated as an "A" category player. The question before the ECJ was therefore whether Rule 15 of the *Spielordnung* restricting the number of non-EU nationals able to represent any one team was contrary to the Association Agreement between the European Union and the Slovak Republic.

THE JUDGMENT

The ECJ first considered the question of the direct effect of Article 38(1), observing that an identical measure in the Association Agreement between the EU and Poland had already been considered to be capable of direct effect in a previous judgment.[3] Similarly, the ECJ noted that the two Association Agreements shared common objectives and contexts and thus concluded that Article 38(1) of the Association Agreement between the EU and the Slovak Republic was capable of having direct effect and therefore of being applied by the German court.

The ECJ recognised that the judgment in *Bosman* set out the principle that the prohibition of discrimination set out in Article 39 EC applied to the rules of sporting associations determining the conditions under which professional sportsmen may be employed. The court was then concerned to determine whether its interpretation of that provision could be effectively transposed to Article 38(1) of the Association Agreement. The ECJ concluded that Article 38(1) of the Association Agreement did not specifically

[3] *Pokrzeptowicz-Meyer*, Case C-162/00, [2002] ECR I-1049.

grant Slovak nationals freedom of movement within the Community. It would nonetheless be appropriate, in the light of the objectives and context of the Association Agreement, for the ECJ to give Article 38(1) a meaning identical to that of Article 39 EC.

The DHB had argued that Article 38(1) of the Association Agreement applied only to conditions once in employment and not to access to employment itself. It was further argued that this precluded Kolpak from making use of the provision as the *Spielordnung* acted in such a way as to limit access and was thus unaffected by the provision. The ECJ rejected this argument. Whilst it was accepted that Article 38(1) of the Association Agreement was limited to Slovak nationals already in lawful employment within a Member State, and thus did not afford Kolpak rights in respect to access to employment, it also noted that Kolpak was already lawfully employed in Germany and that the rule in question affected his conditions of employment. It could, therefore, be considered to fall within the ambit of Article 38(1) of the Association Agreement as the rule impacted upon his ability to perform as a professional sportsman once lawfully employed. The ECJ acknowledged that in previous judgments it had accepted that it would be lawful to regulate team composition on the basis of nationality.[4] However, such discrimination would only be lawful where it was made on the basis of non-economic, sporting reasons, such as the selection of a national representative team.

The ECJ concluded that the *Spielordnung* were indeed in breach of Article 38(1) and thus that it was unlawful to place a Slovak national such as Kolpak into a category whose participation in a professional team, once already in employment, was effectively limited.

ANALYSIS

From a purely legal perspective this case does not appear to represent a particularly significant development in the law. However, if one adopts a more holistic approach the case provides further evidence of the influence of European Community law and, in this case Association Agreements with non-EU states, in the regulation of sporting activity. While *Kolpak* does not represent an epochal shift, such as that precipitated by *Bosman* and subsequent agreements with the European Commission on the transfer systems operated in respect of association football, it does signify the continued engagement of law and sporting regulation at a continental level. It is perhaps indicative of a greater acceptance of legal, and particularly European Union, intervention in sport that this case has been greeted with a deafening silence in the media: in direct contrast to the outcry that followed *Bosman*. There may, at least in the context of the United Kingdom, be a degree to which failure to acknowledge the implications of the case is as a direct result of its pertaining to handball, rather than the sacred cow of soccer.

The practical impact of this ruling is that bodies regulating professional sport in EU member states will need to take account of the ECJ's position in *Kolpak* and, where necessary, amend their rules so as to ensure that citizens of nations such as the Slovak Republic and Poland, which have entered into Association Agreements containing such a clause, are not discriminated against once in employment by their inclusion in categories of players subject to a quota limiting participation in particular teams.

[4] *Dona* v. *Mantero*, Case 13/76, [1976] ECR 1333.

Perhaps the most obvious means by which regulating bodies will seek to circumvent this is by placing limitations on the number of non-EU/EEA players that may be *employed* by any one team rather than upon team composition for any given contest. This would take advantage of the fact that the clause in question serves to prevent discrimination on the grounds of nationality for those already employed and, unlike Article 39 EC, does not prevent such discrimination in relation to access to employment.

The impact of *Kolpak* may, in any case, be limited. Those countries that have entered into Association Agreements with the EU have generally done so with a view to joining the Union. For this reason the influence of the ruling may be relatively short-lived, as the nations affected become part of the EU, allowing their citizens to take full advantage of the free movement provisions of the EC Treaty. Nevertheless the case should serve as a warning to sporting authorities that *Bosman* did not represent the end of the road in respect of legal engagement in sports administration. Instead it denotes a first stride, albeit giant, down a path where sport and law become increasingly entwined.

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PRE-IMPLANTATION GENETIC DIAGNOSIS: A CASE FOR LAW REFORM?

R. v. *Human Fertilisation and Embryology Authority, Ex Parte Josephine Quintavalle*

[2003] EWCA Civ 667, [2003] 3 All E.R. 257 (Court of Appeal)
(Lord Phillips M.R., Schiemann and Mance L.JJ.)

INTRODUCTION

Over a decade ago, scientists at Hammersmith hospital in London developed a technique called pre-implantation genetic diagnosis (PGD).[1] PGD involves taking a 6–8 cell *in-vitro* embryo, removing one or two cells from it by biopsy and then analysing genetic material taken from these cells. The development of the technique opened the door to IVF users being able to choose to have some of the genetic characteristics of their *in-vitro* embryos identified. It is possible, for example, to use it to detect certain genetic disorders. Indeed, it is now widely used across Europe for this purpose.[2] Genetic disorders fall into two categories: chromosomal anomalies and gene defects.

> Chromosomes are the structures in the nucleus of a cell which carry the genes of the individual concerned. Normal human (diploid) cells contain 46 chromosomes – 22 pairs of autosomes and 2 sex chromosomes XX (female) and XY (male).[3]

Some anomalies result in the embryo not surviving, whilst others will cause an abnormality (*e.g.* Down's Syndrome) or disorder. Gene defects are mutations of the genetic code that can result in a genetic disease. Examples of such diseases are cystic fibrosis, beta thalessemia and Duchenne's muscular dystrophy. It is also possible to use PGD to identify the tissue type of *in-vitro* embryos and the gender, hair and eye colour for which they are encoded. PGD could also be used to predict behaviour and intelligence, *if* science can ever overcome the difficulties of identifying these attributes from genes.[4]

The revolutionary aspect of PGD is the fact that IVF clients can use it to decide which, if any, of their *in-vitro* embryos to implant. For example, if it is found that an *in-vitro* embryo has a particular disorder, the clients may choose not to implant it. Alternatively, the clients might be able to fulfil a desire to implant an embryo that is encoded for blue eyes and blonde hair. Both such uses hint that PGD raises serious ethical issues. Indeed, there are three hurdles that must be overcome if PGD use is to be considered ethical: firstly, it must be shown that IVF itself is ethical. Secondly, it must be shown that to test and carry out a biopsy on an *in-vitro* embryo is not *of itself* unethical. Thirdly, since PGD works within a regime where people can choose to discard *in-vitro* embryos, it must be shown that it is ethically acceptable to discard and to do so selectively according to genetic criteria.

The legal control of PGD hinges on interpretation of the Human Fertilisation and Embryology Act 1990. The Act was passed to make provision in connection with human embryos and subsequent development of such embryos; to prohibit certain

[1] Handyside, A.H., Kontiogianni, E.H. *et al*, "Pregnancies from Biopsied Human Preimplantation Embryos Sexed by Y-Specific DNA Amplification" (1990) 344 *Nature* 768–770.

[2] Gunning, J., "Pre-implantation Genetic Diagnosis" in Gunning, J. (ed.), *Assisted Conception: Research Ethics and Law* (Ashgate, 2000), p. 21.

[3] *Ibid.* at p. 18.

[4] Nuffield Council on Bioethics, (2002) "Genetics and Human Behaviour: The Ethical Context", para. 13·60, http://www.nuffieldbioethics.org.

practices in connection with embryos and gametes, to establish a Human Fertilisation and Embryology Authority and for other related purposes. The Authority can license clinics to undertake some practices which without a licence would be prohibited. The Authority considers PGD to be such a practice. Following a public consultation in 1993 it had concluded that PGD should not be used for gender selection for social reasons.[5] In 1999 the Authority consulted with the public again on the broader issue of when, if at all, PGD should be used.[6] At this stage the Authority had already licensed four centres to use the technique to detect chromosomal anomalies and *serious* disorders.[7]

The instant case involved the now famous Hashmi family. Mr. and Mrs. Hashmi wanted to use PGD to test *in-vitro* embryos not just for a serious disorder but also for tissue-type. The context was that one of their existing children, Zain, had a serious inherited blood disorder called beta thalessaemia. A stem cell transplant was a possible cure. However, none of the family was a suitable genetic match for Zain. The Hashmis set about having more children in the hope that if they had one who was both matched *and* free of beta thalessaemia, stem cells from the placenta could be transplanted to Zain. Mrs. Hashmi went on conceive naturally and abort an embryo that was shown by pre-natal testing (PND) to have beta thalessaemia. From a second natural conception she had a child who was tested free of beta thalessaemia but was not a match. After this she met Dr. Simon Fishel, the Managing and Scientific Director of CARE (Centres for Assisted Reproduction Limited). He suggested that if Mr. and Mrs. Hashmi used IVF, PGD could be performed on the resultant embryos to find one that was beta thalessaemia free and a match. The Authority accepted a request to allow such dual purpose use. However, before anything could proceed, Josephine Quintavalle, acting on behalf of a pressure group called Comment on Reproductive Ethics (CORE) brought an action for judicial review of the Authority's decision.

THE DECISION OF THE HIGH COURT

Giving judgment in the High Court, Kay J. made two findings. Firstly, he found that the biopsy and testing activities involved using an embryo and, hence, could not be unregulated activities because section 3(1) of the Act states that embryos can only be created, kept or *used* pursuant to a licence.[8] On appeal, the Authority conceded this point.[9] However, it challenged[10] Kay J.'s second finding: that testing for a tissue match could not be licensed.[11] This second conclusion was largely based on an analysis of two provisions: paragraph 1(3) of Schedule 2, which limits the granting of a licence for treatment to activities that "appeared to the Authority to be necessary or desirable for the purpose of providing treatment services";[12] and section 2(1) which defines treatment services as "medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children". Kay J.

[5] See the HFEA/ACGT Consultation Document, (1999) "Pre-Implantation Genetic Diagnosis", para. 10, www.hfea.gov.uk.

[6] *Ibid.*

[7] *Ibid.* at para. 11. One additional centre is authorised to carry out the biopsy part only.

[8] [2002] EWHC 2785 (Admin) at paras. 11–14.

[9] [2003] EWCA Civ 667 at 20.

[10] *Ibid.*

[11] [2002] EWHC 2785 (Admin) at paras. 15–18.

[12] Schedule 2 classifies licensable activities into research, storage and treatment. Genetic analysis for the purpose of tissue-typing was clearly purporting to be the last of these.

held that testing for tissue matches was not necessary or desirable for the purpose of assisting a woman to carry a child because it had no impact on the ability of the woman to carry the embryo after implantation.[13]

THE DECISION OF THE COURT OF APPEAL

The Court of Appeal took the view that a biopsy to facilitate testing for the purposes at hand presented no problem provided that testing for these purposes was itself licensable. The court accepted three contentions about the law relating to PGD:[14]

1. It was not a totally unlicensable activity when done for the purpose of detecting abnormality.

2. It could be licensed not just for the purpose of detecting abnormalities that threatened carriage and birth *but also* those that only threatened the health of the child after birth and/or the health of future generations.

3. A licence could also cover testing for desirable characteristics (at the very least in the instant case where if the embryo with the desirable characteristics was implanted and given birth to, its mother might be able to cure Zain with a donation of stem cells from the placenta).

The first contention is easy to agree with. Paragraph 1(1)(d) of Schedule 2 allows under licence "practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose". Parliamentary proceedings made it clear that Parliament's view was that this section would allow PGD for the detection of abnormality.[15] Furthermore, paragraph 3(2)(b) of Schedule 2 of the Act permits embryo research activities to be licensed for the purpose of "developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation". It would clearly be inconsistent to allow PGD for the detection of abnormality in the context of research but not in the context of treatment.

In relation to the second contention, counsel for Mrs. Quintavalle sought to reconcile the fact that Parliament had intended to allow PGD to test for abnormalities with Kay J.'s view that the phrase "treatment services" in section 2(1) was restricted to activities that assisted women to overcome problems in conceiving and carrying a child to term.[16] The reasoning was that PGD to screen out embryos with abnormalities was consistent with helping women do this because abnormalities generated a greater risk of problems in pregnancy and birth.[17] However, as Mance L.J. noted, it had been demonstrated in expert evidence that some abnormalities *did not* generate such a risk.[18] Hence, the implication of Kay J.'s approach is that the Act only allows testing abnormalities to be licensed where the abnormality poses an added risk of problems in pregnancy and birth. However, the Court of Appeal held that licensing was not restricted in this fashion for two reasons: firstly, that there was nothing in Parliamentary proceedings or in the Act's approach to research that supported such a

[13] [2002] EWHC 2785 (Admin) at para. 17.

[14] See particularly the judgment of Lord Phillips M.R. [2003] EWCA Civ 667 at para. 31 onwards.

[15] The matter was discussed in Parliamentary proceedings with the Health Minister, Kenneth Clarke, making an express statement confirming this position. For detailed arguments to this effect see the judgments of Lord Phillips M.R. at paras. 33–6 and 41 particularly and Mance L.J. at paras. 120–128.

[16] *Ibid.* at para. 118.

[17] *Ibid.*

[18] *Ibid.*

restriction;[19] and secondly, that the phrase "assisting women to carry children" under section 2(1) should be interpreted broadly to include any assistance without which women might be less inclined to have children. This meant that even testing for abnormalities that did not affect pregnancy or birth was licensable since without the security of having it some women would be put off having children altogether.[20]

The third contention was, did this more generous definition of treatment services also support biopsy and genetic testing that enabled a choice between healthy embryos based on a desire for certain characteristics? The Court of Appeal reasoned that it does, as without it a woman will not get to have the child she wants and this may lead her not to want the child at all. Indeed, this appeared to be the scenario in the immediate case; the Hashmis did not seem to want another child unless it was not only free of beta thalessaemia but had a genetic make-up compatible with Zain.

CRITIQUE OF THE COURT OF APPEAL'S REASONING

The *ratio decidendi* of the Court of Appeal's decision can be found in the statement of Lord Phillips M.R. that where PGD

> has the purpose of producing a child free from genetic defects, or of producing a child with stem cells matching a sick or dying sibling, the IVF treatment that includes the pre-implantation genetic diagnosis constitutes "treatment for the purpose of assisting women to bear children".[21]

However, this view of the law requires us to accept an extremely broad view of the term "treatment". The strict view of the term "treatment" is that it is something designed to address an underlying condition. The relevant underlying condition of those seeking IVF is that they have problems having children naturally or at least having *healthy* children naturally. *In-vitro* embryo biopsy and testing can be consistent with the latter when it is to enable people to choose an embryo free of an abnormality, such as beta thalessaemia. However, biopsy and testing to enable people to choose an embryo genetically encoded with a particular eye or hair colour, gender (on a social basis) or tissue match with an existing child is *not* treating an underlying condition. Medical interventions in other contexts that do not treat an underlying condition are on the borderline of the term "treatment" at best when they are designed to undertake an elective "improvement" on a well individual (*e.g.* elective cosmetic surgery). However, where - as in the instant case - they are purely about fulfilling the needs of a third party, they are firmly entrenched within the non-therapeutic category. The Court of Appeal's view that this was treatment is thus dubious and subversive of the purpose of these sections: that being to help women overcome problems having (healthy) children naturally. Mrs. Hashmi was not using the services for this purpose but to fulfil her desire to help an existing child (to the point where it appeared she would not want a child at all unless guaranteed that both forms of testing were performed).

ETHICAL ISSUES

Is IVF in itself ethical?

Before examining the issues specific to the instant case, I want to consider whether, regardless of the circumstances, the practice of IVF can be justified on ethical grounds.

[19] *Ibid.*

[20] *Ibid.* at para. 43.

[21] *Ibid.* at para. 48.

Clearly, where consenting adults wish to have a family naturally, this is something extremely private in which the state should not interfere. However, the question of whether humans should use technology to reproduce themselves is very much one that the state has a role in determining. I take the view that whilst technology should be used to enhance our lives and overcome certain limits, there is, in Kantian terms, a categorical imperative[22] to have humility in relation to the life creation process. Such an imperative would bar the artificial creation of existing forms of life. It would also bar the artificial creation of variants such as pigs with human genes in them; plants with genetic material from other plants and animals artificially inserted into them and finally embryos that have been cloned. The norm is to focus on the consequences of such creation in assessing whether it is right or wrong. However, public concern may also be based on the view that we have no business treading in these areas. The European Convention on Human Rights and Biomedicine appears to voice a form of such absolute thinking by banning the creation of cloned human beings partly on the basis that allowing it offends human dignity.[23] If human cloning is wrong partly because it is an "instrumentalisation of human beings"[24] then creating other forms of "artificial" life and creating existing forms of life artificially can be viewed as wrong partly on the same basis.

Is testing the embryo ethical?

Even if IVF is to be used does that mean we should allow PGD? There are concerns about its accuracy and also that it may have adverse effects on the embryo much as it is thought pre-natal diagnosis (PND) may do. Although there are some studies on the accuracy and effect of PGD and some comparisons with the effect of PND, the quality of the evidence appears to be of limited value. In reviewing the data, McIntyre concludes that there is:

> no reliable evidence to compare effects of PGD with other pre-natal diagnostic strategies on take home baby rates and congenital anomalies among couples undergoing IVF. We found no reliable evidence regarding diagnostic sensitivity and specificity of PGD for both chromosomal and genetic abnormalities, although case series have reported that missed diagnosis is rare.[25]

She suggests that:

> Controlled studies are needed to compare PGD versus "conventional" pre-natal diagnostic strategies among couples undergoing IVF. Studies should report on a standard set of pre-defined outcomes including take home baby rate per couple, details of neonatal examination, ante-natal testing rates and results and sensitivity and specificity of the diagnostic technique. Until such time, the conclusions suggested by the identified studies should be regarded as tentative.[26]

[22] Kant states that if something "is represented as good in *itself*, and thus as a necessary principle for a will which is in itself in accordance with reason, then the imperative is categorical", Kant, I., *Groundwork of the Metaphysics of Morals* (Akademie, 1785), p. 414. Ultimately the only difference between the utilitarian and the deontologist is that the former only believes in one categorical imperative - that of utility – and treats all other goals not as ends in their own right but as subservient to the aim of best fulfilling their concept of utility.

[23] The Additional Protocol on Prohibition of Cloning of Human Beings (January 1998) follows partly from "the principle of protecting human dignity found in Art. 1 of the Convention", Zilgalvis, P., "The European Convention on Human Rights and Biomedicine: Its Past, Present and Future" in Garwood-Gowers, A., Tingle, J. and Lewis, T. (eds.), *Healthcare Law: The Impact of the Human Rights Act 1998* (Cavendish, 2001), p. 44.

[24] *Ibid.*

[25] McIntyre, L., "Pre-implantation diagnosis" (2001) 1 *Steer* 15 at 7–8, www.signpoststeer.org.

[26] *Ibid.*

A dedication to detailed, timely and impartial analysis of the effects of PND and PGD is called for.

The ethical context of PGD use – questions of creation, use and disposal of in-vitro embryos and their selective disposal

Since PGD is designed to facilitate selective disposal of *in-vitro* embryos, a discussion of the ethics of genetic selection and of embryo discarding *per se* is crucial. The law relating to abortion is the traditional means of protecting embryos. The Offences Against the Person Act 1861, section 58, makes it a criminal offence, punishable by life imprisonment to, "procure the miscarriage of any woman". Section 59 criminalises the supply of drugs or other instruments for use in procurement of a miscarriage. The Infant Life (Preservation) Act 1929, section 1(1) creates an offence of child destruction to protect the "child" (*i.e.* foetus) that is "capable of being born alive" from any person undertaking wilful acts with "intent to destroy" its life. However, the Abortion Act 1967, section 1(1)[27] provides that:

> . . . a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith-
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Conflicting categorical imperatives are in operation here. The principal conflict is between the life of a being and the right of the pregnant woman to bodily control. One must give way for the other to be protected. The law comes up with a compromise. As regards medical interventions generally, the pregnant woman's right to self-determination is protected if she is competent[28] and her best interests protected if she is not.[29] However, her right to bodily security on its own is treated as insufficient to warrant her having an abortion. There must additionally be a disability of the kind laid out in section 1(1)(d) or (s)he and/or her existing children must have a sufficient health interest (combined effect of sections 1(1)(a) – (c)). An interesting feature of this is that it still requires this interest to be present when conception occurred from rape. The philosophy appears to be that if one is hosting a being – or at least this particular kind of being which is either a potential human being or according to some "a human being or person with potential"[30] – one needs a justification not to continue doing so even if that hosting was not brought about by voluntary conduct. This unacceptably contravenes a legal norm that people should not have to sacrifice their right of bodily

[27] As amended by the Human Fertilisation and Embryology Act 1990, s. 37.

[28] *St. George's Health Care NHS Trust* v. *S.* [1999] Fam 26 (C.A.).

[29] See, for example, *Re M.B. (An Adult: Medical Treatment)* [1997] 2 F.L.R. 426 (C.A.).

[30] Ford, N., *When Did I Begin?* (Cambridge University Press, 1998), p. 82. Ford suggests that this does not apply to the embryo that has not yet developed a primitive streak (*ibid*, at pp. 164–182 especially).

security to meet the needs of others unless they have voluntarily engaged in conduct that results in them owing a duty to give up that security to those others.[31]

Section 1(1) is also clearly aimed at making it more difficult to have an abortion after the 24th week at which point the foetus is capable of being alive.[32] This is an example of the law protecting the embryo/foetus differentially according to its level of development. Another is the fact that abortion law does not cover the embryo that is not yet implanted. Offences under the 1861 Act are connected with the procurement of miscarriage, which requires carriage. Carriage does not take place until implantation according to the High Court in *R.* v. *Secretary of State for Health, Ex Parte John Smeaton (On Behalf of The Society for the Protection of Unborn Children) and (1) Schering Health Care Ltd (2) Family Planning Association (Interested Parties).*[33] This position protects the freedom to use birth control methods that prevent implantation of a fertilised embryo, such as the morning after pill and IUD.[34] Non-implanted embryos are only protected by reproduction law when they are *in-vitro* (by the Human Fertilisation and Embryology Act) and here only to a limited degree. The rationale for this is principally that they have not yet developed a primitive streak. The primitive streak develops at 15–18 days after conception and results in an embryo having cellular identity.[35] Up until the middle of the last century, the primitive streak was regarded as sufficiently significant by many to warrant embryos that had not yet developed it being given a separate name within:

> a threefold distinction of pre-natal life. So for instance, the physician and Jesuit Austin O'Malley opens Chapter 3 of his book The Ethics of Medical Homicide (1921) remarking without ado that: "By embryologists from the moment the spermatozoon joins the nucleus of the ovum until the end of the second week of gestation of conception the product is called the *Ovum*; from the end of the second week to the end of the fourth week it is the *Embryo*; from the end of the fourth week to birth it is the *Fetus* (p. 33)".[36]

Some thinkers try to make light of the significance of the embryo before the primitive streak lacking cellular identity by using what Lee and Morgan classify as an "I'm in there somewhere" type of argument.[37] However, this argument misses the point that the embryo in this state is not, in fact, an embryo at all but a bunch of cells, at this point only an undetermined group of which will go on to become an embryo. This would suggest that we are dealing with something out of which an identity will be formed rather than something that already has an identity within it.

The question is how should we treat this identity-less ovum? The answer depends on what we construe its potential to be and what we make of this. In European terms, Mori notes that the submerging of the ovum into the embryo category became

[31] For the norm and a general philosophical defence of it see further Garwood-Gowers, A., "Intervention on the Incompetent that Benefits Others: A Clarification and Defence of the Best Interests Test" (paper presented to the SLSA conference at Nottingham Trent University, April 2003). In the abortion context specifically, Thompson gives the hypothetical example of a famous unconscious violinist who has a fatal kidney ailment. The Society of Music Lovers finds you to be suitable for the violinist to be "plugged into". They kidnap you and against your will they connect your circulatory system with his. If you unplug him before the end of a nine-month period he will die. She argues that you should not be forced to stay connected and that by analogy forcing a woman to host an embryo conceived during involuntary sexual intercourse is also wrong (Thomson, J.J., "A defense of abortion" (1971) 1 *Philosophy and Public Affairs* 1).

[32] Though there must be doubts over whether "section 1(1)(c)" is harder to satisfy than "section 1(1)(a)".

[33] [2002] EWHC 610 (Admin), [2002] 2 F.L.R. 146.

[34] The case itself concerned the morning after pill, Schering being a pharmaceutical company.

[35] The then Archbishop of York, John Hapgood, in the legislative debates of 1989 (*House of Lords, Official Report*, 8 February 1990, col. 956).

[36] Mori, M., "The Influence of Pluralism in the Perception of the Status of the Embryo" in Gunning, J. (ed.), *Assisted Conception: Research Ethics and Law* (Ashgate, 2000), p. 76.

[37] *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone, 2001), at p. 70.

common after the Second World War.[38] His thesis is that this was linked to a wider, Christian-dominated, theoretical treatment of the reproductive process. Mainstream Christian churches viewed it as a moral absolute that sexual acts should only be undertaken within the bounds of marriage and for the sole purpose of reproduction. To this end they all opposed contraception until 1930 when the Anglican Church altered its view. St. Augustine's particular view was that contraception was homicidal for "he who is about to become a man is one already, and all the fruit is contained in the seed".[39] In the modern context, this is patently absurd, not least because the seed in question does not even have the latent potential to be a fruit within itself; to become an ovum it needs to mix with another type of reproductive material (an egg). Furthermore, more modest expressions of this restrictive view of sexual expression and reproduction are still problematic. As Mori notes, such expressions obviously conflict with the view that it is legitimate to control reproduction,[40] a view that can be morally located within the perspective that humans are here to grow and that sexual expression is one dimension of experience through which growth can occur. If the overarching purpose is growth, birth control is potentially not just acceptable but a positive personal moral duty where having a child would give rise to more problems than benefits.

Mori's solution to the conflict is to suggest that people "who believe that there are absolutes are allowed to behave accordingly, but they cannot impose their view on people who think that there are no absolutes".[41] However, this defence of reproductive freedom can be criticised as nihilistic. Ultimately, if we do not defend some values as absolute, such as the value of not harming others except in legitimate self-defence, we would be left with a Hobbesian lawless state. A better line of attack is to suggest that it is by no means obvious that we should sacrifice growth for the sake of sexual expression defined in such a limited way. Furthermore, the limited view can be attacked as highly questionable from its own religious basis. The psychologist Wilhelm Reich did this in *The Mass Psychology of Fascism*. He addressed a mass rally in Berlin on the subject of sex and reproduction in the early 1930s through a series of questions:

1. The church contends that the use of contraceptives is contrary to nature, as is any interference with natural procreation. If nature is so strict and so wise, why did it produce a sexual apparatus that does not impel one to engage in coitus only as often as one wants to procreate children, but on the average of two or three thousand times in a lifetime?
2. Would the representatives of the church who were present state openly if they engaged in sexual intercourse only when they wanted to procreate children? (They were Protestant pastors.)
3. Why did God produce two kinds of glands in one's sexual apparatus: one for sexual excitation and one for procreation?
4. How did they explain the fact that even small children developed a sexuality, long before the procreation function begins?[42]

[38] *Ibid.* at p. 7.

[39] Meline, P. (Brown, P., translator) *The Moral Law of the Family* (Sands and Co., 1929), p. 111.

[40] Mori, M., "The Influence of Pluralism in the Perception of the Status of the Embryo" in Gunning, J. (ed.), *Assisted Conception: Research Ethics and Law* (Ashgate, 2000), p. 81.

[41] *Ibid.*

[42] Reich W., *The Mass Psychology of Fascism* (Souvenir Press, 1970), p. 128.

Reich's thesis is that the restrictive view of the role of sexual expression was in fact merely a distortion and inhibition of its true function. He proceeds to demonstrate that this repression is at the heart of the development of authoritarian character and hence of the development of fascism within the psyche.[43]

There are sound reasons indeed, then, to suggest that there is nothing wrong with active contraception. The fact that the sperm has the potential to combine with an egg and ultimately become a human means no more than that it is of special value. This brings us back to the ovum. Harris has suggested that just because the ovum/embryo/foetus has potential to become a human does not mean that we should treat it any differently from sperm or even from many ordinary cells in the human body which could be used to clone a human by cell nuclear replacement.[44] However, the reason why an ovum is different from both sperm and such ordinary cells is that it is already a life-form with the latent potential to become a human already entirely genetically encoded within it. This special nature means that it has special value. However, does it have more than that? It has a much weaker case than the embryo proper for arguing that it has rights because of its lack of identity. The case is too weak to warrant the law restricting the freedom of a woman who has voluntarily allowed its creation to be forced to continue hosting it or be forced to have it inserted after being created *in-vitro*. Equally, it is probably too weak to suggest that she should be restricted to creating the number of *in-vitro* ova that she intends to have implanted. Indeed, if the ovum's significance lies wholly or largely in its potential to become an embryo proper and then a human; creating an excess beyond that number within reasonable limits may even be desirable: it maximises the chance of at least one ovum beating the poor odds of treatment success and fulfilling its latent potential. It would also, on this basis, be desirable to create an excess as an "insurance policy" against one or more ova being found by PGD to have a chromosomal anomaly or serious disorder that would affect pregnancy or birth.

A further category of actions in relation to the *in-vitro* ovum occupies a middle ground because they maximise the ability of ova to fulfil their potential only to the extent that without them women might not want to implant at all. The use of PGD to find an ovum with characteristics that fit the needs of an existing child and to detect genetic disorders that do not affect pregnancy or birth, fall into this category. Interestingly, after granting a licence in the Hashmi case, the Authority rejected an application for tissue-typing from a family whose child suffered from a rare condition called Diamond Blackfan anaemia. The only difference with this case was that the biopsy was being performed to allow testing for tissue-type, not for genetic disorder as well. However, in both cases ova were created to fulfil the needs of a sick child and in both they would be discarded if they could not fulfil that role. Hence, the Authority's own Ethics Committee was right to suggest that there was no ethical basis to treat the two cases differently.[45]

Using PGD to find an ovum genetically encoded with a particular eye or hair colour or gender (for social reasons) also fall into this category. However, they do so in a much more consumer orientated way that implies that there is no case for giving ova *any* moral consideration in their own right. Indeed, such testing may be more

[43] *Ibid.*

[44] Harris, J., *The Value of Life: An Introduction to Medical Ethics* (Routledge, 1985), pp. 11–12.

[45] HFEA, (November 2001), "Ethical Issues in the Creation and Selection of Pre-Implantation Embryos to Produce Tissue Donors", www.hfea.gov.uk.

questionable than creating *in-vitro* ova purely as subjects for research[46] which occupies an end ground of actions which have nothing to do with enabling ova to fulfil their potential.

In terms of consequences, it is difficult to evaluate these forms of action *vis-à-vis* the ovum completely without our being certain whether it should have rights. However, one thing is clear: allowing genetic characteristics to influence selection of *in-vitro* ova is eugenic in the broadest sense of the word because it alters the composition of the human gene pool.[47] When those making this choice do so *because* of genetic characteristics rather than because of the impact on their life of having a child with these characteristics, we enter the realms of eugenics in the narrow sense of the word.

Humans can have powerful instinctive fears as regards their own future, their ability to procreate successfully and the future of their wider group or nation. In the last century, several states expressed, legitimised and even encouraged these deep-rooted fears to perpetrate various forms of narrow eugenics. One example is the sterilisation on social grounds of those whose procreation was deemed to put the future flourishing of the nation under threat.[48] "Narrow" eugenics on humans is now widely condemned but it continues to be given scope for expression on both the embryo and the ovum. With the implanted embryo, it is almost actively condoned by the structure of the Abortion Act 1967, section 1(1)(d). In setting out the circumstances in which abortion can be authorised, sections 1(1)(a), (b) and (c) weigh the interests of the embryo/foetus with those of the woman/her family. However, the subsection 1(1)(d) merely requires a (substantial) risk of it being born with (serious) handicap. In other words, it encourages a focus on the nature of the problem rather than its impact on others.[49]

With an *in-vitro* ovum the protection is at best similar. Tissue-typing does not give rise to narrow eugenics selection. However, the use of PGD to detect abnormality *may do so* even if that abnormality is serious, as the Authority currently requires. This is because without establishing the intentions of the parties such decisions can be made on the basis of the nature of a disability rather than its impact on others. The Authority leaves it to clinicians to determine what serious means on a case-by-case basis rather than compiling a list of such disorders. This is understandable for a number of reasons. For example, the list would have to be constantly reviewed as understanding and treatment of disorders affected judgment of their seriousness and the list could not take into account family and personal circumstances or the potential nature, severity and likelihood of transmission in an individual case. In addition, the Authority appears to have a significant measure of confidence in the capacity of centres to define the term "serious" in a reasonable way:

[46] Research can only be carried out on embryos under licence and only until the primitive streak develops (between days 15–18). However, they can be deliberately created for use in research. Article 18(2) of the European Convention on Human Rights and Biomedicine subsequently banned creation for such a purpose but the Convention is not binding on the UK because the UK has not yet signed or *a fortiori* ratified it. The UK is the only country to allow their creation for research and both Germany and Austria ban research on embryos altogether. For the approach of European member states in general on this issue see Gunning, J., "Overview: Legislative Approaches" in Gunning, J. (ed.), *Assisted Conception: Research Ethics and Law* (Ashgate, 2000) and Lee and Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone Press Ltd, 2001), pp. 85–87. A dissenting minority of the Warnock committee stated that embryos "should not be used for experimentation. Still less should they be deliberately created for the purpose of experimentation" *(Committee of Inquiry into Human Fertilisation and Embryology,* Cmnd.9314, London: HMSO, 1984, Expression of Dissent, 90, para. 5).

[47] See Kitcher, P., *The Lives to Come: The Genetic Revolution and Human Possibilities* (Penguin Press: London, 1996). Interestingly Kitcher says it is also eugenic to do nothing when we can do something about the gene pool. On one version of semantics this may be so, but to use the word eugenic in this way is to make discussion unnecessarily difficult by departing from normal usage without good reason.

[48] See Kelves, D., *In the name of Eugenics* (University of California Press, 1985), p. 73.

[49] It is more eugenic than the lines of reasoning used to say that some people with extremely low quality of life are better off not having treatment or continued treatment since these are – however misguided – at least based on a genuine attempt to assess interests.

> At present ... centres are understood to be applying the criteria for termination of pregnancy for foetal abnormality published by the Royal College of Obstetricians and Gynaecologists ... This limits the use of PND to cases where there is a precise diagnosis and a "substantial risk" of "serious" handicap.[50]

In this respect ova are given the same level of protection against being discarded on grounds of disability as is provided to embryos pursuant to these guidelines, which are an interpretation of the Abortion Act 1967, section 1(1)(d). However, on the downside, there are concerns that the term "serious" is given too diluted an interpretation.[51] If so, the likelihood of decisions being made on a narrow eugenics basis is increased. Furthermore, it is far easier emotionally, physically, strategically and practically to give up *in-vitro* ova than a (probably lone) embryo that is already implanted. Hence, despite its financial cost and invasiveness, "PGD has a far greater eugenic potential than prenatal genetic testing".[52] If there is an opportunity for decisions to be made on a narrow eugenics basis, PGD will make it easier to take advantage of the opportunity.

Even when selection after PGD is not done on narrow eugenics grounds, it poses potential dangers. Judging the characteristics of *in-vitro* ova could encourage people adversely to judge human characteristics generally, to the extent that, where individuals have characteristics thought of as less desirable, adverse attitudes and prejudicial treatment could be condoned. Social pressure could also be put on potential parents to select. Already, the Authority has rather bizarrely[53] asked in its consultation document whether the "principle of the welfare of the child (can) ever be compatible with a decision to begin a pregnancy knowing that a child will be born with a genetic disorder?"[54] Even if PGD is restricted to more serious purposes, as is currently the case, there may be pressure to allow it in less serious cases to the point at which the process of founding a family is viewed in a destructively consumerist fashion. Indeed, this pressure already exists. The Authority is already considering whether to allow PGD to detect gender beyond situations where there is a special risk of chromosomal anomaly or serious genetic disorder to situations where the parents already have several children of the opposite gender. The Nuffield Council on Bioethics has gone further. It suggests that, should we gain the ability, PGD should not be used to screen for "behavioural traits in the normal range such as intelligence, sexual orientation and personality traits"[55] but that a case might still be made for using it to enable one to have a child with modestly enhanced behavioural traits.[56] It suggested that this "would not seriously undermine the present relationship between parents and their children".[57] It was not entirely persuaded by conservative reasoning on the matter – such as the view that attempts to control the type of child one has in this way represents a failure to have natural humility.[58] The Council's view is difficult to agree with. There may be a right to protect oneself from having a child with a serious handicap on the basis that

[50] HFEA/ACGT Consultation Document, (1999) "Pre-Implantation Genetic Diagnosis" para. 34, www.hfea.gov.uk. See further the Royal College of Obstetricians and Gynaecologists report *Termination of Pregnancy for Foetal Abnormality* (January 1996).

[51] See Helm, S., "Ethical Issues in Pre-Implantation Diagnosis" in Harris, J. and Holm, S. (eds.), *The Future of Human Reproduction: Ethics, Choice, and Regulation* (Clarendon Press, 1998).

[52] Human Genetics Alert, (March 2000) "The Regulation of Pre-Implantation Genetic Diagnosis: response to the HFEA/ACGT consultation from the Campaign Against Human Genetic Engineering", www.hgalert.org.

[53] The bizarreness of this question lies in the fact that it implies that some people are better off not being born. Even if that were the case, who would know from assessing their potential physical condition as a child?

[54] HFEA/ACGT Consultation Document, (1999) "Pre-Implantation Genetic Diagnosis" para. 38, www.hfea.gov.uk.

[55] Nuffield Council on Bioethics, (2 October 2002) "*Genetics and Human Behaviour: The Ethical Context*", para. 13.78, www.nuffieldbioethics.org.

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.* at para. 13.76.

such a child would be much harder to rear, but there is certainly not such a thing as a right to ensure for social reasons that one has a child of a certain gender, hair or eye colour or with certain behavioural traits that one likes. Decisions to reject ova on the basis that they do not have such characteristics constitute narrow eugenics.

Using PGD to tissue-type for match with an existing sick child also raises problems. For one thing, if the mother's donation from her placenta fails there will be pressure on the resultant child to donate. The Authority has pointed out that there are procedures in place to protect the interests of the new child should such a scenario arise.[59] However, these procedures do not – in the case of bone marrow donation at least – include mandatory court involvement. Furthermore, from a sociological standpoint there are obvious conflicts of interest. In particular, the medical profession has an interest in "overall utility" and the family in "family utility" both of which can be inconsistent with what is best for the child.

CONCLUSION

The ability of the Human Fertilisation and Embryology Act 1990 to cope with scientific developments that had never been envisaged when it was passed has been under serious scrutiny in recent years. Considerable doubt about the Act's ability to cope was raised when the Hashmis' case and the question of legality of cloning by cell nuclear replacement were going through the courts.[60] The House of Commons Science and Technology Committee took the view that the Act needed urgent reform to reconnect it with modern science.[61] This call was endorsed by the Authority's new chief executive who suggested that "clearer legislation is desperately needed that takes into account the massive advances that have taken place since the last act was drafted and is less open to misinterpretation".[62] The government seemed to be alone in thinking that the Act was functioning sufficiently well not to need an overhaul.[63] However, the House of Lords' dexterous interpretation of the Act's applicability to cloning by cell nuclear replacement[64] along with the Court of Appeal's decision in the instant case has shown that there is some merit to the government's view. The case for Parliament to consider reform is not that the Act is proving difficult to adapt to new conditions as the reverse; the courts are applying the Act to areas which raise very important issues of ethics that Parliament did not contemplate when passing it. PGD is a classic case in point. For the use of it to be controlled by the Authority rather specifically determined by Parliament is democratically deficient. The deficiency was worsened in the Hashmi case by the fact that using PGD for tissue-typing was not something on which it had consulted the public in either its 1999 document or before. Indeed, The House of

[59] HFEA, (2001) "A summary of the 113th meeting of the HFEA on 29 November 2001", www.hfea.gov.uk/aboutHFEA.

[60] In *R.* v. *Secretary of State for Health, Ex Parte Bruno Quintavalle (On Behalf of the Pro-Life Alliance)* [2001] EWHC (Admin.) 918, [2001] 4 All E.R. 1013, the High Court concluded that cloning a human being by this method was not even covered by the Act. The decision was reversed in the Court of Appeal whose decision was then upheld by the House of Lords, [2003] UKHL 13, [2003] 2 W.L.R. 692. In the meantime Parliament hastily passed the Human Reproductive Cloning Act 2001, section 1(1) of which states that, "a person who places in a woman a human embryo which has been created otherwise than by fertilisation is guilty of an offence".

[61] House of Commons Science and Technology Committee, (18 July 2002), "Developments in human genetics and embryology", recommendation 12, www.doh.gov.uk.

[62] Media Press Release Response to House of Commons Science and Technology Committee report, (18 July 2002) "Developments in human genetics and embryology", http://www.hfea.gov.uk/forMedia/archived/18072002.htm.

[63] Department of Health, (November 2002, Cm. 5693) "Government Response to the Report from the House of Commons Science and Technology Committee: Developments in Human Genetics and Embryology", www.doh.gov.uk.

[64] *R.* v. *Secretary of State for Health, ex parte Bruno Quintavalle (on behalf of the Pro-Life Alliance)* [2003] UKHL 13, [2003] 2 W.L.R. 692.

Commons Science and Technology Committee criticised the Authority for authorising this use without specific consultation.[65] The Department of Health noted that it was not practical to consult further before making the decision.[66] However, the response to this could be that we should not march forward with expanding the use of an ethically controversial technology without consultation simply because of the exigencies of a single case.

So what position should Parliament take? I would maintain that IVF should not be permitted under any circumstances. Nevertheless, if it is to be permitted, the case for arguing that the ovum has rights appears to be too weak on its own to prevent forms of action on it that are contrary to the actualisation of its potential. However, the need to prevent narrow eugenics is sufficient on its own to ban PGD for purposes beyond those already licensed by the Authority. Furthermore, the slim possibility that the ovum should be afforded rights combined with fears of a slippery slope in terms of how we treat other forms of life, may be enough to warrant a prohibition on the use of PGD for tissue-typing and the creation of ova simply as subjects of research.

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[65] House of Commons Science and Technology Committee, (18 July 2002), "Developments in human genetics and embryology", www.doh.gov.uk.

[66] Department of Health, (November 2002, Cm. 5693), "Government Response to the Report from the House of Commons Science and Technology Committee: Developments in Human Genetics and Embryology", www.doh.gov.uk.

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ADVOCATES' IMMUNITY IN SCOTLAND

Wright v. *Paton Farrell*

LTL 29/8/2002 (unreported elsewhere)
(Outer House, Court of Session) (T. G. Coutts, Q.C.)

INTRODUCTION

The historic immunity from negligence suits enjoyed by advocates was abolished in England and Wales by the House of Lords in the case of *Arthur J. S. Hall.*[1] This case brought to an end the 200-year-old immunity, which prevented an advocate, whether solicitor or barrister, from being sued in negligence in respect of the conduct and management of a case in court, and the preliminary work connected with it. The immunity had no statutory basis, but its existence had been recognised by the House of Lords in 1967, in the case of *Rondel* v. *Worsley*,[2] and its extent and limits were considered in *Saif Ali* v. *Sidney Mitchell and Co* in 1978.[3] Since that time, not only was the scope and extent of the immunity the subject of much case law, but the rule itself received a great deal of criticism. By abolishing it, the House of Lords recognised that the public policy justifications for it were no longer valid. It also brought England and Wales in line with other member states in the European Union, and with other common law jurisdictions.[4] However, in Scotland, a recent case has confirmed that Scottish advocates are still covered by the immunity in criminal cases.

THE DECISION IN *WRIGHT* v. *PATON FARRELL*

The case concerned an allegation of negligence by Mr. Wright on the part of his former solicitor in relation to the way his defence was conducted in a criminal trial. The criminal trial concerned charges of driving while disqualified and theft, and his defence was one of alibi. Due to a misunderstanding by the sheriff, the procurator fiscal and Mr. Wright's solicitor, the trial was conducted on the misconceived basis that the events had taken place on a particular Friday morning. In fact, they had occurred in the early hours of the subsequent Saturday morning. Mr. Wright thought, and gave evidence on the basis, that the court was discussing Friday night into Saturday morning. He was convicted and sentenced to a term of imprisonment. His subsequent appeal was allowed on the grounds that the trial was conducted on a wholly misconceived basis, namely the date when the events took place. This mistake resulted in doubt being cast on Mr. Wright's credibility, which was particularly damaging as his defence rested entirely on alibi. The appeal court concluded that Mr. Wright had been badly prejudiced in giving his evidence to the jury, had not received a fair trial and that a miscarriage of justice had occurred. His conviction was quashed. Mr. Wright then

[1] *Arthur J. S. Hall & Co (A Firm)* v. *Simons; Woolf Seddon (A Firm)* v. *Barrett; Roberts & Hill (A Firm)* v. *Harris (conjoined appeals)* [2000] 3 W.L.R. 543; [2002] 1 A.C. 615. See Ter Kah Leng "The Demise of Advocates' Immunity" (2000) 9(2) Nott. L. J. 74–86; M. Seneviratne "The Rise and Fall of Advocates' Immunity" (2001) 21(4) *Legal Studies* 644–662.

[2] *Rondel* v. *Worsley* [1967] 3 All E.R. 993; [1969] 1 A.C. 191.

[3] *Saif Ali* v. *Sidney Mitchell and Co* [1978] 2 All E.R. 1033; [1980] A.C. 198.

[4] Australia, New Zealand and Singapore still have advocates' immunity.

sought to recover damages from his solicitors for the negligent way the criminal trial was conducted. The Court of Session however held that the solicitors were immune from negligence claims while acting as advocates in the criminal courts.

ADVOCATES' IMMUNITY

Advocates immunity had attracted a great deal of criticism[5] before it was abolished in England and Wales, and thus the decision in *Hall* was perhaps not so remarkable. Indeed, what is surprising is that this "not very attractive defence"[6] survived for so long. It is interesting therefore that the Court of Session in this case decided not to follow the lead set by the House of Lords in *Hall*, and confirmed that, in Scottish law, advocates still enjoyed immunity from suit in relation to the conduct of criminal proceedings during the course of a trial. The court was satisfied that the decision in *Hall* did not affect the Scottish position, on the basis that it was concerned with English law and English civil procedure. Scotland had different procedures.

One of the rationales for the immunity had been the dangers of re-litigation, vexatious claims and unmeritorious cases. In England, these types of cases can be controlled and disposed of, for example through wasted costs orders, and the use of court management of civil claims. Abolition of the immunity thus posed few problems in England. However, there are no such parallel procedures in Scotland, where wasted costs orders cannot be made. The court was of the opinion that there was therefore a real danger of re-litigation in Scotland, which is unlikely to occur in England. What was also persuasive for the court was that *Hall* did not expressly overrule *Rondel* as being wrongly decided. Rather, *Rondel* was declared not to apply because it no longer reflected public policy. *Rondel* therefore remained good law until the decision in *Hall* was pronounced, and the criminal trial, which was the subject of this negligence case, occurred before *Hall* was decided.

The court also stressed that *Hall* had been a claim for negligence arising out of the conduct of a civil case. This was a criminal case. The House of Lords had not been unanimous in their views about the abolition of the immunity in criminal cases.[7] Although the majority agreed that the immunity should be abolished for criminal litigation, it was not necessary to decide on this in *Hall*, so their comments are *obiter*. Clearly, however, the views of the majority are of great persuasive authority, and it is unlikely that a future court in England would decide that there was justification for retaining advocates' immunity in relation to a criminal case.

HUMAN RIGHTS

It was argued on behalf of Mr. Wright, that the immunity was not compatible with the provisions of the European Convention on Human Rights, on the basis that such a bar on actions in negligence would be a breach of Article 6(1). This article states that: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair

[5] See T. Dugdale "Immunity for the Case plan – *Atwell* v. *Michael Perry & Co* (1998) 14(3) *Professional Negligence* 184; C. Miller "The advocate's duty to justice, where does it belong?" (1981) 97 L.Q.R. 127; R. Chandran "No Immunity for Counsel in Singapore" (1997) 13(4) *Professional Negligence* 116; K. Richards "Advocates' Immunity: justice delivered by the law" (1995) 5(5) *Consumer Policy Review* 161; A. Aurora and A. Francis *The Rule of Lawyers* (1998, Fabian Society Discussion Paper 42); M. Seneviratne "The Rise and Fall of Advocates' Immunity" (2001) 21(4) *Legal Studies* 644.

[6] *Harris* v. *Manahan* [1997] F.L.R. 205 at 209, *per* Lord L.J.

[7] Lords Hobhouse, Hope and Hutton gave dissenting judgments on this point.

and public hearing within a reasonable time by an independent and impartial tribunal established by law ...". The claim therefore is that the immunity from suit is a derogation from a person's fundamental right of access to a court, which has to be justified.[8]

Famously, the case of *Osman* v. *United Kingdom*[9] had indicated that blanket immunities from negligence are not acceptable.[10] This case proved to be very controversial,[11] attracting a great deal of criticism from senior judges and academics, and has been described as "deeply flawed".[12] Indeed, in a subsequent case, *Z. and others* v. *United Kingdom,*[13] the European Court acknowledged that the right to have a question determined by a tribunal was not absolute and could be subject to legitimate restrictions. It was accepted that the view expressed by the court in *Osman* had been based on a misunderstanding of the law of negligence.

Thus, it is not inevitable that the mere fact of an immunity is sufficient to found a violation of Article 6(1). It is a matter of policy, and the court in this case was of the view that the immunity in Scotland, unlike in England, was based upon valid public policy reasons, and was therefore not inconsistent with the Convention. If the Scottish court were to decide that this public policy justification no longer applied, the immunity would go.

THE LOSS SUFFERED

It had been argued, on behalf of the defender solicitor, that the substantive case was irrelevant because the loss and damage was not of a type which could be compensated. There was no evidence that the outcome of the trial would have been different without the mistake about the date, and it was not a case where an assessment of "loss of chance" was appropriate. It was also argued that the loss claimed was speculative, as it could not be proved that there would have been a real chance of acquittal. Despite the fact that the case could not proceed because of the existence of the immunity, the Court of Session decided to pronounce on the issue of loss and damage, on the basis that a higher court might take a different view about the issue of immunity.

The court decided that what Mr. Wright had to show was that he had a real and substantial right, that this right had been lost, and that the loss had an ascertainable, measurable, non-negligible value. Mr. Wright had been deprived of a fair opportunity to present his defence to the jury, a defence which might have succeeded. His loss of right therefore was the loss of a fair trial. It was evident that he had lost the right to have his case presented to the jury in a manner in which his credibility could not be so obviously assailed. The assessment of damages for this loss may be difficult, but the fact of damage was not speculative.

The court accepted that in many of these types of cases, it is very difficult to prove causation. For example, it is difficult to show that there would have been a different outcome in the trial, if the case had been conducted differently. Without the necessary causal link, the negligence claim would fail. This causal link can be difficult to show

[8] See *Golder* v. *United Kingdom* (1975) 1 E.H.R.R. 524.

[9] (2000) 29 E.H.R.R. 245.

[10] This case concerned the immunity of the police from a negligence claim in relation to actions taken in connection with the investigation and suppression of crime.

[11] See R. English "Forensic Immunity Post-*Osman*" (2001) 64(2) M.L.R. 300; C. Gearty "Unravelling *Osman*" (2001) 64(2) M.L.R. 159.

[12] C. Gearty "Unravelling *Osman*" (2001) 64(2) M.L.R. 159 at 159.

[13] 10 B.H.R.C. 384.

in criminal trials because, unlike civil cases, there is no question of settlement, nor any prospect of some form of negotiated outcome which could be evaluated in cash terms. However, in this case there was no difficulty in establishing a causal link between the negligence and the loss. Although the negligence had not caused Wright to be convicted, it had caused him to lose his opportunity to advance his case to the jury. It was not necessary for him to prove that on the balance of probabilities he would have been acquitted. Only if it could be shown that he would have been convicted anyway, would there have been no loss. In this case, the conviction had been set aside, and that fact established the causal link between the negligence and the loss. Whether or not he was likely to be acquitted was a matter to be dealt with in the assessment of damages.

There would, therefore, have been a case to answer had there been no immunity. There had been a miscarriage of justice caused, perhaps only in part, by the negligence of the solicitor. Even though the fiscal and sheriff might also be responsible, there was at least a case of joint and several fault on the part of the solicitor. It may even be the case that the solicitor was solely at fault. Such questions could only be decided after taking evidence of the whole circumstances surrounding the negligence and the conviction. It would then be possible to arrive at an assessment of what, if anything, should be received in damages a result of any proven negligence.

CONCLUSION

Advocates' immunity is still in existence in Scotland, at least so far as criminal cases are concerned. It will be interesting to see if the same conclusion is reached if a civil case comes before the courts. It will also be interesting to see if a higher court takes a bolder stand, and brings Scotland in line with England and Wales, and other European states. Surely it is time for this anomalous immunity to be abandoned, and for such wrongs as appear to have occurred in this case to be given their appropriate remedy.

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BOOK REVIEWS

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

LOCATING LAND LAW WITHIN A PROPERTY LAW CONTEXT – AGAIN

Property Law by ROGER J. SMITH, London, Longman, 2003, lxviii + 617 pp., Paperback, £29·99, ISBN 0 582–473241

The first edition of *Property Law* was published in 1996. This review is of the fourth edition published in 2003. The focus of the book is land law and it is indicative of the pace of change, in what was once regarded as a reassuringly stable subject, that this generational period of around two years between editions has been largely driven by legal developments. When the first edition went to press the Landlord and Tenant (Covenants) Act 1995 had barely come into force (commencement was on 1 January 1996); the Trusts of Land and Appointment of Trustees Act 1996 was still a bill; the Commonhold and Leasehold Reform Act 2002 was still very much a recommendation with merit but no realistic chance of enactment in the near future; and the Land Registration Act 2002 was not even a twinkle in its draftsman's eye. Together references to these four Acts account for well over a third of entries in the Table of Statutes in the book (just under four pages out of nine).

The first edition of the book was a welcome attempt to situate land law within the context of the general law of property. The fourth edition remains, rightly in this reviewer's opinion, committed to the appropriateness and educational efficiency of viewing land law as a species of property law; rather than seeing the subject as a unique product of historical misadventure, or as the mystery that lies behind the practice of the professional conveyancer. Both the structure of the book and its length have remained remarkably stable across editions. This is a consistency that irresistibly suggests a structural strength and a remarkable discipline in jettisoning material that is no longer central to the book's concerns.

Property Law is divided into four sections: "Introduction", "General Principles", "Rights to Enjoy Land", and "Other Interests in Land". It is within the first two sections, which comprise nearly half the book, that the structurally distinctive features of the book are most evident. Although the treatment of land law is given predominance, the exposition and analysis is framed by a consideration of the nature of property law, and the sections contain a substantial consideration of the law of personal property. This allows the treatment of land law to benefit from an analytically more coherent treatment and allows for a functional approach to criticism.

The impact of this approach on a land law text is perhaps most strikingly illustrated by a consideration of what is not covered in detail by the book. Both the law of unregistered conveyancing and the old law of registered land, contained in the Land Registration Act 1925 and subsequent cases, are almost completely eclipsed by the

treatment of the new law of registered land enacted by the Land Registration Act 2002. The book does not an attempt to provide a complete account of the law that may impact upon a conveyancer in his or her career. *Property Law* has more citations of the Human Rights Act 1998 than it has citations of the Land Charges Act 1972. The book seeks primarily to give an account of the contemporary solutions offered by the law to age-old problems of property law.

The book is meticulous in its treatment of the subjects it covers in detail. Legislation and case law are given both full exposition and critical consideration. Reports of the Law Commission are taken fully into account and there is ample and informed treatment of academic publications. Where the law is doubtful the treatment makes this clear. However, where expressions of doubt seem to be fanciful, ill-judged, or subsequently resolved, this too is made apparent. Roger Smith has been one of the more impressive commentators on land law, especially the law of registered land, for many years.[1] His willingness to pose searching questions remains, and is evidenced on many occasions in this book.

The style of writing is terse, and repetition is avoided by internal cross-referencing. On occasion the exposition of the law becomes more magisterial than explanatory, which calls for care in a reader who is still uncertain of the technical terminology of the law. However, the law is treated at different levels of detail in different places within the book, and the key to a successful use of the book as a text lies in a willingness to use it actively rather than to expect it to open at the appropriate page for the reader. For example, registration is considered in chapters four, ten, and 11. Within chapter 11 there is an overview at the beginning and end of the chapter. Diving into the middle of chapter 11 would almost certainly produce little understanding in someone unfamiliar with the law. On the other hand for somebody with knowledge of the subject it is rare not to find material of an interesting and stimulating nature on each dip into the book.

The fourth edition contains a very full account of the new law of the Land Registration Act 2002. As one would expect from the author the treatment is far more than simply a description of the Act. When considering the proposed move to electronic conveyancing; the threat to the security of registered title posed by the deemed authority given to those with network access agreements is identified (p. 105). This is not the threat of computer misuse by third parties: this is the statutory authority that will allow fraudulently inclined professionals to dispose of the property of proprietors of registered land. When considering the changes made to overriding interests, the danger to purchasers of a tenant under an overriding lease who is not in possession is identified (p. 243) and therefore there is a recognition of the continuing need to ask occupiers about rent payments, despite the exclusion of those in receipt of rents and profits from actual occupation. When assessing the success of land registration the fact that it has not actually reduced conveyancing costs significantly (nor improved the speed of transactions) is faced, and considered (pp. 272–274). These examples illustrate an intelligence at work that is not content with grasping and explaining how law is meant to work, but asks how law reform will work in our less than perfect world.

The treatment of the distinction between personal claims against those who acquire registered land and the survival of property rights enforceable against those who acquire registered land is very valuable (pp. 237–239). The explanation of the new law

[1] *e.g.* (1977) 93 L.Q.R. 541.

of commonhold land is clear and useful (pp. 535–538). The book is a stimulating, up to date, scholarly, and clearly written text that repays the attention it demands of readers.

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MAKING MODERN LAND LAW ACCESSIBLE TO STUDENTS

Modern Land Law by MARK P. THOMPSON, Oxford, Oxford University Press, 2003, xliv + 533pp., Paperback, £24·99, ISBN 0-19-926048-6

The appearance of a second edition of Thompson's book only two years after the first is very welcome. I say so for three reasons. The first is (partly) explained by Thompson himself in the opening lines of his preface:

> Traditionally land law has not been perceived as being one of the fastest moving subjects in the curriculum. Consequently, when I completed work on the first edition of this book, I thought it would be some time before I would need to return to it. In that, I was, of course, mistaken, as the past two years have seen profound changes to the law. Of these, the most important is, undoubtedly, the Land Registration Act 2002, the provisions of which, it has been claimed, will have an even more profound effect on conveyancing and land law than did the reforms enacted in 1925 . . .

In the academic year 2003–2004, all land law teachers will face a challenge similar to that faced by Geoffrey Cheshire and his contemporaries back in 1926. Thompson provides considerable help in meeting that challenge.

My second reason for welcoming this new edition might seem, *at first sight*, to contradict my first. While Thompson gives clear explanations of the new law, he does not neglect the "old" law displaced by such measures as the Land Registration Act 2002 and the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"). I believe that this approach is correct. A transaction with land, such as a long lease or the creation of a trust of land, may well have impacts stretching over many generations. But (subject to exceptions) the effect of a land transaction is governed by the law *as it was when the transaction first took place.* For example, a 21 year lease of business premises granted in 1992 is still today subject to the "old" rule that the original tenant's liability on covenants lasts until the end of the lease (2013). The fundamental change enacted by the Landlord and Tenant (Covenants) 1995 does not apply.

Or consider a strict settlement created over an unregistered title family farm in 1980. This settlement will probably continue well into the 21st century. But it will be always governed by the Settled Land Act 1925 (vesting deeds and all), not by TOLATA. Moreover, at risk of stating the obvious, the Land Registration Act 2002 will not have any application. The land is unregistered title.

In the second paragraph of his preface Thompson states (almost apologetically):

> For the present at least, attention has continued to be paid to the principles of unregistered land, as these principles, despite the remorseless spread of registered title, will continue to be relevant for some time to come. . .

In my view, any writer of a textbook on land law need not apologise for considering unregistered title in some depth. Not only is there still a large amount of unregistered land, but also there is the pedagogical consideration that most older cases on land law (*e.g. Walsh* v. *Lonsdale*[1] and *Wheeldon* v. *Burrows*[2]) relate to land which is unregistered title. To understand these older cases fully, the student needs the rudiments of unregistered land.

This leads to my third reason for welcoming Thompson's book. The book is clearly aimed at students, not at the author's fellow academics. The book is of manageable length, with 519 *uncrowded* pages. The book is readable, and the page layout is very

[1] (1882) L.R. 21 Ch. D. 9. C.A.

[2] (1879) L.R. 12 Ch. D. 31, C.A.

"easy on the eye". Furthermore, the order in which Thompson deals with topics helps towards a clear understanding of the subject. I particularly welcome the fact that while covenants between landlord and tenant are dealt with as part of the leases chapter (chapter 11), restrictive covenants between freeholders are not dealt with until chapter 14. These two topics, dealt with together in certain books, are in reality *conceptually* very distinct from one another.

Students sometimes complain that land law bears no relation to real life. Such students should certainly read Thompson's book. Just looking at chapter one, "The Scope of the Subject", might be enough to convince them that land law deals with real live topics such as brooches found in airport lounges, bungalows built on concrete stilts and ownership of flats.

Land law students also sometimes find difficulty with the (often complex) *facts* of land law cases. Thompson is very skilled in picking out the essential facts of a case and omitting the rest. See, for examples, his treatment of *Walsh* v. *Lonsdale*[3] (p.38) and of *Peffer* v. *Rigg*[4] (p. 145).

Where a point of law is genuinely open to debate, Thompson is usually careful to put both sides of the argument before coming to his own conclusion. See, *e.g.*, pp. 250–2 on overreaching under TOLATA.

However, on one important but very difficult point, the reader only really sees one side of the argument. The running of the benefit of restrictive covenants is a notoriously tricky issue. Taken in isolation, the decision of the Court of Appeal in *Federated Homes*[5] (1980) does provide a simple rule for the running of the benefit of restrictive covenants. But the "rule" in *Federated Homes* (based on a strained interpretation of the Law of Property Act 1925, section 78) has one extremely significant practical drawback. It makes it very difficult for the purchasers of servient land to identify who is or are the dominant owner(s).

Moreover, the thinking in *Federated Homes* sits very uncomfortably with two later decisions of the Judicial Committee of the Privy Council. In both *Jamaica Mutual Life* v. *Hillsborough*[6] (Jamaican law) and *Emile Elias & Co. Ltd.* v. *Pine Groves Ltd.*[7] (Trinidadian law) their lordships stressed the importance of a servient owner being able to identify the dominant owners. As I tell my students, "If you must buy land subject to a restrictive covenant, make sure it is in Jamaica or Trinidad, not in England or Wales".

Federated Homes is a nightmare for property developers, but perhaps Thompson has no sympathy for such people.

But this leads on to my only serious criticism of Thompson's book. Reading Thompson's treatment of land law as a whole, I sense a bias towards residential property, and a possible neglect of agricultural and commercial land. For example, Thompson has only a very limited discussion of *profits à prendre*, still very important in agricultural areas.

I particularly sense this apparent bias towards residential property when I turn to the very extended treatment of how to distinguish a lease from a licence (pp. 319–329). This focuses almost exclusively on residential properties, and completely omits the 19th century case of *Wells* v. *Hull Corporation*[8] (the dry-dock case) which is the origin of

[3] *Op. cit.*

[4] [1977] 1 W.L.R. 285, Ch. D.

[5] *Federated Homes* v. *Mill Lodge Properties Ltd.* [1980] 1 W.L.R. 594, C.A.

[6] [1989] 1 W.L.R. 1101, P.C.

[7] [1993] 1 W.L.R. 305, P.C.

[8] *Wells.* v. *Kingston-upon-Hull Corporation* (1874–75) L.R. 10 C.P. 402, C.C.P.

the "exclusive possession" test for the existence of a lease. *Shell-Mex* v. *Manchester Garages*[9] and *Addiscombe Garden Estates* v. *Crabbe*[10], two 20th century cases which applied the lease/licence to commercial properties, get the very briefest of footnote mention. Yet at least the latter case (about a tennis club which was granted a "licence" over tennis courts and changing rooms) is still of considerable interest. In that case the Court of Appeal, 24 years before *Street* v. *Mountford*,[11] held that the transaction granting exclusive possession was a lease, despite the "licence" label attached to it by the landlords.

I also sense a bias towards residential properties in Thompson's treatment of TOLATA and related issues. Thompson has two excellent chapters on co-ownership, but these focus almost totally on co-owned houses. *Re Buchanan-Wollaston*,[12] the almost revolutionary 1939 case about the open ground at Lowestoft, gets only the briefest of mentions, while the intriguing 2001 case of *Rodway* v. *Landy*,[13] about two doctors whose common surgery was partitioned using section 14 of TOLATA, scrapes into a footnote.

Further, certain key provisions of TOLATA are not dealt with in satisfactory depth. The extraordinary section 8(1), which allows a settler to take away all the trustees' powers to deal with the land, is barely mentioned, while section 9 gets just one sentence. Yet section 9, which allows the trustees to delegate any of their powers to the life beneficiary, is likely to be very important where the trust land is a family farm or family business premises.

These criticisms, which might just be influenced by my own personal preferences as to what is really important in land law, should not be allowed to detract from the main thrust of this review. Thompson's *Modern Land Law* is an excellent book for land law *students*, especially those who want both a clear explanation of the law and a stimulating discussion of the more controversial points.

ROGER SEXTON*

[9] [1971] 1 W.L.R. 612, C.A.

[10] [1958] 1 Q.B. 513, C.A.

[11] [1985] A.C. 809, H.L.

[12] *Re Buchanan-Wollaston's Conveyance*, [1939] Ch. 738, C.A.

[13] [2001] EWCA Civ 471, [2001] Ch. 703, C.A.

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NOTTINGHAM MATTERS

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

SOCIO-LEGAL STUDIES ASSOCIATION ANNUAL CONFERENCE 2003: REPORT

*MARY SENEVIRATNE**

From 14 to 16 April 2003, Nottingham Law School hosted the annual conference of the Socio-Legal Studies Association (SLSA). The SLSA is a learned society, the object of which is to advance education and learning, in particular to advance research, teaching and the dissemination of knowledge in the field of socio-legal studies. Socio-legal studies embraces disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services, and with the influence of social, political and economic factors in the law and legal institutions. Socio-legal research is diverse, covering a range of theoretical perspectives and a wide range of empirical research and methodologies.

The SLSA's conference is hosted each year by universities in the United Kingdom, and this is only the second time in the past 17 years that the event has been hosted by a new university.[1] The conference brought together academics from a range of UK and overseas universities,[2] together with funding bodies, policy makers, practitioners and publishers. Altogether, 322 delegates attended, and increase on last years 300, which itself was the highest number ever attending. Although the vast majority of delegates were from the UK were a number from overseas, including 10 from Australia, six from the USA, and 15 from the Republic of Ireland. There were delegates from a total of 20 countries, including a number of European states, Hong Kong, Canada, Israel, Malaysia, New Zealand and South Africa.

A total of 251 papers were given, organised into 26 separate streams. These were wide ranging, covering topics as diverse as Access to Justice and Sex Offending. The stream on Human Rights proved to be very popular, occupying seven of the possible eight sessions, with a number of delegates attending from the Irish Centre for Human Rights, National University of Ireland. Papers in this stream covered issues about the use of force, minorities, refugees, economic, social and cultural rights, and international criminal law. Law and History also had seven sessions, with papers on the

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[1] Manchester Metropolitan University was the host in 1998.

[2] Altogether, 65 UK and 27 overseas universities were represented.

legal-historical approach, the social context of law in the 19th century, and citizenship and the state. It had joint sessions with the mental health, health law and gender streams. There was also a round table session: "Law and History *is* happening". The Regulation stream was also popular, with seven sessions, and topics ranging from regulation on transitional societies, water poverty, corporate responsibility and financial regulation.

Criminal Justice had six sessions, with papers about victims, policing, re-offending behaviour, the criminal courts and criminal process, comparative perspectives, and anti-social behaviour. The Housing Stream had five sessions, with papers on the meaning of home, and the regulation of housing. There was also a session within this stream presented by members of the Housing Law team from the Law Commission, which considered the progress on the proposed reforms and the issues still outstanding in this area. The Labour Law stream also had five sessions, with papers on inequality and discrimination in the workplace, and the international and European dimensions of Labour Law. The five sessions in the Access to Justice stream had papers on legal need, lawyers and human rights, mechanisms and standards in dispute resolution, barriers to access to justice, and legal aid services. This stream also had a round table discussion on civil justice.

Other streams included Children and the Law, and Family Law and Policy, where papers were presented on child protection; consulting children; extended families; comparative perspectives; divorce and kinship; and the regulation of marriage and cohabitation. The four sessions in the Environmental Law and Society stream had papers on individual rights; resources and sustainable development; international trade rules; and pollution. The Health Law stream had four sessions, with a range of topics covering new reproductive technologies; infant vaccination; medical negligence; consent issues; and voluntary euthanasia. There was also a separate stream on Mental Health issues. The Information Law stream also had four sessions, with papers including issues of access to the internet; free access and filtering on the internet; and on-line dispute resolution.

Education Law and Policy, European Issues, Legal Education, Legal Profession and Ethics, and Methodology each had three sessions for their papers. There were two sessions for papers in the Law and Literature, Law and Popular Culture, and Social Theory streams. Gender, Free Speech and Sex Offending each had one stream for their papers. In addition, there was a separate stream for postgraduate students, in which five papers were presented in two sessions. Postgraduate students also presented papers in the other sessions.

There was a special session given by funding bodies, where Sharon Witherspoon of the Nuffield Foundation discussed socio-legal research capacity in the UK, asking whether there was a short-fall in the number of people who can carry out high quality socio-legal research. Michael Bright, from the Economic and Social Research Council talked about forthcoming opportunities for funding, and gave advice on preparing good applications. Judith Sidaway, from the Lord Chancellor's Department (now the Department for Constitutional Affairs) gave information on the department's research programme. The Lord Chancellor's Department also hosted a special session where reports were given from the First Phase of the Courts and Diversity Research Programme. Three reports were given: housing possessions in the county courts; ethnic minorities in the criminal courts; child protection in a multi-cultural setting.

Professor Jean Cohen, Professor of Political Science, Columbia University New York, was the Plenary speaker. Her lecture: "Personal Autonomy and the Law: the Dilemmas of Regulating Intimacy", discussed the dilemmas of legal regulation in the sphere of life considered the most personal. The dilemma arises because, as feminist

criticism has made clear, the domain of intimacy is also a domain where power relations exist, and where great abuses, injustices and violence occur. In the lecture, Professor Cohen argued that the choice between equality and autonomy is a false one, dictated in part by a particular conception of law and its relation to society that should be abandoned.

In addition to the full and stimulating academic sessions, there was a conference reception, at the Council House, attended by the Lord Mayor of Nottingham, the Sheriff of Nottingham, the Dean of the Law School, and the Head of the Centre for Legal Research. The Lord Mayor and the Dean welcomed delegates to Nottingham and to the University. The annual dinner was held at the Royal Moat House hotel. There were ten academic publishers who exhibited at the conference, and there was generous sponsorship by a number of publishers of social events, lunches, and post-graduate bursaries.

The conference was a great success, both for the SLSA and the Law School. Delegates were impressed by the Law School and university facilities, and there was general agreement that the conference was very efficiently organised. A number of staff within the Law School organised streams and gave papers, and hosting the conference has helped to put the Law School at the heart of socio-legal studies. The large number of delegates attending and the number, range and quality of the conference papers illustrate the increasing popularity of socio-legal studies, not only in the UK, but also world-wide.

SOLON/NCSRHC HATE CRIMES CONFERENCE HELD AT THE GALLERIES OF JUSTICE, NOTTINGHAM, 22–23 FEBRUARY 2003

*KIM STEVENSON, JUDITH ROWBOTHAM AND MIKE SUTTON**

WHY A CONFERENCE ON HATE CRIMES?

The traditional concept of a "hate crime" is something that many academics and professionals across a wide range of disciplines *think* that they can both identify with and comprehend within the context of their own discipline or experience. However, as many of those directly involved with this phenomenon know, hate crime is an emotive term and a complex one. On the one hand, as a generic label "hate crime" can cover a diversity of activities and behaviour, raising their profile in the public consciousness to the benefit of those targeted. On the other hand, such classification can be over-simplistic and may fail to acknowledge either the nebulous and transient nature of certain forms of conduct and socialised behaviour or the wider issue of cultural traditions where the original motivation behind the behaviour has been lost. There is also the danger of underestimating the impact on different victim groups, especially across national or cultural boundaries. Hate crime is an international issue, likely to be prominent in community thinking and in policy evolution by a range of bodies; governmental and non-governmental organisations; voluntary support groups and of course international agencies. Amongst this diversity of interest in the topic, who or what determines whether a particular type of conduct or offence is defined as a so-called "hate crime"? Once categorised as such, what are the effects and implications upon those involved and affected, and those charged with investigating and prosecuting such transgressions? How is it possible to translate the abstract into action, in terms of the delivery of practical initiatives and appropriate training to recognise and deal with manifestations of hate crime?

In order to facilitate and open up debate addressing a number of these issues, SOLON[1] combined forces with the Nottingham Centre for the Study and Reduction of Hate Crimes (NCSRHC) to involve participation of as wide an audience as possible.

A SOLON-NCSRHC INITIATIVE

NCSRHC is based in the Criminology Division of the Faculty of Economics and Social Science at Nottingham Trent University under the Directorship of Dr. Mike Sutton. This centre is involved in the implementation and evaluation of research projects aimed at reducing hate crimes in their different manifestations. It actively seeks to bring together professionals and victims of hate crime with academics, to promote collaborative work that will help the wider community, locally but also nationally and internationally. The centre already has an interest in the role of the internet in promoting hate crime, including the international use of the medium by extremist groups and cyber-stalking, and in the wider application of criminological theory to the

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[1] See "SOLON: Interdisciplinary Studies in Bad Behaviour and Socially Visible Crime", (2001) 10(1) Nott. L. J. 85–90.

actual experience of hate crime. It was therefore appropriate that the NCSRHC should link up with SOLON in holding its first annual conference, since SOLON had already identified the theme of hate crime as one which had a strong resonance with its own mission of promoting interdisciplinary studies in bad behaviour and crime.

THE CONFERENCE

The first Hate Crimes conference was appraised by delegates as a resounding success. Initially intended to run for one day only and with a limited audience of around 40 delegates, the conference attracted so much interest that it was extended to two days and numbers of potential delegates in this country and overseas were disappointed that they were unable to attend. The level of interest and support has encouraged the NCSRHC and SOLON to continue combining forces in order to make this an annual event, and the Call for Papers for a second (three day) conference in February 2004, on the theme of Crime and Prejudice, was circulated at the first conference. Over 130 academics and professionals from a range of subject areas and organizations attended: nearly 70% of whom were non-academics. Academic speakers from the UK, North America and Europe represented disciplines including criminology, law, and history. Professional bodies attending included representatives from fourteen UK police forces – many associated with training and development programmes within their home force – the National Council for Crime Prevention, the Crown Prosecution Service, Victim Support agencies and a group from the Swedish Office of the Ombudsman against Discrimination because of Sexual Orientation. Speakers debated what type of activities do, and should, constitute hate crimes including homophobia, racism and rape, in both national and international contexts and discussed the current official and police responses in tackling such actions.

GETTING TO GRIPS WITH HATE CRIME

The theme of hate crime provides an overarching concern for society today, but one that is by no means new. As the opening keynote speaker, Barbara Perry from Northern Arizona University and author of *In the Name of Hate: Understanding Hate Crimes* (Routledge New York, 2001) stressed, the fundamental issue is the question of the usefulness of the descriptor "hate crime" in describing what academics may term "bias motivated behaviour". In other words, are hate crimes really concerned with hatred in the sense of an almost pathological detestation or repugnance of certain individuals or groups or does the term more often provide a convenient label for actions and, often "normal" practices that are more to do with ignorance, bias and prejudice? This raises a number of very practical dilemmas including:

a How is it possible to criminalise the "normal"?
b Does the process of criminalisation of actions and words require more than a particular resentful disposition towards others (based around ignorant presumptions about race, gender, class, religion *etc.*)?
c Is the presence (and proof) of some sort of intent and determination of will implicitly required in any legal labelling?
d How does – how can – this coincide with societal practices?

This in turn raises the issue that if hate crime must be volitional in this sense, then arguably not all so-called hate crimes can be included within this classification. In other words, is the descriptor "hate" in fact a misnomer, a token or label with accompanying baggage that can militate against full and frank introspection and analysis?

As Les Moran from Birkbeck College, University of London, argued, this can lead to a false obsession with identity politics and to the fuelling of unrealistically high levels of public expectations (fanned by the media) that if only "hate crimes" could be eliminated, then streets and homes would inevitably become safer through the targeting of specific crime and disorder initiatives. But are such public safety concerns arguably more associated and created by bad, or even normal, behaviour and "dis"respect rather than hate?

VICTIMS AND PERPETRATORS – IDENTIFICATIONS AND CLASSIFICATIONS

As became apparent from the diverse range of papers, there is no stereotypical hate crimes victim or victim group. Howard Erhlich from The Prejudice Institute, Baltimore, USA, warned of the dangers in prejudging stereotypes of what constitutes a victim and consequently, in producing research which "proves" and legitimates existing bias. Papers dealing with anti-semitism, and discussions concerning religiously-justified manifestations of types of prejudice highlighted the dangers of privileging certain types of bias because of their supposed cultural roots in a historic past.

Papers addressing the international context included homophobia in post-Milosevic Serbia; legal responses to hate crime in Rwanda and its Holocaust echoes and women's vulnerability in Kosovo. These underlined the argument that there are contexts where a victim could be termed "doubly-damned", and so potentially a target from several perspectives, because of some combination of vulnerable categories. It could be argued, for example, that in some contexts, to be of a particular ethnic or racial group, and to be gay could be a double damnation, as could be having a mixed-race heritage or being part of an inter-racial relationship. Further, there are victim groups that have the almost contradictory potential to be both victim and perpetrator, because of, say, a mix of racial grouping or sexual orientation and chosen occupation. This highlights a reality that there is more than one type of perpetrator, and that identification of perpetrators is equally complex.

Real contradictions are also evident with apparently clear-cut categories where issues of gender or sexual orientation or identity are involved. A problem with the apparently straightforward identification of homophobic-inspired crime was highlighted at several points throughout the conference. This is clearly still an area surrounded by ambiguities and contradictions at all levels, including official ones. Peter Bartlett, of the University of Nottingham, discussing the murders of gay men, revealed that, despite expectations by the legal system, backed up by claims from perpetrators when in court, that a "hatred" of homosexuality had led to the killings, this was by no means readily proved to be the case. Indeed, it was easier in many cases to identify the murders as killings for greed and other "normal" motivations, but, he claimed, it was easier for all sides involved to invoke the label of homophobia. This linked interestingly with points raised by Peter Tatchell, founder of Outrage and prominent gay rights campaigner, who argued that the Metropolitan Police had shown themselves to be reluctant to deal with the possibility of a homosexual dimension to the killing of

Damilola Taylor. There were disturbing indications that the homosexual label had been applied to him, and used for justification in a prior beating up of Damilola. Mr. and Mrs. Taylor had raised the issue with the police, but it had not been pursued.

Judith Rowbotham's paper highlighted the role and responsibility of the media, past and present, in the process of labelling types of hate crime as worthy, or unworthy, of society's anger. All too often, there can be a media-encouraged tolerance of types of prejudice, and the ignorance underlying such bias, which arguably gives an implicit encouragement to types of hate crime as being acceptable to dominant community prejudices, including the production of retrospective excuses for actions as being based in "instinctive" lashing out against an individual. It can also lead to failure to recognise the bias involved in the active harassment of less easily recognised victim groups.

VICTIMS AND PERPETRATORS – GENDER

Gender adds a further layer of complexity to considerations of the way in which to identify victims of hate crime. Can misogyny be held to be a recognisable factor in hate crime? Alternatively, is it so widespread in so many societies, with such deep cultural roots, that some other factor (such as sexual orientation or ethnic origin) must be added to the mixture before women can claim to be victims of hate crime *because* of their biological gender? Papers on this theme included:

a Lesley Abdela from Eyecatcher Associates examined the use of rape as a conscious strategy in the expression of hatred between opposing sides in the Kosovo conflict. Complementing this perspective, Kim Stevenson questioned the extent to which gang rapes could and should be assessed as hate crimes. Jane Kilby, of the University of Salford, focused on rape in "everyday", non-conflict conditions, and the continuing historic dilemma of accepting motivations for rape which may go beyond masculine testosterone-fuelled sexual urges.

b The issue of cultural traditions and the "responsibility" of women for conforming unquestioningly to masculine norms of behaviour was the theme underlying several papers dealing with the vulnerability of Asian women, especially in the UK. The reluctance of Western authorities to get involved in cases of domestic violence, including honour killings, as Usha Sood of Nottingham Trent, highlighted, is regularly justified by invocation of the mantra of respecting other traditions in the name of multi-cultural tolerance. Her paper has led to an invitation to address the 2003 UK-India Policing Conference on this theme.

CONCLUSIONS

One issue that was regularly highlighted is that there could be a difference in perspective between those who have been a victim and target of hate crime, or who have worked with those personally affected, and those analysing the problem from a more objective and theoretical standpoint. For those personally affected it may be the case that the only acceptable descriptor for the attack upon them is "hate", so there is a need to understand the impact that different types of hate crime exert upon different victim groups. For example, Rebecca Ditton, Independent Advisors' Group to

Merseyside Police, and Graham Smith, of the Nottingham Trent University, both spoke of their personal experiences of being abused or attacked for no apparent reason comprehended by them, and by those expected to protect them: police officers on duty. The context was significantly different in each case, and yet shared certain commonalities relating to being the "wrong" person in some sort of locational sense.

Plainly there is a real need to reshape current understandings, both practical and abstract, of how hate crime impacts on different victim groups and of how to recognise that this affects groups and individuals in different ways and at different levels according to a complex mix of social and cultural factors, including class, race, gender and age.

The issue of the uncontrolled use by extremist groups of the internet, and the failure of communities to recognise the potential of internet use for the promotion of bias and ignorance needs, as Mike Sutton stressed, to be properly recognised and quantified.

A survey of the conference contributions also reveals what was left out, in terms of considerations of types of hate crime. There was nothing on black on black violence, for example, or on black-Asian violence, and these are areas that also need research and exploration.

Enforcement is a key issue and significantly should not be left solely to the official agencies, primarily the police. All have an obligation and responsibility to prevent, prohibit and limit these types of activities, and as Judith Rowbotham argued, the media can and should play a crucial role in promoting recognition of this. The only workable responses to hate crime, leading to its reduction (although it is recognised it will never be eliminated) will have to be community responses, formulated in consultation with appropriate official and voluntary bodies, including practitioners and academics.

THE WAY FORWARD

a The setting up of a practitioner forum, linked to NCSRHC and to the SOLON membership network, to explore the translation of abstract ideas into concrete policy through specific projects and meetings. Multi-agency training initiatives can be developed as a result of collaboration between practitioners and academics, through initiatives such as the Practitioner Forum.

b Improvement in the information resources available to practitioners and academics can only be achieved through collaborative work within the community, involving community members as data collectors, rather than relying on either official bodies such as the police or traditionally-trained academics. Instead, training should be offered to individuals chosen in collaboration with appropriate community advisors. Acute sensitivity and the strictest of guidelines will be required in setting up such projects which will forward the key objective of identifying ways in which agencies need to respond to both victims and offenders, and this will be a key element in applications for funding to support such projects. Further suggestions to NCSRHC or to SOLON, as appropriate, for collaborative work in this area from conference participants are very much welcomed.

c Improved links with the media, who have a significant role to play in promoting a better sensitivity to the complexities of hate crime, its motivations and its manifestations. The promotion of citizenship and respect for diversity in media outlets are crucial if any headway is to be made. At both national and

international levels there needs to be joined-up thinking between academics, practitioners and the media, to produce collaborative approaches to ensure proper law enforcement of existing provisions.

d Pressure for improvement in the methodology of the recording of crime by agencies such as the police, to improve the information base in the neglected areas of hate crime, including types of inter- and intra-ethnic hatred.

Avenues for moving forward in studying hate crime, working for its reduction and translating abstract concepts into practical initiatives have been identified through the first Hate Crimes conference. The second conference in February 2004 intends to move this agenda on still further, through the focus on Crime and Prejudice. This conference will offer opportunities to explore issues raised by current conflicts in particular.

APPENDIX ONE

Format:

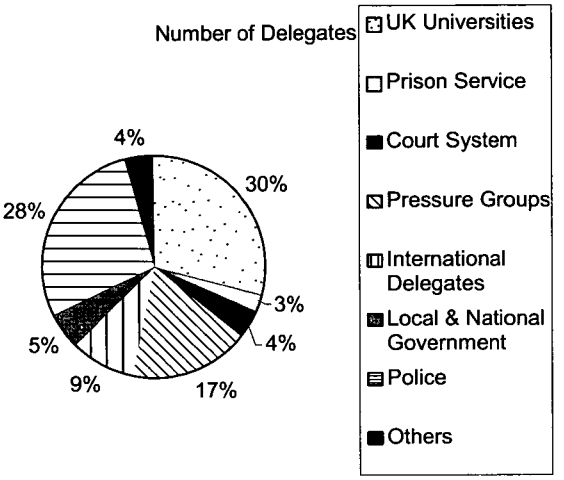
The conference was, on the basis of received feedback, highly successful and important as well as a much-needed initiative. In particular, the broad mix of academics and practitioners ensured both challenging and informative debates raising a number of key questions and issues.

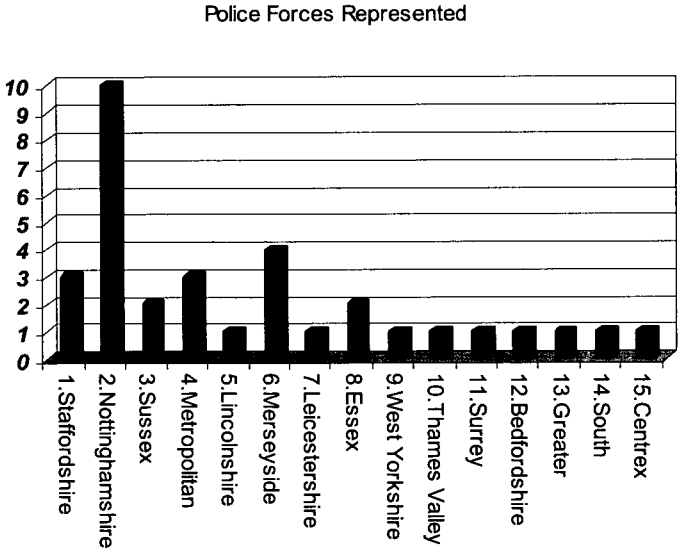
In crossing a range of disciplinary boundaries, including the bringing together of practitioners and academics as speakers and auditors, a number of practical issues arose, of which SOLON and the NCSRHC will take note for future conferences.

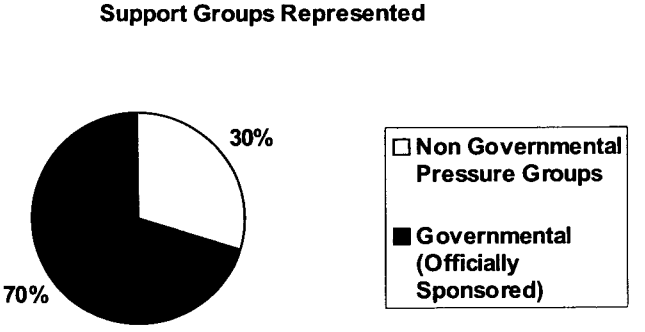
The purpose of the Hate Crimes conferences is to encourage the swift evolution of projects and policy initiatives in areas of need. Both SOLON and NCSRHC recognise that to promote greater collaboration and debate between practitioners and academics, some differential perspectives need to be consciously accommodated as a result of different expectations of ways in which information is delivered and received. Academics in disciplines such as law and history are used to delivering complex research in papers focusing on ideas and interpretation of evidence, raising questions that may lead to the development of policy initiatives *but the suggestion of these is not usually the primary purpose of such papers.* Practitioners are more accustomed to delivery that directly proposes strategies and policy initiatives on the basis of identification of key practical problems that they encounter. This highlights the need for increased time for debate and questions in conference sessions. In the light of the success of the first conference in identifying areas for future collaboration, such as the setting up of a practitioner forum organised by these NTU-based units, future conferences will take even more account of the importance of discussion formats in working out timetables. One such strategy to highlight effective forums will be an increase in the number of shorter panel sessions, with two speakers and enhanced discussion time. This is in the light of our expressed hope to have a much higher number of practitioner-speakers next year. We also encourage suggestions for a range of different formats including round table discussions. A higher level of practitioner-speakers will also enable us to combine an academic speaker with a practitioner so that the underlying theories and practical operation can be even better synthesised within the conference format.

APPENDIX TWO

Analysis of conference delegates:







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