The Trent Law Journal

Journal of the Department of Legal Studies
Volume 11 1987

Contents

Those wishing to subscribe to the Journal in North America are advised to contact :

Wm. W. Gaunt & Sons, Inc.,
Gaunt Building,
3011 Gulf Drive,
Holmes Beach,
Florida 34217.2199
U.S.A.

who are the distributors of the publication in that area.

EDITOR SHEILA E FOSTER, LLB PhD, Solicitor.

EDITORIAL BOARD PROFESSOR R I E CARD, LLM, Head of the Department of Legal Studies.
J R BRADGATE, LLB, Solicitor.
M ABUL FAZAL, MA (Dacca) LLB (Dacca) DPhil (Oxford), Barrister.
J MATHER, LLB FCA.
D McGOLDRICK, LLB, Barrister.
FIONA E SPEARING, LLB Solicitor.
I R STOREY, MA (Cantab), Solicitor.

ISSN No. 0309 - 8990

LAW AND MORALITY IN THE MARKET PLACE

Sir Gordon Borrie, QC, Director General of Fair Trading

This is the text of the Trent Law Journal lecture as delivered on 11 March 1987

When I became Director General of Fair Trading nearly eleven years ago, the United Kingdom seemed at a low ebb economically with the highest level of inflation ever and the UK unable to pay its way in the world. Many people were making comparisons with 1931.

We had a Cabinet Minister in 1931 called Jimmy Thomas, an ex-trade union leader of whose straightforward manner King George V was rather fond. One evening the King said to him: "Tell me, Jimmy, are things really as bad as they seem?" and Jimmy Thomas said in reply: "Well, King, if I were you, I would put the colonies in your wife's name".

That advice, if taken seriously, raises a number of legal, constitutional and moral issues. Since those days, the possibility of nation states and local authorities living beyond their means and going bankrupt is certainly a real one.

Mexico, New York City, and Liverpool are only examples of many governmental authorities joining the swollen ranks of business and individual borrowers that have risked becoming over-committed in recent years. The Pope has recently suggested that it may be morally acceptable for certain Third World countries to renege on their debt payments. Whole communities as well as individuals have been increasingly behaving in a way that raises legal and moral issues. What is the moral responsibility of the debtor and of the creditor respectively where there is serious risk of over-commitment? How far does or should the law reflect any such moral responsibility? And one may question the moral position of the State if its laws and courts seek to impose on the public a higher order of morality than is followed by its own executive branches of government.

I shall seek in this Lecture to examine the law and morality of credit transactions as my principal example of the qualified overlap between law and morality in the market place. I take as my starting point, on which I hope all my audience can readily agree, some words of the late Professor A L Goodhart[1]:-

> "Law generally approves and reinforces what is generally accepted as good moral behaviour in the society in which it operates and disapproves and penalizes what is regarded as bad moral behaviour, such as sexual immorality, dishonesty and unfair dealing. But there is no exact correspondence between law and accepted morality"

One of the worst aspects of the high inflation that held sway in the UK in the 1970s was that it had long-term after-effects, not only in terms of losing us markets for our products overseas which, in many instances, could never be recovered, but in terms of reinforcing the habit acquired in those years of borrowing up to the hilt for houses, furniture, domestic appliances and many other things. It made no sense to wait before buying - the price would be inevitably higher if you did so. Two digit inflation was a great boost to buying on credit and buying a house on credit made the greatest sense of all because

inflation ensured that the capital value of your house increased while your repayments took a gradually smaller proportion of your income.

For some years now inflation has been much lower. Of course, it still makes sense to use credit to a reasonable degree. You benefit from the earlier use and enjoyment of goods and services and so long as you can afford the commitments involved (ie the repayments) and the interest rates are not unduly high, its still makes some sense to buy some things on credit. But the fact is that the habit acquired in the days of rampant inflation of borrowing almost without any self-imposed limit has taken hold of the community at a time when the costs and the risks are so much greater. Interest rates are currently very high, there are greater risks of redundancy and inflation is no longer high enough to make borrowing the bargain that it once was.

The law in relation to credit transactions is modern, extensive and complex but it does not directly impinge on the moral issues that present themselves for both borrowers and creditors in the situation I have been describing. Common law (both criminal and civil) and the Consumer Credit Act 1974 provide a framework for ensuring greater honesty, greater openness and transparency as to the commitments involved and for removing rogues from the credit scene. Under the Act, there are very detailed rules for written agreements and "truth in lending" requirements as to the APR (annual percentage rate) enabling intending borrowers to make sensible choices. There are controls over high-pressure salesmanship, particularly through the provision of cooling-off periods (or free rights of cancellation), licences to engage in credit business can be refused or revoked by the Office of Fair Trading and there is judicial control over extortionate credit bargains. An earlier Act, the Administration of Justice Act 1970, made harassment of debtors a criminal offence.

Clearly there are some obvious links between many aspects of the law on credit transactions and morality. Misleading advertisements, which are prohibited by section 46 of the Consumer Credit Act, are clearly immoral and the phrase "truth in lending" is redolent of moral prescription. If you accept the passage I quoted earlier from Professor Goodhart, any kind of "unfair dealing" is immoral. But I have to say that there are limits to how far the law goes at the present time in demanding high moral standards. Indeed, in the court's powers to re-open extortionate credit bargains, it seems that the law has fewer moral overtones than before the Consumer Credit Act. Under the old Moneylenders Acts, the test was: is the agreement (and the rate of interest) "harsh and unconscionable"? Browne-Wilkinson J said that this meant: were the terms of the credit transaction imposed in a morally reprehensible manner?**[2]** Now, in the recent case of **Davies** v **Directloans Ltd**[3] Mr Edward Nugee QC, sitting as a deputy judge in the Chancery Division, said the question of moral behaviour was irrelevant because the word "extortionate" was defined exhaustively in section 138 of the Consumer Credit Act by reference to various matters relating to the debtor (his age, business capacity, whether under financial pressure etc) and the degree of risk on the creditor. Perhaps this is another unfortunate consequence of the tendency of so much modern legislation to be over detailed. It seems that Parliament cannot assume that even judges in the Chancery Division will inject a little basic equity into their interpretation of statutes or that they will see the wood for the trees if the trees are too dense.

In a broader sense too, the law seems to distance itself from morality in credit matters. If you are pushed by clever, persistent and insistent marketing into being over-committed, then so long as there has been no misrepresentation, duress or undue influence, the agreement is binding. Yet it is at least open to question whether it is moral for a lender to promote credit aggressively, often aiming at those already in financial difficulties, with

only minimal enquiry into the borrower's track record or existing commitments. The young can be vulnerable too. The mother of a student wrote to me last year saying that, after her daughter had incurred a considerable debt on her credit card and she (the mother) had reluctantly paid it off, the bank sent her daughter a notice saying that her credit limit was increased. Clearly, the paying off of a big debt made the daughter a good credit risk in the eyes of the bank!

The most restrictive type of laws against unfair dealing in credit transactions, the Usury Laws, were abolished in the last century. Although, as I have shown, the Consumer Credit Act has introduced many requirements of fair dealing, they operate within a very broad freedom to lend and borrow. Current orthodoxy suggests that the existence of a minority of casualties in the credit society is a necessary price to pay for that freedom.

If you contemplate legal restrictions on the provision of credit in order to compel, as it were, a greater moral responsibility on the part of creditors, there are various possibilities. One might be to impose the penalty of non-enforcement of a credit transation on any creditor unable to prove that the debtor was creditworthy and not already over committed at the time of the loan. Clearly, you would have to envisage a much more comprehensive availability to potential creditors of information about applicants for credit than is currently available from the credit reference agencies. But if such information were available, you would hardly need the penalty of non-enforcement which I have mentioned.

I recall the basic conclusion of the Crowther Committee in 1971:-

> ". . . . .it remains a basic tenet of a free society that people themselves must be the judge of what contributes to their material welfare . . . . . Since the vast majority of consumers use credit wisely and derive considerable benefit from it, the right policy is not to restrict their freedom of access by administrative and legal measures but to help the minority who innocently get into trouble through failure to manage their financial affairs more successfully . . . . . The basic principle of social policy must . . . . .be to reduce the number of defaulting debtors. This is in everybody's interest".[4]

Such sentiments still hold good in 1987. I do not consider that any major revision is needed to the Consumer Credit Act which was based upon the Crowther Committee's report. But I do believe that there is scope both to cut down the number of defaulters and to help those who do become the casulties. I look for greater moral responsibility here on the part of creditors and I do not think that this is a naive expectation because enlighted self-interest on the part of creditors is likely to lead them in the same direction. I am looking, for example, for a greater participation by banks and others in the work of credit reference agencies. I also welcome the steps which are being taken by financial institutions, individually and collectively, to demonstrate and reinforce the all important principle of prudential lending. It is right that, before offering credit facilities, the lender should satisfy itself as to the borrower's present and future ability to repay, including the taking of all reasonable steps to discover the consumer's existing commitments. So long as it works, voluntary acceptance of this sort of obligation must be a better approach than more legal restrictions which would be likely to penalise the more creditworthy whilst pushing many of the less creditworthy into the hands of vicious and violent unlicensed money-lenders.

Voluntary action - whether motivated by considerations of morality or enlightened self-interest - can also assist those who do fall foul of the credit society. I would like to see a greater commitment on the part of major creditors to give material assistance to the many centres, CABx and other independent advice-giving agencies who are in the front line dealing with the casualties.

I do not think therefore that the law should seek to dominate to the extent that it leaves nothing to the moral sense and responsibility of creditors or debtors. And let us be clear that a moral responsibility lies on the borrower as well as the lender. Every borrower owes it to himself and his family if he has one, to say nothing of other consumers who bear the costs of default, to provide accurate answers to questions about circumstances and to avoid over-commitment with its risks of debt-collectors, court action, bailiffs and repossession. But I cannot agree with Bernard Levin when he suggests that *greater* responsibility rests with the borrower.**[5]** In my view the greater responsibility lies on the lenders. Credit is their business and they should make it their business to show the greatest care not to over-promote the benefits of credit.

Moving on from credit transactions to other transactions in the market place and especially those where typically a private consumer deals with a businessman trader, there are many examples of the law being brought in to enforce higher moral standards but they also tend to demonstrate that law has a smaller reach than morality. In my view, it is inconceivable that the law should try to embrace the whole of what society considers moral behaviour in the market place. The law should not be so ambitious. Yet, in a society where there is less consensus on moral questions, where religious restraints are less effective than they once were and where the club-like restraints of the City of London and other exclusive homogeneous trading groups are loosened under the pressures of competition, a somewhat greater role for the law is both inevitable and desirable. The good health of the community demands that the law should intervene more than once was the case. So it is that recent years have seen not only the Consumer Credit Act but also the Fair Trading Act 1973, the Unfair Contract Terms Act 1977 and the Financial Services Act 1986. Consumer and investor protection have both been given complex legislative frameworks and these frameworks are based on moral foundations of equity and fairness. The difficult question is not whether the law should intervene but how far and to what extent the law should impose higher moral standards.

I must not give the impression that all this is new and that the law has emerged as an active force only in the past 20 years. The criminal law has for centuries intervened to establish a certain basic morality of honesty to combat cheating. The regulation of weights and measures dates back to the Middle Ages. The Assize of Bread and Ale in the 13th century prescribed measures for those two commodities and the Statute of Pillories soon afterwards laid down:-

> "if the offence be grievous and often, then he shall suffer punishment of the Body, that is to wit, a Baker to the Pillory and a Brewer to the Tumbrel".

(It is a long time since a brewer was convicted of giving short measure. He is more likely nowadays to be sent to the Monopolies and Mergers Commission than to the tumbrel.)

In the complex society of today, mediaeval statutes and the developing common law of crime have had to be supplemented by many detailed statutes - the Weights and Measures Act, Food and Drugs Act, Consumer Credit Act, Trade Descriptions Act - and the moral content of laws prohibiting cheating, deception and fraud and requiring

honesty and clarity in the advertising, labelling and pricing of goods and services is self-evident. Just as important as the substantive provisions of these laws is the enforcement obligation placed upon the local authorities. Specialised departments devoted to trading standards are much more likely to see that the law is actually obeyed than the police who have many other tasks and different priorities. If there is a weakness in enforcement it is that the penalty and therefore the deterrent effect of the law on others is in the hands of the courts, and magistrates too often display a misplaced leniency. I commend the approach of Lawton L J when hearing an application for leave to appeal against a sentance by car dealers convicted under the Trade Descriptions Act of supplying cars that had been "clocked". They had been fined a total of £1,555. Lawton L J made the point that the dealers "took a chance" that the mileometer readings were genuine and courts should discourage dealers who take such chances by "taking all the profit out of the transaction and a good deal more".[**6**] I think the Judge showed a strong moral sense in expressing these sentiments. These statutes giving the backing of criminal law to various prohibitions of trading malpractice are really only specialised applications to the modern market place of age-old laws condemning deception and dishonesty. Deception and dishonesty have long been accepted as clear examples of wickedness and deserving of moral opprobrium and, therefore, appropriately part of the criminal law. It is arguable as to whether the imposition of strict liability, so common in modern regulatory legislation, is justified but in my view, without strict liability, the moral imperative and practical effectiveness of the legislation would be measurably weakened.

Is morality also a guiding force in the *civil* law of the market place? Traditionally, the civil law did not demand high standards. The general rule is that the consumer must look out for himself: *caveat emptor*. But even in the 19th century many judges realised that this was inadequate in transations where increasingly the buyer could not adequately look out for himself and needed to place some reliance on the greater knowledge of the seller. Out of that view developed the judge-made obligations placed on the seller that goods must be reasonably fit for their purpose (made known expressly or implicitly to the seller) and must be of merchantable quality. However, even after these obligations were embodied in the Sale of Goods Act 1893, it was still permissible to exclude them by appropriately worded terms of contract and very few judges were prepared to strike them down by reference to "fairness" and "equity" or recognised that the unequal bargaining positions of trader and private consumer demanded a new approach. Lord Denning was of course the exception. In a 1973 case, not for the first time, Lord Denning insisted that the common law would "not allow a party to exempt himself from his liability . . . when it would be quite unconscionable for him to do so".[**7**] But the common law as expounded by all other judges declined to follow this highly moral lead. They followed the dogma of freedom of contract irrespective of any disparity in bargaining power of the parties. It was left to Parliament to intervene and introduce what are now the provisions of the Unfair Contract Terms Act 1977. Now, in considering many types of exemption clauses, judges are required to apply a "reasonableness" test.

Even when modern statute law is taken into account, the civil law is not all that exacting in moral terms. A seller (whether a trader or not) does not have to be open and honest about deficiencies in the goods he is selling. The law requires only that there is no fraud, no misrepresentation, no active concealment of defects. There is no general legal obligation to disclose defects known to the seller, yet I would submit that morality does demand a degree of openness and honesty beyond the requirements of the law.

There is of course one well-known exception to the general rule that a contracting party has no duty of disclosure to the other party. This is in insurance law and the obligation of disclosure is imposed, not on the stronger party to the contract, the insurer, but on the

insured. Full unambiguous disclosure is required of all the material facts known to the insured. I am reminded of the story of the young man who wanted to take out life assurance and was faced with certain questions on the proposal form: "Are your parents alive? If not, how did they die?" His difficulty was that some years ago his father had been hanged. The insurers' agent said: "That's no problem. Just put: No. My mother died of pneumonia. My father was taking part in an official function when the platform gave way".

I think it is fair and right that this duty of full disclosure should be imposed on the insured. Suppose someone seeks life assurance. Because the insured has the knowledge and information about his medical history and other material matters, it would be quite wrong for the insurer to be committed to provide insurance cover on the basis of a certain premium if the insured has kept secret some vital or relevant piece of information. It would be immoral for the insured to keep back such information. On the other hand, I do think the common law obligation goes too far because the test of whether an undisclosed fact is material is whether it would influence a prudent insurer to decline the risk or alter the premium. (In Scottish law the test is that of the reasonable person in the position of the insured.) Further, I think that if the insurance contract is preceded by a proposal form, the insurer should see to it that all the questions he wants answering are put into the proposal form, and a residuary duty of disclosure, over and above answering these questions to the best of his knowledge and belief, should not be required. Moreover, the laws have again followed the dogma of freedom of contract, despite the obvious one-sided nature of the bargaining process, by allowing insurers to rely on contract clauses, known as "basis of the contract" clauses, whereby innocent and immaterial misrepresentations are made conditions of the contract. Judges have felt unable to combat such clauses while giving voice to anxious concern about them. In a 1920's case, Lord Wrenbury (noted for his "sound grasp of all equity matters"[**8**]) said this:-[**9**]

> "I think it a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay upon a ground which no one says was really material. Here, upon purely technical grounds, they, having in point of fact not been deceived in any material particular, avail themselves of what seems to me the contemptible defence that although they have taken the premiums they are protected from paying".

Moral sentiments indeed but an exercise in hand-wringing as well!

It was left to the threat of legislation and the work of the Law Commission[**10**] to impel the insurance industry to change its ways. The insurance industry introduced Statements of Insurance Practice in 1977 and revised Statements were promulgated in 1986. Like the Law Commission, I would prefer changes in the law, but, as one observer has commented recently, the Statements do "represent a genuine attempt by the insurance industry to meet some of the criticism levelled against it and it would be unduly cynical to describe them as mere tokenism".[**11**]. The Statements are to my mind a genuine attempt to see that insurers do not take unfair or immoral advantage of the law that is so favourable to the insurer. Thus, according to the Statements of Practice, matters which insurers have found generally to be material should be the subject of clear questions in proposal forms, proposal forms are not expected to be completed except according to the proposer's knowledge and belief and the consequences of non-disclosure must be fully explained.

So now the moral and legal obligations on the potential insured are matched by the moral obligation on the insurers not to take unfair advantage of their legal position. Further, as

part of the new framework of protection for those taking out life assurance, embodied in the Financial Services Act 1986, a series of rules is being introduced for the conduct and marketing of life assurance business. The emphasis is on disclosure of information so that the consumer has full and real free choice - information as to whether the salesman is an independent intermediary or works for one company only; disclosure to the consumer if levels of commission to intermediaries exceed agreed maxima; and information about surrender values and post-investment performance. It is the intention of the Securities and Investments Board (SIB) to bring to an end "the practice of companies competing for business on the basis of escalating and unrealistic projections of future performance"

In the insurance world the long-established duty of disclosure on the insured is being complemented by obligations of disclosure on the insurer. It is worth considering how greater disclosure and openness in other types of transactions could make for a higher standard of morality. For some time I have pressed for a measure of disclosure on the part of the sellers of secondhand cars. In a report published in 1980[**12**] I proposed that legislation be introduced requiring that all used cars up to 10 years old, offered by traders to consumers, should be accompanied by a written statement about the car's condition. A more detailed description of the car would give greater practical reality to the buyer's right under the Sale of Goods Act to obtain goods that correspond with their description as well as to the sanctions of the Trade Descriptions Act. I do not think present day standards of commercial morality on the part of certain types of second-hand car dealer can be relied on to reduce the incidence of dubious and unfair dealing now prevalent in parts of this trade. The law needs to be brought in to enforce the requirements of morality.

Given that the most important purchase in most people's lives is the purchase of a house, perhaps some consideration should also be given to the lack of any legal requirement on the vendor to disclose defects Sensible purchasers arrange to have a structural survey but fees are of course lost if the house is sold to someone else and, regrettably, only a minority of buyers obtain such a survey. Some have suggested that the vendor should be under a legal obligation to provide an independent survey and make it available to any bona fide potential purchaser. Meantime, unless specific questions are put during the pre-contractual stages of conveyancing, the disclosure of any deficiencies is left to the vendor's sense of morality. Is this enough to satisfy the legitimate interests of the buyer?

I believe there has long been a strong case for an extension of law to enforce higher standards of morality in the market place. Short of law, the Statements of Practice in the insurance industry (to which I have referred), the British Code of Advertising Practice under the aegis of the Advertising Standards Authority as well as the various codes of practice promoted by my Office in such sectors as package holidays, double glazing, footwear and furniture, have all contributed to the raising on trading standards. I doubt, however, whether principled calls for raising standards in the name of morality or fairness would have been successful by themselves. Fortunately, morality and calls for greater morality and transparency and disclosure in the market place have been strengthened by the widely understood belief that *competition* is good for efficient markets and greater consumer choice. It is clear that competition can only work effectively if imperfections and distortions in the market place such as false or misleading advertising, high pressure sales techniques, cartels and monopoly practices are eliminated or reduced. The objective of raising standards of trading morality has been allied to the objective of promoting economic efficiency and the use of law (or quasi law like codes of practice) is the obvious means of promoting both objectives. The failure of the courts to advance the law in these directions has generally meant that significant changes can only come through Parliament.

Of course it has to be recognised that greater competition, desirable as it is for all the well-known reasons of enhancing efficiency and keeping down prices and charges and enabling the UK firms to match their rivals overseas, *can* cause a lowering of standards. This has been argued by architects, solicitors and other professional groups when required by Government to allow fee competition, individual firm advertising and other commercial practices. Unbridled competition can indeed tempt even the more reputable firms to lower quality and morality standards in order to survive. Yet, it seems to me, rules unduly restrictive of competition cannot be allowed to remain. Other more economically acceptable ways of ensuring standards must be developed. What the law has to do in these cases, combined with the rules of the professional bodies, is to provide for openness and transparency of operations, disclosure of interests and the adequate discipline of offenders.

Not only the professions but the City of London generally are, for good reason, expected to be more competitive. The importance of Britain's financial markets to this country's economic well-being cannot be underestimated and London can only maintain its position as one of the three great financial centres of the world if it allows for the maximum competition. The City's reputation in the world would have seriously declined if it had failed to give up its old ways including the fixed commission system of the Stock Exchange and the separation of function of jobber and broker. But reputation is a subtle thing. The City of London's reputation and therefore its success depends not just on economic factors like competition and efficiency but on soundness and standards. A greater competitive environment in the City has included the growth of financial conglomerates and the arrival of outsiders from the United States, Japan and elsewhere. The old separation of function rules have gone and with it the club-like atmosphere that might have been relied on to remove conflicts of interest. But the Financial Services Act 1986 introduces a host of institutions - the SIB and the self-regulatory organisations -and a host of new requirements to ensure standards and protect the investor. The new Act also increases the legal powers of the Department of Trade and Industry to deal with insider trading. The new regime is full of examples of the law underpinning high moral standards of trading. I hope these developments will not be undermined by any failure to recognise what morality requires. The **Sunday Telegraph** said recently[**13**]:-

> "(Insider trading) is not, as some respected City gentlemen contend, a victimless crime. Buying or selling shares on inside information is theft. It is as dishonourable a practice as a captain abandoning his ship before telling passengers there is a bomb on board".

Just as modern conditions require moral standards to be increasingly backed by law, so the effectiveness of the law needs to be backed by an ability on the part of the community and in particular that section of the community most affected - in this case the City of London - to recognise what is moral or immoral and to appreciate that insider dealing and market rigging are not just illegal - they are immoral too. The **Sunday Telegraph** thought that, for the City, 1986 ended on "a depressingly low moral note" and the public was outraged by a series of insider trading scandals. It is essential that the City itself has a sense of outrage too.

In maintaining my thesis on the need for law to back up standards of morality in the market place, let me conclude on a cautionary note. Regulations and law can go too far. There is a lack of flexibility, both because of lack of Parliamentary time to amend when necessary and because of our rules of statutory interpretation. Further, law can sometimes be counter productive in unduly hamstringing some trading activity and law can bring with it an increase in bureaucracy. Some time there will have to be a review of

the proliferation of regulatory bodies recently created - OFTEL, OFGAS, SIB and so on. It is not sensible to contemplate the law taking over the whole area of conduct in the market place. Too much stress on legal regulation can lead to mindless concern with rules rather than their purpose. And if the community comes to feel there is an excess of the law, rules are likely to be followed more in the letter than in the spirit. Pushing close to the limits of the law and even evasion of the law can even assume a certain moral justification if laws are perceived as too burdensome and oppressive.

Moral standards, without legal underpinning, will be inadequately supported. But I suggest that a society that leaves nothing to an individual's own sense of what is right and moral would no longer be a free society. Where the balance should be struck between freedom and regulation is of course a perennial problem that every new generation has to tackle in the light of changing patterns of behaviour. There is no final answer.

Notes

(1) A L Goodhart, **English Law and the Moral Law** (1952).

(2) **Multiservice Bookbinding Ltd** v **Marden** [**1978**] 2 All E R 489, 502; [**1979**] Ch. 84, 110.

(3) [**1986**] 2 All E R 783.

(4) Consumer Credit : Report of the Committee (Chairman : Lord Crowther) Cmnd. 4596, paras. 3.9.1 and 3.9.2.

(5) **Discredit where it is due, The Times,** 29 December 1986.

(6) **R** v **Hammerton Cars Ltd** [**1976**] 1 WLR 1243, 1251; [**1976**] 3 All E R 758, 765.

(7) **Gillespie Brothers Ltd** v **Roy Bowles Ltd** [**1973**] **1** All E R 193, 200.

(8) **Oxford Companion to Law**, 1980.

(9) **Glicksman** v **Lancashire & General Assurance Co Ltd** [**1927**] A C 139, 144.

(10) Report on Insurance Law : Non-disclosure and Breach of Warranty : Law Com No 104, Cmnd. 8064 (1980).

(11) A D M Forte, **The Revised Statements of Insurance Practice - Cosmetic Change or Major Surgery?** (1986) 49 Modern Law Review, 754, 767.

(12) **Consumer difficulties inthe used car sector : a report and recommendations,** 1980 -Office of Fair Trading.

(13) **Sunday Telegraph** - Editorial, 28 December 1986.

THE POLICE POWERS OF ENTRY AND SEARCH OF PREMISES IN ORDER TO SEIZE EVIDENCE FOUND THEREIN*

Jonathan Daniels, LLB

Introduction

> **"The Police, by the very nature of their function, are an anomaly in a free society. The specific form of their authority to arrest, to search, to detain and to use force - is awesome in the degree to which it can be disruptive of freedom, invasive of privacy and sudden and direct in its impact on the individual. Yet a democracy is heavily dependant upon its Police to maintain the degree of order that makes a free society possible.[1]**

There is no concensus as to what should be the proper scope and content of Police powers in contemporary society. Great debate exists as to what the precise ambit of those powers should be. It is necessary, on the one hand, that the Police possess adequate power in order to achieve the task that they have been employed to do by the State; but, on the other hand, it is vital to exclude those powers which are seen as un-acceptable, in that they infringe or erode ancient civil liberties which must be preserved in any freedom loving society.

The powers granted to the Police, by the legislature, must therefore strike a balance. The Government's aim throughout must be to ensure that the Police have the necessary powers they need to bring offenders to justice, but at the same time to balance those powers with new safeguards to ensure that those powers are used properly[2] and only where, and to the extent that they are really necessary.

The need for balance was indeed recognised by the Royal Commission on criminal procedure[3], whose terms of reference included, inter alia, the examination of the issues of Police powers "having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime".[4] Clearly a task requiring the balancing of different interests.

Thus, two schools of thought exist; one in favour of the Police being endowed with greater and wider powers and the other advocating a restraint on such authority being given. As the Royal Commission states, "two very different positions, two opposed philosophies in perceiving and evaluating the criminal process, so diametrically apart" exist.[5]

The names I have devised for these two schools are firstly, the "*power-need theorists*' and secondly, the "*power-restraint theorists*"

* Submitted as part of the requirement for the award of the LLB degree (CNAA) of Trent Polytechnic, 1987 (This article consists of the introduction, second chapter and conclusion taken from the dissertation. The appendices are not included.)

Both schools have one dominant aim in mind, which is central to their thought.

The governing factor for the power and need theorists is that more and more effective power is needed for the Police to combat the ever increasing level of criminal activity in our society. As crime in this country is becoming more violent and widespread, the Police must be granted and invested with wider and further reaching powers if they are to make any reduction in the amount of criminal behaviour - the aim not only of the Police, but surely the wish of every right-thinking and reasonable member of the community. Not surprisingly, supporters of this theory are usually present and former members of the Police force[**6**], but not exclusively so[**7**].

The central element which guides the power-restraint theorists, is the need to preserve civil liberties. They accept that the Police must have the necessary powers to detect crime, but this is not the dominant issue as far as these theorists are concerned. Civil liberties must, in all events, be kept intact if we are to live in a free society and not in a Police state, governed by uncertain, oppressive and arbitrary powers. Such theorists are usually associated with various types of pressure groups and organisations devoted to the protection of civil rights, but are not so restricted. Indeed, a barrage of criticisms came from such bodies at the British Medical Association, the Judiciary, the Law Society, the Clergy and of course, the National Press, when the present Conservative Government proposed an extension to Police powers in the form of the Police and Criminal Evidence Bill 1982[**8**]

This proposal by the Government in 1982 injected the debate on the proper ambit of Police powers with a boost of energy. Much heated argument between the two sets of theorists followed as a result. The power-restraint theorists argued that if the new Bill were enacted, many fundamental liberties would lack safeguards, which were vital if these civil rights were to be preserved and protected. The power-need theorists argue that individual civil liberty does require that one can walk down the highway without being mugged; or to arrive home without finding that you have been burgled; or to carry out your business without worry that some violent gang will throw stones through your shop window or loot it after closing hours. They argue that if the Police had more power, such offenders could be detected and brought to justice.

Despite the storm of criticism aimed at the Bill, it was enacted, albeit with amendments in 1984. Prior to the Act, the Law relating to Police powers was ambiguous, unclear and antiquated. As the authors, Bevan and Lidstone state, it developed in a piecemeal way since the establishment of the professional Police forces in the nineteenth century. Police law had been supplemented in a number of ways, such as the rules articulated by the Lord Chief Justice known as the Judges Rules and by the Judiciary collectively in the form of Case Law. The result of all these events was a patchy and inconsistant network of Police powers. "A wide ranging overhaul of the system had been due for many years; new and heavier pressure on the Police and a more critical Public opinion demanded that the powers of the Police should be placed on a modern statutory footing".[**9**]

The central theme of this project, is the law relating to Police powers of entry and search of premises in order to seize relevant material found therein[**10**].

The powers granted to the Police, by the legislature, in the form of the Police and Criminal evidence Act 1984, shall form a substantial part of this work. However, it will not be exclusively confined to this recent statute. Police powers, under the Common Law and under various statutes , to enter and search for evidence, prior to the Act, will also be discussed[**11**]. Submissions will be made as to whether Parliament has tilted the balance

too much in favour of the Police, as the power-restraint theorists would claim, or has equilibrium been found, in that these new powers preserve civil rights, yet allow the Police to reduce the amount of un-lawful conduct in society, as the power-need theorists would claim?

The views of these theorists are constantly expressed throughout this project. The reader must be aware of this fact before continuing. Ideas are presented as such theorists would perceive the position, if they were asked the question: "How does this Police power or safeguard accord with your school of thought?"

CHAPTER TWO

Entry for the Purpose of Search by Authority of a Search Warrant and the Issue of Production Orders Under the Police and Criminal Evidence Act 1984

> **"We, as a Police Service, cannot expect a carte-blanche Power-of-Search in this area of such a delicate nature. The need should arise in-frequently and would be used responsibly; the decision to adopt the procedure being taken at a high level; but it could be an in-valuable tool when needed and should greatly assist in our efforts to detect serious crime when other methods cannot be used.[12]**

2.1 An outline of the Government's response to the Royal Commission's recommendations

Before we examine the statutory provisions relevant to this area, a brief outline of the birth of the present legal position shall be given.

The Government did not accept or acknowledge all the Royal Commission's recommendations in the area of search warrants. In some cases, they were totally rejected,[13] whilst in others, only partial acceptance was given. This is illustrated by the proposal submitted by the Commission that to enter premises and search for EVIDENCE therein, the authority of a Judge would **always** be needed.[14]

The legislature was of the view that as Magistrates already possessed the power to grant such warrants in so many vast and varied situations,[15] there was no reason, or need to change this procedure by substituting a Judge as the issuing authority for a Magistrate when it came to dispensing warrants to search for EVIDENCE. The Government did, however, accept that the authority of a Judge would be needed to sanction such a warrant to search for evidence if the material sought by the Police was held in confidence. The Police, the Government proposed, would apply to a Circuit Judge in these circumstances on an **EXPARTE** basis.[16]

This exparte proposal by the Government was accompanied by severe criticism and great outcry by the power-restraint theorists.[17] This tidal wave of criticism came from many quaters of the community; the Clergy, the Medical Profession, the Law Society and Journalists.[18] The magnitude of criticism centred on the objection that such a proposal would empower a Judge to grant to the Police a search warrant authorising them to enter premises occupied by an innocent third party - say a Doctor's surgery - and search his files which will contain material given in confidence. As such a warrant would have been applied for on an 'exparte' basis, the Doctor cannot present a case, before the Judge, as

to the necessity of the warrant or propose alternative methods in order to obtain the information sought. Furthermore, as such material will usually be held in confidence, the potential power of the Police to search medical files for example, might make it more difficult to gain the trust and confidence of their patients.

The Government in responding to this outcry - and perhaps realising that it had tilted the balance too much in favour of the power-need theorists - decided to re-draft its original proposals in this area and consequently made a number of significant concessions.[**20**] The two most relevant concessions which were eventually enacted in the 1984 Act are listed clearly and concisely by Professor Zander as follows:-[**21**]

1. The hearing before the Judge would be **INTER PARTIES**[22]

2. The enforcement of a Judicial order to produce confidential material would be by proceedings for contempt and not by a search warrant.[**23**]

The Act thus provides two different procedures by which the Police may obtain evidence of criminal conduct. Firstly, the Police may apply under S8 to a **Magistrate** for a search warrant authorising them to enter and search premises for evidence; alternatively, they may apply to a Circuit Judge under S9 and Schedule 1 of the Act.

The correct procedure that must be followed by the Police will depend on the subject matter and constitution of the material sought.

2.2 Section 8 - An Application to a Justice of the Peace by the Police to Obtain a Search Warrant

S8 of the 1984 Act provides that a Justice of the Peace may grant a warrant to a Constable to enter and search *premises* if he is satisfied that there are *reasonable grounds for believing*:-

a) That a *serious arrestable offence* has been committed AND;

b) That there is material on the premises which is likely to *be of substantial value* (whether by itself or together with other material of an offence) AND;

c) That the material is likely to be *relevant evidence* AND;

d) That it does not consist of or include items eubject to *legal privilege; excluded material* or *special procedure material* AND;

e) ANY of the conditions in S8 (3) are satisfied.[**24**]

It is emphasised to the reader that the issue of a warrant by a Magistrate is cardinal upon the existence of ALL the circumstances defined in S8(1) (a) - (d) AND ANY of the conditions specified in S8 (3) of the Act.

2.3 The Meaning of the Phrases Employed by S8

A. **PREMISES:** Defined in S23 of the 1984 Act to mean any vehicle, vessel, aircraft or hovercraft, any off-shore installation, any tent or moveable structure.[**25**]

B. **REASONABLE GROUNDS FOR BELIEVING:** This concept is relevant in two contexts. Firstly, not only must the Police "applicant" be satisfied personally that there are reasonable grounds to believe that property sought is to be found on the premises in question, but secondly, the issuing Magistrate must also be satisfied on reasonable grounds that this is so. The term is used to try and filter out the un-justified use of power.[**26**]

The authors Bevan and Lidstone[**27**] state:-

> "It is not necessary to have substantial proof before one can believe; belief implies that there is information available which turns conjecture or surmise into an acceptance that something is true"

With this in mind, the authors came up with the following formula. If there are ten steps from mere suspicion to a state of certainty, then reasonable belief may be as high as step nine or ten.[**28**]

The use of the adjective "reasonable" - implies an objective standard.[**29**]

C. **A SERIOUS ARRESTABLE OFFENCE HAS BEEN COMMITTED**[**30**]: The reasonable belief by the Magistrate, that an offence is a serious arrestable offence, is an essential pre-condition to the exercise of the granting of a warrant that permits entry and search[**31**].

> "It follows that the exercise of these powers in respect of an offence which is NOT reasonably believed to be a serious arrestable offence is un-lawful. Consequently, the interference with the liberty of the citizen will be a tort and/or a defence to a criminal charge".[**32**]

The 1984 Act defines serious arrestable offence in Schedule 5 and S116. However, the power-restraint theorists argue that terms such as "serious harm", "serious interference", "serious injury", "serious financial loss" and "substantial gain" are not the most clear concepts.[**33**]

One wonders whether the power-restraint theorists have cause to worry, not because the legislature has granted too much power to the Police or Magistrates, but that the power they have granted is un-certain and imprecisely defined and as a result, a Magistrate could quite easily exceed his jurisdiction.

D. **LIKELY TO BE OF SUBSTANTIAL VALUE:** The evidence sought by the Police must be "likely" to be of substantial value to the investigation. Thus, if evidence that is of no value is taken, the conduct will be unlawful. The purpose of the insertion of these words is submitted, is to try and prevent "fishing expeditions"[**34**]. In committee[**35**] the following examples were given of evidence likely to be of substantial value - finger prints; clothing of the victim of a violent attack, a gun if the Police already had possession of the bullets.[**36**]

E. **RELEVANT EVIDENCE:** This term is defined as anything that would be admissable at a trial for the offence.[**37**]

2.4 Section 8 It's Effect - An Even Balance? A General Comment

A) All the existing powers to issue a warrant mentioned in chapter one are preserved by the Act.[**38**] In this respect, the provisions of the Act contained in S8 will not prejudice any existing power to enter and search premises under the authority of a warrant. On this basis, the Police have two alternative powers on which to base a search warrant.[**39**] Bevan and Lidstone[**40**] submit, persuasively it is thought, that if for example, the material sought was £1 million in gold bullion which is the proceeds of a robbery, an application for a warrant should be made under S26 of the Theft Act 1968. If, however, the material sought is other relevant EVIDENCE of that offence which is un-obtainable under the Theft Act but is likely to be of substantial value to the investigation - for example the vehicle used in the robbery - an application must be made under S8.[**41**] This submission would not seem un-reasonable and illustrates the way in which S8 supplements the pre-existing law, enabling the Police to examine and obtain evidence which otherwise would be un-obtainable.

B) REFORMS

As noted - in chapter one, prior to the Police and Criminal Evidence Act 1984, an application would be made by the Police to a Magistrate in order that he may grant a search warrant. However, there existed in such a procedure two main and substantial defects - one raised by the power-need theorists and the other by the power-restraint theorists. Firstly, no statutory criteria existed which the Police or the issuing Magistrates were obliged to satisfy before they obtained or granted such a warrant.[**42**] Secondly, no general power existed to enable the Police to obtain a warrant to enter premises to search for EVIDENCE for even the most serious offences such as murder or kidnap.[**43**] On this basis, both theories are at concensus ad idem in that the law in this area was ripe for reform.

S8 tries to cater for these omissions and in the process, it is submitted that it has been relatively successful. The effect of this section is two fold - one tilted towards the power-need theorists, the other towards the power-restraint theorists - and in this respect, achieves the balance sought.

Firstly, the section "fills in a gap where one existed previously without any apparent logic"[**44**] and which was seen by the power-need theorists as a major hindrance in the fight against crime. As Lord Denning explains "No Magistrate, - no Judge even - has the power to issue a search warrant for murder. He can issue a warrant for stolen goods and for some statutory offence, such as coinage, but not for murder. Not to dig for the body, nor to look for the axe, the gun or the poison drugs. The Police have to get the consent of the householder to enter if they can, or if not, to do it by stealth or force. Somehow, they seem to manage, no decent person refuses them permission".[**45**]

Section 8 caters for this glaring omission in the English law and consequently no longer will the Police have "somehow to manage . . . by stealth or force". Legal authority now exists which permits the Police to enter and search for relevant

evidence of a serious arrestable offence. On this basis, the reader will understand why the power-need theorists are satisfied. For them, S8 not only fills in a gap but in addition it lays down a red carpet on top. The Police are now empowered to obtain a warrant to search for a body believed to be buried in a garden or entombed in a recently concreted cellar floor or to enter premises to search for the rapist's mask or the robber's gun. This is seen as a necessary and essential power in the fight against crime. It is submitted that with prudent use, the power conferred by S8 should secure admissable evidence against those, who in the absence of stealth and force of the investigation would otherwise evade justice.

Secondly, for power-restraint theorists, S8 defines to a greater extent what a Justice of the Peace should have reasonable grounds to believe in before a warrant should be issued.[**46**]

To this end, some argue, that it is easier to "vet" and challenge the validity of such a warrant if issued in-correctly[**47**]. Moreover, a further safeguard for the Public which accompanies this new power is found in S8 (3) of the Act. In effect, this sub-section creates a presumption that before the Police apply for a warrant, they should try to secure where it would be likely to be removed or interfered with if the Police interest in the material became known.[**48**] However, "this last requirement stresses the reliance that Magistrates will have to place on Police evidence since they are ill-equipped to challenge operational evaluations such as the need for surprise".[**49**] In this respect, one wonders whether the criticism mentioned in chapter one, that Magistrates merely "rubber-stamp" many applications for search warrants by Police Officers, is still valid, despite the new provisions contained in S8.

2.5 Excluded Material: Special Procedure Material and Legal Privilege

Prior to the Police and Criminal Evidence Act 1984, there existed limited statutory provisions which authorised the Police to obtain evidence which was held by third parties on a confidential basis. The Royal Commission remarked that "there will be rare circumstances where a compulsory power is needed and which should be available to the Police before a charge".[**50**] The Bankers Book Evidence Act 1879 allows access to Bank records but the holder cannot be compelled to provide them.

Once again, however, a limitation that existed in pre-1984 law relating to the search for material held in confidence has been catered for by the new Act in that such material, despite it being held in confidence, will be available to the Police on the order of a Circuit Judge. The Court will, in effect, override any duty that the holder of the information has to any other person.

As noted above, by virtue of S8 (1) (d) a Magistrate is prohibited from issuing a warrant if the evidence sought by the Police is classified as being "**subject to legal privilege**" "**excluded material**" or "**special procedure material**". An application for a warrant to enter premises in order to search for excluded or special procedure material is subject to a separate and more rigorous procedure before a Circuit Judge.[**51**]

Thus, an application is made under S8 to a Magistrate if the Police wish to search for evidence of a serious arrestable offence. On the other hand, if the Police wish to obtain evidence which is classified as either excluded or special procedure material, they must initially seek an order under S9 and Schedule 1, supervised by a Circuit Judge.

It is submitted that in this respect, the Act once again has maintained a state of equilibrium between Police powers and civil liberties.[**52**]S8(1) (d) prevents the Police from simply applying to a lay Magistrate in order to obtain access to confidential information. However, by the authority of SS9 to 14 and Schedule 1, the Police can obtain certain material held in confidence, if instead of consulting a Magistrate, they approach a Circuit Judge, who applies additional safeguards before sanctioning such access.[**53**]

2.6 Excluded Materials: Special Procedure Material and Legal Privilege - A Definition[54]

Excluded Material

S11 of the 1984 Act defines excluded material. Basically it is material which falls into one of three categories:- **Personal records, human tissue or tissue fluid and journalistic material.** It is essential that in order for such items to be classified as excluded material they must be held in confidence.

As far as personal records and human tissue or tissue fluid are concerned material is held in confidence where it is subject to an express or implied undertaking to hold it in confidence[**55**] or it is covered by an obligation of secrecy by virtue of a statute passed at any time.[**56**] As regards journalistic material, an obligation of confidence exists where it is held subject to an undertaking, restriction or obligation of confidence and has been so held by one or more persons continuously since it was first acquired or created for the purpose of journalism.[**57**]

a) Personal Records

These are defined by S12 and include any documents[**58**] and other records concerning an individual[**59**] which relates to one of the following matters:-

1. **Physical and mental health S12 (a)** - Medical, psychiactric and dental records would clearly be classified as excluded material.[**60**]
2. **Spiritual counselling or assistance given or to be given S12 (b)** - The essential word here is "spiritual". This clearly relates to records kept by Rabbis, Priests, and Imams.

   Moreover, "it clearly covers religious advice and this can extend to unusual, if not dangerous religious sects such as the Moonies".[**61**]
3. **Counselling or assistance given or to be given for the purpose of personal welfare S12 (c)** - The potential scope of this category is vast. It is submitted that records kept by the following bodies could come within S12 (c). Social Workers, Samaritans, C.A.B, Release, NCCL, Probation Officers, Organisations established to help victims of rape, drugs, alcohol or spouse batterers.[**62**]

   (It should be noted that generalised statistical data cannot be regarded as personal records and hence excluded material. The material must relate to an individual so that he can be identified from it.)

b) Human Tissue or Tissue Fluid

This concept is defined by S11 (1) (b) which states that it is tissue which has been taken for the purposes of diagnosis or medical treatment.[**63**]

c) **Journalistic Material**
This is defined by S13. It means material acqiured or created for the purpose of journalism in the possession of a person who acquired or created it for the purpose of journalism including one receiving material from someone who intends that the recipient shall use it for those purposes.[**64**]

All the above provisions represent the Government's response to the power-restraint theorists fierce campaign to exclude such material from the scope of an ordinary search warrant issued by a Magistrate under S8 of the Act.

It is submitted that the worries of these theorists have more than adequately been catered for by these provisions. It could be argued that in trying to maintain equilibrium, the Government has gone the other way and tilted the balance too much in favour of preserving information to the expense of the Police investigation. Why it could be argued should such organisations as the Moonies[**65**] and the Paedophile Information Exchange[**66**] be able to shelter behind the excluded material provisions? Why was the term bona-fide not inserted in S12 (b)?

Before concluding on excluded material, the reader should be aware that such material can still however, be obtained under other pre-existing statutory warrant provisions -e.g. under the Theft Act 1968 - but only if the special procedure before a Circuit Judge discussed below is followed. Bevan and Lidstone state: "Excluded material is only excluded if the Police are seeking a search warrant under S8 of the 1984 Act. If they use other statutes, excluded material can be obtained provided of course, the Police follow the special procedure to obtain the warrant".[**67**]

Special Procedures Material

S14 defines special procedure material to include:
a) journalistic material other than that already falling within excluded material and
b) material, other than items subject to legal privilege and excluded material, acquired or created in a trade, business, profession or occupation of for the purpose of an office paid or un-paid where it was held in confidence.[**68**]

Sub-section (3) provides that material acquired by employees from their employer, or by a Company from an associated Company, is only special procedure material if it was such materal immediately before it was acquired.[**69**]

Legal Privileges Material

Under the 1984 Act, it is NOT possible **IN ANY CIRCUMSTANCES**, to obtain a warrant to search for legally privileged material and furthermore, this prohibition applies to ALL rights of search emanating from other statutes.[**70**] S10 of the Act defines the term to include "Lawyer-Client" communications when giving legal advice or by their representatives if it was in connection with and for the purpose of legal proceedings.[**71**] Such material is thus uniquely treated

2.7 Procedure that the Police must Follow to Obtain Excluded and Special Procedure Material - An Application to a Circuit Judge

By virtue of S9 (1) of the Police and Criminal Evidence Act 1984, the Police are permitted to seek access to both excluded material and special procedure material, if, **and only if**.

the application to gain access to such material is sanctioned by a Circuit Judge, who must in turn follow procedure set out in Schedule 1 to the Act. Faced with such an application, the Judge can grant a production order or in exceptional circumstances, he may issue a search warrant. S9 (2) repeals all existing enactments in so far as they empower Judges or Magistrates to authorise searches for excluded or special procedure material - all applications for searches for such material must now be made in conjunction with S9 and Schedule 1.

A. The Application for a Production Order

A production order is a document requiring the person whom it is addressed[72] to produce material to the Police, so that they can either take it away and inspect it, or examine it there and then without removing it. Before the Judge issues an order, he must be satisfied that one or the other of the two sets of access conditions are met. "The first set of conditions relate to special procedure material, the second set applies both to excluded and special procedure material".[73]

1. The first set of access conditions - applicable only to special procedure material (Schedule 1 paragraph 2)[74]

A) There are reasonable grounds to believe that a serious arrestable offence has been committed and on the premises, there is special procedure material which is likely to be of substantial value to the investigation and likely to be relevant evidence.

B) Other methods of obtaining the special procedure material have failed or have not been tried because it appeared that they would be bound to fail.

C) It is in the public interest to produce or allow access to the material, having regard to the benefit of the investigation and the circumstances under which the person holds the material.

Most of the terms used in this schedule have been defined when discussing S8. The reader, should, however, note that paragraph C) above has no compatible equivalent contained in S8. Its aims is to direct the Judge to consider the all important question of "public interest". Differing arguments will be presented to the Judge to sway him to one side of the public interest force. Bevan and Lidstone stated on the one hand the Police Officer will urge the relevance of the material to the investigation and gravity of the offence, on the other hand, the holder of the material will argue the importance of preserving his obligation of confidentiality. This latter argument, however, is unlikely to be accepted since A) the sections on excluded material have already pin-pointed and protected the most sensitive areas of confidentiality and B) the Courts are likely to err on the side of the gravity of the offence.

It is submitted that the only apparent additional safeguard in relation to access to special procedure is that it is a Circuit Judge and not a mere Magistrate who supervises the application.[75] The requirement that the application be made inter partes is also regarded by some as a safeguard in that the holder of the material can present constructive argument to the Judge as to why the material should be withheld.[76]

Some power-restraint theorists argue strongly that all these alleged safeguards are merely illusory and the language employed vague and un-certain. Talking of the inter-parties application, Williams[**77**] states "it is inevitable that the Police evidence is more likely to be accepted, although much of it will be circumstantial. For example, in relation to there being special procedure material on the premises, the Constable could present evidence that a Journalist has been seen visiting a Civil Servant from the Ministry of Defence who has access to classified information. On this basis, the Police could argue that there were reasonable grounds for believing that secret information had been passed to the Journalist. How is the Journalist to deny this? Anything other than a straight forward denial is difficult as it is impossible for the Journalist to prove what he has not got in his files other than by giving the Police access"

Furthermore, a party who possesses the material wanted by the Police might not have the funds to employ counsel to articulate and formulate arguments for him as to why the material should be witheld.[**78**].

2) The Second Set of Access Conditions - Special Procedure Material or/Excluded Material (Schedule 1 Paragraph 3)

The second set of access conditions are applicable for applications for excluded **OR** special procedure material made under Schedule 1 which, but for S9 (2) of the 1984 Act, would have been the subject of an application for a warrant under a pre-existing statutory power.[**79**] "The requisite conditions are

a) a reasonable belief that the material is on the premises,
b) that a search warrant could be obtained under another statute were it not for S9 (2) of the Act and;
c) that such a warrant would have been appropriate in all the circumstances".[**80**]

The effect of these provisions can be seen from the following example[**81**] - If a military plan were passed to a Journalist by a confidential source, the plan would be excluded material. Prior to the 1984 Act, a warrant could have been issued by a Magistrate under the Official Secrets Act 1911 S9 (1) to search for the plan, but by virtue of the 1984 Act, S9 (2) (b) the Police may no longer make an exparte application to a Magistrate in respect of excluded material. They could, however, apply to a Circuit Judge inter parties for a production order because a warrant could have been granted under the pre-existing law and thus condition b) above, being satisfied. "Furthermore, it will not be open to the holder of the information, unlike in the first set of conditions to try and defeat the order by establishing that the material in question will not be of substantial value to the investigation, or by arguing that such disclosure would be contrary to Public policy".[**82**]

3) The Procedure that must be Followed in Relation to a Production Order

The application for the production order must be made, as we have seen, inter parties. This is provided for by paragraph S7 Schedule 1

The effect of this provision is that when the Police apply for a production order, the person who possesses the material is served with a notice to the effect that such an application has been made. This notice may be served on the person in

question by registered post, recorded delivery, deposited at the address of that person or delivered by hand. Once the notice has been served, the conduct of the person to whom it is addressed is restricted in so far as it relates to the material sought by the Police. (Paragraph 8).

For example, the possessor cannot conceal, destroy, alter or dispose of the evidence to which the application relates, save by leave of the Judge or the written authority of a Police Officer involved or if the application is dismissed or abandoned.[**83**] "In this respect, the material is frozen".[**84**] Furthermore, the production order must be compiled with no later than seven days after the order is made. If the recipient of the notice fails to heed these restrictions and does not comply with the order, he may be held in contempt of Court.[**85**]

In R v Central Criminal Court, exparte Adegbesan[**86**], where a Police Officer sought an order from a Circuit Judge for access to special procedure material, it was held that it was his duty to provide a description of all that was sought to be produced. Failure to do so could result in the recipient of the notice unwittingly destroying that material since it was impossible for him to know whether he was complying with the provisions relating to non-disposal of the relevant material within Paragraph 11 of Schedule 1.

It is submitted that these procedural requirements are quite comprehensive, providing safeguards and provisions which are designed to prevent the production order being frustrated. Despite the criticism aimed at it above by Williams, it is thought that the requirement that the application be made inter parties is the most effectice safeguard against unjustified orders, enabling the party concerned to present an argument as to why the material he holds should not be disclosed.

2.8 An Application to a Circuit Judge for a Search Warrant - (Schedule 1 Paragraph 12)

In certain cases, the person entrusted with the special procedure or excluded material may refuse to co-operate with the Police or alternatively ignore the production order. If such circumstances arise, then the Police may apply directly to a Circuit Judge for a search warrant to obtain the material in question. Such an application is made **EX PARTE**. However, as a further safeguard, the Judge should not grant a warrant which will authorise entry and search of the premises in question unless he is satisfied that *either set* of access conditions have been fulfilled **and** in addition, that one of the conditions imposed in paragraph 4 is also met:- viz, "a) that it is not practicable to communicate with a person entitled to grant entry; b) or if it is, that it not practicable to communicate with a person entitled to grant access or; c) that there is a statutory restriction on disclosure or obligation of secrecy and disclosure would be in breach of the statute unless a warrant is issued or d) that service of notice of an application for an order would seriously prejudice the investigation". Thus, if a warrant is to be applied for by the Police, it **cannot** be granted by the Judge unless the further safeguards in paragraph 4 have been met - the clear intention being that a search warrant should be the last resort. In this respect, the power-restraint theorists are content in that an additional safeguard exists. It should also be stated that the power-need theorists are also satisfied in that if it really came to it, the Police, if they followed the correct procedure, could obtain a search warrant to gain access to further information which may help them in their criminal investigations. However, several comments can be made . . .

The complexities surrounding Schedule 1 can be so daunting that the Police are well advised to firstly consider very carefully whether the holder of the material is implicated in the crime under investigation, so that they - the Police - can arrest him and rely then on the search and seizure powers contained in S18 and S19,[**87**] which have no restrictions on the seizure or search for special procedure are excluded material; or secondly, to try and persuade the holder of thematerial sought, to part with it. For example, doctors are subject to professional, ethical guidelines, which give them a discretion to disclose confidential information. Social workers may feel that the tribulations of a hearing before a Circuit Judge are outweighted by the simplicity of complying with a Police request for the material.

> "From the Police point of view, the lesson is clear - they are well advised to avoid Schedule 1 whenever possible to use the loopholes that exist when they can do so".[**88**]

This view is strongly supported by the Author. Admittedly Parliament had to concede some sort of special procedure for obtaining information held in confidence, but as the above pages demonstrate, the procedure devised is both complex and in parts, uncertain. Furthermore, as the reader will see, there are ways in which this special procedure can be circumscribed and to this end, the stated safguards are by-passed.

On this basis, it is submitted that the Act, although it has the intention of striking a balance, firstly introduces a detailed and complex procedure that will be very rarely used and secondly, if the Police feel that his procedure needs to be followed, they will search for other means to obtain the material and only as a last resort, proceed under Schedule 1

Power Need v Power Restraint

Throughout this Project, the author has presented, what appeared to him, to be the perceived views of both the power-need and power-restraint theorists. The author has also tried to conclude where the true balance of Police Power lies. In this respect, many views of his are to be found in the main text of this project. . .

The aim of this conclusion, is, therefore to bring the author's overall view as to whether one should see one's self as a power-need or power-restraint theorist; as to whether the balance sought by Parliament has endowed too much power in the direction of the Police or has the balance been tilted too much the other way to the expense of the criminal investigation?

It is submitted that the Police are faced with a nearly impossible task. They are the first to be called when a burglary takes place, or when a child goes missing, or when one is assaulted. Yet these same people - the public - moan and groan when the Police are given more powers powers that are aimed at catching the burglar, kidnapper or assailant. In this respect, we turn 'Janus like', two faced to a Policeman. We ask him to be human and yet, in-human. We ask him to administer the law, and yet to waive it.

It is thought that you or I would support the power-need theorists if we were on the "receiving end" of a criminal act, - the victim of a robbery or violent, personal attack. It is only when one is not involved in the criminal process as a victim, that one can easily stand back and favour the power-restraint theorists. This may seem a simplistic approach, but it is genuinely thought that it is the correct one.

Finally,the author would like to state a few general points in relation to the Police and Criminal Evidence Act 1984 . . .

Firstly, prior to the Act, the law and practices governing the investigation of crime were to a large extent, "un-certain and anachronistic. The Act has the considerable merit of providing a modern and detailed footing for Police powers".[**89**]

Secondly, whatever, the overall merits of the Act, simplicity is not one of them. The reader will be aware how complex the Act is, especially in relation to such areas as confidential material. As Bevan and Lidstone state, a statute that affects so many citizens so immediately, and which governs the Police, who like the citizen, are not Lawyers, should be drafted in a readily intelligible manner.

It is submitted that the singular importance of the Act lies in the fact that it is the first legislative attempt to enact a comprehensive code of Police powers and practices in relation to the investigation of crime and it will probably govern the methods of policing well into the next century.[**90**]

Notes

(1) H Goldstein, Policing a Free Society 1977.

(2) On 1 March 1983, 'The Times' reported a raid in which armed Police were said to have broken into a flat with sledge hammers, held up a couple at gunpoint and taken one of them to the Police Station under the misapprehension that they had been involved in an armed robbery. On 9 March 1984, the 'Daily Telegraph' reported that a six year old boy used a carving knife to defend himself and his mother and sister against six Policemen from the serious crime squad who had broken into the wrong house when executing a search warrant. The Police apologised and paid for the repairs, but the effect on the children can only have been distressing. "The result is the need for rules setting out the justifications which are socially acceptable for intrusions". **D Feldman** "The Law Relating to Entry, Search and Seizure"

(3) Cmnd 8092; and indeed by the Judiciary :- "We have to consider on the one hand, the freedom of the individual, the security of his home is not to be broken except for the most compelling reason. On the other hand, we have to consider the interests of Society at large in finding out wrongdoers and repressing crime". per Lord Denning in Chic Fashions v Jones 1968 2QB 299.

(4) Paragraph 11 - See generally chapter 1 of the Commissions Report where the whole concept of balance is explored. Furthermore, see the Criminal Law Review 1981, page 445 - "Balance and Clarity" - has the Royal Commission achieved them? D McBarnet.

(5) Paragraph 1.29.

(6) For example:-

A) The former Metropolitan Police Commissioner, Sir David McNee in his evidence to the Royal Commission on criminal procedure, states that because the Police have **limited** power. "Many Police Officers have early in their careers learned to use methods boardering on trickery or stealth in their investigations because they were deprived of the proper power by the legislative. Source-part one of the written evidence of the Commission of Police of the Metropolis to the Royal Commission. Scotland Yard 1978, page 2.

B) The Chairman of the Police Federation, Les Curtis, stated - "They - the Police - are currently operating with one arm tied behind their back. An increase in Police powers would for the first time provide a framework which will make it possible for the Police to make a real impact on the fight against crime". "The Guardian" 25 March 1983.

C) See further Criminal Law Review 1967 page 19, "Search and Seizure: a Comment" By Deputy Chief Constable of Liverpool.

(7) See Criminal Law Review 1967 page 20 - D Williams

(8) For example:-

A) Talking of the Police and Criminal Evidence Act 1984, Carol McMulhwy quoted in Policing the Police 1981 volume 2 page 183, "I detect shades of both South Africa here and indeed of a Police state".

B) On the same topic, 'The Daily Mail' on 15 March 1983 stated "Powers so unlimited and so capable of abuse belong more properly to a Police state and not a free society"

(9) Bevan and Lidstone "A Guide to the Police and Criminal Evidence Act 1984" page 359

(10) This project is not concerned with the Police powers of entry **for any other reason**, for example, to prevent a breach of the peace, or to save life or property. These areas, both prior to the 1984 Act, and contained in it - S17; are beyond the ambit of this project.

(11) Chapter one.

(12) The Police Journal Vol LV Number 2, April - July 1982, page 138.

(13) It rejected the proposal that a Senior Officer should in an emergency situation possess the power to authorise a warrant for the entry and search for prohibited goods. See Report para 3.45

(14) See Report para 3.42.

(15) See Chapter 1 pages 5/8.

(16) See Clause 10 of the Bill - thus only giving partial acceptance to the recommendation.

(17) Known by the former Home Secretary, Mr Whitelaw as the "caring professions".

(18) See for example, Daily Telegraph 15.4.83. or "The Police, the Constitution and the Community" Baxter and Hoffman pages 220 - 223.

(19) It also argued that the search and seizure of such confidential documents might amount to an interference with contractural or ethical obligations.

(20) Which once again returned a "smile" to the power-restraint theorists.

(21) "The Police and Criminal Evidence Act 1984" page 18.

(22) Unless the Police could satisfy the Judge that there was reason to believe that the person holding the information was implicated in the crime.

(23) Save only in exceptional circumstances.

(24) Viz

i) It is not practicable to communicate with the person entitled to grant entry.
ii) That it is practicable to communicate with such a person, but it is not practicable to do so in relation to a person entitled to grant access to the evidence.
iii) Entry will not be gained, save by use of a warrant.
iv) The purpose of search may be frustrated or seriously prejudiced unless immediate entry can be secured.

(25) Clearly a comprehensive and all embracing definition.

(26) "There must be safeguards to protect members of the Public from random arbitrary and discriminatory searches... the principle safeguard must be found in the requirement... of reasonable suspicion". Royal Commission 1981 Cmnd 8092 para 3.24 - 3.25.

(27) "A Guide to the Police and Criminal Evidence Act 1984" pages 11 - 12.

(28) See Johnson v Whitehouse RTR 38 1984 per Nolan J.

(29) However a subjective factor exists. Siddiqui v Swain 1979 RTR 454. The Divisional Court stated, "The words reasonable grounds to suspect or believe import the requirement that the **Constable** in fact suspects or believes".

(30) See Police Review 23.11.84.

(31) It is thus a concept that also limits the exercise of such a power and meets with the approval of the power-restraint theorists.

(32) Hargreaves and Levenson "A Practitioner's Guide to the Police and Criminal Evidence Act 1984" page 5.

(33) The problems caused by these imprecise and subjective terms can be illustrated suppose that D steals £1,000 from a Bank which has assets of £10 million. This would constitute a serious arrestable offence if it confers on D's substantial gain. How are the Magistrates to judge whether this is so?

(34) See Standing Committee J Col 1523 per Mr H Bermingham.

(35) H L Deb standing Committee E20 December 1983 col 458 - 459.

(36) This is because the gun would be of substantial value together with other material viz the bullet.

(37) See S8 (4).

(38) e.g warrants issued under the Theft Act 1968 or the Misuse of Drugs Act 1971.

(39) e.g. Under S23 (3) of the Misuse of Drugs Act for controlled drugs or under S8 generally to search for evidence of drugs.

(40) Ibid

(41) i.e S26 (i) of the Theft Act could not be used as authority to enter and search for the getaway car as it might not be "stolen goods" which is the only type of item S26 (1) caters for However, S8 has a wider ambit and could be used to search for "relevant evidence" - a getaway car stolen or not.

(42) Homed in on by the power-restraint theorists.

(43) Stressed by the power-need theorists.

(44) Walters and O'Connell "A Guide to the Police and Criminal Evidence Act 1984" Page 14.

(46) "These provisions demand a great deal more of Magistrates before they issue a warrant authorising entry and search than has been the case in the past" Powell and Margrath. Pg 29. "Police and Criminal Evidence Act - a Practical Guide" Perhaps this will eliminate some of the criticism directed at the Magistrates in chapter one

(47) i.e. "Reasonable grounds" are needed; a "serious arrestable offence" must have been committed; and the evidence must be likely to be of substantial value before a warrant could be issued

(48) See The Home Office and Criminal Evidence Bill Briefing Guide issued in 1983 para 4.8.

(49) C L R 1984 Vol 449.

(50) See Report para 3.41

(51) One can now appreciate why it was stated above that the Act provides for two different procedures by which the Police may obtain evidence of unlawful conduct depending on the Constitution of the material sought.

(52) Between the power-need and the power-restraint theorists.

(53) Where it is thought the danger of rubber-stamping Police requests will be reduced.

(54) It is very important that Magistrates realise what is meant by such terms. This is a fundamental point for otherwise if the terms are not fully understood, Magistrates could grant warrants authorising searches for such material which will clearly be ultra vires.

(55) See Law Commission No 110 Breach of Confidence 1981 para 4.1-5.

(56) S11 (2) (a) - (b) such statutes include the Official Secrets Act 1911, Public Records Act (2) 1958, Schedule 2.

(57) S11 3 (a) and (b).

(58) "Documents" is taken to have the same meaning as in S10 of the Civil Evidence Act 1968 S118 (1) including photographs, disc, tapes, film.

(59) Whether alive or dead.

(60) As S12(1) (a) imposes no requirement that the holder of such records must be medically qualified, anyone who portrays himself within the ambit of the protection offered by the sub-section, e.g. Physicians not recognised by the General Medical Council such as faith healers, acupuncturists, osteopaths and hypnotists.

(61) Bevan and Lidstone Page 103.

(62) Again, this sub-section is not qualified by the term bonafide and so as such S12 (c) could include such controversial organisations as the Paedophile Information Exchange or the Gay Liberation Organisations.

(63) On this basis, a bullet removed from a patient would not be classed as excluded material because the definition is restricted to **HUMAN** produced material.

(64) The point being that "journalistic material cannot acquire the status of excluded material at a later stage just to avoid a search and seizure" - Walters and O'Connell Page 15.

(65) Who are believed to brain wash their members and encourage criminal acts.

(66) Who encourage obscene sexual activities with children.

(67) To help illustrate this point, the following example can be given; Suppose the Police wish to obtain journalistic material to assist a murder enquiry. S8 **cannot** be used as the material excluded. If, on the other hand, the material is stolen, confidential information held by a journalist, it can be obtained under the Theft Act 1968, but the warrant must follow the special procedure - set out in Schedule 1.

(68) i.e. subject to an express or implied undertaking to that effect or a statutory requirement to restrict disclosure or maintain secrecy.

(69) See Feldman "The Law Relating to Entry, Search and Seizure" page 110.

(70) S9 (2) Frank Truman v MPC 1977 QB 952 appears to be the "authority" for the proposition that a search warrant could override the privilege. If so, it is now reversed.

(71) "The justification being that historically it stands apart from all forms of sensitive material and that the legal system could not function effectively without such a privilege".

(72) Who will be the person in possession of the evidence sought.

(73) Bevan and Lidstone Pages 109 - 110.

(74) The reader is referred to The Times Report Ex parte Bristol Press 11.11.86 where the applications for production orders is examined.

(75) Admittedly the Public interest element is also present in this context and is not to be found in S8; however, if the authors quoted above are correct in their submissions, one wonders whether the public interest safeguard is worth the paper it is written on.

(76) S8 in this respect has no matching provision.

(77) "The Police, the Constitution and the Community" page 226.

(78) Moreover, phrases such as "is likely to be of substantial value to the investigation "relevant evidence" places the Judges very much at the mercy of the Constable making the application. Much reliance will be placed upon the Officer's judgement as to the importance and weight of the material sought. It is unlikely that the Constable will say that they are only of minor importance.

(79) e.g. the Theft Act 1968 if no such warrant existed previously the material is un-obtainable.

(80) Bevan and Lidstone Page 110.

(81) Example given by Standing Committee E on 20 December 1983.

(82) Williams - Similarly the Police do not have to show that the offence is a serious arrestable offence, that they have tried other methods of obtaining the material or that the material is "relevant evidence". "Appropriate" is the **SOLE** governing criterian for Schedule 1 paragraph 3.

(83) Schedule 1 Paragraph 11.

(84) Hargreaves and Levenson P 47

(85, This again was an important concession by the Government:- They originally proposed the idea that disobedience of the order for the production of the material by the possessor should be followed by an application for a search warrant See paragraph 15. Schedule 1.

(86) Times Report May 20th 1986, Divisional Court.

(87) Discussed below.

·88) ibid - See chapters four and five for these loopholes

(89) Bevan and Lidstone "A Guide to the Police and Criminal Evidence Act 1984" page 359.

(90) Despite the Labour Party's declaration that they intend to repeal the Police and Criminal Evidence Act. once in power.

INDEPENDENT CONTRACTORS AND EXTRA-HAZARDOUS OPERATIONS

Gilbert Kodilinye, MA(Oxon) LLM (London) Barrister
Lecturer in Law, University of Birmingham

In the recent case of **Stevens** v **Broadribb Sawmilling Co Pty Ltd.**[1] the High Court of Australia refused to acknowledge the existence of a doctrine of strict liability for extra-hazardous operations in the context of the liability of employers for damage caused by their independent contractors. The so-called doctrine of extra-hazardous operations forms part of the wider concept of the non-delegable duty of employers which, according to Charlesworth, [2] arises -

(1) in relation to dangerous things;

(2) in relation to dangers on the highway;

(3) where duties are imposed by statute; and

(4) where an act involves special risk of damage.

Running through all four of Charlesworth's categories is a common thread; that of danger to persons or property. The effect of the concept of the non-delegable duty is that a person who employs an independent contractor to do a job which is fraught wth danger, for example to do repair work on a public street,[3] to excavate close to a building,[4] or to use dangerous implements which are likely to cause fire or explosion,[5] is under a personal duty[6] to ensure that reasonable precautions are taken to avoid any harm to others, and he cannot shift that responsibility on to the contractor. The principle was clearly expressed by Romer LJ in **Penny** v **Wimbledon UDC.**[7]:-

> "when a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take those precautions"

The conclusion to be drawn from the large number of English cases in which a non-delegable duty has been held to exist is that the liability of the employer is more than a duty to take care, but less than a strict liability. It is, in Widgery LJ's words, "a direct duty to see that care is taken[8]". Nevertheless, there is some authority for the view that there is a special category of "extra-hazardous" or "inherently dangerous" activities which attracts strict liability on the part of the employer. The case which is usually cited as establishing this principle is **Honeywell and Stein Ltd** v **Larkin Bros Ltd**[9] where a photographer was employed to take flashlight pictures in a cinema, and the magnesium flash caused a fire which resulted in severe damage to the building. It was held by the Court of Appeal that the employer of the photographer was liable for the damage. It is submitted that there is nothing which takes this case out of the mainstream of decisions which establish that where a contractor is employed to do work which is dangerous, in the sense that there is a substantial risk of damage to others if precautions are not taken, the employer is under a primary duty to see that care is taken, and if he fails in this duty he will be liable to the person harmed. However, subsequent decisions and textbooks have

interpreted Slesser LJ's judgment as establishing strict liability in a special class of cases involving "extra-hazardous acts[**10**]". This view may have been prompted by one particular paragraph in His Lordship's judgment where, after referring to "the special rules which apply to extra-hazardous or dangerous operations", he said that "the rule of liability for independent contractors' acts attaches to these operations, because they are **inherently dangerous, and hence are done at the principal employer's peril".**[**11**] It is perhaps unfortunate that Slesser LJ should have used the latter phrase as it is undoubtedly too wide and is out of line with the rest of his judgment. That judgment seems to be completely in accord with the general principle established in cases such as **Bower** v **Peate**[**12**], **Dalton** v **Angus**[**13**] and **Hughes** v **Percival**[**14**], that the employer is under a non-delegable duty to take steps to ensure that necessary precautions are taken, and he is not relieved of that responsibility merely by appointing an apparently competent contractor. Such a duty arises in all cases where there is a serious risk of damage, whether the operations are of an "extra-hazardous" nature or not. Liability is not strict in the sense that the employer will be liable whether or not he has failed in his duty to oversee the contractor and whether or not the contractor himself has been negligent. The employer will be liable only where he has failed to carry out his primary personal duty to see that the contractor has taken reasonable precautions.

In **Stevens** v **Broadribb Sawmilling Co Pty Ltd**[**15**], as in the earlier case of **Stoneman** v **Lyons**[**16**], the High Court of Australia rejected the idea of a separate category of extra-hazardous acts. In **Stevens**, S who was employed by B Co as a truck driver, was struck and injured by a log carelessly loaded by G, a bulldozer operator engaged by B Co. Both S and G were independent contractors of B Co. One of the issues to be decided was whether B Co was liable to S "on the footing that his injury arose out of dangerous operations or extra-hazardous acts". Mason J pointed out that the so-called doctrine of extra-hazardous acts had been applied in the United States and Canada and had been affirmed in a number of English decisions, but it had not achieved complete acceptance and had actually been rejected by the House of Lords in **Read** v **J Lyons & Co Ltd.**[**17**] Mason J also pointed out that the doctrine had not found favour in Australia. In **Torette House Pty Ltd** v **Berkman**[**19**] the Supreme Court of New South Wales had "emphatically rejected the notion that a principal could be made liable for the negligence of an independent contractor on the basis that the activities he was engaged to perform were extra-hazardous", and in **Stoneman** v **Lyons**[**20**] the High Court of Australia had emphasised the elusive nature of the distinction between acts that were extra-hazardous and those that were not. Mason J concluded by suggesting that the traditional common law response to the creation of a special danger was "not to impose strict liability but to insist on a higher standard of care in the performance of an existing duty".[**21**]

Wilson J[**22**] also doubted the correctness of the proposition that an employer was liable for damage caused by extra-hazardous acts on the part of the contractor during the course of carrying out the work the contractor was engaged to do. In his view the direction taken by the Australian courts had been away from strict liability for tortious behaviour and towards a principle more in accord with ordinary negligence principles, viz that the extent of the employer's duty of care depended "upon the magnitude of the risk involved and its degree of probability . . . Thus the standard of response required is that of a reasonable man placed in the relevant circumstances", and "if that means . . . an ultra-cautious response to an ultra-hazardous operation, it nevertheless falls short of the imposition of strict liability"[**23**].

It is interesting to compare the reasoning of Mason and Wilson JJ in **Stevens** with that adopted by Stephen J in the earlier case of **Stoneman** v **Lyons.**[**24**] That case was an

action by the owners of a garage in respect of damage caused by the negligence of the defendant's contractors in excavating a trench adjacent to the garage wall. Stephen J expressed approval[25] of the view taken by Jordan CJ in **Torette House Pty Ltd** v **Berkman**[26] to the effect that an employer was liable for all the consequences contracted for in his agreement with an independent contractor, but he was not generally responsible for damage caused by the negligence of the contractor "in applying the methods selected by the contractor for achieving those results, these methods and their application being matters over which the emploer has no control, and not being methods which must necessarily be used and from which damage must necessarily result". Nor, in Jordan CJ's view, was the general rule subject to any exception concerning the "extra-hazardous" nature of the work. Stephen J accordingly went on to hold[27] that an employer would be liable for the consequences (1) of those acts specifically authorised or directed by him and (2) of methods not authorised but necessarily involved in carrying out those acts. But the employer was not liable for the consequences of other negligent conduct of the contractor over which the employer had no control. The great merit, said Stephen J, of this approach was that it avoided "the search for the elusive criteria" for identifying both the category of "extra-hazardous acts" and the difficulties in defining "collateral negligence".[28] In the instant case the employer was not liable since the digging of the trench was not an act authorised or directed by him nor was it necessary in order to achieve the contractual aim. It was merely a grossly unskilled and hazardous method selected by the contractor.

The principle of strict liability for extra-hazardous operations has thus been expressly rejected by the Australian courts and, it seems, by the majority of the English authorities. Only in Canada[29] and the United States[30] does the doctrine appear to be established. Academic writers on this side of the Atlantic have generally been hostile to the doctrine,[31] principally on the ground that it is impossible to define "extra-hazardous" with sufficient precision. It is submitted therefore that in cases where damage is caused by, for example, fire, explosion or flooding in the course of dangerous operations, strict liability should arise only where the circumstances come within the rule in **Rylands** v **Fletcher**,[32] i.e. where there is an accumulation of a dangerous thing which escapes from the defendant's land, or where the defendant's activity constitutes a nuisance.[33] Where the facts do not come within **Rylands** v **Fletcher**[34] or nuisance, the employer should be held liable only where he fails to perform his duty to ensure that the contractor takes those steps which are reasonably necessary to prevent the harm threatened, and the standard of care required of the employer and the contractor will depend upon the magnitude of the risk involved. Thus the more inherently dangerous the operation the greater the degree of care required by both parties. It is only where the employer has failed to carry out his duty of care to the required standard that he will be liable for the ultimate harm caused.

Notes

(1) (1986) 60 A LJR 194.

(2) **Charlesworth and Percy on Negligence,** 7th ed. pp 130 - 136. Other suggested instances of non-delegable duties at common law include the duty of care owed by a hospital to its patients, the employer's duty to provide a safe system of work for his employees, and the shipowner's duty to navigate his vessels carefully (**Cassidy** v **Ministry of Health** [1951] 2 KB 343, at p. 363, per Denning LJ; **Kondis** v **State Transport Authority** (1984) 154 CLR 672, at p 536 per Mason J; **Stevens** v **Broadribb Sawmilling Co Pty Ltd** (1986) 60 ALJR 194 at p 200, per Mason J. In the New Zealand case of **Mount Albert Borough Council** v **Johnson** [1979] 2 NZLR 232, it was held that a property development company was under a non-delegable duty to see that proper care and skill was exercised by contractors in the building of houses and flats.

(3) **Penny** v **Wimbledon UDC** [1899] 2 QB 72; **Holliday** v **National Telephone Co** [1899] 2 QB 392; **Clements** v **County Council of Tyrone** [1905] 2 IR 542.

(4) **Bower** v **Peate** (1876) 1 QBD 321; **Dalton** v **Angus** (1881) 6 App Cas 740; **Hughes** v **Percival** (1883) 8 App Cas 433; **Duncan's Hotels (Glasgow) Ltd** v **J & A Ferguson Ltd** 1972 SLT 84; **Randall's Paints Ltd** v **Tanner** (1969) 4 DLR (3d) 652; **Bristow** v **Urban Contracting** Ltd (1984) 49 Nfld & PEIR 155.

(5) **Honeywill & Stein Ltd** v **Larkin Bros Ltd** [1934] 1 KB 191; **The Pass of Ballater** [1942] p 112; **Savage** v **Wilby** [1954] SCR 376; **Peters** v **North Star Oil Ltd.** (1965) 51 DLR (2d) 365

(6) There are conflicting opinions as to whether the employer's liability in such cases in personal or vicarious. See (1934) 50 LQR 71 (Chapman); Atiyah, **Vicarious Liability in the Law of Tort,** pp 336 - 338; **Clerk and Lindsell**, Torts, paras 3 - 37 and 3 - 38; [1956] CLJ 183 (Glanville Williams); **Savage** v **Wilby** [1954] SCR 376 at p 380, per Kellock J; **Stevens** v **Broadribb Sawmilling Co Pty Ltd** (1986) 60 ALJR 194, at p 199, per Mason J.

(7) [1899] 2 QB 72, at p 78.

(8) **Salsbury** v **Woodland** [1970] 1 OB 324, at p 338. A similar phrase was used by Langton J in **The Pass of Ballater** [1942] p 112, at p 117.

(9) [1934] 1 KB 191.

(10) See e.g. **Salsbury** v **Woodland** [1970] 1 QB 324, at p 348, per Sachs LJ; **McDonald** v **Associated Fuels Ltd** [1954] 3 DLR 775, **Peters** v **North Star Oil Ltd** (1965) 51 DLR (2d) 364; Winfield and Jolowicz, **Tort.** 12th edn, p 596; Prosser, **Torts**, 4th edn, para 70; Clerk and Lindsell, **Torts**, 15th edn, para 3 - 48.

(11) [1934] 1 KB 191, at p 201. Emphasis supplied.

(12) (1876) 1 QBD 321, at p 326, per Cockburn CJ: "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises or some independent person, to do what is necessary to prevent the act he had ordered to be done from becoming wrongful".

(13) (1881) 6 App Cas 740, at p 829, per Lord Blackburn. "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor".

(14) (1883) 8 App Cas 443 at pp 445, 446, per Lord Blackburn: "I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that the duty went so far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party wall, exposing it to this risk. If such a duty was cast upon the defendant he could not get rid of the responsibility by delegating the performance of it to a third person".

(15) (1986) 60 ALJR 194.

(16) (1975) 8 ALR 173.

(17) [1947] AC 156, at pp 181, 182, per Lord Simonds: "I would reject the idea that, if a man carries on a so-called ultra-hazardous activity on his premises, the line must be drawn so as to bring him within the limit of strict liability for its consequences to all men everywhere".

(18) (1986) 60 ALJR, at p 199.

(19) (1939) 39 SR (NSW) 156.

(20) (1975) 8 ALR 173.

(21) (1986) 60 ALJR, at p 199.

(22) **Ibid,** at p 203.

(23) **Ibid,** at p 204.

(24) (1975) 8 ALR 173.

(25) At p 183.

(26) (1939) 39 SR (NSW) 156.

(27) (1975) 8 ALR, at p 183.

(28) At p 184.

(29) See e.g **Holinsky** v **Hawkins and Neilsen's Maintenance Ltd** (1966) 52 DLR (2d) 289, at p 291, per Schroeder JA, **Randall's Paints Ltd** v **Tanner** (1969) 4 DLR (3d) 652, at p 661; **Peters** v **North Star Oil Ltd** (1965) 51 DLR (2d) 364, at p 371

(30) Restatement of Torts, paras, 416, 427; Prosser, **Torts**, para 70.

(31) Atiyah, **Vicarious Liability**, pp 372, 373. Glanville Williams [1956] CLJ 186, 187; Chapman (1934) 50 LQR 74. But see Clerk & Lindsell, **Torts**, para 3 - 48.

(32) (1868) LR 3 HL 330. See e.g **Balfour** v **Barty-King** [1957] 1 QB 496, **H & N Emanuel Ltd** v **Greater London Council** [1971] All ER 835.

(33) As in **Spicer** v **Smee** [1946] 1 All ER 489; **Job Edwards Ltd** v **Birmingham Navigations** [1924] 1 KB 341.

(34) (1868) LR 3 HL 330.

EQUAL PAY

Peter Jones, LLB, Solicitor, Senior Lecturer in Law, Trent Polytechnic.

A recent survey by the General and Municipal and Boiler Makers Union illustrates the extent to which women remain subject to discrimination at work: the report reveals that women are all too frequently in low paid, undervalued jobs. Indeed it concludes that the gap between mens' and womens' earnings remains much as it was in 1969, immediately before the passing of the Equal Pay Act 1970.

Yet there is momentum for change. Trades Unions are increasingly aware of the potential significance of the Act, and they are correspondingly more ready to support applications for equal pay by women members. The Equal Opportunities Commission remains active. The consequence has been development of case law and, more recently, a number of important appellate decisions.

Even though the Law relating to Equal Pay is developing in a lively and interesting fashion, it is still all too often regarded by practitioners and academics alike as of limited significance. Employers too, whilst they may be aware of the concept of equal pay, are generally unaware of their vulnerability to attack, and of the potentially catastrophic effect a successful claim may have on their financial viability.

For example, suppose a woman successfully maintains a claim against her employer for a £10 a week pay differential. The industrial tribunal will equalise her pay and award her two years back pay amounting to about £1000. Suppose she is one of one hundred female employees with similar cases. Clearly, the consequential financial impact is substantial.

This article seeks to examine the state of the law relating to equal pay both in the domestic and European context.

European Law.

Domestic legislation must be considered against the background of Article 119 of the Treaty of Rome and the Equal Treatment Directive.

Article 119 provides inter alia

> "Each member state shall .... maintain the application of the principle that men and women should receive equal pay for equal work"

Pay is defined to include

> "any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer"

The Equal Treatment Directive[1] provides, inter alia, that

> "Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal value..... The principle of equal pay for men and women outlined in article 119 of the Treaty .... means, for same work or for which equal value is attributed, the elimination of all discrimination on the grounds of sex with regard to all aspects and conditions of remuneration"

Article 119 has a direct effect and confers enforceable rights on all individuals within the E.E.C.

The relevance of European Law can be seen from the recent landmark decision of the Court of Appeal in **Pickstone and others** v **Freemans plc. (1987)**[2] Here the Court considered a claim for equal pay for work of equal value under s. 1(2)(c) of the Act. In the leading judgment, Nicholls LJ found that, considering the claim only within the context of the Act, it must fail. The words of the subsection were clear and unambiguous, even though the literal construction failed to cure the mischief which the legislation was designed to remedy.

Nonetheless Article 119 "enshrined a broad general principle: equal pay for equal work. There was no justification for implying into that general principle a rigid and inflexible limitation .... It was now well established that where Article 119 applied to the facts of a case, without the need for more detailed implementing measures on the part of the member state ...., the Law enacted in that Article was binding on the English court and the individual had a right to apply to the English court for relief"

The case was remitted to the Industrial Tribunal for hearing.

The Equal Pay Act 1970

The Act is based on a concept which is, in essence, simplicity itself, namely that in contracts of employment (including in certain circumstances contracts **for** services) there is to be implied an **equality clause**. The broad thrust of the legislation is that in order to invoke the equality clause, a woman has to establish that she is engaged in work which, when compared to a male (the comparator) is either

> like work (s.1(2)(a)); or
>
> work rated as equivalent in a job-evaluation study (s.1(2)(b)): or
>
> work of equal value (s.1(2)(c)).

The clause relates not only to pay but to terms generally (s.1(2)). It does not operate, however, where the employer establishes that any differential is **genuinely due to a materiai factor** which is not the difference in sex. (s1(3)).

As to s.1(2)(b), the claim arises where the employer has voluntarily undertaken a job-evaluation scheme, Whilst such schemes are more common than they once were, they are rarely the subject of litigation and are not considered further here. Of much more interest and potential significance are claims based on like work and equal value work.

Like Work

This is defined in s.1(4) of the Act.

> "(4) A woman is regarded as employed on like work with men if, and only if, her work and theirs is of the same or a broadly similar nature, and the difference (if any) between the things she does and the things they do are not of practical importance in relation to the terms and conditions of employment".

It is difficult to succeed in like work claims. The term "pratical importance" is not defined, nor is it easily capable of definition. The decisions of the appellate courts have limited value, because each case very much turns on its own facts. Industrial tribunals have been urged to take a broad view, and not to undertake too minute an examination. (**Capper Pass Ltd** v **Lawson (1976)**[3]). Therefore it is very much a matter for the tribunal. There is no real guidance either from the Act or from precedent. It will be comparatively rare for the EAT to find that a Tribunal has come to a perverse decision (that is, one which no reasonable tribunal would have come to on the facts).

The point is illustrated by a recent decision of the Employment Appeal Tribunal.

In **Thomas and others** v **National Coal Board (1987)** [4] some 2000 women canteen assistants sought to compare themselves with a male canteen worker who worked permanently at night and alone, on the ground that they were engaged on like work. Sample cases were taken. The Industrial Tribunal held, inter alia, that the women were not engaged on like work. The majority held that the male comparator had the added responsibility of night duty, and this was a difference of practical importance. Other differences were also identified. Thus the work was not "like work"

The EAT refused to upset the decision. The Industrial Tribunal were entitled to come to that conclusion.

Work of Equal Value.

Here, the applicant does not have to prove any similarity between her job and that of the comparator, save in terms of the "demands" made upon her. The importance of this ground can readily be seen. It will often be easier to establish equal value.

It cannot be said that the United Kingdom approached the adoption of the principles of equal pay into domestic legislation with alacrity. Indeed, when the Act first came onto the statute book, the Act made no provision for equal value claims (save in regard to job evaluation studies voluntarily undertaken by the employer). It required action by the Commission to bring domestic legislation into line with the Article and the Directive.

In **Commission for the European Communities** v **United Kingdom (1982)**[5] the European Court held that the Act did not comply with the treaty. In consequence the Equal Pay (Amendment) Regulations 1983[6] amended the Act so as to enable women to claim on an equal value basis.

S.1(2)(c) states

> "where a women is employed on work which, not being work to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment
>
> (i) if (apart from the equality clause) any term in the woman's contract is or becomes less favourable .... that term .... shall be modified as not to be less favourable"

By way of example, in **Hayward** v **Cammell Laird Shipbuilders Ltd. (1984)[7]**, the first case to be taken under equal value, a canteen cook was compared with painters, thermal insulation engineers and joiners found to be doing a job of equal value.

That, however, proved to be something of a pyrrhic victory for Ms Hayward. For reasons examined later, there proved to be all sorts of difficulties in applying the equality clause to her contract of employment.

It is appropriate to outline in brief the procedure to be adopted in an equal value claim.[8]

It is not necessary to identify the comparator in the originating application. Provided a prima facie case is made out, the Tribunal may order discovery so that the applicant may select the most favourable comparator (**Clwyd County Council** v **Leverton (1985)[9]**). If the tribunal then considers the claim to have a reasonable prospect of success and that it cannot better be dealt with on a like work or on an existing job evaluation study, the tribunal will commission an expert to prepare a job evaluation report. The expert may apply to the tribunal for orders for the production of documents and information. Whilst the finding of the expert is not binding on the tribunal, if equal value is established, it is highly likely that the tribunal will follow that finding.

Apart from the matters already mentioned, there appears to be another impediment to proceeding with an equal value claim. This arises from a decision of the Employment Appeal Tribunal in **Leverton** v **Clwyd County Council (1987)[10]**, a claim which had already been on appeal in regard to discovery (supra).

The applicant, a nursery nurse (and one of four hundred who were seeking equal pay), sought to compare herself with 11 male clerical officers with various job descriptions. She had to prove that they were "in the same employment" as provided in s.1(2)(c)

"Same employment" is defined in s.1(6) in the following manner

> "(6). . . . and men shall be treated as in the same employment with a woman if they are employed . . at the same establishment or at establishments which include that one and at which common terms and conditions of employment are observed either generally or for employees of relevant classes"

"Establishment" is not defined in the Act, but it appears to have been common ground that the men were all employed in different establishments from the Applicant. Accordingly the EAT had to consider whether the Applicant had "common terms and conditions" with all or any of the men.

There were, in fact, substantial differences in working hours and holiday entitlement. The Industrial Tribunal found that these were so radically different that it could not be said that there were common terms and conditions, even though the "core" terms had much similarity. Accordingly, they refused to appoint an expert to carry out a job evaluation study.

The EAT upheld their decision.

Whatever may be the proper construction of s.1(6), the decision does not, it is suggested, lie easily with Article 119. It is the very essence of an equal value claim that one is not comparing like with like. Different jobs may, of their nature have different terms and conditions. So, with a nursery nurse, whose hours and holidays will be linked with the provision of nursery facilities and are likely therefore to be very different from, say, an office worker.

Let us take an extreme example : An unscrupulous employer may employ all his female employees at one establishment. He may, for entirely discriminatory reasons, pay them £30 pound per week. They may, however, only work hours to fit in with "child-care" responsibilities. They may have longer holidays for the same reason. The employer employs all his male workers at other establishments. He pays them at £150 per week. Their jobs are equivalent in terms of demands and so on. If **Leverton** is correct, the women would be locked into low pay for overtly discriminatory reasons.

It is submitted, however, that it is perfectly proper to consider disparity in terms and conditions (which are to the advantage of the woman) at various stages during the claim.

Firstly, there is the question of equal value itself. Taking the **Leverton** facts, arguably, "demands" will be less in terms of the job because of shorter working hours and longer holidays.

Secondly, there is the possibility of the Employer being able to defend the claim by the material factor defence (which is considered further below).

Thirdly, there is the application of the equality clause itself (see below).

Leverton is now under appeal to the Court of Appeal.

The Genuine Material Factor Defence.

Even if the applicant succeeds in proving like work, equivalently rated work or work of equal value, the employer may still rely on the material factor defence to justify the differential.

S 1(3) of the Act states

> "An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference in sex and that factor
>
> (a) in the case of an equality clause falling within subsection (2)(a) or (b) above must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within subsection (2) (c) above, may be such a material difference.

But what may be regarded as a material factor? Does the employer have to prove that there is a material factor (other than a discriminatory factor) between **that** woman and **that** man, or can other fators be taken into account? In particular, is it possible to market forces to be taken into account so as to "protect" an employer who has to take on a male employee at a higher rate because of a skill shortage amoung prospective female employees?

These questions have now been decisively answered by the House of Lords in **Rainey** v **Greater Glasgow Health Board (1987)**[11].

Until that decision, and following **Clay Cross (Quarry Services) Ltd** v **Fletcher (1978)**[12] the "personal equation" test had been applied in relation to like work claims (and indeed equivalently rated claims). It will be remembered that the test under s.1(3)(a) is that the material factor **must be a material difference between the womans case and the man's.** In **Clay Cross**, the Court of Appeal interpreted these words to rule out consideration of any factors beyond those which are personal between the Applicant and the Comparator. S.1(3)(b), which was inserted by the 1983 amendment regulations, was drafted with **Clay Cross** in mind so as to specifically bring extrinsic factors into account (note the use of the word **may** as opposed to **must** in s.1(3)(a)).

In **Rainey**, however, the House of Lords disapproved the personal equation approach.

The facts of **Rainey** were that Mrs Rainey was employed as a prosthetist by the board. She earned approximately 25% less than Mr Crumlin who was one of the highly paid prosthetists employed by the board. Mrs Rainey had been recruited from the NHS and was paid on the Whitley Council scale. However, the Board could not fully staff the service without recruiting additional personnel from outside the public sector. It therefore recruited from the private sector, and in order to do so offered much higher salaries. All prosthetists from the private sector were male. All but one from within the health service were female.

It was therefore a like work claim where, classically, market forces were at work.

The House of Lords held that upon the proper construction of s.1(3)(a) and Article 119 it was permissible to take market forces into account, and indeed any other relevant extrinsic factors.

The decision was initially greeted with dismay by those who advocate the cause of equal pay. But, a close analysis of the leading speech of Lord Keith suggests that there are severe limitations on the use of the market forces "defence". For though the House of Lords held that market forces could be taken into account to prima facie justify a differential, that was not enough. The differential must be "objectively justifiable either on economic or administrative grounds" The Lords approved the dictum of Browne-Wilkinson J in **Jenkins** v **Kingsgate (Clothing Production) Ltd** (1981)[13] namely "If the Industrial Tribunal finds that the employer intended to discriminate against women, the employer cannot succeed under s.1(3). Even if the Employers had no such intention, for s.1(3) to apply, the employer must show that the difference in pay . . . . is reasonably necessary to achieve some result (other than the employment of cheap female labour) which the employer desires for economic or other reasons".

Thus, it will never be open to an employer to say "I employ women at a lower wage because I can get them at a lower wage in the market place". The starting point has to be that the employer is paying the woman a proper rate for the job. He then has to establish that he is paying the man above that rate, and for justifiable economic or administrative reasons.

Applying the Equality Clause.

The concept of the equality clause has a seductive attraction. But it's application is proving difficult in the extreme.

Even though there may be a differential in pay, it may be claimed that there are other terms and conditions (for example, longer paid holidays for the woman) which compensate that differential. In such a case, how will the equality clause be applied? Should the compensatory factors be left out of account, or should there be a "package" approach, so that an attempt is made to put a value on the compensatory factors, to either reduce, or extinguish the differential?

This was considered by the Court of Appeal in **Hayward** v **Cammel Laird Shipbuilders Ltd (1987)[14]**

Before considering the facts and the decision in that case, it is necessary to set out in full the statutory provision. s.1(2)(c)(i) provides

> "(i) if (apart from the equality clause) **any** term in the woman's contract is or becomes less favourable to the woman than a **term of a similar kind** in the contract under which the man is employed, **that** term of the woman's contract shall be modified so as to be no less favourable"

The subsection, whilst not perhaps very happily drafted, seems clear enough. If, say, the term relating to pay is less favourable, it should be brought up to the level of the male comparator. If the woman has the advantage of superior terms otherwise, then that is too bad for the employer.

But consider the implications. It is not only a woman who can seek to compare herself. A man may also seek equal terms by comparing himself with a female comparator (s.1(13)). Thus, once the woman has achieved equality in pay, the man can turn around and seek equality in, say, holiday provision. There would be a "leap-frogging" of contractual terms and conditions.

When **Hayward** came before the EAT in 1986, they described this possibility as one which would "result in widespread chaos in industry and inflict grave damage on commerce"

As to the facts of **Hayward** it has already been mentioned that Ms Hayward, a canteen cook, had been found to be doing work of equal value with various male comparators. She undoubtedly received a lower wage each week. But, as against that, she had 30 minutes paid meal break each day, 2 days a year additional paid holiday, and better sickness benefits.

The Court of Appeal found no difficulty in favouring the "package" approach. Despite the reasonably clear words of the statutory provision with which they were dealing, the Court

were of the view that "pay", although not defined in the Act, had an extended meaning. To that extent they equated the meaning with the definition of "pay" in Article 119. Accordingly, this would include paid meal breaks, additional holidays and even sickness benefits. The industrial tribunal would have to put a value on the various items within the pay package, and apply the equality clause accordingly.

The decision certainly makes pragmatic sense, but can one regard contractual sickness benefits as "pay" even within the extended definition in Article 119?

In any event, is not the Court of Appeal creating as many problems as it seeks to solve? How precisely (and it should be precisely) does one value contractual sick pay provisions. Surely, the value depends on how sick the particular person is, or perhaps more accurately, will be. Will the tribunal have to ask for a prognosis from the applicant's doctor? The Court of Appeal thought the Tribunal would have no difficulty, but made no suggestions as to how it should be done. And in whatever manner it is done, the value will vary from applicant to applicant. What if there are hundreds of applicants making similar claims? Each will have to be considered separately. The Tribunal concerned could be doing little else for years!

The difficulty in **Hayward** is that at no stage before the industrial tribunal did the employer plead the material factor defence. That defence must, of course, be considered before the equality clause is applied. Surely this is a far more appropriate stage at which to consider the package. The employer may say "Well, I pay the man more, but, if one looks at the employment package as a whole, I can justify that on other than discrimatory grounds because the woman has better fringe benefits". The tribunal can then, quite properly, consider the matter generally, without having to dissect the contract term by term and undertake an inevitably imprecise exercise in valuation. If the employer does not succeed in his defence, then perhaps, he must pay the price.

The Court of Appeal refused to give leave to appeal, but leave has since been given by the House of Lords.

The Future

There remain fundamental issues to be litigated. Of great potential significance is the position regarding occupational pension schemes and part time employees. Far fewer part time employees are permitted entry to occupational pension schemes. Most part timers are women. Is this situation susceptible to attack? It is certainly a possibility.

In **Bilka Kaufhause** v **Weber von Hartz (1986)[15]**, the European Court of Justice considered the position. It held that the exclusion of part-timers from a pension scheme contravenes Article 119 if this exclusion affects significantly more men than women, unless the employer can show that the exculsion is based on objectively justified factors unrelated to discrimination on the grounds of sex. In order to justify indirect discrimination the employer must show that the means chosen serve a real need on the part of the undertaking, are appropriate, and are necessary to meet that need.

The consequences of a successful challenge are, of course, immense.

Conclusion

During the last two years, there have been a number of landmark decisions. It is not easy to predict the shape of things to come. Of interest (and not only within the area of equal pay) will be the extent to which the Courts will be willing to make references to the European Court of Justice under Article 177 of the Treaty. It may be appropriate, for example, for a reference to be made in **Hayward,** particularly as the effects of that decision are likely to be widely felt.

Certainly, the issues of equal pay have been thrown into profile. Many of the leading cases have achieved a considerable degree of publicity which again adds to the momentum of the campaign.

And yet the subject receives scant attention among practising lawyers. How much more attention is it given on law courses? It now does not even get a mention on the Law Society Finals Course. One wonders why?

Notes

(1) Council Directive 75/117/EEC.

(2) (1987) IRLR 218.

(3) (1976) IRLR 336.

(4) Unreported.

(5) (1982) IRLR 333.

(6) SI 1983 No. 1974.

(7) (1984) IRLR 463.

(8) Industrial Tribunals (Rules of Procedure) Regulations 1985 Schedule 2.

(9) (1985) IRLR 197.

(10) (1987) ICR 158.

(11) (1987) IRLR 26.

(12) (1978) IRLR 361.

(13) (1981) IRLR 388.

(14) (1987) IRLR 186.

(15) (1986) IRLR 317.

THE EFFECT OF BUSINESS TRANSFERS ON CONTRACTS OF EMPLOYMENT UNDER THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981.

David Thomas, BA, Lecturer in Law, Trent Polytechnic

Introduction

The Transfer of Undertakings Regulations 1981 (SI 1981, No 1794 as amended by SI 442 1987) occupy a unique position in the field of Labour law, constituting the first fundamental piece of employment legislation passed in the form of delegated legislation under the authority of section 2(2) of The European Communities Act 1972. More specifically, the Regulations were designed to implement the United Kingdom's obligations under EEC Directive 1977/187, on Acquired Rights of Workers on Transfers of Undertakings. The policy behind the Directive was the safeguarding of employees' rights of business takeovers. The remarkable method adopted by the UK Government to implement this policy was to deem that employees' contracts of employment are automatically transferred from vendor (the transferor) to the purchaser (the transferee) irrespective of the parties' wishes, upon a relevant transfer.

Given the novelty of this provision in Regulation 5, it is regrettable that the UK Government did not choose to implement the provisions by Act of Parliament. Indeed, the failure to attempt any integration with the existing statutory provisions served only to exacerbate the confusion and controversy that, until very recently, surrounded the application of the Regulations.

Business Transfers at Common Law

In order to understand the operation and potential impact of the Regulations more clearly, it is helpful to analyse the operation of the common law in the context of business transfers and their effect on individual's contracts of employment. In **Nokes** v **Doncaster Amalgamated Collieries**[1] the respondents argued that, following the amalgamation of their company with the Hinkleton Main Co Ltd (HMC Ltd) pursuant to s.154 of the Companies Act 1929. Nokes' contract of employment with his previous employers, HMC Ltd, ipso facto was assigned to them following the transfer, irrespective of his consent. By absenting himself from work, Nokes was therefore in breach of contract. The appellant contended that there was no contract between himself and the respondents. The House of Lords, reversing the Court of Appeal decision, allowed the appeal. Lord Atkin proclaimed[2] that "ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that right of choice constituted the main difference between a servant and a serf"

Admirable though this statement is (and one would expect little else than for the common law to uphold rigorously the doctrine of freedom of contract), the obverse of the result in Nokes is equally true, namely that the transferee employer is under no obligation to continue the employees' contract. Such a doctrine can therefore be seen to be inimical to the employee's best interests. It was these interests which the Directive (and hence the Regulations sought to protect[3].

The essence of the policy underlying the Regulations is contained in Regulation 5 which aims to reverse the common law rule in **Nokes**. Regulation 5(1) states:-

> 1. A relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if orignally made between the person so employed and the transferee.
>
> 2. Without prejudice to paragraph (1) above, on the completion of a relevant transfer -
>
> (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee;...
>
> 3. Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions".

What is a "Relevant Transfer?"

It is clear that the Regulations apply to a transfer of an '**undertaking**'. Although 'undertaking' is not exhaustively defined, Regulation 2(1) provides that it includes

> "... any trade or business but does not include any undertaking or part of an undertaking which is **not in the nature of a commercial venture**".

Interestingly this requirement that the undertaking must be in the nature of a commercial venture was **not** included in the Directive. To satisfy Regulation 2(1) firstly there has to be a transfer of a trade or business, and the test for whether or not a business has been transferred is construed in broadly the same way as under the continuity of employment provisions of the Employment Protection (Consolidation) Act 1978. In short, the cases on this point emphasise that the mere transferring of physical assets between transferor and transferee is not sufficient to amount to a transfer of a business[**5**]. What is required is the transfer of the business as a going concern.[**6**]

The requirement in the Regulations that the undertaking sold must also be in the nature of a "commercial venture" is an unwarranted gloss on the Directive: it quickly becomes apparent that a restrictive view of what constitutes a "commercial venture" would exclude large numbers of employees from the protection of the Regulations. For example, the dictionary definition of commercial[**7**] is "interested in financial return rather than artistry". A strictly literal application of such a definition would exclude many employees who work in the so called public sector, eg local government, schools, colleges, hospitals, etc from the ambit of the Regulations. Indeed, given the growth of privatisation of many previously run public services (for example hospital cleaning, refuse collection, transport, etc) it would appear that had the Regulations applied to such employees they may have proved a stumbling block to the Government's plans in this area[**8**]. It is difficult to argue logically the case for excluding such workers from claiming

protection under the Regulations, given that they enjoy all other statutory employment protection rights.

Moreover, it is not only employees in the public sector who may be precluded from claiming under the Regulations because their undertaking was not run as a commercial venture. A recent example of this is to be found in **Woodcock** v **The Committee of Friends School, Wigton**[**9**]. Here the Court of Appeal, upholding the decision of the EAT, found that the sale of a Quaker Boarding School, which had charitable status, and was run on a break-even basis, was not a transfer of a "commercial venture" within the Regulations. Somewhat surprisingly, May LJ[**10**] remarked

> "I think that it is impossible to define 'in the nature of a commercial venture' so as to govern every particular set of circumstances. I think I know a commercial venture when I see one, and I did not recognise the operation of the school in the manner found by the Industrial Tribunal as a commercial venture"

The learned judge went on to state that the dictionary definition of commercial gave a pointer to its meaning and, at the end of the day, the decision was one of fact for the Industrial Tribunal, so that an appellate body should not interfere unless that decision was perverse.

It is submitted that the construction adopted by the Court of Appeal is too narrow. In reaching its decision, the Court of Appeal focused its attention solely on the business **as run by transferors**, and not on the intended use of the business by its new owner[**11**]. There seems no reason why (apart from the obvious reluctance exhibited so far by the judiciary) Industrial Tribunals should not direct their attention to this point. Such an interpretation would, in the case of privatisation, presumably remove any barrier for employees in the public sector from claiming under the Regulations, as any privatisation plan being implemented by the transferee would obviously be made with the intention of running the services on a strict profit making basis.

Despite the strong arguments for interpreting the phrase "run as a commercial venture" widely, particularly as the Directive sought to increase employment protection[**12**], the trend has continued in the opposite direction. For example, in **Banking Insurance and Finance Union** v **Barclays Bank plc**[**13**] the setting up of an **investment** business by the respondents, to cope with the so-called Big Bang in the City, by transferring staff from its subsidiary to that business, did not come within the scope of the Regulations. Although the case was decided on other grounds[**14**] the EAT said, obiter, that the thing transferred was not in the nature of a commercial venture!

Immediately before the Transfer

Assuming that there is a 'relevant transfer' under Regulation 2(1), it is important to note that under Regulation 5(3) only employees who are employed 'immediately before' the transfer will have their contracts of employment transferred automatically from vendor to purchaser. It is vitally important to clearly establish by whom the employee is employed, for the purposes of bringing an action for a redundancy payment or unfair dismissal[**15**]. In the early years the courts were prone to give conflicting judgments as to the interpretation of this phrase, but, in the main, they appeared to favour the employee on this crucial point. For example, in **Alphafield t/a Apex Leisure Hire** v **Barratt**[**16**] an employee who was dismissed on Friday, the business being sold on the following

Monday, was held to have been employed 'immediately before the transfer' for the purposes of the Regulations. The employee's claim that he had been unfairly dismissed therefore lay against the transferee not the tranferor. Explaining the reasoning behind this decision Tudor Evans J[**17**] commented that

> "It has to be remembered that if the words [**immediately before the transfer**] are construed in their strictest sense, as contended by the employers, it would be very easy for a transferor without funds to agree with a transferee, for reasons convenient to them both, that employees should be dismissed a short time before transfer, thus leaving them with a worthless remedy and so defeating the protection afforded by the regulations".[**18**]

Although this liberal approach towards the interpretation of this crucial phrase as meaning not an exact moment of time (as contended by the employers in '**Apex Leisure**') but rather as an undefined period of time, to be decided in each particular case, can be defended in that it serves to enhance employment protection[**19**], it has the disadvantage of introducing a large element of uncertainty surrounding the application of the Regulations. Indeed, such was the confusion as to who actually was the employer, for the purpose of making claims for compensation, it was not unusual to see actions brought where all three parties were joined in the proceedings[**20**].

This uncertainty was unequivocably resolved by the decision in **Secretary of State for Employment** v **Spence**[**21**]. In this case, the Court of Appeal held that employees who were dismissed at 11 am, the business being sold at 2 pm the same day, **were not** employed 'immediately before the transfer'. The decision in Alphafield t/a Apex Leisure v Barratt was expressly overruled the Court of Appeal relying on the European Court of Justices decision in **Wendelboe** v **LJ musik Aps (in liquidation)**[**22**] finding that only contracts of employment still in existence **at the time that the contract of transfer was concluded**, were caught by the Regulations. Liability for the dismissals therefore remained with the transferor. Since that company was insolvent, the employees' redundancy payments were to be paid out of the Redundancy Fund (hence the Secretary of State's interest in this case). Balcombe LJ favoured such a strict interpretation, stating that it would bring a degree of certainty into this area of law and claiming that the confusion as to the operation of this requirement contained in Regulation 5(3) was proving to be a deterrent for potential purchasers of businesses. It is worth noting that before the decision in **Spence**, a Government White Paper, 'Building Businesses not Barriers', called for a review of the problems the Regulations were causing. After **Spence** this planned review was dropped. The Court of Appeal's decision in this case undoubtedly injects certainty into this particular aspect of the application of the Regulations. However, in actively promoting certainty for purchasers of businesses, there has been the abandonment of any principle of certainty for employees in this context, who are, quite literally, liable to be dismissed at a moment's notice in order to avoid the application of the Regulations.

Dismissals connected with Relevant Transfers

Regulation 8(1) provides

> "where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part V of the 1978 Act . . . as unfairly dismissed if the

transfer or a reason connected with it is the reason or principal reason for his dismissal"

On the face of it, Regulation 8(1) appears to extend considerable protection to employees who are dismissed in connection with business transfers. However, there is a defence contained in Regulation 8(2) which provides that if the dismissal is for "... an economic, technical or organisational reason. entailing changes in the work force ...", Regulation 8(1) does not apply and the dismissal is presumed to be for a substantial reason under section 57(1)(b) of the 1978 Act. The decision to dismiss then falls to be considered under s.57(3) of that Act, ie the Tribunal has to decide whether or not the employer has acted reasonably in treating it as a sufficient reason for dismissing the employee. Provided the employer can adduce sufficient evidence to satisfy Regulation 8(2) (and, in practice, employers have little difficulty in satisfying this requirement) - those familiar with the application of s.57(3) in the area of business reorganisations will know that Tribunals are reluctant to interfere with the exercise of managerial prerogative in this context, and there is an increasing tendency to find such dismissals fair[**23**].

An illuminating example of Regulation 8(2) in operation was seen in **Anderson & McAlonie v Dalkeith Engineering Ltd**[**24**]. Here the transferors, who were in receivership, dismissed all their employees at the behest of the transferee before the transfer agreement was concluded. On the employees' claims for unfair dismissal (against the transferor of course) the EAT found the dismissals fair. The tranferee's motives for requesting the dismissals were held to be irrelevant, as it was the transferor who was in fact dismissing the employees. Therefore, since the best deal available to them was to sell the business shorn of employees, that was a sufficient economic reason to bring the dismissal within Regulation 8(2), and was accordingly fair under s.57(3). This provides yet another loophole in the Regulations, in that in order to escape liability the transferor need only obtain written notification from the transferee of the employees who are to be dismissed. Following the reasoning in **Anderson**, if this request is presented on a 'take it or leave it' basis, then those dismissals will presumably be adjudged fair. The transferee's motives, however unreasonable, **cannot** be used as evidence to show that the transferor has failed to satisfy the reasonableness requirement in s.57(3) of the EP(C)A 1978.

However, in contrast to this approach in **Anderson** recently the EAT in **Wheeler v Patel and J Golding Group**[**25**] has held that the "economic" reason for dismissal contained in Regulation 8(2) ought to be construed narrowly as meaning a reason which relates to the **conduct of the business**. A mere desire to obtain the best price for the business, or simply to affect a sale is not an economic reason within the Regulations. If such a reason is given for the dismissals, then they will fall under the automatically unfair provision contained in Regulation 8(1). Such a narrow interpretation is undoubtedly more favourable in that it would serve to enhance employment protection in the context of business transfers and is therefore more in keeping with the spirit of the Directive.

That being so, since both **Anderson** and **Wheeler** are EAT decisions. tribunals may choose which one they wish to follow. If, on the whole, they adopt the approach apparent in **Anderson** then this reasoning in conjunction with the **Spence** interpretation of Regulation 5(3) devastates the protection intended by the EEC Directive and must call into question whether the UK Government has observed its treaty obligations by implementing the Directive in its municipal law.

Finally, when discussing dismissals upon a relevant transfer, it should be noted that Regulation 8(2) will only apply if the "economic, technical or organisational" reason for

the dismissal "entails changes in the workforce" The Court of Appeal in **Berriman** v **Delabole Slate Ltd**[**26**] held that 'changes in the workforce' meant that the employer's plan must be to achieve a change in the actual composition of the workforce. In this case the transferee sought to reduce the transferred employee's pay in order to standardise it with that of his other employees. Such a reason did not entail 'a change in the workforce', and was therefore automatically unfair under Regulation 8(1). However, this decision is likely to prove a pyrrhic victory for employees, since transferees will simply insist on the employees being dismissed before the transfer. They can then choose whom they want to re-engage under fresh contracts of employment[**27**]. The overall effect of the practical application of Regulation 8(2) is that there is little scope (unless the decision is **Wheeler** is taken up) for the operation of the automatically unfair provision contained in Regulation 8(1)[**26**]. It should be stressed that a finding of fair dismissal under Regulation 8(2) does not (despite earlier cases to the contrary) preclude a dismissed employee from claiming under the redundancy provisions contained in Part IV of the EP(C)A 1978[**29**].

Given the present state of the application of the Regulations, Mr David Waddington's (the then Under Secretary of State) closing the address to the House of Commons as to the impact of the Regulations appears to be remarkably prophetic. He put it thus:

> "The Government has done a great deal to mitigate some of the worst effects of the Directive. I do not believe that it will have the drastic effect on British business that some people seem to imagine. I have already spelt out how limited will be its effect".[**30**]

Can a Transferee be liable for inducing breach of contract?

It has already been seen how it is in many ways beneficial for the transferee to instruct the transferor to dismiss employees he does not wish to be automatically transferred along with the business. Provided those employees are dismissed before the transfer agreement is concluded there is nothing on which the Regulations can bite. Those employees who are dismissed will then have to claim the appropriate compensation (most likely redundancy payments) from the transferor. If that company is insolvent, then, under section 106 of the EP(C)A 1978 the employee is paid in full as far as the redundancy is concerned, out of the Redundancy Fund. In the case of unfair dismissal compensation awarded against an insolvent employer, only the basic award is payable, which is again guaranteed by the Redundancy Fund under section 122(3)(d) of the EP(C)A 1978. Given that it is quite common for purchase agreements in such circumstances to be shrouded in secrecy, with employees unaware, until the very last moment about the outcome of negotiations, it is possible that if the transferee insists on the dismissal of certain or all employees at short notice, (as in **Spence**) the transferor will be dismissing those workers in breach of the agreed contractural notice periods, ie, they will have been wrongfully dismissed. In such circumstances could the transferee be liable for the tort of inducing a breach of contract?

The tort of inducing a breach of contract originated in the case of **Lumley** v **Gye**[**31**]. The essential components of this tort are -

1. an intention to induce the breach plus knowledge of the contract to be broken;
2. inducement;
3. breach of contract and, finally,
4. loss.

The first three elements are fairly straightforward, indeed the transferor may be using the transferee's demands for dismissal to refute any claims of unfair dismissal that may be made against him[**32**]. However, the last element, ie, loss, is a little less easy to identify. Where an employee has been wrongfully dismissed he is entitled to a sum in damages. The measure of damages is the wages he would have earned had his employers complied with the notice period[**33**]. If the employer is insolvent then, under section 122(3)(b) of the EP(C)A 1978, the employee may recover from the Redunancy Fund the amount that the employer is liable to pay him for the period of notice to which he is entitled [**34**]. However, only payments in lieu of the statutory minimum periods of notice are paid out of the fund[**35**]. Should the employee's contractural period of notice be longer than the minimum required by statute he will suffer the loss necessary to trigger off the tort.

It would be ironic indeed if this tort, which has been used almost exclusively by employers against trade unions organising industrial action, were to be turned against employers themselves in the context of business transfers. However, although there is no reason why such an action should not succeed (and there are no cases on this point) the transferee could easily escape liability by either ensuring that the correct notice periods are complied with, or, if this is not possible, the fact that the employees are not dismissed before the transfer could be reflected in the total purchase price paid.

The possibility of keeping the contract alive following a wrongful dismissal

Another question that begs an answer is whether following a **wrongful dismissal** an employee can refuse to accept the transferor's repudiatory breach, thus keeping his contract alive long enough so that it is automatically transferred when the business is eventually sold? Under ordinary contract law, the contract is not brought to an end by the guilty party s breach, the innocent party having the choice of either accepting the repudiation, and bringing the agreement to an end, or continuing with the contract. This is, for obvious reasons, known as the acceptance view, and typified by statements such as that by Asquith LJ in **Howard** v **Pickford Tool Hire Co**[**36**] who said:

> ....an unaccepted repudiation is a thing writ in water and of no value to anybody"

However, given the unusual open-ended nature of employment contracts, another viewpoint exists that such contracts are an exception to the normal rule, or sui generis[**37**], and the contract is brought to an end automatically following the repudiatory breach - the so called automatic theory of contractural termination

There are numerous cases that support both views, so many that this article does not have the space to discuss them, and the reader is referred to McMullen's seminal article, 'A Synthesis of the Mode of Termination of Contracts of Employment"[**38**]. The difficult question of which view is correct has plagued labour lawyers for years There is a recent trend of opinion which favours the automatic termination theory for **statutory purpose**, thereby avoiding the horrendous complications that would otherwise arise if the acceptance view is applied[**39**]. However, May LJ in **R** v **East Berks Health Authority**, **Ex parte Walsh**[**40**] stated obiter that

> ' this difficult question of the effect of an unaccepted wrongful dismissal is unresolved"

The learned judge did say however that the 1978 Act appeared to be drafted on the basis that the automatic theory is correct. Moreover, he also favoured the application of the automatic theory to dismissals at common law as well[**41**].

In the context of business transfers the question of which view prevails is therefore of crucial importance to an employee who has been wrongfully dismissed and seeks to keep the contract alive. With the law on this issue in an unsatisfactory state (the application of the automatic view in a statutory context appears to be contrived simply to avoid complications that would otherwise result) it remains a moot point as to the likelihood of an employee successfully utilising the acceptance theory of contractural termination in order to keep his contract alive until it is transferred automatically to the purchaser of the business.

Conclusion

Although the two theories concerning possible tortious liability and the acceptance viewpoint on contractural termination do have some merit, and may yet provide a form of employment protection for workers in the context of business transfer, as there are as yet no cases on these points their value is difficult to assess.

It is not surprising that Paul L Davies[**42**] referred to the Regulations as amounting to no more than a voluntary code. Indeed, Lord Wedderburn in the House of Lords[**43**] was moved to say of the Regulations that:

> "....they snatch away the rights intended by the Directive like a bicycle thief snatching away purses in the night".

Quite simply, given the very narrow interpretation of the Regulations by the Judiciary, the undoubted benefits which the EEC Directive sought to give workers in this country have been so diluted as to be practically worthless. They do not, as suggested by Teddy Taylor MP[**44**], give an employee a job in perpetuity, and provided that employers comply with what amounts to no more that a series of procedural requirements, the potentially radical effects of the Regulations will not be felt at all. The status quo of the legal effect of business transfers before the 1 May 1982 has thereby been regrettably restored.

Notes

(1) (1940) AC 1014. See also **Griffith** v **Tower Publishing Co** (1987) 1 Ch 21.

(2) At page 1026.

(3) But note Hugh Collin's view that the Regulations "produce the ultimate commodication of labour, for employees become like intangible assets, to be sold along with lock, stock and barrel at the transferor's discretion". "Dismissals on Transfer of a Business" 15 1LJ 244 at 247.

(4) Para 17(2) Schedule 13.

(5) **Melon** v **Hector Powe** (1981) ICR 43. See also on this point **Robert Seligman Corporation** v **Baker** (1983) 1CR 770.

(6) See Davies & Freedland "Labour Law: Text & Materials" at p540 criticising this narrow approach to the interpretation of what constitutes the transfer of a business in law.

(7) Concise Oxford English Dictionary.

(8) K Platten "Transfer of Undertakings - A Question of Profit or Loss". 135 New LJ 124.

(9) (1987) 1RLR 98.

(10) At page 100.

(11) See Michael Rubenstein, Highlights, March 1987 1RLR.

(12) See especially the comments by the EAT in **Hadden** v **University of Dundee Students Association** (1985) 1RLR 449.

(13) The Times, March 21 (1987) EAT.

(14) ie. there was no transfer of goodwill, or indeed there was no identifiable business capable of being transferred.

(15) See Michael Duggan "Transfers of Undertakings and the Individual Contract of Employment II" 130. SJ p61.

(16) (1984) 1 WLR 1062.

(17) At p1066.

(18) See also **Secretary of State** v **Anchor Hotel (Kippford) Ltd** (1985) 1CR 724 and **Fenton** v **Stablegold Ltd** (1986) 1RLR 64.

(19) The Tribunals appeared to be following the reasoning of Stephenson LJ in **Teeside Times Ltd** v **Drury**[1980] 1RLR 72, although here of course, the learned judge was deciding matters under the continuity provisions of Schedule 13 EP(C)A 1978.

(20) **Batchelor** v (1) **Premier Motors (Romford) Ltd (2) Petropolis** (1982) 1T (101T 1339/181) unreported.

(21) (1986) 1RLR 248.

(22) (1986) CMLR 476.

(23) See J McMullen "Managerial Prerogative, Reorganisation and Employees Rights on the

Transfer of Undertakings" 49 MLR 524. See also on this point the decision of the EAT in **Bowater Containers Ltd** v **McCormack** (1980) 1RLR 50.

(24) (1984) 1PLR 429.

(25) (1987) 1RLR 211.

(26) (1985) 1CR 546. See also **May & Hassell (West) Ltd** v **Jensen** (1985) EAT 526/83 unreported.

(27) Such employees will also probably come free of all accrued service, such a dismissal breaking the employees continuity of service, see **Teeside Times Ltd** v **Drury** (1980) 1RLR 72.

(28) The view taken by the Scottish EAT in **Canning** v **Niaz** (1983) 1RLR 431 particularly at p432.

(29) As in **Goricfree** v **Jenkinson** (1984) 1RLR 391.

(30) HC Debs. 7.12.81. Col 697.

(31) (1853) 2 E&B 216.

(32) As in **Anderson & McAlonie** v **Dalkeith Engineering**, supra note 24.

(33) **Bliss** v **South East Thames Regional Health Authority** (1985) 1RLR.

(34) See **Secretary of State for Employment** v **Haynes** (1980) 1RLR 270.

(35) Contained in S49 EP(C)A 1978.

(36) (1951) 1 KB 417 at p421, see also **Photo Productions Ltd** v **Socuricor** (1980) 1 All ER 556.

(37) See especially the comments by Sir John Donaldson in **Sanders** v **Ernest A Neale Ltd** (1974) 1CR 563, at p571.

(38) 41 CLJ 110. See also Francis D Rose "The Effects of Repudiatory Breaches of Contracts", 34 CLP 235.

(39) See **Robert Cort** v **Charman** (1981) 1RLR 437, approved by the Court of Appeal in **Stapp** v **Shaftsbury Society** (1982) 1RLR 326.

(40) (1984) 1CR 743.

(41) Contrary to the decisions in **Thomas Marshall** v **Guinle** (1979) Ch 227 and **Gunton** v **Richmond-Upon-Thames LBC** (1980) 1CR 755.

(42) Papers given at the Labour Relations and the Law Conference, 7 November 1986 at the Cavendish Conference Centre, London.

(43) HL Debs, 10.12.87. col 1490. Note also an article by Roger Rideout, the title of which is self explanatory of the writer's views on this area of law - "The Great Transfer of Employment Rights Hoax" 35 CLP 233.

(44) HC Debs 7.12.81. col 694.

ESTOPPEL : SHIELDS AND SWORDS

John Field, LLB Solicitor, Lecturer in Law Trent Polytechnic

It is frequently said by judges[1] by writers of textbooks[2] and by academic lawyers[3] that estoppel is a shield and not a sword.

The object of this article is to examine the extent to which this proposition is true.

The expression itself is pithy, but imprecise. Any suggestion that it should be taken as meaning that no action can ever be founded upon an estoppel (in other words, that no representee can ever take positive action to enforce a right based upon estoppel) is ill conceived, as will be demonstrated. It will be seen that the proposition that estoppel is not yet a cause of action in itself is better supported by authority, but that even that proposition is not one of absolute veracity.

The expression 'a shield and not a sword' appears to have originally been coined in the case of **Combe** v **Combe**[4] which was a case of what has come to be termed 'promissory estoppel'. Various labels or classifications have been applied to the different forms of estoppel in pais, including 'promissory estoppel', 'proprietory estoppel', 'estoppel by existing fact representation', 'estoppel by acquiescence', and 'estoppel by convention'. This list is not exhaustive and a detailed examination of the categories is not proposed here; suffice it to say that the writer considers that if any of these classifications is used by a court to describe a case, then the classification should be treated with a degree of circumspection. The history of the classification of estoppel in pais has been one of misunderstanding, semantic difficulty, and misapplication. It is suggested that, in examining any case in which the court has applied one or other of the traditional classifications, it is prudent to look behind the label, and to examine the true nature of the estoppel in question, before proceeding.

The proposition that 'estoppel is a shield and not a sword' is frequently used in respect of each of the forms of estoppel in pais. It is proposed, first of all to examine a number of cases of what can properly be called 'promissory estoppel', in order to ascertain whether authority tends to support or deny the truth of the proposition.

Cases which can properly be classified as proprietory estoppel will then be examined. This class of estoppel is generally recognised as giving some rights of positive action Finally, the remaining categories of estoppel will be considered.

The first milestone is the case of **Central London Property Trust Ltd** v **High Trees House Ltd.**[5] The somewhat enigmatic obiter dictum of Denning J (as he then was) in this case is often cited as authority for the proposition that promissory estoppel (if, in spite of the comments of Denning J in that case[6] we may so call it) is a shield and not a sword. It is suggested that this proposition is an inaccurate and unwarranted generalisation of what Denning J actually said on this point, which was as follows:-[7]

> 'The courts have not gone so far as to give a cause of action **in damages** for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it'.

Firstly, it can be seen that Denning J expressly restricts his comment to rights of action in damages. One must ask whether Denning J intended that other remedies should be available, and that the representee should be able to seek them, and, if so, then why the right to bring an action for damages should be excluded.

It is perhaps best to answer the second part of the question (i.e. the reasons for the exclusion of the right of action in damages) first. Denning J had already said[**8**] that the facts of the High Trees case did not give rise to an estoppel because the representation in question was not one of existing fact. But the strict requirement of existing fact representation is relevant only to common law estoppel. What Denning J does is to say that this is not a case of common law estoppel. It therefore logically follows that he should exclude the common law remedy of damages. Denning J makes no express reference to equitable remedies. That is to say, he does not exclude the possibility of the representee seeking them. What he does say, of course, is '(the courts) have refused to allow the party making it to out inconsistently with it (i.e. the promise).' It is suggested that an application by the representee for an injunction would be entirely consonant what Denning J says; this would be none the less so if the injunction were mandatory, likewise there would appear to be no objection to an application by the promisee for an order of specific performance. Even if, in such an action, the court exercised its power to grant damages in lieu of specific performance, Denning Js comments would be distinguishable on the grounds that such an action would not, strictly speaking be an action in damages, and that in any event Denning Js comments were in respect of common law damages.

Furthermore, it should be noted that there would seem to be nothing to prevent a representee from taking the positive action of applying for a declaration of the respective rights of the representor and the representee. There is nothing in such an action which is inconsistent with the High Trees case, yet it cannot be denied that this is a positive action by the representee which may have the same practical effect as admitting that he has a cause of action properly so called.

It is an interesting and worthwhile exercise to closely examine the case to which Denning J 'particularly desired to refer',[**9**] in the High Trees case, and upon which Denning J relied as authority, and to ask whether those cases indicate a general prohibition of positive action on the part of the representee.

In **Re William Porter**[**10**] a director of a financially weak company agreed to forego remuneration - an action which was intended to induce, and did induce, the company to carry on business. The director became bankrupt, and his trustee in bankruptcy was held to be estopped from claiming arrears of remuneration. It is clear that there is no question of this case being used as an authority for the proposition that a representee cannot bring an action.

In **Buttery** v **Pickard**[**11**], a wartime rent abatement case similar on its facts to the High Trees case, the action was brought by the representor (the landlord), and again the case is silent on the question of the rights of action of the representee.

The case of **Fenner** v **Blake**[**12**] is however of very great interest indeed. The facts were that the defendant, a tenant from year to year represented to the plaintiff, his landlord, that he would quit on Midsummer day. No notice to quit was served. The Plaintiff contracted to sell the property, with vacant possession. When the defendant refused to leave, the Plaintiff brought an action for ejectment. It is of course immediately apparent that the Plaintiff was the representee. The Plaintiff succeeded. It should be noted that the case has two rationes. The first, which is not of direct interest, being that the agreement to

leave took effect as an immediate surrender, and re-grant of a fixed term tenancy ending on Midsummer day. The second ratio, said by Channell J[**13**] with the agreement of Bucknill J, to be 'equally applicable', was that the facts raised what was described as 'an ordinary estoppel'.

It should be noted that this is promissory, and not existing fact representation, estoppel. This must be so because the court regarded estoppel as an **alternative** ground to that of the 'new tenancy'. Therefore the court was not saying that the defendant was estopped from denying that he had a new tenancy, and had surrended the old one, but rather that he was estopped from reneging on his promise as to his future course of conduct.

It may be thought that his case could be explained on the basis that the landlords action was based upon his right to possession, and therefore that the estoppel worked only in a negative sense against the representor. It is submitted that such an explanation would be both superficial and fallacious. It was the estoppel, i.e. the promise coupled with anticipated and intended reliance upon it which in the first place gave rise to the landlords rights to possession. Without the estoppel, the landlord had no right to bring the possession action.

It must therefore be recognised that, if it is accepted that the estoppel based ratio is an alternative - and it is quite clear from the judgement that it is - then this is a case in which estoppel is the very foundation of the action, and in which the action could not have been brought but for the estoppel.

What, then, of the other case upon which Denning J founded his proposition in High Trees?

A close examination of **Marquis of Salisbury** v **Gilmore**[**14**] reveals that neither estoppel nor estoppel related concepts were even mentioned in any of the judgements, though Denning KC (as he was then) introduced the notion in his argument. The case appears to have been decided on the precise wording of S18 of the Landlord and Tenant Act 1927.

Hughes v **Metropolitan Railway Co Ltd.**[**15**] was of course a case in which the estoppel was used defensively by the representee. But nowhere in any of the speeches in the House of Lords is there expressed any general limitation of estoppel to this role. There is only one passage, in the speech of Lord Cairns LC, which might be interpreted in this manner He said:[**16**]

> "It was not argued at your Lordships Bar, and it could not be argued, that there was any right of a court of equity, or any practice of a court of equity, to give relief in cases of this kind, by way of mercy or by way merely of saving property from forfeiture. . . . ."

It is suggested that this statement is not to be taken as restricting the scope of estoppel, but rather as an indication that a court of equity will not intervene on the sole ground of hardship, or, as Lord O'Hagon put it:[**17**]

> "Your Lordships have no power to relieve . . . . merely on the ground that it pressed hardly upon the defendant"

The final case referred to by Denning J is of greater interest. It is the case of **Birmingham and District Land Co.** v **North Western Railway Co.**[**18**]

The facts, briefly, were that A occupied land under an agreement terminable if he did not complete building works on it by 1885. It subsequently appeared that, before that date, a railway company would compulsorily acquire the land. The landowner, through his agent, indicated to A that he could suspend the building operations until the outcome of the proposed railway scheme became known. In 1886 the railway company entered onto the land occupied by A. A claimed that the landowner was estopped from terminating the agreement, and that he (A) therefore still had an interest in the land, and therefore a right of compensation against the railway company. A was successful in this argument.

Three points of interest arise. Firstly, it is quite clear that the estoppel is the very foundation of As rights, if any. Without the estoppel, A clearly has no rights, Secondly, A actually brought the action, in which he sought an injunction and a declaration, and did so successfully.

Thirdly, it is perhaps worthy of note that in this case an action was not only used to found an action; it was used to found an action against a third party.

From the above it can be seen that Denning Js remarks in High Trees as to estoppel as a cause of action should be - and, indeed, must be - strictly interpreted and restricted to at most, actions involving damages, and, more probably, to actions for common law damages.

But the High Trees case and its acknowledged forbears, are by no means the only cases in estoppel (promissory or otherwise) to have found their way into the Law Reports. Let us now examine one or two more well-known and oft-cited promissory estoppel cases, from the point of view of rights of action in the representee. Probably the strongest case tending against any finding of such rights is **Combe** v **Combe**,[**19**] the brief facts of which were as follows:-

Pending the grant of a decree absolute of divorce, H promised to pay to W maintenance of £100 per annum. The payments were not made. W did not apply to the court for maintenance, but subsequently brought an action to enforce the agreement and to claim the substantial arrears which had accumulated. The action failed. In an ex tempore decision the Court of Appeal held, basically, that since there was no evidence of any express or implied request by H that W should not apply for maintenance, such forebearance could not amount to consideration, and said that the doctrine of promissory estoppel could not be used to side-step the doctrine of consideration. Denning LJ (as he then was) said:[**20**]

> "Much as I am inclined to favour the principle of High Trees it is important that it should not be stretched too far lest it be endangered. It does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties. That is the way it was put in the case in the House of Lords which first stated the principle Hughes v Metropolitan Railway Co - and in the case in the Court of Appeal which enlarged it - Birmingham and District Land Company v London and North Western Railway Co. . . ."

Now what does this mean? Does it mean that an action cannot be based upon an estoppel? That is certainly **not** the 'way it was put' in either of the cases cited by Denning LJ, as has already been shown. Or does Denning LJ attempt to distinguish between

estoppel as a cause of action, and estoppel as the foundation or basis of a cause of action? If so, what is the difference?

The generally accepted meaning of the term 'cause of action' is 'every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have the right to traverse' (per Brett J in **Cooke** v **Gill**[**21**])

Perhaps the best explanation of Denning LJs rather obscure statement is that he had in mind that the two cases which he mentions (and, indeed, High Trees and all the cases upon which it was based), and, with one exception,[**22**] all the cases which he then proceeds to mention in his judgement in **Combe** v **Combe**, have a common factor, namely, that they were all cases involving waiver or variation of a pre-existing contractual agreement. Perhaps what Denning LJ meant was that a contractual relationship cannot be formed, ab initio, by estoppel; leaving untouched the proposition which must, on authority, surely be accepted, that an action can be founded on estoppel to allow a representee to enforce the terms of a waiver or variation. If this is what Denning LJ intended to say, then further interesting questions arise as to the respective consideration requirements of variation and of formation of contract.

It should be noted that there are, on the facts of **Combe** v **Combe**, at least three significant features which could, and probably would, in any event have led to the failure of an action founded upon the equitable doctrine of promissory estoppel. The first is that reliance by the representee upon the promise or representation is certainly an essential element of promissory estoppel.[**22**] It is probable, though less certain, that such reliance must be detrimental to the representee. It is probable that, on the facts of **Combe** v **Combe**, neither of these requirements was satisfied in that case. This is because the income of W was substantially greater than that of H. As Denning LJ said:[**23**]

> "He left her to apply if she wished to do so. She did not do so, and I am not surprised, because it is very unlikely that the divorce courts would have made any order in her favour, since she had a bigger income than her husband"

Nor, as Denning LJ said[**24**] is there any evidence that the promise was intended to be acted on.

Secondly, in order that W should be able to avail herself of relief in equity, she would need to fulfill the requirements of the maxim that 'he who seeks equity must do equity'. On the facts, W would have had difficulty. Per Denning LJ[**25**] 'I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years, and then demand the whole £600'. Clearly there are elements of inequitable conduct (and of laches) which could defeat Ws claim.

Thirdly, what W was claiming was, in effect, common law damages for breach of contract. And, was as we have already seen, Denning J had already pointed out, in **High Trees** that such a rememdy was not available in respect of the equitable doctrine of promissory estoppel.

It is now proposed that a number of cases, in which actions have been successfully brought to enforce estoppel - derived rights should be examined. The purpose of this examination is two fold. Firstly, and most importantly the cases are strong authority for the proposition that estoppel can be used to found actions. Secondly it is interesting to identify the common factors displayed by the cases. It will be seen that, though there is

one particular striking common factor - namely, that all the cases concern interests in land - the courts appear to have taken what could be described as an ad hoc approach, and do not appear to have given overt recognition to this unifying factor. Furthermore the courts have not consistently applied or referred to the traditional classifications of estoppel. In some cases they are mentioned. In others the courts simply refer to 'general principles of equity' (**Chalmers** v **Pardoe**) 'a case of ordinary estoppel' (**Fenner** v **Blake**, supra[**27**]). It will also immediately be seen that many of the 'promissory estoppel' cases also have reference to interests in land. Many estoppels straddle traditional classification. It is proposed, for the sake of convenience only, to refer to the cases which follow, as cases of proprietory estoppel.

The first of these cases to which the writer would draw attention is that of **Foster** v **Robinson**[**28**]. This case concerned a contractual tenancy of a cottage, occupied by the tenant (T) and his daughter, (D). An oral agreement was reached whereby T would cease to pay rent and would (presumably along with D) continue to occupy the cottage until Ts death. The agreement was honoured. After Ts death the landlord, (L), claimed possession. L contended that the agreement produced a surrender by operation of law. D defended the action for possession.

In the Court of Appeal Ls contention was upheld. Sir Raymond Evershed MR said[**29**] quoting Foa, Landlord and Tenant

> "It has been held that in order to constitute a surrender by operation of law there must be, first, an action of purported surrender invalid per se by reason of non-compliance with statutory or other formalities, and, secondly, some change of circumstances supervening upon or arising from the purported surrender which, by reason of the doctrine of estoppel or part performance makes it equitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender"

The Master of the Rolls then continued:

> "The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law, is I think clearly discerned . . . ."

Sir Raymond Evershed MR was satisfied that estoppel was the foundation of the surrender. The surrender was the foundation of the landlords action. Ergo, the estoppel, being the foundation of the surrender was the foundation of the action.

In addition to the obvious point that the action was brought by the representee two further features of this case must be worthy of note: firstly, the case concerned an interest in land, and secondly, it concerned a variation of a pre-existing contractural relationship between the parties. This latter feature however was not present in the subsequent Privy Council case of **Chalmer** v **Pardoe**[**30**].

The facts briefly were that Pardoe owned leasehold land. He allowed Chalmer to expend money in building on the land, apparently on the understanding that he would be granted some interest in the land. Chalmer brought an action claiming an equitable charge or lease on the land. The action failed on the technical ground that the grant of an interest to Chalmer was in breach of the statute under which the lease was granted. The Privy Council however, considered the 'estoppel' argument. Sir Terence Donovan, delivering the advice of the Privy Council, said,[**31**]

> There can be no doubt upon the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land upon the faith of an assurance or promise that that part of the land will be made over to the person so expending the money, a court of equity will prima facie require the owner by appropriate conveyance to fulfill his obligation"

Again, in a case relating to land, clear authority to say that the promisee can take action. But there is rather more to **Chalmers** v **Pardoe** than that. Not only is the estoppel the basis of the action, it is the very cause of action itself, even within the definition laid down in **Cooke** v **Gill.**[**32**] And there is clearly no question of this being a variation of pre-existing contractual rights, for there were none. The Privy Council did not attempt to classify the estoppel. Indeed, the word 'estoppel' is not used at all. The Privy Council instead refers to a 'general equitable principle' though there can be little doubt that the word estoppel could properly be substituted for that expression. The Privy Council also emphasised that a wide range of remedies - including conveyance of the land in question is available to the representee to satisfy such an equity.

Further support for these propositions is to be found in **Crabb** v **Arun District Council.**[**33**] Briefly the facts were that the defendants represented to the plaintiff that they had granted or, more probably, would grant to the plaintiff a right of way. In reliance on that representation the plaintiff sold part of his land without reservation of a right of way to the retained part. The defendants then reneged upon their representation, and the retained land was land-locked. The plaintiff successfully brought an action for declaration and injunction, claiming that the defendants were estopped from denying him a right of way. Lord Denning MR said[**34**]

> "When Mr Millett, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietory estoppel, it does give rise to a cause of action. We had occasion to consider it a month ago in **Moorgate Mercantile Co. Ltd** v **Twitchings**[**35**] where I said at (pg 287), that the effect of estoppel on the true owner may be that
>
> ...his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein ..
>
> The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action..."

Lord Denning MR says that estoppel is capable of constituting a cause of action. It is clear that in Crabb that is exactly what it was i.e. the estoppel was not only the foundation of the action, but also the cause of action. As Scarman LJ said in the same case[**36**]

> The Plaintiff cannot claim a right of way of necessity. The plaintiff has no grant. He has the benefit of no enforceable contract. He has no prescriptive right. His case has to be that the defendants are estopped from denying him a right of access over their land to the public highway"

The statement is that more powerful if we realise that what it really means is that the estoppel gives to the plaintiff a cause of action, and is in itself sufficient to prove the action, for a right of way.

It is interesting to see that Lord Denning finally agrees that estoppel can be a cause of action. He then limits this to propriety estoppel cases, but then there is, in his quote from **Moorgate Mercantile** a suggestion that he would not restrict his definition of 'proprietory estoppel' to estoppel relating to interests in land. He then closes, however with a reference only to land. Certainly it is clear that there is abundant authority for the proposition that estoppel in relation to interests in land gives rise to a cause of action. What none of the cases - Crabb included - trouble to do is to point to any logical justification for such discrimination. It is clear from a perusal of the authorities that some connection with an interest in land is the common factor shared by the great majority of the cases where estoppel has been the cause or the foundation of the action. The expression 'the great majority' is deliberately used in preference to 'all', as it will be shown that there are cases in which estoppel has been admitted as a cause of action in the absence of any interest in land. The fact remains however that the courts have been remiss in failing to address themselves to the basis of the distinction, which they have assumed to exist, between land and non-land cases, or to put it another way, the distinction between proprietory and other estoppels. Perhaps this is what troubled the mind of Scarman LJ when he said in **Crabb**,[**37**]

> "I do not find helpful the distinction between promissory and proprietory estoppel... I do not think that in solving the particular problem raised by a particular case, putting the law into categories is of slightest assistance".

If the courts are prepared to undertake such a de-classification exercise, is the inevitable outcome not to be that estoppel will be more readily admitted as a cause of action in non-land cases?

As has already been briefly suggested, there are a number of such cases in which estoppel has already been recognised as being admissable either as a foundation of an action or as a cause of action properly so called. The first of these is the case of **Low** v **Bouverie**.[**38**] The facts, in brief, were that enquiries were made of a trustee by a prospective lender who proposed to advance money to a beneficiary on security of the trust fund. The enquiries and the replies were ambiguous. The lender suffered loss, and claimed that the trustee was liable on the grounds, inter alia of estoppel based on this statement. The claim failed, primarily on the ambiguity of the statement. However, Lindley LJ made the following comment[**39**]

> "As regards estoppel, if the Defendant had said that there were no incumbrances on Admiral Bouvery's life interests except those mentioned in his letter the case would be clearly one of estoppel: it would be distinguishable from **Burrowes** v **Loch** and the Plaintiff would be entitled to relief, not to damages for a misrepresentation, but to an order on the Defendant as trustee for the Plaintiff to pay him the Admirals life interest in the fund in question . . this is not the relief sought (in this case) by the Plaintiff... but it is relief to which he would be entitled on the grounds of estoppel. . ."

Admittedly this statement is obiter. But it is to be noted in three important respects. Firstly, it admits a right of action in the representee, not to common law damages, but to an

equitable remedy. Second, it can be seen that the estoppel would be more even than the foundation of the action. It would in such a case be the cause of action itself, within the definition in **Cookev Gill**. Third there is in this case no trace of an interest in land.

The second and third of these features are displayed in two cases well known to company lawyers. The first of these is **Re Bahia and San Francisco Railway Company.[40]**

A company on the strength of a forged transfer wrongfully registered 2 persons, S and G, as holders of shares. It issued certificates saying that S & G were the registered holders in reliance on the statements in certificates, purchased the shares. The company subsequently removed the name of X from the register, and re-instated the true owner. X brought an action against the company, on the basis that the company was estopped from denying the statement made in the certificates. The plaintiff was successful in this action.

An attempt was made to explain this decision in **Re Ottos Kopje Diamond Mines[41]**. The case was broadly similar on its facts, except that in this case the certificate itself was said to have been obtained fraudulently. The plaintiff paid over money on the strength of the statements as to ownership made by the company through the medium of the certificate. The company then refused to register the plaintiff as a member on the grounds that he had acquired no title. The plaintiff pleaded the estoppel. Lindley and Bowen LJJ both sought to explain **Re Bahia**, and to deny that estoppel was to the cause of action, in the following terms :- Lindley LJ[**42**]

> "To give a person a right of action there must be some breach of duty by the company".

Failure to register is a breach of duty. Estoppel can then be raised but breach of duty is the cause of action. The certificate gave rise to an estoppel but was not a warranty of title upon which an action could be based.

Bowen LJ said[**43**]

> "Until the company did something it should not have, or omitted to do something it should have, no cause of action would arise. That is the true view of **Re Bahia.** No cause of action arises upon an estoppel itself. The Court must therefore look for the cause of action elsewhere"

So the Court of Appeal attempted to underline the distinction between a cause of action on the one hand, and the basis or foundation of the action on the other. Though the court was quite happy to admit estoppel as the latter, it denied that it could ever be the former, and said that though one can bring an action which is in substance an action to enforce estoppel - derived rights, one must find some other peg upon which to hang ones action. Though it is pleasing to see that the Court of Appeal admits a right in the representee to enforce the estoppel in a case of devoid of real property features, it is submitted that the reasoning behind the denial of existence of a cause of action is erroneous. on the following basis. The case says that the cause of action is the breach of duty to register. or in the case of Re Bahia not to remove from the register. But if such a duty exists, what is its origin? Is such a duty to register owed to one who plainly has no title to shares? It is clear that, in both Re Bahia and in **Re Ottos Kopje,** the plaintiff had, on an application of the nemo dat principle, no title to the shares. If that is so, whence arose the duty to register or not to remove from the register? It is suggested that the only possible answer is that the

duty in these cases itself arose entirely out of the estoppel. Without the estoppel there was no duty. To say, therefore, that the cause of action lay not in the estoppel but in the breach of duty is an argument at best circular. Estoppel, duty and cause of action were not three links in a chain of pleadings. They were one and the same thing.

Another well known case susceptible of similar analysis is **Robertson** v **Minister of Pensions**[44] a case involving not on interest in land, but on action brought (by the representee) to enforce a disputed entitlement to an army pension. The plaintiff, who had suffered injury, wrote to the war office asking whether his injuries could be regarded as attributable to military service. The reply was that the case had been considered and the disability had been accepted as attributable to military service. In reliance on this representation the plaintiff forbore to obtain independent medical reports. The minister of pensions then sought to deny the truth of the statement made by the War Office. The court accepted that, as both were crown servants, any statement binding the one bound the other.

Denning J held that the statement was sufficient to raise an estoppel against the crown. Here again, a representee was allowed to bring an action based on an estoppel to enforce a purely pecuniary right. It cannot be doubted that estoppel is here the foundation of the action. A traditional interpretation of Robertson would follow the lines of **Re Ottos Kopje** - in other words, that the cause of action was breach of duty to pay the pension, and that estoppel would only come into play to prevent the Minister from alleging that there was no attributable injury. But this analysis must be re-examined. Surely it was the acceptance of the injuries as attributable to military service which gave Robertson his right of action against the Minister. The acceptance gave him the right to the pension. Until his injuries were accepted, or held by the Court, to be attributable, he had no pension rights. It is not good enough to say that the Minister was estopped from denying the right, or that Robertsons action was for the pension and that the Minister was estopped from raising a defence. The estoppel does not merely go to the enforcement of the right. The estoppel is the very creation of the right.

It can be seen therefore that there is an overwhelming body of authority to support the proposition that estoppel can found an action, and that there is less voluminous, but nevertheless considerable, authority to suggest that estoppel may actually be capable of constituting a cause of action properly so called It can also be seen that these authorities are not confined to any one of the nebulous so-called categories of estoppel, and, though the preponderance of the cases tend to have a 'proprietory' flavour, in the sense of some connection with an interest in land, the authorities are by no means restricted to this category.

Recent cases have demonstrated increasing judicial dissatisfaction at the classification of estoppel, and show a move towards a more flexible approach; or rather a recognition that attempts to classify estoppel have not only been unproductive, but have also been ineffective. The adoption of a more flexible judicial approach, a move towards a recognition that estoppel is a single principle, capable of appearing in many forms and guises, and that the single principle requires a uniform body of remedies so broad that one is always available to do justice whatever the circumstances of the case, is what is required. It is suggested that his position has almost been reached, but by a long and circuitous path, in which the courts have been misled by their own attempts to classify and categorise estoppels. It is indeed unfortunate that confusion and stultification have been the result of attempts to rationalise. Judicial recognition of this proposition seems at last to be at hand. It can be seen in the comments of Scarman LJ in **Crabb**, cited above. It is more clearly to be perceived in the more recent case of **Amalgamated Investment and**

Property Co v **Texas Commerce International Bank**[45] a case on complex facts relating to enforceability of certain securities and guarantees for loans. Lord Denning MR said[**46**]

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgement. It has evolved during the last 150 years in a sequence of separate developments; proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has sought to be limited by a series of maxims, estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration and so forth. All these can now be seen to merge into one principle shorn of limitation. When the parties to a transaction proceed on the basis of an underlying assumption - be it of fact or law, whether due to misrepresentation or mistake make no difference - on which they have conducted dealings with them - neither of them will be allowed to go back on that assumption, when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it the courts will give to the other such remedy as the equity of the case demands".

Perhaps a similar sentiment can be detected in the judgement of Brandon LJ in the same case, when he considers the question of enforcement of the estoppel derived rights by positive action.[**47**]

> "I turn to the second argument . . . that the bank is here trying to use estoppel as a sword rather than as a shield . . . another way in which the argument is put is that a party cannot found a cause of action on an estoppel.
>
> In my view much of the language used in connection with these concepts is no more than a matter of semantics".

In a final demonstration of the inadequacies of our attempts to classify estoppel, if such a demonstration be needed, look briefly at the simple and not untypical case of **Piggott** v **Stratton**[**48**] In that case the defendant sold a property to the plaintiff representing to the plaintiff that he (the defendant) could not build in front of the house so as to obsure the view, as the terms of the long lease on which he held the land forbade it. The defendant then surrendered the lease, and took a new one free of such restrictions. The plaintiff successfully brought an action for injunction against the defendant and his sub-lessee, based on estoppel arising out of the representation. Now even such a simple case as this can, according tified as proprietory, as it relates to an interest in land.

Is it not better to see all cases as manifestions of a general equitable principle which though not exactly indeterminate, is not susceptible of precise definition and determination. by reference to categories and classification? If these barriers are broken down, flexibility of remedy in the sense of greater freedom of application of rights and causes of action already recognised and admitted, must surely follow.

Notes

(1) e g. per Birkett LJ in Combe v Combe 1951 2KB 215 AT PG 224.

(2) **e.g. Hanbury & Maudsey 'Modern Equity' 12th Ed. at PG 855 (Promissory Estoppel).**

(3) Eg Bailey 1983 47 Conveyancer 99.

(4) 1951 2 KB 215.

(5) 1947 1 KB 130.

(6) At PG 134.

(7) At PG 134.

(8) At PG 134.

(9) Fenner v Blake, Re Wickham, Re William Porter & Co. Ltd. Buttery v Pickard.

(10) 1937 2AER 361.

(11) 1946 WN 25.

(12) 1900 1QB 426.

(13) At PG 428.

(14) 1942 2QB 38.

(15) 1877 2AC 439.

(16) At PG 448.

(17) At PG 448.

(18) 1888 40 Ch.D. 268.

(19) Supra Note 4.

(20) At PG 129.

(21) 1873 LR 8 CP 107.

(22) This proposition has, so far as the writer is aware, been questioned in only one reported case, namely Brikom Investments Ltd. v Carr 1979 2AER 753 per Lord Denning MR. Roskill LJ, with whom Cumming Bruce LJ concurred, expressly disassociated himself from any opinions expressed by Lord Denning MR on the doctrine of promissory estoppel in that case.

(23) At PG 221.

(24) At PG 221.

(25) At PG 222.

(26) 1963 1 WLR 677.

(27) 1900 1QB 426.

(28) 1950 2AER 342.

(29) At PG 346.

(30) Supra, Note 26.

(31) At PG 681.

(32) Supra, Note 21.

(33) 1975 3 WLR 847.

(34) At PG 853.

(35) 1975 3 WLR 286.

(36) At PG 858.

(37) At PG 858.

(38) 1891 3CH 82.

(39) At PG 103.

(40) 1868 3 LR QB 584.

(41) 1893 1 CH 618.

(42) At PG 625.

43) At PG 628.

(44) 1949 1KB 227

(45) 1981 3 WLR 565

(46) At PG 575.

(47) At 584.

(48) 1859 1 De gf & J 33.

VOID/VOIDABLE DISTINCTION IN ADMINISTRATIVE LAW

M A Fazal, BA MA LLB (Dacca) DPhil (Oxon), Principal Lecturer in Law, Trent Polytechnic

In **Dimes** v **Grant Junction Canal Proprietors**[1] the House of Lords set aside the decision of the Chancery Court because the Lord Chancellor (who sat on the Chancery Court) was a shareholder of the plaintiff company in whose favour an injunction had been issued. The impugned decision was said to have been rendered voidable by bias. In an earlier work[2] of this author had argued that bias rendered a decision void rather than voidable. The Dimes case was explained as a case of appeal as distinct from judicial review exercised by a superior court over inferior tribunals and authorities. In an appellate proceeding an impugned decision is necessarily voidable i.e. valid till set aside on an appeal. This author then argued that an action or decision successfully challenged in proceedings for judicial review over acts of inferior jurisdictions (as opposed to appeal) was always void (except in the case of an error of law apparent on the face of the record which rendered a decision voidable). This view has now emerged as the dominant view among academic lawyers[3] and judges.

However, this line of argument has developed into a fundamentalist approach with alarming implications. And this calls for a re-assessment of the position in administrative law. In **Anisminic Ltd** v **Foreign Compensation Commission**[4] a tribunal had its decision set aside because it had considered an irrelevant factor despite a strong ouster clause. Lord Reid explained that a decision made without or in excess of jurisdiction is a nullity. His Lordship stated "**there are no degrees of nullity**".[5]

Lord Reid explained jurisdictional errors in wide terms even going beyond the Wednesbury principle.[6] His Lordship stated[7]

> "there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the questions remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. **I do not intend this list to be exhaustive**".[8]

A further twist was given to the concept of jurisdiction in **Anisminic** by abandoning the distinction between ultra vires and intra vires as far as errors of law were concerned. Any error of law would henceforth go to jurisdiction. This position seems to have received further judicial approval. Thus Lord Diplock said in **O'Reilly** v **Mackman**[9] referring to an ouster clause

> "It was this provision that provided the occasion for the landmark decision of this House in **Anisminic Ltd** v **Foreign Compensation**

> **Commission** ... and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had heretofore imposed on themselves so far as determination of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction"

Therefore any error of law committed by a deciding body would be construed so as to affect its jurisdiction and to render its decision a nullity. The effect of this may have been somewhat mitigated by confining this reasoning to decisions of administrative authorities and tribunals as opposed to those of courts.[**10**]

What is a nullity

The word 'a nullity' or 'void' was understood as a relative concept as opposed to an absolute concept. Thus Professor H W R Wade explained

> "There is no such thing as voidness in a absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy. If and when that remedy is taken away, what is void must be treated as valid, being now by law unchallengeable".[**11**]

The courts have at times acted on this 'relative' concept of nullity. Thus is **Calvin** v **Carr**[**12**] the Privvy Council stated that the decision of an administrative or domestic tribunal reached in breach of natural justice was void rather than voidable but until declared to be void by a competent body or court it was effective and could not be considered to be legally non-existent. It was assumed that the decision (to disqualify a jockey) was nonetheless a decision for the purposes of an appeal, which the appellate tribunal had jurisdiction to consider.

However, this has not been the unanimous view of the courts. The absolute concept of nullity or what Craig calls 'retrospective nullity'[**13**] underlies the notion that certiorari does not lie to quash a nullity This was current in the earlier cases.[**14**] The idea has been revived recently with serious implications. Lord Denning MR said in **R** v **Paddington Valuation Officer ex p. Peachey Property Corporation Ltd.**[**15**] "It is necessary to distinguish between two kinds of invalidity. The one kind is so grave that the list is a nullity altogther. **In which case there is no need for an order to quash it. It is automatically null and void without more ado.**[**16**] The other kind is when the invalidity does not make the list void altogether, but only voidable"

The implications of an absolute nullity can be seen also in a statement of Lord Diplock in **Hoffman-La Roche** v **Secretary of State for Trade and Industry.**[**17**] In this case His Lordship stated that a statutory instrument (to prohibit charging of higher prices for drugs) was presumed to be valid unless that presumption was rebutted before a competent court by a party having locus standi within the appropriate time-limit. In other words the concept of a nullity relied on was a relative one. Nonetheless His Lordship said (at p. 1154)

> "It would, however, be inconsistent with the doctrine of ultra vires .... if the judgement of a court in proceedings properly constituted that

> a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument **incapable of ever having has any legal effect[18]** on the rights and duties of the parties to the proceeding (cf. Ridge v Baldwin[**19**]). Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interferred with in reliance on the law which the statutory instrument purported to declare"

Although in this case the nullity or voidness was made conditional on the pronouncement of a competent court to that effect it would have horizontal effects, not limited to the parties to the proceedings.

Implications of Absolute Nullity

(a) Criminal proceedings 20

Applications for judicial review are widely used to challenge legality of criminal proceedings. Consequently the concept of absolute 'voidness' developed in the context of judicial review has profound implications for tribunal proceedings. **The rule against double[21]** joepardy and the pleas of autrefois acquittal or conviction are at risk.

Harrington v. **Roots[22]** is the case on the point. In that case the accused was charged with assaulting a police constable and using threatening behaviour likely to cause a breach of the peace. At the start of the hearing the prosecutor applied for an adjournment because the Constable alleged to have been assaulted was away on holiday. The magistrate decided to adjourn the case on a date which the defence found inconvenient owing to the fact that the accused was going to be away on holiday on that date. The magistrate then refused to allocate another date for the hearing of the case and instead without asking the prosecution if they were in a position to proceed forthwith dismissed the charges. The prosecutor applied for judicial review of the magistrates' decision. The defendant conceded that the magistrates had acted in breach of natural justice but submitted that the decision to dismiss the information amounted to an acquittal. The High Court accepted this submission and held that where a defendant had been put in jeopardy of being convicted and had been acquitted the court could not intervene with the magistrates' decision by prerogative orders, however improperly the acquittal had been obtained (in this case in breach of natural justice). Robert Goff L J tried to escape from the consequences of absolute Nullity by saying

> "(I)t cannot be said and indeed it was not argued, that the breach of the rules of natural justice which occurred in the present case rendered the proceedings a nullity".[**23**]

However, the High Court conceded that had the proceedings been rendered a nullity by the breach of natural justice there would have been no escape route for the accused. Robert Goff L J said[**24**]

> "The matter will, however, be different if there has been such a mistrial as to render the proceedings a nullity, because if they are a nullity the defendent will not have been lawfully liable to suffer judgment for the offence charged against him and so will not have been in jeopardy"

This shows that the defence of double jeopardy is defeated if the proceedings in question are rendered a nullity. Indeed that is precisely what happened in this case as the decision of the High Court was reversed on appeal by the House of Lords on the ground that the proceedings had been rendered a nullity (owing to a breach of statutory procedure rather than natural justice). Lord Roskill said

> "(I)n view of the observation regarding jeopardy in the judgment of Robert Goff L J, it is necessary to point out . . . that an accused person is not, in the context of a plea of antrefois convict or antrefois acquit, in jeopardy merely because that person is standing trail on a particular charge . . . Jeopardy in the relevant sense only arises after a lawful acquittal or a lawful conviction".[**25**]

That the application of the concept of 'absolute nullity' has this effect on criminal proceedings is shown also by the earlier cases.[**26**] On the other hand if the proceedings are characterised as 'voidable' or at any rate not a nullity the pleas of antrefois convict or antrefois acquittal do apply.[**27**]

(b) Civil proceedings

The effect of 'voidness' on civil proceedings would be similar. If the proceedings in question were rendered **coram non judice**, say, by breaches of natural justice this could have the effect of the cases being disposed of, on technical grounds and preclude a hearing on the merits of the cases. That this could happen in civil proceedings is shown by the case of **Firman** v **Ellis**[**28**] (although in that case the characterisation of certain proeedings as null and void happened to save them from being statute-barred). In that case the plaintiff sued the defendant in a personal injury case. He wanted to join the repairers of the vehicles as the defendants. The Registrar granted leave to amend the writ but without serving notice on their solicitors, i.e. in breach of natural justice. The action was statute-barred but under section 3 of the Limitation Act 1975 the Court had discretion to extend the time but S.3 applied to actions commenced before the Act and still pending as it applied to actions after the Act. It did not apply to 'a final order or judgment'. This raised the issue of 'void or voidable' Lord Denning MR said (at p. 862)

> "This raises a nice question as the status of the order of Registrar . . . when he gave leave to amend and join the Smiths as defendants. Was it a nullity and void ag initio, for in that case everything that followed from it was also a nullity and void; and no action had been commenced against the Smiths. Or was it good when it was made and only voidable? For in that case everything that followed was good until it was set aside; and an action would have been 'commenced' against the Smiths and then dismissed by Rees J in a 'final' order'

The Court held the Registrar's order to be a nullity. Consequently S. 3 applied. However, the case does illustrate the point that a hearing on the merits of a case could also be precluded by the characterisation of a certain proceeding as a nullity.

(c) Judicial Remedies

At one time the idea was current that certiorari did not lie to quash a nullity. Rubinstein thought that in contemporary law this would be limited to acts of usurpers.[**29**] However, the idea has been revived as a result of the characterisation of proceedings as a nullity. Thus Lord Roskill said in **Harrington** v **Roots**[**30**] referring to the orders of the justices

> "Since in my view their orders were a nullity I do not think that it would have been right to order certiorari to issue"

However, His Lordship thought that mandamus could be issued to the justices 'directing them to hear and determine these information according to law.[**31**] But mandamus is a remedy to enforce performance of public duties as opposed to exercise of power where certiorari is the normal remedy. This shows that the **Anisminic doctrine** (that wide ranging types of jurisdictional errors render a decision a nullity) has introduced a serious limitation for the scope of certiorari - the most important public law remedy.

(d) Ouster clauses

In the **Anisminic** case[**32**] the House of Lords ruled that an ouster clause, no matter how strongly worded, cannot protect a decision that is a nullity. All jurisdictional errors including all errors of law render a decision a nullity. **Smith** v **East Elloe R D C**[**33**] (which had held that a compulsory purchase order was immune from judicial challenge by means of an ouster clause after the expiry of six weeks from the date of the order) was disapproved. As a result all ouster clauses became non-operative. This created a serious problem. Professor H W R Wade commented on this aspect of **Anisminic** ruling

> "Thus the way now lies open for challenging all sorts of planning, housing, compulsory purchase and other orders after the prescribed six weeks on any of the many grounds which go to jurisdiction. But then there will be fresh sets of problems. For what is to happen if a compulsory purchase order is shown to be a nullity after a housing estate or a motorway have been built on the land with the expenditure of much public money? In cases of this kind there are genuine reasons for setting a time-limit to legal disputes".[**34**]

This explains why the Court of Appeal in **R** v **Secretary of State for Environment ex. p Ostler**[**35**] involving a challenge to a compulsory purchase order on the ground of bad faith after the expiry of the prescribed six weeks reaffirmed the ruling in **Smith** v **East Elloe R D C** and distinguished **Anisminic. Lord Denning MR tried to escape from the consequences of nullity by labelling the decision 'voidable'. He said (at p. 95)**

> "So **Smith** v **East Elloe** must still be regarded as the law in regard to this provision we have to consider here. I would add this. If this order were to be upset for want of good faith or for lack of natural justice, it would not to my mind be a nullity or void from the beginning. It would only be voidable. And as such, it should be challenged promptly before much has been done under it"

Subsequently Lord Denning M R retracted this statement.[**36**] Various points of distinction between **Anisminic** and **Ostler** had been attempted. The judges themselves were unable to agree on these.[**37**] Extra-judicially Lord Denning discarded all these points of distinction and faced the reality. He said

> "(I)f the six weeks expire without any application being made, the court cannot entertain it afterwards. The reason is because, as soon as that time has elapsed, the authority will take steps to acquire property, demolish it and so forth. The public interest demands that they should be safe in doing so. Take this very case. The inquiry was held in 1973. The orders were made early in 1974. Much work has already been done

> under them. It would be contrary to the public interest that the demolition should be held up or delayed by further evidence or inquiries".[**38**]

This shows that the courts are now finding it difficult to draw the line between cases where a statutory exclusion clause protects a decision and where it does not. This problem has again arisen from the premise of the **Anisminic case** which takes a wide view of jurisdictional errors, all resulting in void decisions.

(e) Administrative chaos

Judicial pronouncements as to the nullity of administrative actions can also result in public inconvenience. It happens in more spectacular fashion in constitutional law.[**39**] A fundamentalist approach as to invalidity can have similar consequences in administrative law. This is why the Court of Appeal was driven to hold that the impugned valuation list in **R** v **Paddington Valuation Officer ex p. Peachey Property Corporation Ltd.** was voidable rather than void. Lord Denning MR said

> "IV. The resulting chaos.
>
> The fourth question is what is to happen if the valuation is quashed. It was said that it would be a nullity from the beginning. The rating authority would have to go back to the 1956 list which was based on 1939 values. It would be necessary . . . to unravel all the assessments and payments since Apr. 1, 1963. The result would be chaos. I do not accept this at all . . . In the present case the valuation list is not, and never has been, a nullity . . . (T)he list (is) voidable and not void.It remains good till it is set aside".[**40**]

The same point was made by Lord Hailsham in **Chief Constable of North Wales Police** v **Evans**[**41**] when he said

> "If the decision (to dismiss a Constable) was 'void' has the respondent been a constable in the police force in North Wales in the intervening years and what happened to the ten months of uncompleted probationary service? Since the only decision removing him from office was the decision now impugned has he now become an established constable? Has he acquired pension rights? Is he entitled to back pay? . . . Can we simply put the clock back as if nothing has taken place?"

These considerations led the House of Lords to deny the police constable a declaration of the invalidity of his dismissal in spite of admitted breach of natural justice a declaration of the type issued in **Ridge** v **Baldwin.**[**42**]

Degrees of Nullity in Administrative Law

The above discussion shows the difficulties that have been created by the notion of absolute nullity. Those difficulties are not solved by harking back to that notion. Lord Denning MR attempted this in **Firman** v **Ellis.**[**43**] He said

> "I think that the order of 11th July 1973 (of the Registrar) was a nullity and void ad initio . . . it was made contrary to the rules of natural justice.

> Such failures make the order a nullity and **void ab initio: see Aiminic** v **Foreign Compensation Commission**[44] per Lord Reid and Lord Pearce. It is true, of course, that the Smiths might have waived their right to complain of it... But they did not waive it. They entered a conditional appearance and got it set aside. On being set aside,it was thereupon shown to have been a nullity from the beginning and void"

The paradox of this reasoning is obvious. If the order was a nullity from the very beginning how could the parties by having waived their objection or by their consent have turned it into a valid one? In public law the validity of an action is derived not from the consent of the parties by from the applicable law.

The lesson of the cases discussed so far is that the concept of 'voidable' has a legitimate place in administrative law. However vigorously the courts may try to throw it out, it returns with equal velocity. Consequently when the courts find that the concept of absolute nullity has landed them into the most awkward dilemma they invoke the 'voidable' solution. Cases like **Ostler** and **Peachey Property Corporation** provide the typical illustration of this. As a result we are constrained to ascertain the degrees of nullity in the context of administrative law.

(i) Void ab initio

It seems that in administrative law the courts have evolved two different concepts of 'lack of jurisdiction' and two different concepts of invalidity appropriate to each. A narrower concept was developed in the context of collateral proceedings of judicial challenge (e.g. by way of defence[**45**] to enforcement measures both civil or criminal or in tort actions[**46**]). In these proceedings a much narrower range of errors is said to go to jurisdiction and the resulting action or decision is deemed to be a nullity, **void ab initio** or **coram non judice.** Indeed a party cannot succeed in collateral proceedings unless he can persuade the Court that the decision complained of was an absolute nullity. In this case a prior judicial determination that the impugned decision had been **void ab initio** is not called for. Providing that the court is persuaded to treat the decision as **coram non judice** it will allow the defence (e.g. to enforcement measures in planning law) or claims in a tort action to succeed. The underlying assumption is that if a decision is a nullity it could be challenged (or ignored for that matter) by anyone anywhere. It does not require any judicial intervention or pronouncement to that effect. To use the language of Lord Denning MR "where the invalidity is so grave that the (decision) is a nullity altogether... (T)here is no need for an order to quash it. It is automatically null and void without more ado".[**47**] It is worth emphasising that in this context (i.e. in the context of collateral challenge) we are not talking about a decision being 'void' as a relative concept, i.e. a 'void' decision being capable of having effect or existence in law until invalidated by a competent court in direct proceedings of challenge. We are talking about a decision being void in an absolute sense, i.e. void in the sense alluded to above by Lord Denning MR.

Void ab initio and third parties

We have maintained that a void act (void in absolute sense) is a mere nullity and has no legal effect whatever. It may be challenged by anyone anywhere while a voidable act is liable to be challenged only by the parties entitled to challenge. This was indeed the ruling of the Privvy Council, in **Durayappah** v **Fernando**[**48**] where challengability of the dissolution of a Municipal Council by the Minister was an issue. On the question whether third parties could challenge such a decision the Privvy Council stated (at p. 158)

> "The answer must essentially depend upon whether the order of the Minister was a complete nullity or whether it was an order voidable only at the election of the Council. If the former, it must follow that the Council is still in office and that, if **any Councillor, ratepayer or other persons having a legitimate interest, in the conduct of the Council[49]** likes to take the point, they are entitled to ask the Court to declare that the Council is still the duly elected Council with all the powers and duties conferred upon it by the Municipal Ordinance"

(ii) Voidable

On the other hand in direct proceedings of challenge, e.g. in an application for judicial review, the court has developed a wider concept of 'want or excess of jurisdiction' and also a wider notion of invalidity. Here, the jurisdictional principle embraces not only strict ultra vires actions on the construction of the applicable statute but also actions which could be considered to be unreasonable, taken in bad faith or based on irrelevant considerations or in breach of natural justice. The **Wednesbury Principles[50]** form part of the jurisdictional notion in direct proceedings. This broad concept of'jurisdictional errors' was articulated in **Anisminic** v **Foreign Compensation Commission.[51]** The principle of jurisdiction evolved in direct proceedings is much wider than that developed in collateral proceedings.[**52**] It is not a matter of pure vires, but a matter of the restraints which the Wednesbury principles and the rules of natural justice impose on the exercise of the authority's power. The Courts have acknowledged the distinction between these two concepts[**53**] not only in collateral proceedings[**54**] but also in direct proceedings.[**55**] In **McC** v **Mullan 54**the Northern Ireland magistrate ordered an offender to be detained at a young offenders' centre without informing him of his right to apply for legal aid. The order was quashed on an application for judicial review. He then brought an action against the magistrates claiming damages for false imprisonment. Lord Bridges said (at p. 917) referring to the judgment of Lord Lowry LCJ of the Court of Appeal of Northern Ireland

> "(H)e went on to refer to the **Anisminic case** (1969) 2 A.C. 147 in a sense which seem to imply that the extended concept of acting without jurisdiction or in excess of jurisdiction ... must be applied to extend the range of justices' potential civil liability If that was indeed his meaning, I must respectfully but emphatically dissent from it".

The concept of 'invalidity' is also different in direct proceedings of challenge. An action vitiated by jurisdictional defects in this 'broad' sense is not a nullity or void ab initio. It is valid in law till invalidated by a competent court in the appropriate proceeding. This is what Lord Wilberforce meant when he said in **Calvin** v **Carr[56]**

> "(A) decision made contrary to natural justice is void but ... until it is so declared by a competent body or court it may have some effect or existence in law... (W)here the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent".

For all practical purposes therefore the impugned decisions in direct proceedings (including where appropriate appellate proceedings) are 'voidable' and not void. They remain operative and binding till set aside or declared to be void in direct challenge. **In order to avoid confusion they ought to be characterised as 'voidable' i.e. valid till invalidated.**

The characterisation is one of practical importance. In the **Harrington case**[57] the High Court had decided not to set aside the magistrates' decision to dismiss the charge because otherwise the accused would have been exposed to the risk of double jeopardy. The Court had proceeded on the assumption that the proceedings were voidable. However the House of Lords reversed the judgment of the High Court on the ground that the proceedings were rendered a nullity. If the House of Lords had taken the view that the breach of the statutory provisions was due to errors of law intra vires and the resulting decision was voidable then the plea of autrefois would have been available to the accused.[58]

It is submitted that notwithstanding the Anisminic case[59] **there are degrees of nullity in direct proceedings of challenge as distinct from collateral challenge.** Degree of invalidity could range between 'absolute invalidity' to 'voidable'. In **Agriculture Training Board v Aylesbury Mushrooms Ltd**[60] a statutory instrument which was issued without complying with the consultation procedure was held binding on those who were consulted but not on those who were not consulted. Examples of decisions which ought to be characterised in direct proceedings as voidable as those where the time-limit for challenging has expired;[61] where a party without locus standi has challenged;[62] where the jurisdictional defects are not apparent on the face of the proceedings[63] such as bias[64] which is ascertainable from the knowledge of the parties rather than from the record of the proceedings of the inferior jurisdiction, and; where there is available an appellate proceeding (the decision is voidable for the purposes of the appellate proceeding[65].

We are not suggesting that the characterisation of a decision as 'voidable' should necessarily lead to the denial of judicial review in direct challenge. Indeed our thesis is to the opposite. For the purposes of review in direct challenge characterisation of a decision as 'void' or 'voidable' is immaterial.

On the other hand in collateral challenge the pre-condition for granting review must be that the impugned decision was a nullity or void, having been made without jurisdiction. Jurisdiction in collateral proceedings can be limited to certain persons,[66] places,[67] or subject-matter[68] or be subject to mandatory statutory procedure.[69] Neither error of law or fact,[70] nor absenoe or insufficiency of evidence,[71] nor irregularity of procedure (unless it is a 'gross and obvious irregularity or procedure"[72]) will suffice.

The Declaration as a remedy against a voidable decision

It could be argued that if a decision is assumed to be voidable in direct challenge it could not be remedied by means of a declaration which is used only to deal with a decision that is void or a nullity made without jurisdiction. A declaration being only a declaratory remedy can declare a decision void. But it cannot alter a decision that is intra vires and valid.

In answer to this it is sumitted that we are not arguing for the abandonment of the jurisdictional principle as a basis for judicial review. What we are saying is that the concept of want of jurisdiction as employed in direct challenge is much wider than that used in collateral review and that the concept of absolute nullity relevant to the latter is inappropriate for the former. If the review court in the proceedings of direct challenge finds that an impugned decision is in excess of jurisdiction or based on a serious misapprehension of law it should be able to grant a declaration to that effect. This is what Sellars LJ meant when he said in **Punton v Ministry of Pensions and National Insurance (No. 2)**[73]

> "That would be so where an authoritative statement of the law by the High Court will serve to undermine a decision or order so that it need not be complied with and could not in the light of the pronouncement of the law be successfully enforced"

Indeed this is precisely what the House of Lords did in the **Anisminic case[74]** where it asserted the jurisdiction to grant a declaration to deal with any error of law. In any case under the proceedings of 'Application for Judicial Review' a different remedy could be substituted for the declaration.

Bias and Jurisdictional Defects

Therefore it appears that bias and breaches of the audi alteran partem rule constitute jurisdictional defects as evolved in the direct proceedings of challenge (i.e. wider concept of want or excess of jurisdiction). However, they render a decision voidable and not void (as understood in collateral challenge, i.e. absolute nullity). If this approach is adopted it would be possible to avoid many of the complications that have arisen out of the concept of absolute nullity. Thus the plea of autrefois acquit or convict as involved in **Harrington** v **Roots[75]** and the rule against double jeopardy would be saved in criminal proceedings. In civil proceedings the outcome of litigation would not be dictated purely on technical considerations as opposed to merits. In cases such as **Smith** v **East Elloe RDC[76]** and **R.** v **Secretary of State for the Environment ex p. Ostler[77]** failure to utilise the limited right of judicial review will protect a decision from further challenge. This approach will also negate inhibitions on the part of the court from issuing judicial remedies including certiorari to quash 'nullities'. It will also enable the courts to deal with the cases involving potential administrative 'chaos' as a matter of substantive law rather than as a matter of discretion to decline or to issue remedies.[**78**]. The approach advocated in this article seems to have been adopted by the court in **Plymouth City Council** v **Quietlynn Ltd** [**79**] where it was held that in a collateral challenge the invalidity of the decision must be apparent on the face of the proceedings.

Notes

(1) (1852) 3 HLC 759.

(2) M A Fazal, Judicial Control of Administrative Action in India and Pakistan (OUP 1969) pp. 154 - 167.

(3) H W R Wade, Administrative Law (5th ed.) Chap. 10; P P Craig, Administrative Law (1983) Chap. 11; Garner and Jones, Administrative Law (Sixth ed.) pp. 158 - 161.

(4) (1969) 1 All ER 208; (1969) 2 AC 147.

(5) (1969) 1 All ER at 213.

(6) **Associated Provincial Picture House Ltd.** v **Wednesbury Corpn.** (1948) 1 KB 223 at 229.

(7) (1969) 1 All ER at 213 - 214.

(8) Emphasis added.

(9) (1982) 3 All ER 1124 at 1129.

(10) **Re Racal Communications Ltd.** (1981) AC 374 at 382 - 83. **R** v **Registrar of Companies ex p Central Bank of India** (1986) 1 All ER 105 at 121 - 22; see also **Harrington** v **Roots** (1984) 1 All ER 474 (HL).

(11) HWR Wade (1967) 83 LQR 499 at 512. An illustration of this is provided by the case of **Glynn** v **Keele University** (1971) 2 All ER 89 where disciplinary actions against certain students were acknowledged to be in breach of natural justice but the court in its discretion refused to grant the remedy with the result that the impugned actions remained effective.

(12) (1980) AC 574, see also **Lovelock** v **Minister of Transport** (1980) 40 P & C R 336 at 345. In **London & Clydeside Estates Ltd.** v **Aberdeen Corpn.** (1980) 1 WLR 182 (HL) it was argued that the failure to mention the right of appeal in breach of the mandatory procedure rendered the proceedings a nullity (and therefore) a decree of reduction was inappropriate as 'there was nothing upon which it could operate'). This argument was rejected. The certificate was held effective - till it was struck down by a competent authority.

(13) P P Craig Op Cit Chap 11

(14) See Rubenstein, Jurisdiction and Illegality pp 83 - 85.

(15) (1966) 1 QB 380.

(16) Emphasis added.

(17) (1974) 2 All ER 1128; (1975) AC 295.

(18) Emphasis added.

(19) (1964) AC 40.

(20) See on this **D P P** v **Head** (1959) AC 83.

(21) See Hugh Tomlinson "Judicial Review of Magistrates' Court Cases: 1, 2, 3" Legal Action, March, April, May, 1986. In 1981 the figures in England relating to applications for judicial review of proceedings in magistrates' court was 450 out of a total of 533. While the figures for criminal applications remained almost constant at 150, the overall total has increased

in 1982; 685 in 1983; 850 in 1984;in 1985,1230. Mr Justice Woolf in (1986) Public Law p 222.

(22) (1984) 2 All ER 474 (HL).

(23) (1983) 3 All ER 29 at 32.

(24) (1983) 3 All ER at 31.

(25) (1984) 2 All ER at 479.

(26) **R** v **Marsham ex p Pethick Lawrence** (1912) 2 KB 362 (the proceedings were rendered a nullity by the unsworn evidence of a prosecution witness). **R** v **West** (1964) 1 QB 15 (an indictable offence was tried summarily - rendering the acquittal a nullity). In **Crane** v **DPP** (1921) 2 AC 299 at 332 Lord Sumner said "Acquittal implies a true legal trial has been held. Here there has been none at all, but only the semblance of one, a mis-trial which does not count". Lord Devlin said in **DPP** v **Nasralla** (1967) AC 238 at 249 - 250 "(W)hat is essential to the plea of antrefois is the proof of a verdict of acquittal . . . not proof that the accused was in peril of conviction for that offence"

(27) **R** v **Simpson** (1914) 1 KB 66: the defendants were acquitted by two justices of whom one was not qualified to sit. The Court refused to grant certiorari to quash the acquittal on the basis that the acquittal was not a nullity. See also **R** v **Middlesex JJ exp DPP** (1952) 2 QB 758.

(28) (1978) 2 All ER 851.

(29) Amnon Rubenstein, Jurisdiction and Illegality p 85.

(30) (1984) 2 All ER at 480.

(31) Salmon LJ expressed a similar view in **R** v **Paddington Valuation Officer ex p Peachey Property Corporation** (1966) 1 QB 380.

(32) (1969) 1 All ER 208; (1969) 2 AC 147.

(33) (1956) AC 736.

(34) HWR Wade (1969) 85 LQR 208.

(35) (1976) 3 All ER 90.

(36) **Firman** v **Ellis** (1978) 2 All ER at 862.

(37) (1976) 3 All ER at 97. Goff LJ said "with all respect to Lord Denning MR . I do myself find difficulty in distinguishing the **Anisminic case**".

(38) The Discipline of Law p. 108.

(39) In **Simpson** v **Att. Gen** (1955) NZ LR 271 the Government-General had issued his warrant for the holding of election later than the date specified by the Statute. In order to avoid the consequences of the invalidity of the election the Court held the requirement to be directory.

(40) (1965) 2 All ER 836 at 841.

(41) (1982) 3 All ER 141 at 145.

(42) (1964) AC 40.

(43) (1978) 2 All ER at 862.

(44) (1969) 1 All ER 208 at 213, 233, (1969) 2 AC 147 at 171, 195.

(45) Examples are **Commissioners of Customs and Excise** v **Cure & Deeley Ltd.** (1962) 1 QB 340; **Wandsworth LBC** v **Winder** (1985) AC 461; **D P P** v **Head** (1959) AC 83.

(46) McC v Mullan (1985) AC 528; R v Waltham Forest Justices (1985) 3 All ER 727.

(47) R v Paddington Valuation Officer ex p Peachey Corporation Ltd. (1965) 2 All ER 836 at 841. A contrary suggestion appeared in **Plymouth City Council** v **Quietlynn Ltd** (1987) 2 All ER 1040 (DC).

(48) (19 67) 2 All ER 152; (1967) 2 AC 337.

(49) Emphasis added.

(50) **Associated Provincial Picture House Ltd** v **Wednesbury Corporation** (1948) 1 KB 223 at 229.

(51) (1969) 2 AC 147.

(52) See Amnon Rubinstein, Jurisdictions and Illegality (QUP, 1965) on this generally.

(53) In**Fawcett Properties Ltd** v **Buck CC** (1960) 3 All ER 503 at 521 Lord Jenkins drew a distinction between 'broad' ultra vires and 'narrow' ultra vires by saying that an authority may act within the scope ofthe statute in a 'broad sense and yet act ultra vires in a 'narrow' sense by acting unfairly, unreasonably etc'.

(54) (1984) 3 All ER 908 (HL); (1985) AC 528.

(55) **Westminster City Council** v **GLC** (1986) 2 All ER 278 (HL).

(56) (1979) 2 All ER 440 at 445.

(57) **R** v **Dorking JJ ex p Harrington** (1983) 3 All ER 29 at 31.

(58) That is how the decision in **R** v **Middlesex JJ ex p DPP** (1952) 2 QB 758 was viewed by the House of Lords in the **Harrington case** (1984) 2 All ER at 480.

(59) (1969) 2 AC 147

(60) (1972) 1 All ER 280.

(61) **Smith** v **East Elloe RDC** (1956) AC 736; **R** v **Secretary of State ex p Ostler**(1977) QB 122.

(62) **Durrappah** v **Fernando** (1967)2 AC 337.

(63) **Farquaharson** v **Morgan** (1894) 1 QB 552 at 562, **R** v **Comptroller General of Patents** (1953) 1 All ER 862 at 866· **Plymouth City Council** v **Quietlynn Ltd.** (1987) 2 All ER 1040.

(64) **Dimes** v **Grand Junction Canal Proprietors** (1852) 3 HLC 759.

(65) 'A condition of an appeal is the existence of a voidable decision''**Calvin** v **Carr** (1980) AC 574, (1979) 2 All ER 440 at 445, **Crane** v **DPP** (1921) AC 299 at 323; **White** v **Kuzyel** (1951) AC 585.

(66) **Marshalsea case** (1612) 10 Co Rep 686

(67) **Houlden** v **Smith** (1850) 14 QB 841.

(68) **Polley** v **Fordham** (No. 2) (1904 - 7) All ER Rep 651.

(69) **R** v **Cockshott** (1898) 1 QB 582; **R** v **Kettering JJ ex p Palmore** (1968) 3 All ER 167.

(70) **Johnston** v **Meldon** (1891) 30 LR Jr 15.

(71) **R** v **Mahony** (1910) 2 JR 695; **R** v **Nat Bell Liquors Ltd** (1972) 2 AC 128.

(72) **McC** v **Mullan** (1984) 3 All ER at 920. Lord Bridge provided some examples of such gross irregularity of procedure by saying 'if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence or of the rules of natural justice, as for example if the justices refused to allow the defendant to give evidence'.

(73) (1964) 1 All ER 448 at 455.

(74) (1969) 2 AC 147.

(75) (1984) 2 All ER 474 (HL).

(76) (1956) AC 736.

(77) (1977) QB 122.

(78) Contrary to Lord Evershed's approach in **Ridge** v **Baldwin** (1963) 2 All ER at 83 - 84.

(79) (1987) 2 All ER 1040.

THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BILL: THE PROBLEM OF POLITICAL SUPREMACY

Ian G Williams, LLB, Trainee Solicitor with Eking Manning, Nottingham*

[It will be observed that a substantial part of this article is written by reference to a Bill which failed to receive its second reading in the 1987 Parliament. Nonetheless, it is likely that either the same Bill or one similar will be re-introduced in Parliament within the foreseeable future and it will therefore be seen that for this reason, the article and the arguments which it advances retain their intrinsic value - Editor]

The Human Rights and Fundamental Freedoms Bill (The Human Rights Bill) is the latest in a number of attempts, spanning some twenty years, to get the European Convention on Human Rights (ECHR) enacted into British domestic law. The last attempt in the late 1970s by Lord Wade passed all stages in the House of Lords but was never debated in the House of Commons. The present Bill completed its Third Reading in the House of Lords on 30th April of this year. It now remains to be seen what will become of it in the House of Commons in the new Parliament. The Bill is in the name of Rt Hon Lord Broxbourne, OC, formerly Sir Derek Walker-Smith, a minister in the Conservative government of Harold Macmillan, and one-time Chairman of the Conservative Lawyers' Association, but it is in fact the result of a partnership between Lord Broxbourne and Lord Scarman, a veteran campaigner on this subject[**1**] who retired from the judiciary this year.

The Bill, if it became law would have far reaching implications for the British Constitution because it would curtail Parliament's powers to impliedly repeal it. In this article it is proposed to analyse the Bill and to discuss whether in fact it is possible to entrench a Bill against implied repeal under the existing constitution. It is further proposed, while acknowledging that some degree of entrenchment is essential for the successful operation of a Bill of this nature, to outline a system whereby the concept of entrenchment may be made a more politically acceptable idea.

It is interesting on examination of the Long Title of the Bill to notice that the point has been made that the UK is a party to the convention and is therefore obliged to provide an effective remedy before a national authority to everyone whose rights (set out in the convention) are violated. By not providing a national remedy under Article 13 Britain is therefore in breach of her international obligations. As Lord Scarman said[**2**]: "...this Bill will be a valuable means of ensuring that the United Kingdom honours its international obligation" Related to this advantage is the fact that this Bill would mean that an individual complaining of a violation of his rights under the convention would be spared the delays and expense of getting a decision from the European Court of Human Rights in Strasbourg. Among the other positive advantages of the Bill is that the British judges could play a part in interpreting and applying the convention.

General criticisms which have been levelled at the convention are that most of the provisions of the convention are no real advance on the state of English law as it stands at the moment[**3**] and that the manner of drafting is quite different from British statutes and as it is likely to attract the same maxims of interpretation as British statutes many problems could occur[4] A third general criticism is that even though the convention would break new ground for English law the exceptions contained in the articles are

such that the general rights could easily be overridden. Article 8 illustrates this point with the following qualifications to the right of privacy:

> ". . . except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

I put this point to Lord Scarman[**5**] who did not accept the criticism since the European Court had ruled that the exceptions had to be confined strictly to the substantive clause. Of course the major criticism of this Bill as a whole was the shift in the balance of power between the executive and the judiciary but this will be dealt with later.

Only part of the ECHR has been included in the Human Rights Bill namely Articles 2 to 12, Article 14 and Articles 1 to 3 of Protocol 1 This could cause problems if the Bill became law because one part of the convention would be operative internally while the rest of the convention would still be actionable but only externally, ie, at the European Court of Human Rights. Lord Broxbourne and Lord Scarman have however been very astute in realising the fantasy of getting the whole of the convention incorporated in one Bill. This having been said however a notable and important ommission from the Bill is Article 18 of the ECHR which states:

> "The restrictions permitted under this convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed"

The inclusion of this article would be very useful in administrative law for enabling the courts to ascertain the motives of officials. Having ascertained the motives it could be decided whether they were proper or not. This is the concept of **detournement de pouvoir** where administrative action is challenged for improper motives of the officials involved. Article 18 could be the basis for the development of such a system in English law filling in the gaps in the law highlighted in cases like **Soblen**[**6**] and **Bourgoin SA** v **Ministry of Agriculture**[**7**].

Although the Bill does not contain Article 15 of the ECHR which sets out the position in the event of an emergency, section 9 gives the government unfettered power to declare a state of war or other public emergency threatening the life of the nation and hence the power to abridge or abrogate some of the freedoms contained in Schedule 1 (ie the convention). The exceptions to this are that there can be no derogation from Article 2 (the right to life) except in respect of death resulting from lawful acts of war, Article 3 (torture and inhuman treatment) and Article 7 (retrospective criminal legislation). The important point is however made in section 9(2) which states:

> "No Order in Council made under this section may be questioned in any proceedings whatsoever"

Taking for granted the continued existence of responsible democratically elected governments this section would pose no threat to human rights. It would further be totally impractical for the government to have to reveal and explain matters of state security before a court if the decision on an emergency were judicially reviewable.

Section 6 of the Human Rights Bill states that judicial notice should be taken of the convention and of the judgments of the European Court of Human Rights and of the reports and decisions of the European Commission. Does this mean that the British courts would be bound by the decisions of the European Court or are the judgments merely persuasive authority? Looking comparatively at the European Communities Act 1972 it can be seen that section 3(2) requires judicial notice to be taken of any decision or opinions of the European Court of Justice on community law. The Human Rights Bill contains this much but lacks the equivalent of section 3(1) of the European Communities Act namely that questions of community law shall be treated as questions of law and if not referred to the European Court of Justice are to be decided in accordance with the principles laid down by the court in relevant decisions. The point is not made clear in the Human Rights Bill and it is a major oversight that the drafters have not made this clear.

It can be seen from section 3 that the Human Rights Bill is only operative against the Crown and acts done by statutory or public bodies. This therefore means that individuals could not act against other individuals under this Bill. In many cases however it would be highly unrealistic to allow third party actions. For example it would be totally impracticable to guarantee an absolute protection of privacy under Article 8 against violations by private parties. It is submitted that private law remedies are best applied to actions between individuals. The Human Rights Bill correctly directs all its attention to where it can be most effective, against the state.

A major gap in the Human Rights Bill is in the provision of remedies. Damages is the only remedy available. This significantly weakens the strength of the Bill for what are rights without remedies? Other remedies like the power to quash convictions, the power to exclude evidence and the administrative law remedies of certiorari, mandamus and prohibition could easily have been included. Even if the courts could draw in other remedies from the main body of English law in a Bill of this type it is surely prudent to make matters clear. Remedies like the power to quash convictions and exclude improperly obtained evidence are vital to the effective operation of Articles 5 and 6 of the ECHR. The administrative law remedies mentioned above are contained in the Indian Constitution as remedies for breaches of 'fundamental rights' and they should have been included in the Human Rights Bill. Merely to allow for damages is obviously insufficient for the proper protection of the rights contained in the Bill.

Many areas of law reform seem to attract the 'Floodgates' argument and the Human Rights Bill is no exception. As Lord Denning explains:

> "... my objection is fundamental. It is that you are going to have a myraid of cases by a lot of crackpots and they will have to be turned out sooner or later".[**8**]

Even though it is submitted that this is not a valid objection the amended Bill deals with the point admirably. In section 2 of Schedule 3 of the Bill it is stated:

> "A human rights issue shall not be taken to arise in any legal proceedings by reason only of any contention of a party to the proceedings which appears to the court or tribunal before which the proceedings take place to be frivolous or vexatious"

Lord Scarman nevertheless dismissed the 'Floodgates' argument in the Third Reading Debate thus[**9**]:

> "Finally, my Lords, do not talk to me about letting in cranks. There is a six month limit and our judges particularly now in the field of judicial review have a long experience of dealing with cranks. We are paid to do that"

Provision is also made in the Bill for the Crown to become a party to a case where the human rights issue is legitimately raised.

On the whole the Human Rights Bill can be said to be understandably cautious. Lord Broxbourne and Lord Scarman realising the enormity of their task because of the fact that the government are against them have produced a measure which to all intents and purposes achieves the balance between being ideal and standing a chance of becoming law. This having been said however it is submitted that the criticisms outlined above could have been dealt with in the Bill without altering this balance.

In the second part of this article it is proposed to answer the following questions. Firstly, is it desirable that the Human Rights Bill should be entrenched against implied appeal. Secondly, is it possible to do so under the existing constitution, and finally is there any way in which entrenchment can become a politically acceptable concept.

The first question is the most straight forward but the most controversial. This writer believes that unless the Human Rights Bill is entrenched then it is of very little use. The rights contained in the Bill would be impliedly overridden during a period of time. The concept of entrenchment is very hard for many politicians to grasp when considered in the light of existing British Constitution. Many academics deny that entrenchment is possible under the constitution[**10**]. The idea of a higher law is therefore an alien concept to many. As Lord Glenarthur (for the government) said:

> "the reason for the government's opposition to incorporation is not because of any desire to inhibit the pursuit of human rights. Indeed, it has nothing to do with human rights as such. Our concern is that incorporation could cause a shift in the balance of our democratic society. If society does not approve of the government's actions, the government will not be re-elected".[**11**]

Many of other noble Lords re-iterated the well-established arguments about the sovereignty of Parliament and it is this body of opinion which will almost certainly bring down the Bill.

The answer to the second question posed above is also in the affirmative. Parliamentary sovereignty can be surrendered totally or partially thus clauses can be entrenched procedurally and substantively. There is only academic support[**12**] for this view however but since the passing of the European Communities Act in 1972 entrenchment has taken place confirming the views of these academics. It is interesing to note Dicey[**13**] on this point:

> "Let the reader, however, note that the impossibility of placing a limit on the exercise of sovereignty does not in any way prohibit either logically, or in a matter of fact, the ABDICATION OF SOVEREIGNTY. This is worth observation, because a strange dogma is sometimes put forward that the sovereign power, such as the Parliament of the United Kingdom can never by its own act divest itself of sovereignty. this position is clearly untenable"

The European Communities Act proves Dicey's point. Parliament through the Act partially abdicated its sovereignty thus:

> Section 2(4):
>
> Any enactment passed or TO BE PASSED ... shall ... have effect subject to this (directly applicable community law)

Lord Broxbourne's Bill does the same thing in section 4:

> (1) Any enactment made or passed before the passing of this Act which authorises or requires any act to be done shall be taken to authorise or require that act to be done only in a manner and to the extent that it does not infringe any of the fundamental rights and freedoms of any person within the jurisdiction of the United Kingdom.
>
> (2) No provision of an Act passed after the passing of this Act shall be construed as authorising or requiring the doing of an act that infringes any of the fundamental rights and freedoms, or as conferring power to make any subordinate instrument authorising or requiring the doing of any such act, unless such a construction is unavoidable if effect is to be given to that provision and to other provisions of the Act.

The major difference between the Human Rights Bill and the European Communities Act is that at the time entry into the Common Market was a major political issue. It is this writer's view that the European Convention on Human Rights and its relationship with British domestic law will never be the political issue entry into Europe was. It remains however an important issue nevertheless.

ENTRENCHMENT

The problem with entrenchment is political supremacy. The politicians do not want to surrender political supremacy to the judiciary. Those who believe in limiting Parliament's power to legislate through measures like the ECHR realise the importance of entrenchment but as yet have been unsuccessful in convincing the politicians of their point of view. It is submitted that by devising a system of pre-enactment political review of ordinary legislation many may be more ready to accept entrenchment as a viable political concept.

The logic behind the system is this: Working with a fully entrenched Bill of Rights (ie procedurally and substantively) a political body in the form of a 'Parliamentary Constitutional Council' would review certain Bills as against the Bill of Rights (in whatever form it takes) to determine their constitutionality.

There are four major advantages of such a system. Firstly, and most importantly, far from being a political compromise political review would further ensure compliance with the Bill of Rights as judicial review of legislation would still be available. Secondly, an effective system of political review would lessen the already slim chance of legislation being declared unconstitutional by the courts, thereby RETAINING THE NOTION OF POLITICAL SUPREMACY. Thirdly, in giving Parliament the FIRST chance to review its

own legislation it is submitted and hoped that entrenchment may become a more acceptable proposition politically. Finally, a system of political review would also have the desirable effect of raising human rights awareness at Westminister, stimulating Members of Parliament to discuss the effect their actions will have on the civil liberties of the people of the UK

It would not of course be possible for the political review body to review all Bills and thus a well-thought out and carefully defined set of criteria for deciding which Bills it considers would have to be laid down. It is envisaged that decisions made by the political review body would be binding on the executive. To make them optional or merely advisory renders the system worthless. This having been said however would mean that fiscal and monetary measures must be outside the political review body's jurisdiction. Those other Bills which are considered by the political review body would have to be considered prior to its second reading for an initial declaration and prior to its third reading for a final declaration. The credibility of this system will depend upon the attitude of the politicians towards it if it was ever implemented, and thus it is further proposed to include some members of the House of Lords on the Parliamentary Constitutional Council to lessen the risk of the system being used to score political points.

Although the system is of little relevance to the Human Rights Bill because of its limited degree of entrenchment it might be considered in future measures of this kind. In conclusion, there is little chance of the Human Rights Bill becoming law under this government. The Alliance however have been considering a policy to incorporate the convention and it seems likely that until the Alliance form a government the status of the convention in English law will remain in confusion.

Notes

* Student at Trent Polytechnic 1983 - 86.

(1) Sir Leslie Scarman: The New Dimension (1974).

(2) Hansard. House of Lords Vol. 469 No 18, pp 162.

(3) Joseph Jaconelli: "Enacting A Bill of Rights. The Legal Problems pp 227; Lord Elwyn-Jones, Hansard House of Lords Vol 469 No 18 pp 188 and Lord Lloyd of Hampstead at pp 177.

(4) Lord Denning supra note 2 pp: 172.

(5) I was fortunate enough to have a short interview with Lord Scarman on 4-12-85.

(6) R v Governor of Brixton Prison, ex parte Soblen (1963) 2 QB 243.

(7) [1985] 3 All ER 585.

(8) Supra note 4.

(9) Lord Scarman House of Lords Hansard 30-4-86 col 336.

(10) HWR Wade: The Basis of Legal Sovereignty Cambridge Law Journal 1955 pp 172; O Hood-Phillips: Constitutional and Administrative Law, Chapter on Parliamentary Supremacy.

(11) Lord Glenarthur supra note 2 pp 193.

(12) Wade & Phillips: Constitutional and Administrative Law 10th Edition; M A Fazal: Entrenched Rights and Parliamentary Sovereignty, 1974 Public Law 295.

(13) Dicey. The Law of the Constitution pp 37 - 38.

Trent Polytechnic, Nottingham.
Department of Legal Studies.

CURRENT RESEARCH INTERESTS

NF ALLEN	Reform of Child Law.
CWT ATKINS	Third Party Defences and Offences in Consumer Protection Criminal Statutes.
JR BRADGATE	The Impact of Law on Business Activity and Commercial Transactions.
PROFESSOR RIE CARD	The Legal Regulation of Sexual Relationships. Public Order - the New Legislation.
MISS VS COLLINS	Recreation and the Law.
Ms JA CRAVEN-GRIFFITHS	Investigation into Examinations in Law and of Predictive Factors. Access and Admission to Higher Education.
R DUXBURY	Law of Contract.
DR MA FAZAL	Reforms of Administrative Law in the UK with particular reference to Judicial Review of Administrative Action. Rederalism and Human Rights in the UK. Judicial Review of Administrative Action in India, Pakistan and Bangladesh. Also see below.
DR SE FOSTER	The Legal Profession : contemporary development in its regulations and ethics and in the professional conduct of its members. Public Rights of Navigation on Inland Waterways.
NJ HARRISON	An assessment of the effect of judicial review on formal and informal administrative actions.
R HENHAM	The Evaluation of sentencing principles relevant to sentencing violent offenders.
J HODGSON and P JONES	Education Law.
MISS EC KIRK	Legal and ethical implications of scientific research in the field of in vitro fertilization.
N LUCAS	Deinstitutionalisation of mentally ill patients and Legal Safeguards.

D McGOLDRICK	The Practice and Procedure of the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR).
A MANN	Illegitimacy and Inheritance.
RNS SAUNDERS DR MA FAZAL (with Mr IJ Whitead, SOC and DR TF Clarke, BMS)	Higher Education in a Multi-Cultural Society.
RNS SAUNDERS	Legal Education in a Multi-Racial Society.
DR RN SAVAGE	The Regulation of Business Activity.
RN SEXTON	The Law Commission and Land Law. The United States Constitution and its impact on access to and grounds for divorce.
Ms UR SOOD	Registration for Clinical; Psychologists.
Ms UR SOOD and Ms J CRAVEN-GRIFFITHS	The Family Court - an Investigation.
MRS FE SPEARING	Taxation and Trusts Theory and Practice : The Inter-relationship.
IR STOREY	The Law of Conveyancing.
DJ THOMAS BA(Hons) Law	Legal Constraints upon the Employer's Freedom to Reorganise the Business.
MRS MAL THORNTON	Developments in Business Law.
JMR THURSTON	The Liability of Vendors of Land for Physical Defects which they have not created.
Ms J ULPH	Comparative Law : Delictual Liability in France.
TC WALTERS	Law and the Security Industry.
TC WALTERS and MA O'CONNELL	An Examination of Police powers, procedures and the Law of Evidence in the Light of the Proposed Legislative Changes.