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CONTENTS

THE FUTURE OF THE LEGAL PROFESSION

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THE FUTURE OF THE LEGAL PROFESSION

In the last ten years, we have seen significant changes in the legal profession in this country, and in other parts of the western world. Indeed, there was possibly more change in the last ten years than in the ten centuries before them. But despite all those changes, the legal profession has so far consistently failed to provide over the long run the sort of lawyers that clients want. All those changes have not yet gone far enough. I am certain that we now stand on the brink of fundamental changes in the structure of the provision of legal services. Not even the inherent conservatism of the profession that thwarted the Government's recent attempts at reform will be able to stop this restructuring. These changes are not the result of the recession, though that may have exacerbated some of the problems. I am not today describing a temporary readjustment to weather an economic storm. A new kind of lawyer is required with a new approach to delivering legal services.

To understand this new lawyer, we must first understand the current model and the pressures that make fundamental change inevitable. I have thought a great deal about the profession's recent history. With time and effort, we can all have perfect hindsight. But none of us is blessed with perfect foresight, and I cannot claim that my own thoughts and vision for the future will be totally accurate. In the interests of time, I shall also no doubt be guilty of generalisations and over-simplification. My objective is not to solve but to challenge and provoke.

I shall be concentrating my comments on solicitors in private practice. I am doing this for two reasons: first, most lawyers in this country are solicitors in private practice; and secondly, I believe that the future structure and activities of private law firms will determine to a large degree the activities of barristers, lawyers in corporate and government legal departments, and law teachers.

THE LOSS OF LEGAL SKILLS

Until relatively recently, lawyers served predominantly private clients. Lawyers transferred their property, wrote their wills and administered their estates, and litigated personal claims. Little did we realise that the sweeping changes of the 1925 property legislation, introduced to "facilitate and cheapen the transfer of land", in fact sowed the seeds of destruction for parts of the legal profession in the 1980s. Over the years, the transfer of land has been much simplified, proceduralised and computerised. The birth of the post-war property-owning democracy ensured that considerable numbers of properties changed hands regularly. Domestic conveyancing became a cash cow, milked by the legal profession for all it was worth. As the years went by, the legal component of most conveyancing was reduced to negligible levels. The lawyers involved in it were gradually losing their technical legal skills. It didn't matter to them — they were making more than enough money as conveyancing clerks.

Then people began to realise that this monopoly was not in clients' best interests. Reward by scale fees, based on the value of the property, did not reflect the work required to execute the transfer. Clients were paying over the odds for what had become an

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administrative service. The abolition of scale fees, and the advent of licensed conveyancers, started a cut-price conveyancing war. In that war, lawyers did not shoot the opposition; they did not even shoot themselves in the foot: they shot their own feet off! Prices were slashed to a point where profit margins were tight, and previously secure and comfortable livings were in jeopardy. Solicitors opened estate agencies, and estate agents and conveyancers started working together under the same roof in the hope of keeping the cash cow producing. The recession changed all that. The property market has all but dried up. Between 1988 and 1989, the value of conveyancing transactions fell by £28 billion, and that was just the start. National chains of estate agents have been sold off, and hundreds of offices closed. The work that kept so many conveyancers busy just disappeared — almost literally overnight. Thousands of lawyers who had lost their technical skills suddenly had nothing to do and nowhere to go. Many of them will have left the profession for good.

LOSING OUT TO OTHERS

While all this was going on, two other developments were having an equally profound effect on the future of the profession. In the first place, these private clients that most lawyers were content to confine to domestic conveyancing were becoming better educated, more sophisticated, richer and more mobile. They needed and looked for advice on personal tax, estate planning, investment, pensions and insurance. Most lawyers were too busy transferring property to realise that this work was going to accountants, banks and other parts of the financial services industry. It was only when new financial services regulation drew attention to these activities, and coincided with more competition for conveyancing work, that lawyers started thinking about regaining lost ground. But they were too late. Not surprisingly, clients no longer think of lawyers as their first port-of-call for general financial advice. Solicitors are simply starting from too far back in a currently depressed market to make much headway.

In the second development, though, another cash cow was coming along nicely. The 'economic miracle' of the 1980s was turning existing business clients into commercial melting pots, and private clients into entrepreneurs. All over the country, commercial legal practice was growing at a phenomenal rate. The sheer volume of commercial activity and the consequent need for legal advice overshadowed the traditional areas of legal practice — property and litigation. As with conveyancing, much of this new advice often had little to do with law. It involved business deals or financing. Mergers, takeovers and acquisitions, Stock Exchange flotations and company bonds, property developments, and borrowing secured on business assets like ships and aircraft became the typical transactions. Certainly, there was an underlying legal and regulatory framework to all of these transactions, and there was a need for increasingly specialised legal advice in competition law, tax, employment law, and the like. But these elements represented a small part of the lawyers' function. Lawyers were spending more and more time with merchant bankers, venture capitalists, accountants and other professionals dealing with aspects of 'legal' practice for which their traditional academic (and even vocational) training had not prepared them. It is not perhaps surprising that many clients and other professional advisers thought that lawyers were remote and did not truly understand their businesses or the factors that drove them to make a decision one way or another.

Three years ago, the Government published a Green Paper on *The Work and Organisation of the Legal Profession.* One of the early statements in the Green Paper was that: "Most services which are 'legal'...may also be performed by non-lawyers" — notice *"most"*, not *"some"*. This is an extraordinary conclusion — but true. There are now few monopolies in this country, and law is no exception. Most of the work that lawyers do is not, in truth, legal, and could be done by someone else.

What this all amounts to is considerable potential for competition in the provision of legal services in this country: competition from professionals other than lawyers, and competition between lawyers themselves. Corporate legal departments now handle work that they might once have sent outside; they can even instruct counsel direct without going through a solicitor. Members of the Bar give specialist legal advice that might just as easily be given by a specialist solicitor. Solicitors are pressing for rights of audience that will lead them into direct competition with barristers for advocacy work. And, of course, there is now intense competition between law firms for a limited amount of client work that might legitimately go to any one of them.

GROWTH

The need to provide increasingly complex and specialised commercial legal advice, and to invest in training and technology to improve the efficiency and quality of legal services, has led to enormous growth in private law firms. Ten years ago, the largest firm in this country would have had about 200 lawyers. Today, the largest firm has about 1,200. A recent survey in *Legal Business* magazine suggested that 34 firms in this country have fee income in excess of £20 million, with five of them at more than £100 million, and the largest at around £230 million. These firms do not just practise out of one location: they are multinational enterprises with offices in almost every part of the globe where serious business activity takes place. At these levels, the practice of law is big business.

Again, lawyers were not trained to deal with the consequences of this growth. They start with no experience of business. Inevitably, the management role has fallen on the partners in law firms, most of whom became partners as a reward for being good lawyers and staying with their firms for a considerable period of time. They were not prepared for the mantle or responsibilities of ownership and management in multi-million pound businesses. Until 1967, all partnerships were restricted in size to 20 partners. From a management perspective, and from the point of view of collegiality and loyalty between partners, there was a lot of sense in this restriction. But it was removed for law firms, and you can now find a handful of firms with more than 100 partners and one firm with more than 200. Such growth has inevitably led to weaker bonds between partners. It must also lead us to question whether partnership is the right vehicle for the future practice of law. Law firms may now incorporate (subject to many safeguards and without limited liability), and for some that may be a better solution. Nevertheless, whatever the vehicle, an increasing number of lawyers now find themselves in a working environment where size requires cooperation, teamwork and procedures. This often sits uncomfortably with the independent, maverick streak in all lawyers.

Do not go away with the idea that small, High Street general practices have disappeared. Far from it — roughly 60% of solicitors in private practice still work in firms with fewer than 10 lawyers. But they are an endangered species. The percentage is falling every year. And whichever way you analyse the profession, the commercial firms in London dominate. A quarter of all law firms — and there are about 10,000 — are based in London, but they generate a half of the profession's total fee income. The top 10 firms in London together employ just under 10% of all solicitors in private practice. The profession is undoubtedly polarising with large commercial practices at one end of the spectrum, and small general practices at the other becoming increasingly vulnerable.

CHANGING ECONOMICS

As a result of growth and other developments, law firms have had to invest in more staff, new and more expensive premises, and new technology. All have added considerably to the cost of practising law. This has changed the economic perspective of lawyers. It has been

possible for some years now to calculate how much an hour it costs to keep a lawyer behind his or her desk. As a result, lawyers have come to be assessed on how much an hour they can bring into the practice. A variance either way is likely to have financial consequences to the lawyer concerned.

Indeed, the profession took the process a stage further and started charging clients by the hour. In retrospect, a reliance on hourly charging was probably the single largest error of the profession in its recent history. When performance and fees are assessed on this basis, it is inevitable that lawyers will try to create as many chargeable hours as possible. Here is a system that rewards the inefficient, the ignorant, and probably even the downright incompetent. Client satisfaction and service become secondary issues. In many firms, the evolution of legal practice from profession to business simply went too far. Professional values of putting the client first, maintaining collegiality and loyalty to one's colleagues, and behaving ethically towards other lawyers were less important than the pursuit of money. By adopting business techniques and outlook, a law firm does not cease to carry on a professional activity, though some firms seem to have forgotten this. The most consistent and successful firms in the 1990s will be those which remember that the practice of law is both a business *and* a profession, keeping an eye on the economics and supply of legal services but never losing sight of the ethics and values that underpin a strong and independent profession.

At the moment, the cost of legal services is too high. Despite a recession, too many lawyers still expect clients to pay considerable hourly rates, without exploring ways in which their firms can become more efficient in the delivery of legal services. This cannot continue.

THE RESTRUCTURING OF THE PROFESSION

This is where we come to the fundamental restructuring of the legal profession that I referred to earlier. There is presently excess capacity in the legal marketplace — too many lawyers chasing a smaller amount of work. This is not just a temporary aberration before we return to the heyday of recent years. There has to be a shake-out. There has to be a reduction in the number of lawyers, and an improvement in the quality of those who remain.

The driving force behind these changes will be clients. They are rightly refusing to pay what they regard as unreasonable fees which bear no relation to the value of the services or benefit they receive. They want value for money. If we start from the premise that the cost of legal services is too high, then either the cost must go down (and the income expectations of lawyers must likewise go down), or the client's perception of the quality and value of the services must rise. Not surprisingly, lawyers seem to be devoting a lot of activity to the quality issue. But for some, total quality management is giving way to total quality despair as they realise the enormity of their task and recognise that most clients take quality for granted *and* still expect lower fees. I believe that clients are still willing to pay good money for valuable legal services. But in order to achieve this we must redefine what constitutes 'legal' work to be performed by 'lawyers'.

As I suggested earlier, I have little doubt that those aspects of legal practice that have become simplified and proceduralised will no longer routinely be handled by lawyers in private practice. So, for example, conveyancing, wills and the administration of estate will be handled by banks and other financial services institutions. They may decide to employ solicitors, but they will not need to and it will probably be cheaper not to. In addition, there will be more complex personal advice that also will not ordinarily be provided by lawyers in private practice, such as tax advice and estate planning. This will also be

be provided by accountants, banks and other financial services businesses. In the main, law firms will not be able to compete with the national networks, economies of scale and marketing capabilities of these competitors.

Some specialist private client lawyers may well be able to retain a small following of wealthy individuals who are looking for highly complex advice connected with, for example, landed estates or family businesses. It is also likely that continuing changes in the economics of legal practice will mean that very few of those who continue as private client lawyers will be found within commercial law firms.

Even within private practice, the need for greater efficiency in the provision of legal services will mean that some things presently done by qualified solicitors and legal executives will be performed by so-called 'paralegals' — graduate employees with no formal legal qualifications, but having the ability to deal with the routine and administrative aspects of legal work at lower cost. Once this reallocation of legal work has taken place, many lawyers who are currently handling those activities will be left with nothing to do, unless they are prepared to reallocate themselves to legal executive or paralegal roles at lower rates of pay. Solicitors with expectations of high incomes will not earn them by being conveyancing clerks or mere scribes recording business transactions or personal decisions in over-elaborate language. These activities do not add value — if anything, they are necessary evils for which clients will pay as little as possible.

What is then left is *real* work for *real* lawyers: work that adds value to clients' activities and can only be performed by lawyers. But let us not misinterpret what this means. Clients will not value only *technical* expertise in the law. They need that expertise tailored to their particular business or personal circumstances. That requires *experience* more than technical ability; it means understanding the client's business operations and industry; it means being able to communicate with the client about practical decisions rather than legal analysis. I am talking about a level and a type of seniority and know-how that takes some years to develop, and that adds value in the client's eyes.

Unfortunately, the average age of solicitors has dropped significantly in recent years as more and more graduates have been attracted to the profession by high salaries and the supposed glamour of commercial and international legal work. In 1991, 50% of all solicitors in private practice were under the age of 35. The 'grey hair factor' is in short supply. With a decline in the sort of work that can keep the less experienced busy, a large proportion of the profession is currently at risk. However, looking further ahead, time is on the profession's side. Demographic changes in the population will lead to fewer young people entering the job market. Recent large-scale redundancies in the profession, and a consequential lowering in the attractiveness and financial rewards of being a lawyer, will reduce the numbers further. Together, these will combine to produce a more experienced profession in ten years' time that may be better able to cope with the increasingly sophisticated demands being placed on it.

To achieve this, however, law firms must structure themselves in ways that more closely reflect the background and interests of their clients. Out will go the departmental structure beloved by lawyers because it reflects their familiar legal classifications — Company and Commercial, Property, and Litigation. Clients do not package their problems so conveniently, and they are confused when firms re-package them and need three or four lawyers to do so. In will come departments and practice groups based on industry or activity — shipping, insurance, energy, entertainment, technology, retail, and so on. This process has already started.

THE NEW LAWYER

Let me, then, try to give you a sketch of the new lawyers.

Whilst legal education and training might continue to provide a wide, general grounding in many aspects of the law, legal practice will continue to polarise. There will be even more significant differences in the knowledge and skills required of lawyers in private practice, in corporate or government legal departments, or at the Bar. In private practice, there will be more polarisation between large and small firms, between commercial and private client work, between generalists and specialists, and between city and rural practice. All these differences will dictate different approaches, and will make it harder for lawyers to move from one type of practice to another. The new lawyer will therefore have to choose not so much what sort of *law* to practise but what sort of *client* to specialise in.

If it is to be private clients, you may be forced to consider being employed by a bank or other financial institution, or by accountants. Lawyers who wish to remain independent may find a specialist private client firm they can join, but the likelihood is that, by the turn of the century, most of them will be part of multi-disciplinary practices involving accountants, estate agents, surveyors, insurance advisers and others. A partnership comprising only lawyers serving private clients will be anachronistic. And a private client lawyer in a commercial law firm will need to tread a very delicate path. Commercial practices based in cities will find it increasingly difficult to sustain private client services. This type of work will always generate lower fees. Either you must accept a lower income than your commercial colleagues or be absolutely sure that the firm is committed to providing private client advice as a service to its commercial clients and is willing, in effect, to subsidise your practice and income. The new private client lawyer must find the environment to which he or she is temperamentally suited.

If the specialisation is to be central or local government, there will always be a role for lawyers. However, increasing pressure on the costs of government make it likely that the role of lawyers will become more that of the generalist adviser. Specialist and technical advice will be sought from private law firms. The exception may well be at the policy-making level of central government or as Parliamentary draftsmen, where the need for a solid appreciation of 'pure' law will still be required. Perhaps this area of legal practice will be least affected of all.

If the specialisation is to be in industry and commerce, the same economic pressures are likely to result in in-house lawyers being generalists. Their specialisation will be the industry or commercial activity of their employer, and the particular legal requirements of their employer. In-house legal departments will also be staffed at levels that will cope with a normal workload. They will therefore go to private law firms for specialist advice, and to deal with unexpected peaks of work. For litigation, they might use law firms, but are just as likely to go direct to the Bar. Indeed, as advocacy rights are extended, I see no valid reason why a company should not be able to choose to have its own in-house lawyers appear in any court on its behalf. The larger multinational corporations will be able to retain a few in-house legal specialists as part of a headquarters legal team, but those opportunities are likely to be limited. The new corporate lawyer will therefore most often be a business specialist and a legal generalist.

Having developed along certain lines in recent years, commercial lawyers in private practice must now face up to the consequences. Like their counterparts in corporate legal departments, they must choose to specialise in a certain industry or business activity.

The very largest firms might well be able to maintain a team of legal technicians whose discipline crosses commercial boundaries — tax, and intellectual property, for instance. The small commercial firms serving small businesses will also be able to survive by providing general business advice to all comers. But the 400 medium-sized and large firms that together employ a third of the profession have a difficult choice to make. They can no longer provide a complete range of legal services to all types of clients — because clients no longer believe that these firms *can* be expert in all the services they claim to provide. Clients want business specialisation, and will look for depth of experience and expertise in their own industry.

Commercial legal practice will also be more global: language skills will be needed, and some lawyers will be practising as part of multinational partnerships made up of lawyers from many countries.

What of the Bar? There has been much talk of fusing the professions of barrister and solicitor. It is probably a red herring. From the client's point of view, what matters in advocacy is ability and cost. There are many solicitors who are much better advocates than many barristers. Whatever the public posturing at the moment might suggest, some law firms *will* recruit barristers to form advocacy departments. They will do this because their clients require the service and the cost will be cheaper. However, the wider interests of justice will always require an independent and widely accessible source of advocates. In this sense, the Bar has a future. But whether that Bar is made up of advocates who qualified as barristers or those who qualified as solicitors is a matter or supreme indifference to clients. The professions should continue their efforts to make it easy for lawyers to transfer between the two professions. Those who wish to be part of a pool of independent advocates should constitute the Bar, whether they qualified as barristers or solicitors — call them all barristers, advocates, trial lawyers, the title is not important so long as they have advocacy ability. Clients should also have direct access to them. Let *clients* choose whether to go to a private law firm and use their in-house advocates, or to go direct to the 'new Bar', or to go to a law firm which then instructs an independent advocate.

This leads me to the legal aid debate, which will have some influence on the future of the profession. Legal aid accounts for a little over 10% of the profession's fee income. The Exchequer does not have a bottomless pit of cash, and the profession has to accept that. Let us stop the unseemly bickering between Government and lawyers about legal aid funding. There is no right or wrong, only priorities and choices to be made. Litigation is expensive for many reasons, and there is fault on the part of the profession, the Governement and the judicial system. All these faults cost the taxpayer money, and the Lord Chancellor is rightly concerned to see value for money. If he makes the wrong assessment, the quality of publicly funded legal advice will inevitably fall to unacceptable levels. Whatever happens, he surely cannot continue a system that, through delayed payments for legal aid work, starves lawyers of their cash flow. Three months should be the longest period that *any* client expects a lawyer to work without being paid. In return, lawyers must recognise their obligation to the public purse, and join in a radical programme to streamline the resolution of disputes.

The issues of value for money, quality and efficiency are no different for legal aid than they are for other clients. These are going to be the most crucial issues of the 1990s. We are working our way out of a system that has over-valued some lawyers and under-valued others, and that will involve a reassessment of the market worth of lawyers. That worth

has been distorted in recent years by the ability of commercial lawyers to make a lot of money. The answer to this is not necessarily to pay more to legal aid lawyers, government lawyers and in-house corporate lawyers. The market is in the process of telling commercial lawyers that it will not pay them as much as before. The realignment has already begun. The new lawyer will make a personal choice about being a generalist, client specialist, or legal technician, and about the level of income that he or she is happy to live with, and will choose a form of legal practice accordingly.

CONCLUSION

To summarise, the new lawyer will specialise by client rather than by law, will have a keen appreciation of quality of service and value for money, will have a good understanding of the economics of practising law, and will be able to manage an efficient business.

The key to this future is education and training. Law degrees will be needed which fit graduates for something other than becoming academics, appellate judges or policymakers. The Legal Practice Course and Bar Finals must go further in giving lawyers the skills they will need as practitioners to advise efficiently and economically, giving yet more emphasis to understanding clients, communicating with them, negotiating, mediating and counselling. Above all, they must restore a sense of ethics and professionalism. Finally, post-qualification training must raise the standards of management within the profession. At all levels, management and marketing of oneself, of others, and of the business of law are integral and unavoidable duties of the new lawyer. The profession must stop seeing these things as diversions from client work. They are not inconsistent with carrying on a profession — they are a necessary part of client service. Quality and value for money are not separate activities to be left to others and independently certified. They are the very essence of legal practice, and are the sum of its constituent parts.

Here at the Nottingham Law School I believe you are better placed than any other law school to deliver the new lawyers to the profession. Seize the opportunity. Prove that lawyers can add value to personal and business life in this country, and that they are worthy of the continued respect of its people. As the lawyers of tomorrow, the future of the legal profession is in your hands.

PRODUCTS LIABILITY EXPOSURE: THE SACRIFICE OF AMERICAN INNOVATION

by Benjamin A. Neil* and Man C. Maloo**

INTRODUCTION

America's pre-eminent position as an economic powerhouse and global industrial leader faces a serious challenge today. This challenge threatens to undermine the bases on which our national prosperity has been built. Unlike many who would argue that our nation's competitive edge has been dulled by a proliferation of manufactured goods in world markets where American products are reduced to less-favoured status by foreign protectionist extremes, this article contends that the dangers we face lie within our own borders.

Our economy has risen to dynamic dimensions through the consistent promotion of conspicuous consumer consumption. Through the introduction and innovation of a variety of consumer products, consumers have selectively pursued higher standards of living while American corporations have maximised profits. In pursuit of profit maximisation, an incentive which leads to greater consumer choice among competing products, American corporations traditionally have relied upon research and development initiatives to open new channels to consumers.

These efforts, however, sadly are in decline, as is America's corresponding dominance in the world economy. Industrial creativity and manufacturing innovation have been sacrificed in the annual quest to equal or better the previous year's bottom line, while corporate attention is redirected to the opposite end of the market spectrum. Profit maximisation, the fuel that historically thrusted American ingenuity to enviable heights, has given way to damage control. American corporate performance is no longer measured by the desire of our manufacturers to get new products to the marketplace. Rather, the focus of corporate attention, and dwindling corporate assets, increasingly has shifted to the plight of products in the hands of consumers, and the potential financial exposure to manufacturers flowing therefrom.

New developments in our judicial system comprise the greatest threat to profit maximisation. Products liability lawsuits are increasing in amount and frequency to the point at which we must ask whether we can afford to perpetuate a legal system that encourages the filing of claims even where manufacturers are only minimally at fault. The price tag for our society's litigious inclination is dangerously high and getting worse. Indeed, something must be done.

This article addresses the challenge facing American industry to maintain its pre-eminence in the free market economy. Issues such as product exposure, punitive damages, product cost and social cost are explored, each of which is relevant to any determination of whether the challenge successfully will be confronted. Finally, as a guide to attorneys, managers and accountants in external reporting, this article addresses the market share theory of products liability and offers recommendations which might revitalise our flagging research and development traditions.

THE CHALLENGE

We are living in an era of constant change in which innovation is a key strategic tool

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for corporate planners.[1] Through innovation, important and novel ideas are transformed into exciting, useful products. The infusion of technical marvels into our culture has been so constant over the years that innovative brilliance has become a routine expectation. Technological innovation has led America to prosperity, economic growth, stability, unparalleled standards of living and, above all, undisputed industrial leadership in the world.

Historically, our society has relied upon the forces of the marketplace to generate innovations. A longstanding partnership has existed between the manufacturer and the consumer, with the latter typically willing to put the former's inventions to a practical, constructive use. This marriage of market participants, however, recently has fallen into conflict, resulting in a loss to American industry of a significant global market share in, among many other industries, the electronics, automobile, telecommunications, machine-tools and aerospace industries. Correlated to this shrinking world presence, if not constituting a direct cause, are decreasing expenditures by American corporations for research and development.

Until recently, expenditures by American manufacturers for research and development have been the highest among industrialised nations. But these funds, formerly allocated to the braintrusts of engineering and design, are now increasingly being directed to the preservation, rather than the maximisation, of corporate profits. Creative forward projections are cautiously analysed against reserves in anticipation of loss-generating litigation. The fear of products liability lawsuits, and a legal system which encourages their institution and permits huge damage awards, are having a chilling effect on technological innovation leading to the implementation of corpoate policies which prevent new American products from reaching the market and curtail the provision of services. The effect of such litigation as presently pursued is **in terrorem,** and may well be leading to a misperception by industry leaders that short-term problems posed by such actions are indicators of long-term economic decline. Corporations must not respond in a way that cuts them off from the historical sources of their global influence.

The challenge, accordingly, arises from the recognition that in the jurisprudence of products liability, the right of the individual to sue is in direct conflict with our collective, national interest. If America is to continue to play a leading economic role in the world markets, both manufacturers and consumers must accept the need for change in our economic and legal systems, and compromise towards its effectuation.

PRODUCT EXPOSURE

Product innovations have been the backbone of our dynamic economy, the symbol and substance of American industrial leadership and entreprenurial savvy. Competitive market forces have encouraged American manufacturers to finance the generation of ideas through investment in research and development leading to manufacture. The perpetual flow of new products into the marketplace where they are exposed to intermediate and/or ultimate users has given the American consumer a freedom of choice long envied by our foreign counterparts.

In our pursuit of happiness, *i.e.* a higher standard of living, the opportunity to choose from among a panoply of new products is a deeply cherished American tradition. Irrespective of socio-economic distinctions among Americans, all individuals are able to acquire a product which makes life easier to endure and otherwise enhances self-perceptions of

[1] Steel, L. W., **Managing Technology: The Strategic View,** New York, N.Y., McGraw-Hill Book Co., 1989.

upward mobility. Ours is not a static society, and absent the introduction of new goods into the stream of commerce, a national sense of well-being would not exist.

As a general matter, product exposure will continue to increase in the industrialised world, with or without America as a driving force. Foreign manufacturers desire to succeed, not merely survive, in the competitive global markets, and their commitment to the innovation of consumer products will not abate as they sustain and expand their market share in the world economy. In order for American industry to keep pace with foreign competition, the exposure of American-made products in both domestic and foreign markets must be at least as broad as that enjoyed by competing national economies.

Americans, however, are the most litigious people in the world[2]. And it follows that as the exposure of American products increases domestically, so will incidences of products liability lawsuits. To mimimise the potential for products liability actions, manufacturers must improve preventative measures such as safety, quality controls and research parameters in order to manufacture more competitive dependable and reliable goods. Unfortunately, towards the achievement of this objective, corporate production managers already face the difficult tasks of navigating a minefield of complicated standards for quality control and unravelling often conflicting regulatory requirements[3].

These obstacles to industrial success, however, are not as great as those presented to American industry by potential and actual plaintiffs. New tort theories assume that the majority of accidents leading to personal injuries are foreseeable and therefore preventable. A new vernacular has replaced the old legal vocabulary, and juries are awarding plaintiffs large sums for all "reasonbly foreseeable consequences" of manufacturers' negligent actions.

Even products approved by the Food and Drug Administration are not immune to litigation[4]. American corporations complain and argue, and together with their insurers continue to pay-out huge damages. Chief among such complaints are criticisms directed

[2] Spence, G., **With Justice for None: Destroying An American Myth,** New York, N.Y., Time Books, Inc., 1989.

[3] Consider the case of Parke-Davis, a large, pharmaceutical corporation recently involved in products liability litigation which was settled in 1990. The company marketed Dilantin, an anti-epilepsy drug, in 1938. Requisite approval had been obtained from the Food and Drug Administration. Subsequently, the company discovered that Dilantin use risked birth defects, and warning and other cautionary advisories were placed on labels. Despite such efforts to advise the public of possible dangers associated with use of Dilantin, a jury found the company liable for its apparent slowness in informing the public. The mother of twin sons born with birth defects sued Parke-Davis for compensatory and punitive damages. The jury awarded $14 million to the plaintiff.

[4] In March of 1979, Shiley, Inc., a marginal manufacturer of healthcare products, was acquired by Pfizer, Inc., a pharmaceutical giant. By all indications, Shiley proved to be a prize acquisition target because it was expecting Food and Drug Administration ("FDA") approval of a convexo-concave ("C-C") mechanical heart valve. Within one month of the acquisition, the FDA approved the C-C valve for marketing "even though the company told [the FDA] that an implanted valve had broken during clinical testing a year earlier." "Business Week," Feb. 26, 1990, p. 47. Since FDA approval was obtained, roughly 240 of the 60,000 recipients of the C-C valve reportedly have died. Many recipients have lived in fear because replacement has been considered to be riskier than continuing implantation. Cognisant of the flaws in the valve and fearing death at any time, a recipient filed a products liability lawsuit on the basis of mental anguish. A California appellate court recently found "constant mental anguish" to be a basis for suit, thus raising the spectre that virtually any recipient could sue despite requisite FDA approval of the valve or the occurrence of physical injury.

to jury discretion. Damage awards have become unpredictable and excessive, and some maintain that they are unconstitutional. Critics ask whether the federal government is ready to protect the consumer by carefully reviewing potentially dangerous products before permitting their introduction into the market. But the real question addresses the other side of the market equation. It examines the products liability issue from the manufacturers' point of view, and asks whether the federal and/or state governments should limit the rights of Americans to sue for the sake of preserving industry's precarious global market share.

PUNITIVE DAMAGES

Current American tort law operates as a blanket social insurance policy that favours an injured party and penalises a manufacturer regardless of the extent of fault. It encourages risky, careless and irresponsible behaviour on the part of consumers while simultaneously protecting them from the commercial exploitation of vulnerability and naivete they are presumed to possess[5]. Whenever a manufacturer ignores or suppresses indications that its product may maim or kill, that manufacturer correctly is predisposed to litigation. Contingency legal fee arrangements, whereby a plaintiff's attorney earns a percentage of any monies recovered from a manufacturer, ensure that even the poorest of potential claimants receives appropriate representation. A legal system thus structured offers enormous litigation possibilities even if the defendant manufacturer provides all kinds of instructional labels, directions and warnings for the benefit of consumers. "Bizarre accidents can happen with almost any products or service, and... it is impossible to warn in detail about every imaginable misadventure."[6]

For many years, compensation/recovery for an injured consumer was limited to a measurable amount such as medical expenses and loss of earnings. These limitations were just and equitable, and made it possible for corporations to survive and compete through the development of products and services. Recently, however, punitive damages awards in products liability cases, "upheld only three times in the first 200 years of U.S. history," have increased beyond reasonable proportion to a consumer's injury-in-fact[7].

Such awards often are made to redress injuries the extent of which do not lend themselves to precise or reasonably predictable measurement. These non-measurable damages have been awarded to punish a manufacturer for, a plaintiff's pain and suffering, mental agony, psychic anguish, loss of consortium, and even hedonistic damages, *i.e.* the value an injured party would place on the future pursuit of happiness. Some of these awards are mind-boggling. The Rand Corporation's Institute For Social Justice, for example, examined 24,000 jury trials in Cook County, Illinois, and San Francisco, California and found that the average punitive damages award increased in inflation-adjusted dollars from $34,000 during the years 1965-1969 to $729,000 during the years 1980-1984, an astronomical jump of roughly 1,500 percent[8]. In San Francisco alone, the average award rose from $95,000

[5] Huber, R. W., **Liability: The Legal Revolution and Its Consequences,** New York, N.Y., Basic Books, Inc., 1988.

[6] *Id.* at p. 58.

[7] Brimelow, P. and Spencer, L., "The Plaintiff Attorneys' Great Honey Rush", **Forbes,** Oct., 16, 1989, pp 197-209.

[8] Rand Corporation, **An Overview of the First Seven Program Years: April 1980-March 1990,** Santa Monica, Ca., The Rand Corporation's Institute For Civil Justice, 1987, p. 43-44.

during the years 1965-1969 to $381,000 during the years 1980-1984, an increase of some virtually 300 percent[9].

Insurance companies, accountants and manufacturers of consumer goods are rallying for an overhaul of our legal system because of the immeasurable financial consequences of punitive damages on financial projections, statements, analyses and on product costing. Moreover, this inherent uncertainty caused by products liability litigation renders financial statements less useful as investment tools for both sophisticated and unsophisticated investors, thereby contributing to swings and losses of hard-earned capital in our troubled securities markets. The distruptive impact of such damage awards is widespread.

Trial-watchers consistently have expressed the view that punitive damages awards represent a consumer revolt against large corporations with deep pockets. But the rumblings of a different dissatisfaction are being heard. These voices have been joined in the interests of American industry, and reflect a gamut of rising sentiment against the forces that would undermine the integrity of time-honoured "made in America."

At one end of the chorus are those who would argue that punitive damages are unpredictable bolts of lightning hurled by vengeful juries inflamed by prejudice against large corporations. These juries, it is urged, lack the necessary acumen properly to calculate the reasonable amount of punishment, but are nonetheless encouraged to move forward by rapacious plaintiff's counsel who envision large contingency fees. Other voices have urged the banning of punitive damages in products liability cases, a position which fully lifts the evil mask from the face of corporate America. In fact, the legislature of New Hampshire has taken this step[10], as have the courts of Massachusetts[11], Louisiana[12], Nebraska[13] and Washington[14].

Whatever position is adopted in favour of remedial action, it is axiomatic that because of uncertainty in current law plaintiffs' attorneys have seized the punitive damages cash drawer[15]. Our judicial system is based, in part, on the notion that justice is best served when an impartial jury panel and not a judge has the authority to determine the existence of, and apportion blame for, fault. But the selection of citizens at random does not guarantee equity, wisdom, fairness or jurisprudence, or the all-important task of balancing every competing interest, not simply those of the parties at the bar. Moreover, whether individually or as a group, jurors bring into court an assortment of biases and prejudices that lead to variable reaction to the technical intricacies of products liability evidentiary considerations. Given the unpredictable nature of jury composition, fairness might be achieved through the bench, but judges are forbidden by many state constitutions to comment on the merits of a case, the weight of the evidence pr the veracity of witnesses.

[9] *Id.* In some fields of litigation such as personal injury cases, malpractice and products liability filings and awards are up 9,100 percent. The Rand numbers are even more dramatic. In Cook County, the average award in personal injury cases rose from $14,000 during the years 1965-69 to £1.9 million during the years 1980-84, up to 13,700 percent.

[10] N.H. Rev. Stat. Ann. Section 507:16 (Repl. Vol. 1983, Cum. Sup. 1990).

[11] **See USM Corp, V. Marson Fastener Corp.**, 392 Mass. 334, 467 N.E. 2d 1271 (1984).

[12] **See Strauch v. Gates Rubber Co.**, 879 F. 2d 1282 (5th Cir.), **cert den.**, 110 S. Ct. 841 (1989).

[13] **See Distinctive Printing & Packaging Co. v. Cox**, 232 Neb. 846, 443 N.W. 2d 566 (1989).

[14] **See Kammerer v. Western Gear Corp.**, 96 Wash. 2d 416, 635 P. 2d 708 (1981). Also note that some states have set an absolute dollar amount of punitive damages that can be awarded. Alabama, for example, has a limit of $250,000, Virginia's limit is $350,000, and Kansas limits punitive damages to the lesser of the defendant's annual gross income or $5 million. In these and other states having similar liability ceilings, a hearing is conducted subsequent to a determination of liability on the amount to be awarded. Since 1986, twenty states have toughened standards of proof for plaintiffs seeking punitive damages.

[15] Although twenty-eight states have established some monetary limits on punitive damages, the standards by which such limits are imposed in individual cases are haphazards. Awards to victims and penalties assessed against defendants in the form of punitive damages differ wildly, resulting in unfairness to plaintiffs and defendants.

Worst of all, the burden of proof rests with the corporate defendant and not the plaintiff in cases involving punitive damages. These and other factors produce great disparity in the handing-down of economic justice, and highlight the need for practical standards of measurement when alleged corporate misconduct raises the punitive damages spectre.

Most would agree that the need for reform is obvious inasmuch as the current legal system poses frightening prospects for American business. Not only are research and development efforts of American manufacturers being increasingly overwhelmed by foreign competitors, but punitive damages awards are driving some American businesses to receivership and dissolution. Answers may be found in a constitutional cure or the enactment of uniform federal legislation. The ramifications of inaction, however, will be played-out on a global scale, with dire consequences to our domestic well-being.

PRODUCT COST AND SOCIAL COST

It is difficult, if not impossible, for manufacturers and service providers to determine the total cost for manufacturing and servicing a product because costs associated with potential punitive damages are a wild card in the judicial process playable by an injured party for virtually any amount[16]. Electing not to bank on an uncertain future, 50 percent of the companies that responded to a 1988 survey conducted by the Conference Board reported that product lines had been dropped. Of these companies, 40 percent indicated that fear of punitive damages was the primary motivation in opposition to the introduction of new products. This trend[17], moreover, is reflected in the operation of the U.S. Patent and Trademark Office which increasingly has been servicing American industry's foreign competitors. "Foreign investors received almost half the U.S. patents granted in 1987, as compared to a third a decade earlier."[18]

If American companies could anticipate with reasonable certainty the amounts which could potentially be paid-out in products liability litigation under the worst scenarios, such potential awards could be factored into their strategic calculations as an additional cost of doing business[19]. The spectre of uncertainty, however, causes manufacturers to think twice before new products are introduced. Innovative entrepreneurial spirit has given way to anxious reservation.

The price being extracted from American manufacturers in the products liability arena has been characterised as the "tort tax". This power to destroy has been estimated to cost American businesses, municipalities and other entities approximately $80 billion annually, a figure that roughly represents the total profits of the country's top 200 corporations[20]. In addition to direct costs, a total of approximately $300 billion in indirect costs has been attributed to efforts by such entities to avoid litigation and tort liability. Ultimately, of course, everyone pays the price for such liability in the form of higher costs for consumer products. The price tag for an average football helmet, for example, is $110. But 55 percent of this cost is comprised of a products liability insurance premium. Many marginal helmet

[16] Assisi, F. S. "Scientist Suing Harvard," **India News** August 31, 1990, p. 7.

[17] Weber, N., "Products Liability: The Corporate Response **The Conference Board,** Research Report No. 893, 1987.

[18] Nye, Joseph S. Jr., "The Misleading Metaphor of Decline", **The Atlantic Magazine,** March, 1990, pp. 86-94, Volume 265, No. 3.

[19] Imbalance in foreign trade and waning competitiveness in global markets are identified by the Conference Board report as problems endemic to the American economy. Historically, the U.S. had surplus trading accounts which, until 1980, were at a level of $1.5 billion, and in 1981 approximated $8.2 billion. Until 1981, the U.S. was the world's largest creditor nation. By 1989, however, the U.S. had become the world's largest net debtor nation with debts reaching $600 billion.

[20] See note 7, **supra.**

manufacturers have been closed down as a result. In 1970 there were nearly twenty helmet manufacturers in the United States. By 1989, only two remained in business. This bleak tale of shutdowns renders inescapable the conclusion that manufacturers on the cost-cutting horizon cannot weather the storm of skyrocketing products liability insurance costs.

Yet we as a society continue to promote products liability lawsuits, and are content to drive-up their social cost, without assessing the question of whether the benefits to individual plaintiffs justify the imposition of a more far-reaching financial burden[21]. In the final analysis, everyone pays. Consumers pay in the form of higher retail prices. Labour pays in the form of lower or frozen wages, lay-offs and shutdowns, and shareholders pay in the form of lower dividends if dividends are in fact declared. And the indirect cost to society is measured in the form of sluggish or no economic growth which translates into a lack of product innovation through research and development. Funds directed to punitive damages cannot be spent for modernisation, expansion, automation and new capital equipment and technology to improve manufacturing processes or enhance the quality of services. The combined impact is economically devastating.

THE ACCOMMODATION PRESENTED BY MARKET SHARE LIABILITY

Despite the existence of flaws in the legal system relevant to products liability litigation which beg the institution of systemic reforms, consumers justifiably will continue to need protection from defective products, fraud, misrepresentation and other tortuous acts which cause injury. Those who suffer physical and other injuries, including economic loss, because of another's negligence rightfully deserve their day in court. But consumer protection must not be perpetuated at the expense of justice and fairness to businesses. What is needed is a vehicle for resolution that balances the rights of consumers against the interests of manufacturers to survive and compete.

The market share theory of products liability may provide the answer, particularly in this present era of the marketing of more sophisticated and innovative products in a manner known as "scrambled merchandising." This concept of mechandising often results in the inability of an injured party to identify the manufacturer of the specific product that caused injury. Where a plaintiff cannot determine the precise party at fault, the market share theory bases liability on the nationwide risk posed by a product, and does not look to causation of harm in a single case. Liability, rather is, apportioned in a manner which corresponds to the overall culpability of all manufacturers capable of identification in the market for a particular product, measured by the amount of risk of injury each such manufacturer may have created to the public-at-large; not to an individual plaintiff.

In 1989, the New York Court of Appeals decided a case which has been viewed as seminal in the area of tort law and products liability[22]. Plaintiffs had been injured by the latent effects of the prescription drug diethylstilbestrol ("DES"), which had been ingested years earlier by their mothers during pregnancy[23]. Although injured, the plaintiffs could not

[21] Marcus, R., "Justices Reject Limit on Punitive Damages," **The Washington Post,** March 5, 1991.

[22] **Hyomitz v. Eli Lilly and Co.,** N.Y. 2d 487, 539 N.E. 2d 1069 (1989).

[23] The FDA approved the use of DES by pregnant women for the prevention of miscarriages in 1947. The drug was declared safe by the FDA in 1951, after which manufacturers could produce DES without FDA approval. Roughly 250 drug companies entered the market. In 1971, however, the FDA retracted its approval and banned further use of the drug after evidence surfaced indicating that DES caused vaginal and cervical cancer in the daughters of women who had taken the drug. These effects did not come to light until 10 to 30 years after their births.

identify the brand of DES their mothers had taken, and therefore could not assert a claim against a particular producer. Nor could the plaintiffs properly assert their claims because of the passage of time which triggered the operation of a statute of limitations defence to the maintenance of suit. Because injuries caused by DES use were widespread, the New York legislature created a special opportunity for the filing of claims, and upon application of the market share theory the identification of the manufactures of a particular DES brand was not necessary to establish liability.

At trial, plaintiffs requested the courts to issue judgments ordering each manufacturing of DES to pay a pro-rata share of the plaintiffs' damages based upon such manufacturers' proportional share of the total sales of DES. A DES manufacturer which produced 10 percent of all DES sold would be responsible for 10 percent of each plaintiff's damages. A number of trial courts adopted the plaintiffs' theory of liability, and the appellate court affirmed:

> [I]t would be inconsistent with the reasonable expectations of a modern society to say to plaintiffs that because of the insidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers[24].

In fashioning the remedy, the appellate court thoroughly considered issues of market share liability that courts in other jurisdictions either had ignored or glossed-over. For example, the court established the "national" market as the basis for determining proportional liability, even though it was likely that some of plaintiffs' mothers had not taken DES in New York and that some of the defendants had not marketed DES in New York. The court reasoned that to require plaintiffs' to construct market breakdowns for a particular jurisdiction would be to unduly burden their efforts to obtain justice. The court also refused to hold the defendants jointly liable, instead imposing several liability so that a defendant's liability would not be increased beyond "its fair share of responsibility."[25] No producer of DES, it was found, should be forced to assume the responsibility of other defunct or unidentified DES producers. Finally, the court concluded that even where a particular manufacturer unequivocably demonstrated that a plaintiff's mother had never used its brand of DES, the manufacturer would still be liable for a percentage of the plaintiff's injury equal to the manufacturer's share of the national DES market[26].

Particularly with respect to the latter conclusion of the court, discomfort with both the substantive and procedural operation of the market share theory remains, especially among industry leaders who would seem to bear the greatest potential liability wherever the theory might apply. But the same manufacturers would always be able to determine the ceiling of liability to themselves, which in some jurisdictions might be lower than that reflected in statutes which cap the extent of a manufacturer's exposure. A further benefit would be realised by any defendant manufacturer brought into a lawsuit. By assisting in the process of identifying market participants, a defendant not only reduces its own liability as its market share is shown to decrease, but attention can then be drawn to manufacturers who may in fact be responsible for injuries. Thus, enormous responsibility would be placed in the hands of those who acquire a significant market share to remain watchful for potential abuses in the industry, a form of self-oversight non-governmental

[24] **Hyomitz v. Eli Lilly and Co.**, 73 N.Y. 2d 487, 507, 539 N.E. 2d 1069, 1075 (1989).
[25] *Id.* at 513, 539 N.E. 2d at 1078.
[26] *Id.*at 512, 539 N.E. 2d at 1078.

in nature which ultimately would inure to the benefit of an injured consumer. Beyond market share, no defendant would be required to pay a plaintiff monies which under the current legal systems of many states would result in the imposition of hefty punitive awards. Thus, remedies for tortuous acts would be tied to market forces, a concept which does justice to the traditions of free enterprise in America.

CONCLUSION

The dangers faced by American manufacturers in the products liability arena are not experienced by manufacturers in virtually all other countries. These dangers impose increased costs on American producers which make it impossible to do business on a global scale on an equal footing. As technological advances proliferate, American industry will lose its competitive edge through the inability to compete by way of product innovation. Absent a ceiling on punitive damages, resources simply will not exist to create new consumer markets in a global economy poised for technological advancement. Our uniquely American standard of living is threatened by a judicial system which punishes corporations for risking the development of ideas. Legislation providing a uniform products liability standard which contemplates representative market share would allow American firms to compete without the excess burdens of unpredictable liability risks while simulataneously protecting the rights of injured consumers.

THE ROLE OF LAW IN JAPANESE SOCIETY
by Janet S Ulph*

BACKGROUND[1]

Japanese Law is an unusual hybrid: onto its original customary law has been grafted law from two different families of law: the common law family and the civil law family. The reasons for this mixture are historical.

Prior to the twelfth century, Japan was ruled by Emperors but, at the end of the twelfth century, the Shogun, who led the military forces, took power and the Emperors became mere figureheads until the downfall of the Shogun in 1867. The period from the twelfth until the end of the sixteenth century was one of civil disturbance as families competed for the power of the Shogunate; peace and stability were restored by the Shogunate of the Tokugawa family which held power from 1603 until 1867 (described therefore as the "Tokugawa period")[2]. The Tokugawa Shogunate, in consolidating their power, cut off Japan from the outside world. There was a complete ban on all Western literature (partially lifted in 1720)[3] and, by 1638, most foreigners had been expelled: only the Dutch and Chinese had a limited right to trade.

However, during the nineteenth century, Western interest in trade with Japan grew and, in 1853 the US government sent a fleet of warships to cruise off the Japanese coast in order to persuade the Japanese to trade. This gunboat diplomacy bore the expected fruits: the Shogun unwillingly entered a series of "unequal" treaties, first with the US and then with England, Russia and the Netherlands. The treaties were seen as "unequal" because, in particular, it was agreed that foreign consular courts rather than Japanese courts would have jurisdiction over foreigners: this was insisted upon by Western nations who considered Japanese law to be barbaric — as perhaps, in some ways, it was, with torture an institutionalised part of the judicial system[4]. Nevertheless the treaties with the Western nations were widely resented in Japan and this was one of the main causes of the Shogun's downfall in 1867.

The Shogun was replaced by the Emperor who encouraged his country to modernise and learn the technical and scientific skills possessed by the Western nations. It was accepted that the law had to be rapidly modernised so that the humiliating imposition of extraterritoriality in the treaties could be expunged and foreigners could be made subject to the jurisdiction of the Japanese courts. A criminal code and a code of criminal procedure entered into force in 1880 and were heavily influenced by French law[5]. The civil code, brought into force in 1898, was based primarily on German law, however; this was preferred to the French draft for various reasons, not least because

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1 For a brief overview see K. Zweigert and H. Kötz, "An Introduction to Comparative Law", Vol. 1. 2nd ed. 366-372. See also M. Dean, "The Japanese Legal System — a step into the unknown", New Law Journal (1990) 246.

2 For an explanation of the law (essentially criminal and administrative) which existed during this period, see Henderson, "The Evolution of Tokugawa Law" in Henderson and Haley, "Law and the Legal Process in Japan" (1978) 4-30. See further, Wren, "The Legal System of Pre-Western Japan", 20 Hastings, L. J. (1968) 217-244.

3 Yosiyuki Noda, "Comparative Jurisprudence in Japan: Its Past and Present" in Hedeo Tanaka, "The Japanese Legal System" (1976) 194, at 197.

4 Torture was banned in civil cases in 1872 and all institutionalised torture was banned in 1879.

5 Boissonade, a French professor, had been responsible for drafting these codes. See Takayanagi, "A Century of Innovation: The Development of Japanese Law 1868-1961" in H. Tanaka, "The Japanese Legal System" 163 *et seq.*

of Germany's enhanced prestige as the victor in the Franco-Prussian War[6].

After the Second World War, when Japan surrendered to the USA, Japan was occupied by US forces until 1952. The US occupation force was concerned with not merely physical but also psychological disarmament of the Japanese, so that never again would a small military élite under the Emperor take the country into war. Thus, in 1946, a Japanese constitution was introduced which was in many ways similar to the US Constitution and which guaranteed fundamental human rights. The various codes were also revised to ensure, for example, that there was equality of treatment between man and woman.

In order to bring democracy to the economy, the US occupying force was also responsible for the introduction of new company and competition law (the latter known as "antimonopoly" law) largely based on American models.

All these new laws, both civil and common law based, were imposed on the Japanese people by those in power and they were not immediately absorbed by the Japanese populace. This is hardly surprising for these laws reflected societies which were vastly different to Japanese society which was still, in essence, a feudal state at the end of the Second World War.

It is therefore interesting to examine Japanese Law because rules and concepts have been drawn from more than one legal system and adapted to Japanese society, which has undergone many social and economic changes since the end of the nineteenth century. However, it is not so much the law itself as the Japanese attitude to the law which has excited Western attention within the last fifty years. This is not as surprising as it may initially seem: for, in asking why the Japanese people resort to law less frequently than most Western nations (or Hong Kong Chinese or Taiwanese for that matter), one is drawn into more problematic areas, involving an examination of the role of the law in society and its interreaction with societal controls.

THE USE OF LAW IN JAPAN

Law appears to take a less prominent role in Japan than in Western societies. It is well known that the Japanese resort to litigation much less frequently than Western nations in settling disputes[7]. It has also been observed that Japanese businesses more frequently rely on oral contracts and, if contracts are in writing, they tend to be simpler and less detailed than Western models. In particular, rather than using an arbitration clause in a written contract, it is usual for the parties to provide that, in the event of a dispute, the parties must negotiate in good faith[8]. This type of clause should not be confused with an arbitration clause, which is so popular with Western companies. In arbitration, an arbitrator will normally apply the law alone (unless the law of contract or the arbitral rules chosen by the parties provide otherwise) to arrive at a decision in favour of one party or another: in contrast, the typical clause in a Japanese contract is asking the parties to negotiate and it is implicit that the parties will not consider the law alone, if at all, but will make mutual concessions to arrive at a solution which both are prepared to accept[9].

[6] See *ibid*, p.178 *et seq*, for a detailed explanation of the academic and parliamentary debate which led to the rejection of the French draft of the civil code in 1890.

[7] For detailed figures see, e.g. Hideo Tanaka, "The role of law and lawyers in Japanese Society" from H. Tanaka "The Japanese Legal System", 254 at 255.

[8] Kawashima, "The Legal Consciousness of Contract in Japan" from Henderson and Haley, "Law and the Legal Process in Japan" (1978) 841 *et seq*.

[9] For a more general discussion of mediation and arbitration, see Peter Stein, "Legal Institutions" (1984) 5-7.

When one turns to examine Japanese criminal law, one discovers that the law is applied in a more limited way than in Western societies. Where a relatively trivial crime has been committed, the police openly exercise a discretion in deciding whether to prosecute, taking account of whether the offender is apologetic and contrite[10]. More serious crimes must be referred by the police to the prosecutor. However, according to Article 248 of the Code of Criminal Procedure of 1948, the prosecutor can exercise a discretion whether to prosecute[11], however serious the crime. This wide discretion to allow even a murderer, for example, to escape punishment is explained by the fact that the Japanese place emphasis on correction and rehabilitation rather than punishment or retribution. If it is clear that the offender is apologetic and unlikely to re-offend because of age, social circumstances etc., then it is considered preferable that the offender should be absorbed back into the community where societal pressures (from his family, for example, or from his position in a company) should ensure that he subsequently conforms to socially acceptable conduct.

Having demonstrated that law does play a more limited role in Japanese society, one inevitably has to ask the reasons for this. In attempting an answer, a more detailed examination of why Japanese people resort to litigation less frequently is necessary.

RESORT TO LITIGATION

Various writers, in discussing the low level of litigation in Japan, have looked to cultural factors for an explanation. Attention is drawn to the fact that conciliation was the norm throughout the Tokugawa period[12] and Shinto, the native religion in Japan, is based on a belief in harmony. In particular, Kawashima has argued that litigation is disliked because it recognises and admits the existence of a dispute and leads to a clear cut decision of who is right or wrong according to universalistic standards which cannot take into account the particular circumstances of the parties involved[13]. He has stated that, within a social group, it is expected that those lower in the social hierarchy are expected to defer to their superiors in the expectation that their superiors will make concessions, whilst those of equal status have a flexible relationship and the application of fixed universalistic standards would not suit such a relationship. Kawashima has suggested that disputes are less likely to be solved by conciliation where either there is a dispute between social groups or a disagreement occurs in the tense relations between usurer and debtor[14]; in other words, it is more likely that the parties will litigate where social control is weak and where no tradition of harmony exists. Kawashima concluded that there would be increasingly more resort to litigation as traditional values become less influential.

However, Kawashima's writings have been severely criticised by Haley, who argues convincingly that the idea that the Japanese are reluctant to litigate is a myth[15]. Haley's view is that conciliation has been desired by successive governments in Japan and

[10] David H. Bayley, "The Individual and Authority", from Henderson and Haley, "Law and the Legal Process in Japan" (1978) 740 *et seq.*

[11] Technically, prosecution is "suspended": for further details see B. J. George, "Discretionary Authority of Public Prosecutors in Japan" Law in Japan (1984) 42-72. See further Dando, "System of Discretionary Prosecution in Japan", 18 American Journal of Comparative Law (1970) 518-531; M. Koyama "Prosecuting — Japanese style" New Law Journal (1991) 1267.

[12] The Shoguns actively discouraged litigation by a variety of mechanisms: see Henderson, "The Evolution of Tokugawa Law" in Henderson and Haley, "Law and the Legal Process in Japan" (1978) 4 at 22 *et seq.*

[13] Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan" in Tanaka, "The Japanese Legal System" 269 at 277.

[14] *ibid,* at 279 *et seq.*

[15] John O'Haley, "The Myth of the Reluctant Litigant", Journal of Japanese Studies (Summer, 1978) 306-322.

and this explains why laws providing for conciliation of disputes were introduced from the 1920s onwards. He also suggests that the governments have done nothing to remove the various obstacles to litigation.

Certainly, it is true that past governments, referring to the traditional Japanese respect for the spirit of "harmony" (wa), passed a series of conciliation laws from the 1920s onwards which were subsequently consolidated in the Domestic Proceedings Act 1947 and the Conciliation of Civil Affairs Act 1951. Similarly, after a number of major pollution cases were litigated in the 1960s, the government passed the Law for the Resolution of Pollution Disputes in 1970 which provided for the mediation schemes administered by the Prefectural Pollution Review Board, whose members are appointed by local government officials and who are generally law professors, professional lawyers or retired judges. It is interesting to note that the government stated that the mediation schemes were consistent with Japanese tradition; nevertheless, there is incontrovertible evidence that the 1970 law was a compromise to appease businesses which had objected to the imposition of a strict liability law with compensation determined by the courts as in any other tort dispute[16].

Nevertheless, it should be emphasised that conciliation in civil cases is optional (although for contested divorces, it is a necessary first stage) and the parties are not obliged to accept a suggestion by the conciliation committee. Either party can request conciliation (Chotei) prior to trial, or the judge may refer a matter to conciliation once the proceedings have begun. The conciliation committee will consist of two lay commissioners plus the judge, although in practice the judge is usually absent until the final hearing. Parties frequently do accept the suggestions of the conciliation committee and, if they do, the agreement by conciliation subsequently becomes effective like a judgment[17]. Conciliation is very popular in Japan, particularly in the lowest courts, the courts of Summary Jurisdiction[18]. However this popularity may be accounted for by the difficulties that a person who wishes to use the Japanese courts must face.

Potentially the most difficult problem, in my view, is the relatively small number of professional lawyers (bengoshi) in Japan, who are concentrated in the larger cities. As Oda points out, "There are only about 12,000 attorneys in Japan to serve a population of 110,000,000 compared with some 45,000 in the UK with a population of some 56,000,000."[19] The number of professional lawyers is directly controlled by the government. All practising lawyers (including judges and prosecutors) have had to complete a two year apprenticeship at the Legal Training and Research Institute after passing a national judicial examination. As the number of applicants has increased, the pass rate has dropped and has been under 2% since 1974[20]. The government pays a stipend for those who attend the Institute and has used budgetary constraint as a reason for not allowing more than six hundred applicants to pass each year[21]. Haley comments that "The failure of Japan to provide more judges and lawyers has been clearly a matter of governmental policy,"[22] whilst Kawashima comments "The fairly small number of lawyers in Japan relative to the population and

[16] Frank K. Upham, "Law and Social Change in Postwar Japan" (1987) at 56 *et seq.*
[17] For details see H. Tanaka, "Conciliation", in Tanaka, "The Japanese Legal System" at 492.
[18] Hiroshi Oda, "The Land of the rising lawyer" Financial Times, 20 August 1987.
[19] *ibid.* However, in comparing figures, one should note that a number of matters dealt with by lawyers in the UK are not dealt with by lawyers in Japan: for example, divorces are registered in the Family Register and are seen as an administrative matter rather than a legal one.
[20] For figures see Hakaru Abe, "Education of the Legal Profession in Japan", in Tanaka, "The Japanese Legal System" 566 at 567.
[21] Reluctantly increased from 500 by the Japanese government in 1990.
[22] Haley, *ibid* at 319.

the degree of industrialisation suggests that people do not go to court so frequently as in Western countries and that the demand for lawyers' service is not so great."[23] In order to break away from this "chicken and egg" debate, one must comment that the public need for lawyers has not been so great as to persuade the government to allow more lawyers to qualify. Moreover, although established lawyers can pick and choose their clients, those newer to the profession, totally reliant on recommendations since advertising is not allowed, may find themselves under-employed[24]. It should also be pointed out that the relatively small number of lawyers has not as such led to enhanced prestige, as might perhaps have been anticipated. Nevertheless, it is apparent that if a potential litigant lives outside the big cities, the problem of access to a lawyer is a big stumbling block.

A further problem, but a less convincing one in my view, is the fact that there are delays in having the case decided. A case taken to a District Court, which hears the more serious cases at first instance rather than the Summary Court, may take approximately 13 months to be decided. This is not particularly long although, if it is appealed to the High Court and Supreme Court, the case will take on average five years to be decided, although a small proportion take much longer. The delay is caused partly by the relatively small number of judges and partly by the discontinuous trial process where the parties, rather than having their "day in court" as in this country, have their cases reviewed at approximately monthly intervals. However, as countries such as France and Germany have a discontinuous trial process with consequent delays as a result, delays in Japanese courts do not in themselves seem a strong reason in considering the relative lack of litigation in Japan.

Haley also argues that the Japanese courts have no equivalent to the common law power of contempt: although prosecutors can initiate criminal proceedings if necessary, Haley considers this a cumbersome and impractical approach[25]. He argues that lack of effective enforcement measures encourages the Japanese to resort to social controls instead[26].

Finally, it should be noted that legal fees are high and, even if a party wins a case, the cost of legal fees cannot be recovered from the losing party. The rule that the legal fees cannot be recovered from the losing party may not in itself discourage litigation in Japan; in the United States the same rule applies in general and does not discourage litigation and, in fact, can be seen to encourage litigation taking account of the fact that the U.S. lawyer is likely to be paid on a contingency fee basis. Nevertheless, in Japan, where legal costs are high and contingency fee agreements are not accepted, where there is a shortage of lawyers and possible delays in the court, Oda's comment is persuasive that ". . . it is not so much an ingrained 'non-litigiousness' as a rational cost-benefit judgement which keeps the ordinary Japanese away from the courts."[27]

HOMOGENEITY OF JAPANESE SOCIETY

In considering the reasons for the more limited role of law in Japanese society, it is

[23] Kawashima, *ibid* at 280.
[24] Oda, *ibid.*
[25] Haley, *ibid* at 320. See also Haley, "Legal vs Social Controls", Law in Japan (1984) 1 at 2.
[26] Haley, "Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions", Journal of Japanese Studies 8:2 (1982) 265 at 275.
[27] Oda, *ibid.*

important to refer to the fact that Japan is an unusually homogenous society with certain rules of social behaviour expected of individuals. This is due to historical and geographical factors: Japan is isolated from the Asiatic continent and has not engaged in a series of wars throughout its history as Western relations have and there has also been the long period of isolation during the Tokugawa period. Also, for most of its history, approximately 85% of the Japanese people have farmed the land and the tight agricultural schedule which was necessary in growing rice gave Japanese people "a sense of the unity of all people of the nation"[28]. It is evidenced by the fact that Koreans, brought to Japan in large numbers during the Second World War to replace the many Japanese workers fighting in the war, have never been absorbed into Japanese society. More surprisingly, there are a group of Japanese (called "burakumin": "hamlet people") who have traditionally been discriminated against because their families have been employed in demeaning jobs such as butchering animals, the leather trade, etc., contrary to the Buddhist prohibitions on taking the lives of animals: this discrimination still continues and people from these communities cannot obtain jobs with big companies and there is strong societal pressure on young people to ensure that an ordinary Japanese person does not marry a burakumin[29].

Such a strong homogeneity of thinking[30] assists in explaining why the Japanese are often described as "group conscious". When Japan was primarily an agrarian society, the group was the family unit. Nowadays, the group is typically the large company: the company usually provides housing and other benefits for its employees who feel an emotional attachment to the company[31].

This notion of "group consciousness" may help the observer to understand why, in Japanese law, the enforcement of economic laws such as the Antimonopoly Act of 1947 depend upon criminal and administrative sanctions rather than relying upon individual suits[32].

The close relationship between the Japanese people also helps to explain the limited role of law[33]. It is interesting to observe that police stations ("Kobans") are small and locally situated as this makes the police familiar in neighbourhoods and assists in creating close ties with the populace. However, there is considerable social distance between the police and the Korean community, and although some understanding exists between the police and burakumin, definite tension still exists[34]. One can see that it is easier for the police to exercise their discretion not to prosecute where there is a relatively close relationship between the police and the offender, the offender showing a willingness to accept social norms by admitting his guilt and apologising.

The Japanese concern to establish a good understanding with prospective business partners also helps to explain the "negotiate in good faith" clause: in any society, if

[28] Isaiah Ben-Dasan. "The Japanese and the Jews", in Tanaka "The Japanese Legal System" (1976) 286 at 289.

[29] See further: E. Ames, "Police and Community in Japan" (1981) 94 *et seq.*

[30] See further: Yosiyuki Noda, "Characteristics of Japanese Mentality" in Tanaka "The Japanese Legal System" 295 *et seq.*

[31] Nakane, "Criteria of Group Formation" Japanese Society (1970) 1-22.

[32] See further: H. Tanaka and A. Takeuchi, "The Role of Private Persons in the Enforcement of Law"; Tanaka "The Japanese Legal System" 331-352.

[33] For a broader discussion, suggesting that law varies with relational distance, see D. Black, "The Behavior of Law" (1976) 40-46.

[34] See Ames, *ibid.* For a Western comparison see D. Black, "The Manners and Customs of the Police" (1980) "Dispute settlement by the Police" 109-192. See further Henry Lundsgaarde, "Murder in Space City: A Cultural Analysis of Houston Homicide Patterns" (1977) 56 *et seq.*

companies expect to have a continuing business relationship, they are less likely to insist on their strict legal rights[35]. In Japanese society, where there is a great emphasis on having a trustworthy reputation so that personal introductions become all important, relationships between businesses tend to be closer as a result. However, in a society where there are obstacles to litigation and sanctions are not as effective as their common law counterparts, there is every reason for a business to spend more effort in acquainting itself with a prospective business partner rather than having to run the risk of litigation subsequently.

ALTERNATIVES TO LAW

Without law or without sufficient law, a society may resort to various forms of social control[36], such as ostracism, in order to control its members.

What one can see operating in Japan is a mixture of legal and social controls. There are not only social controls in the criminal sphere which influence the exercise of police and prosecutional power to prosecute, but also in the civil sphere. For example, ostracism is practised by the Japanese financial clearing house to ensure that no-one reneges on a promissory note or cheque: it has a rule that no bank can transact business of any type with any individual or firm that defaults twice on promissory notes and cheques; as businesses need a bank account to stay in business this practice ensures that promissory notes and cheques are usually honoured[37].

Another form of social control, in a society where a trustworthy reputation is all important, is adverse publicity. Adverse publicity can lead to loss of 'face' and damaged reputation. Adverse publicity has been sought by the plaintiffs' lawyers in the thalidomide[38] and pollution[39] cases in the 1960s, and in more recent cases[40], to put pressure on the defendants, and to attempt to achieve a consensus in the community on a particular issue to put political pressure on the government.

Where less emphasis is placed on the role of law, both negative and beneficial effects can be produced. The negative effects can be seen in reading of the violent behaviour of the frustrated victims of pollution towards the employees of the responsible companies after the companies initially denied liability[41]. However, there may be beneficial effects as well, as illustrated by the work of the Japanese Civil Liberties Bureau.

The Civil Liberties Bureau was established in 1948 with the active encouragement of the US Occupation Force who hoped that it would lead people to assert their individual rights, particularly against the government. Ironically, less than 1% of the complaints received by the Bureau consist of such complaints: the vast majority of complaints relate to "social rights" involving, for example, parents' complaints about the disrespectful behaviour of their children towards them, or people complaining about unfriendly or selfish neighbours, etc. In other words, a large number of these grievances could not be taken to court if the complainants lived in a Western society and, what is more, there would be no formal

[35] See e.g. S. Macaulay, "Contract Law amongst American Businessmen" in "The Social Organisation of Law" (1973) by D. Black and M. Mileski, 75-94.
[36] See Stein, *ibid* 7-12.
[37] Haley, "Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions", *ibid* at 277.
[38] See "Diary of the Plaintiff's Attorney's Team in the Thalidomide Litigation", Law in Japan Vol. 8 (1975) 136.
[39] Upham, *ibid*, Chapter 2.
[40] Haley, "Introduction: Legal vs Social Controls" *ibid* 5-6.
[41] Upham, *ibid.*

body provided to offer counsel and mediation to the complainant. The main function of the Bureau is, therefore, to encourage people to conform to expected norms of behaviour and, although the Bureau has no formal enforcement powers, it is remarkably effective because the Commissioners are older, respected members of the society who rely on persuasion, publicity and conciliation in resolving most complaints[42].

Alternatives to law can therefore fulfil a useful function. Mediation and conciliation is used in various informal ways in Japanese society: for example, a third party is likely to attempt to mediate when a husband and wife are considering divorce, and the police are frequently used as mediators in all types of dispute[43].

The advantage of mediation and conciliation is that, because some sort of realistic compromise is likely to be agreed, they are less likely to leave one of the parties feeling bitter and resentful[44]. In particular, if conciliation is requested by a party in a civil case, the Conciliation of Civil Affairs Act 1951 provides that the Commissioners should determine the legal position and then apply common sense in trying to achieve a settlement. This allows a flexible, individualistic response to a dispute. Also, because the Japanese place so much emphasis on apologies in their culture, legal resolutions of disputes in court are, in certain cases such as the pollution cases, particularly unsatisfactory[45]. In the pollution cases, the victims were more concerned to receive an apology than compensation.

Mediation and conciliation play only limited roles in a number of Western societies; their use is increasing but clearly they could be used more extensively. If pressures on the courts in England and in the U.S. continue to mount, the introduction of optional or compulsory mediation or conciliation appears inevitable[46]. It is interesting in this context to note that Fujikura has suggested that Americans resort to litigation frequently because there are few other means or devices that allow parties to discuss their problems together[47].

CONCLUSION

Law is clearly a vital tool for regulating rights and duties between people within a complex society and for establishing norms of behaviour. Without law, not merely peaceful forms of social control such as ostracism might be used but also violent forms of social control where one individual or group imposes its will through force. A perfect system of law would ensure that a weaker party is always protected and in the civil law this is dependent upon easy and affordable access to the courts with effective remedies available. If such a system of law was then supplemented by mediation and conciliation, a complainant

[42] Joel Rosch, "Institutional Mediation: The Evolution of the Civil Liberties Bureau in Japan" Law and Society Review, Vol. 21 Number 2 (1987) 243 *et seq.*

[43] Henderson, "Modern Japanese Analogies to Tokugawa Conciliation" in "Conciliation and Japanese Law: Tokugawa and Modern" Vol. II (1965) at 191 *et seq.*

[44] For a discussion of mediation in African societies which refers to their potentially therapeutic effect on the parties in dispute, see e.g. James L. Gibbs "Two Forms of Dispute Settlement among the Kpelle of West Africa" in Black and Mileski "The Social Organization of Law" 368 *et seq.*

[45] Upham, *ibid* at 40.

[46] Mediation is now extensively used in divorce actions in England, although the mediation will be lawyer-dominated; see "Mediation — an addition to the judicial repertoire" by G. Davis, New Law Journal (1991) at 396. In the U.S. federal courts, settlements at pre-trial conferences are encouraged, see S. Hashimoto, "Participatory Value in Settlement Conferences", Ritsumeikan Law Review (1991), 15.

[47] Koichirio Fujikura "A Comparative View of Legal Culture in Japan and the United States" Law in Japan (1983) 129 at 131.

could then choose the most appropriate form of dispute resolution and there could be no suggestion that the complainant was in effect being forced to use mediation or conciliation because of a lack of a satisfactory alternative. No society has entirely achieved such a perfect system: however, the problem with the limited role which law plays in Japanese society is that it is not clear that the social controls are always used fairly and impartially[48] and it is not clear to what extent mediation can lead to oppression of the weaker party.

[48] For example, the prosecutor's discretion to prosecute, which is subject to procedural safeguards and which is generally exercised impartially, is potentially unjust in taking account of the defendant's social background. See the case of **Japan v Fukumoto** in B. J. George's article, *ibid*, at 69.

JACKSON v HORIZON HOLIDAYS — A CASE OF MISTAKEN IDENTITY?

John Hodgson*

THE CASE ITSELF

In November 1970 Julian Jackson booked a holiday for himself, his wife and family in Ceylon (Sri Lanka) with Horizon Holidays. The holiday cost £1,200 and took place in January 1971. It was a disaster. The original hotel was not finished and the substitute was sub-standard. The children's room suffered from mildew and fungus, bed linen was dirty, advertised facilities (including a swimming pool) were non-existent. The food was monotonous and distasteful. On his return Mr. Jackson sued Horizon for breach of contract. Liability was admitted. The judge awarded damages of £1,100 and the Court of Appeal affirmed the award[1]. Some of Lord Denning's *dicta* have been disapproved by the House of Lords[2] although the decision itself was not criticised[3]. The case has been little cited or commented on. So why single it out seventeen years on for an "expanded case-note?" The objective of this note is to seek to demonstrate that this case might be more appropriately categorised as a case in tort and to explore some aspects of the interrelationship between contract and tort which it exemplifies.

The leading judgment in *Jackson* is that of Lord Denning MR, who alone addresses the issue of

> "the legal position when one person makes a contract for the benefit of a party. In this case it was a husband making a contract for the benefit of himself, his wife and children. Other cases readily come to mind. A host makes a contract with a restaurant for a dinner for himself and his friends. The vicar makes a contract for a coach trip for the choir. In all these cases there is only one person who makes the contract"[4]. If the venture is a disaster can that contracting party recover only for his own personal loss and (where recoverable)[5] distress, discomfort and vexation, or can he recover on behalf of the other affected persons. The judge at first instance[6] had ruled that he could not: "...the damages are the Plaintiff's; ... I can consider the effect upon his mind of his wife's discomfort, vexation and the like, although I cannot award a sum which represents her vexation."[7]

He did not apportion the award between diminution in value of the holiday and distress, although Lord Denning favoured the division suggested by counsel for the Plaintiff of £600 (50% of the price) for diminution, and £500 for distress. The Defendant's appeal was essentially on the basis that the award for distress could only be to compensate the Plaintiff himself and was excessive for that purpose. James LJ was indeed content to decide the case on the basis that this was a contract "...made by Mr. Jackson for a family holiday. The judge found that he did not get a family holiday. The costs were some £1,200. When he came back he felt no benefit...I am quite content to say that £1,100 awarded was the right and proper figure in those circumstances."[8] However Lord Denning felt able to go beyond this; referring back to his examples, he said: "What is the position when such

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[1] [1975] 3 All ER 92 CA

[2] *Woodar Investment v Wimpey Construction* [1980] 1 All ER 571 HL

[3] *ibid* at p. 576 (Lord Wilberforce), 585 (Lord Russell)

[4] *ubi supra* p. 95 d-e

[5] In general damages in contract reflect only pecuniary or tangible loss, but in a limited class of cases where the contractual performance includes an element of non-pecuniary benefit, such elements will, where not provided, attract an award of damages; c.f. *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71

[6] His Honour Judge Fay QC sitting as a deputy High Court Judge

[7] *ubi supra* p. 95c

[8] *ibid* p. 96g

a contract is broken? At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit. But when that one does sue, what damages can he recover? Is he limited to his own loss? Or can he recover for the others? ... Only the father or the host or the vicar can sue. He can, of course, recover his own damages. But can he not recover for the others? I think he can."[9] Lord Denning then proceeds to state that the one Plaintiff can recover in respect of pecuniary and non-pecuniary loss for the others and will hold that element of his damages on their behalf. He expressly stated "that the figure of £1,100 was about right. It would, I think, have been excessive if it had been awarded only for the damage suffered by Mr. Jackson himself. But when extended to his wife and children, I do not think that it is excessive."[10] Orr LJ agreed with Lord Denning, and this is therefore clearly on normal principles the *ratio decidendi* of the case.

THE LAW AS STATED IN JACKSON

Lord Denning clearly had in mind orthodox contract law doctrine; there was no privity of contract between the other members of the Jackson family and Horizon Holidays, nor had they given any consideration. Orthodoxy therefore excluded any remedy for them. What he proceeds to suggest is a novel concept of a contract *in favorem tertii* (for the benefit of a third party):

> "It would be absurd to say that the twins of three years old were parties to the contract or that the father was making the contract on their behalf as though they were principals. It would equally be a mistake to say that...there was a trust. The transaction bears no resemblance to a trust. There was no trust fund and no trust property. No, the real truth is that...the father...was making a contract himself for the benefit of the whole party. In short, a contract by one for the benefit of third persons."[10a]

Lord Denning proceeds to support his proposition by reference to a dictum of Lush LJ in *Lloyd's v Harper*[11], which he treates as authority for a general right to recover "all that [the third party] could have recovered if the contract had been made with [him]."

JACKSON CONSIDERED

The correctness both of the treatment of this type of contract and of the general proposition were considered by the House of Lords in *Woodar Investment v Wimpey Construction*[12]. The general proposition was unanimously rejected:

> "I cannot agree with the basis upon which Lord Denning MR put his decision in *[Jackson's]* case. The extract on which he relied from the judgement of Lush LJ...was part of a passage in which Lush LJ was stating as an 'established rule of law' that an agent...may sue on a contract made by him on behalf of the principal...if the contract gives him such a right, and is no authority for the proposition required in *Jackson's* case, still less for the proposition, required here, that, if Woodar made a contract for a sum of money to be paid to Transworld, Woodar can, without showing that it has itself suffered loss or that Woodar was agent or trustee for Transworld, sue for damages for non-payment of that sum"[13].

[9] *ibid* p. 95g-h
[10] *ibid* p. 96c
[10a] *ibid* p. 95e-f
[11] (1880) 16 Ch D 290 at p. 321
[12] *ubi supra*
[13] per Lord Wilberforce at pp. 576g-h, 577a

The actual decision was however upheld, although with varying degrees of enthusiasm "either as a broad decision on the measure of damages (per James LJ) or possibly as an example of a type of contract...calling for special treatment."[14] "[T]he plaintiff had bought and paid for a high class family holiday; he did not get it, and therefore he was entitled to substantial damages for the failure to supply *him* with one. It is to be observed that the order of the Court of Appeal as drawn up did not suggest that any part of the damages awarded to him were 'for the use and benefit of' any member of his family."[15] Lord Wilberforce at least was well aware that this was not a satisfactory situation and indicated a need for flexibility to deal with a sometimes over-rigid system of contract law[16]. Lord Salmon, Lord Keith of Kinkel and Lord Scarman all suggested that the present law governing the recovery of damages for the benefit of third parties was unsatisfactory, and should be reviewed by the House in an appropriate future case. However no such case has yet arisen for decision.

THE TORT DIMENSION

On the face of it however, this is a contractual situation, raising a vexed issue in the law of contract; what connection is there with the law of tort? Ever since the decision of the House of Lords in *Donoghue v Stevenson*[17] it has been accepted that liability in negligence is based on a duty of care, the conditions for the existence of which can be found by application of the "neighbour principle". The key passage occurs in the speech of Lord Atkin[18]

> "Who, then, in law is my neighbour? the answer seem to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act".

Although this principle was not much remarked on for a number of years following 1932 it was restored to prominence in 1970 by Lord Reid in *Home Office v Dorset Yacht Company Ltd*[19]

> "In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v Stevenson* may be regarded as a milestone and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come where we can and should say that it ought to apply unless there is some justification or vital explanation for its exclusion."

In 1977 Lord Wilberforce took the same line of argument to its conclusion in *Anns v Merton London Borough*[20].

[14] *ibid* p. 576f
[15] per Lord Russell at p. 585c
[16] at p. 576f-g
[17] [1932] AC 562 HL
[18] at p. 580
[19] [1970] 2 All ER 294 at p.297 HL
[20] [1977] 2 All ER 492 at p. 498 HL

"The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first case is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it ought to give rise."

ANNS UNDER ATTACK

This formulation has however attracted substantial criticism by the House of Lords and the Judicial Committee of the Privy Council in a number of cases in the last couple of years. The basis of this criticism is that the Wilberforce formula lays too great stress on foreseeability of harm as the touchstone for the existence of a duty of care at the expense of the nature of the relationship between the parties with the result that too many cases where liability ought (in the opinion of the court) to be excluded will satisfy the first limb of the test, leaving the defendant in effect with the burden of demonstrating that there are policy grounds for negativing the duty. It will suffice to refer to the judgment of the Judicial Committee[21] in *Yuen Kun Yeu v A-G of Hong Kong*[22].

"Their Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater that it merits, and greater perhaps than its author intended...Foreseeability of harm is a necessary ingredient of [a relationship apt to give rise to a duty of care], but it is not the only one...The speech of Lord Atkin stressed not only the requirement of foreseeability of harm, but also that of a close and direct relationship of proximity."

Lord Keith goes on to make it clear that the "primary and all-important matter"[23] in all such cases is whether such a relationship exists, and the second or public policy aspect will be applicable only in "a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability".[24] In *Yuen Kun Yeu* itself the only relationship between the plaintiffs and the Registrar of Deposit-taking Companies was that existing between the Registrar and any investor or potential investor in any regulated company. Their Lordships found little difficulty in holding that this relationship lacked the elements of close and direct proximity.

[21] Delivered by Lord Keith
[22] [1987] 3 WLR 778
[23] *ibid* at p. 783A-F, 785 H
[24] *ibid* at p. 785 B

ADDENDUM

THE ATTACK PRESSED HOME

This process has continued subsequently. The actual decision in *Anns* was overruled by the House of Lords in *Murphy v Brentwood DC*[25], although the two stage test was not itself discounted. The question of the approach to be taken to the extension of liability in tort was fully considered by the House of Lords in *Caparo Industries plc v Dickman*[26]. This was a case where the buyer of a company sued the auditor, alleging that the published audited accounts of the company, which the plaintiff received as an existing shareholder, had been negligently prepared in breach of a duty of care owed by the defendant auditor to those to whom the accounts were distributed. The action failed. The House of Lords declined to find a duty of care. Lord Bridge pointed out that Lord Atkin himself, in *Donoghue v Stevenson*[27], was seeking a unifying principle to link the multiplicity of discrete duty situations which had been recognised before 1932. After giving an account of the rise and fall of the two stage test he outlined what the judges now require:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in [the cases] that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."

His Lordship then proceeds to cite with approval a dictum of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman*[28]

> "It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed."

This approach is coupled with a differentation of the types of harm which may be claimed for, so that a higher duty may be owed in relation to physical as opposed to economic loss. Lord Roskill also prefers to deal in categories of case rather than "somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty."

[25] [1990] 2 All ER 908 HL
[26] [1990] 1 All ER 568 HL
[27] [1932] AC 562 at p. 579-80
[28] (1985) 60 ALR 1 at p. 43-44

Lord Oliver lays some stress on the concept of proximity, although again expressly describing it as a label rather than a definition. However he regards proximity as subsuming foreseeability of harm, closeness of relationship and also the policy question of whether it is just and reasonable to impose liability. This has all to be seen, in his Lordship's opinion, against a background of the nature of the harm and the extent of potential risk. He contrasts the contaminated ginger beer which harms only one person, with the misleading statement which may enjoy a huge, and unpredictable, circulation. Lord Goff in *Davies v Radcliffe*[29] saw proximity in a similar way, but laid greater stress on it as a test; it was:

> "[an] expression which refers to such a relation between the parties as renders it just and reasonable that liability in negligence may be imposed on the defendant for loss and damage suffered by the plaintiff by reason of the act or omission of the defendant of which complaint is made."

WHERE WE STAND NOW

It is not the purpose of this article to analyse in depth the current approach to the existence of a duty of care, but some comments are necessary.

It is certainly the case that incidents provoking physical harm tend to be self-limiting in a way that incidence provoking nervous shock or economic loss are not. This is not inevitably the case as incidents such as Chernobyl, Seveso and the Bhopal chemical plant explosion demonstrate. It is clearly right to afford a high level of protection to life and health, but why should wealth be protected more jealously against damage to its tangible manifestations than to its intangible ones? In other words some of the aspects of proximity stressed by the judges may not reflect the views of society or the realities of modern industrial activity.

This having been said, it can be argued that the new concept of proximity is little different in substance from either Lord Atkin's original neighbour principle or the two-stage test. It can be argued that there is now a three stage test — foreseeability, neighbourhood and "just and reasonable"; does this add anything of substance or is it merely a redefinition designed to indicate to plaintiffs that the courts are now less receptive to novel claims than they were?

The alternative or Brennan approach is a rather different matter. In asserting that each novel claim must be dealt with on its merits, and denying that there is any underlying principle of liability the judges are in essence asserting that either:

> — Extending or refusing to extend liability is a matter of pure discretion or policy; in other words there is no room for the doctrine of precedent and each case is decided *ex aequo et bono,* or
>
> — There is a principle at work, which the judges take account of privately, but which they are not willing to articulate for the benefit of potential litigants, for fear of encouraging a flood of unmeritorious claims.

Accepting the first conclusion involves accepting that the judges have abandoned the philosophical basis of the common law, namely that the law exists, and the judges merely declare its application to the facts before them. This is the whole basis of the doctrine of *stare decisis,* and if it is to be abandoned, it should surely not be in this hole and corner way. The alternative hypothesis is less pregnant with implications of principle, but does prompt the observation that in protecting the tenderness of their consciences, the judges are signally failing to supply that clear guidance as to the parameters of liability which

[29] [1990] 2 All ER 536 at p. 540 PC

is essential to legal advisers wishing to advise clients whether to commence or resist proceedings. Thus paradoxically the desire to restrict areas of liabilty is likely to lead to more litigation.

It is certainly plain that none of the current orthodoxies is likely to look kindly on an extension of liability in tort to a new field, although it is still almost ritually asserted that the categories of negligence are never closed.

There were however two earlier decisions in which the same issue had been raised; the first was *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[30] which established that, in principle, there will be liability in tort for the consequences (including economic loss) of negligent false statements, at all events where there was reliance on the defendant's professional or expert judgment and a voluntary acceptance of risk. Lord Devlin expressed the proposition in the following terms: "I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be general or particular...I regard this proposition as an application of the general conception of proximity."[31] The second case was *Junior Books Ltd v Veitchi Co Ltd*[32] The facts of the case were that the pursuer was the owner of a factory, and during the course of the construction thereof the defender had, as a nominated sub-contractor but with no privity of contract with the pursuer, carried out work to the floor. This was allegedly defective and the pursuer claimed to have suffered as a result loss which the House expressly regarded as being purely economic.[33] Rather than suing the main contractor in contract, the pursuer claimed against the defender in tort, and succeeded, at all events on the preliminary point of relevance.[34] The principal speech was that of Lord Roskill, who expressly referred to the *dicta* cited above from *Hedley Byrne, Dorset Yacht* and *Anns* before going on to "look for the reasons why, it being conceded that the appellants owed a duty of care to others not to construct the flooring so that those others were in peril of suffering loss or damage to their persons or their property, that duty of care should not be equally owed to the respondents, who, though not in direct contractual relationship with the appellants, were as nominated sub-contractors *(sic)* in almost as close a commercial relationship with the appellants as it is possible to envisage short of privity of contract, so as not to expose the respondents to a possible liability to financial loss for repairing the flooring should it prove that the flooring had been negligently constructed."[35] In the event, he found none; after stating that he regarded

> "the following facts as crucial...: (1) the appellants were nominated sub-contractors;

[30] [1963] 2 All ER 575 HL
[31] *ibid* at p. 611
[32] [1982] 3 All ER 201 HL
[33] per Lord Keith at p. 205 and Lord Roskill at p. 208
[34] The Scots equivalent of disclosing a reasonable cause of action
[35] *ibid* at p. 211 c-d

(2) the appellants were specialists in flooring; (3) the appellants knew what products were required...and specialised in the production of those products; (4) the appellants alone were responsible for the composition and construction of the flooring; (5) the respondents relied on the appellants' skill and experience; (6) the appellants as nominated sub-contractors must have known that the respondents relied on their skill and experience; (7) the relationship between the parties was as close as it could be short of actual privity of contract; (8) the appellants must be taken to have known that if they did the work negligently...the resulting defects would...require remedying...as a consequence of which the respondents would suffer financial or economic loss."[36]

In the event he held that in the light of Lord Devlin's *dictum* "it seems to me that all the conditions existed which give rise to the relevant duty of care."[37] These two cases were treated by Lord Keith in *Yuen Ken Yeu*[38] as both "turn[ing] on the voluntary assumption of responsibility towards a particular party, giving rise to a special relationship." The decision in *Junior Books* has been held inapplicable to the case of a main contractor and sub-sub-contractor[39] with observations by Dillon LJ that the case "could not be regarded as a useful pointer to any development of the law", and where there is privity of contract between the parties as a result of a collateral contract, on the basis that "it would not be in accordance with present policy to extend *Junior Books* rather than to restrict it; ...the contract was significantly silent as to liability for the manner in which the work was to be executed...it would be difficult to construct a special obligation...in tort to which liabilities created by a collateral contract did not extend".[40] There is however clearly a category of special relationships which will give rise to the necessary relationship of proximity to establish liability in negligence even in the absence of physical harm. Apart from the examples already cited, a solicitor's duty to a beneficiary under a will which he has drawn is a case in point.[41]

JACKSON AS A TORT CASE

The question then is, can *Jackson* itself, and the examples suggested by Lord Denning MR of analogous situations be fairly regarded as falling into this category, and if so, does this provide a more satisfactory solution that the rather lame recourse to a contractual solution with the acceptance of a clear anomaly? It is submitted that whether one adopts the Brennan incremental approach to the existence of a duty of care or the proximity approach favoured by Lord Oliver and Lord Goff when approaching novel duty situations, these are all cases where there will be little difficulty in establishing the close and direct relationship of proximity that we are directed to look for. *Jackson* itself provides an excellent example. If normal practice were followed, the names of the entire party would be on the booking form; Horizon were clearly specialists on whom reliance was to be placed; they alone had the relevant knowledge; they knew that loss might flow and in sum "the relationship...was as close as it could be short of actual privity of contract"[42] While in some at least of the other examples the names would not necessarily be known, the other observations would seem to be equally apposite. If this be right, then there will be a *prima facie* duty of care. If one takes a case where there is no doubt that the behaviour of the defendant amounts

[36] *ibid* at pp. 213j-214b
[37] *ibid* at p. 214c
[38] *ubi supra* at p. 787G
[39] *Simaan v Pilkington Glass* [1988] QB 758.
[40] *G.N.C.S. v Cementation Piling* [1989] QB 71 per Purchas LJ.
[41] *Ross v Caunters* [1979] 3 All ER 580 CA. However the doctrine was emphatically excluded from the sphere of defective premises in *D & F Estates Ltd v Church Commissioners* HL(E) [1989] AC 177
[42] cf per Lord Roskill in *Junior Books ubi supra* at p. 214b

to a breach and where remoteness of damage[43] is not in issue, there are then two questions remaining, namely, has the duty of care been negatived, and has the plaintiff suffered harm which the law recognises as being of an appropriate kind. With respect, these are both in essence questions of policy. In *G.N.C.S. v Cementation Piling*[44] Purchas LJ recognised the cogency of the policy arguments against an extension of tortious liability: "it would not be in accordance with present policy to extend *Junior Books* rather than to restrict it...it was not only the proximity of the relationship giving rise to reliance which was crucial but also the policy of the law as to whether or not in those circumstances damages for pecuniary loss ought to be receovered." In that case the pure economic loss was held to be irrecoverable. It is submitted that a similar result could have been achieved equally easily using the *Anns* test by negativing a duty using the second stage of the test; the policy basis of the decision is just the same. It should also be borne in mind that in both the *G.N.C.S.* case and in *Simaan v Pilkington*[45] there was no reason why this loss should not have been pursued through contractual channels, and in neither case was there anything which might have pointed to the sort of assumption of a duty of care which is required to satisfy the tests proposed in *Hedley Byrne* or *Yuen Kun Yeu* to found liability. It would be idle to dispute that there is at present a strong tide of judicial opinion running in the direction of a more restrictive attitude towards liability in tort, and it really matters not whether the process of reasoning is founded upon a narrowing of the definition of duty situations or upon policy considerations. In all these decided cases we are however concerned with commercial relationships, and loss which is purely pecuniary or economic. It is certainly clear that in the words of Dillon LJ in *Simaan* "the approach of the law to awarding damages for economic loss on the ground of negligence where there has been no injury to the person or property ha[s] throughout been greatly affected by pragmatic considerations", but this must be seen in the light of the traditional view that every man is entitled to protection from the law of tort against damages to his person or property, but must buy protection against damage to his purse through the medium of a contract. With this in mind, are we driven to the conclusion that an expansion of the law of tort into our own different area is one of the "seeds of a major development of the law of negligence"[46] which are at present withering for want of encouragement, or can we make a separate and stronger case. Firstly, there is *ex hypothesi* no proper alternative remedy in contract, which is not the case in either the *Simaan* or *G.N.C.S.* cases. Secondly the nature of the claim, that is to say damages for disappointment, loss of benefit etc. is generally regarded as *sui generis;* it has only a short documented history in contract[47], and admission of such claims would not prejudice the present policy of restriction applied to pecuniary loss claims in the commercial context. Thirdly it seems that there is at least *prima facie* a perfectly respectable case for saying that the defendant has accepted a duty in the requisite sense, in entering into the underlying contract in the full knowledge that there are other persons affected thereby. While it may be an unpropitious moment to suggest the creation of a novel category of negligence, it is nevertheless submitted that the proposition is in accordance with principle and represents a justified, if minor, development.

[43] The other elements of the classic trilogy of negligence
[44] *ubi supra*
[45] *ubi supra*
[46] per Bingham LJ in *Simaan* and referring to *Junior Books*
[47] probably starting no earlier than 1970; cf *Jarvis v Swans Tours* n5 *supra*

LAW AND THE QUALITY OF LIFE: A RIGHT TO DIE?*

Craig M. Barlow**

INTRODUCTION

Courts in other jurisidictions, especially in the USA, have long been troubled by the criminal and civil liabilities incurred by the conduct of medical staff in certain circumstances. The most obviously problematic seem to be where the doctor decides to withdraw or discontinue treatment to a patient who is not yet dead or where the patient steadfastly refuses to consent to a life saving medical procedure.

The courts in England and Wales have so far largely escaped the dilemmas posed by such cases. In this article the dilemmas will be analysed with regard to both traditional and contemporary legal principles. Where appropriate a comparative study with the decisions in American Courts will be made. The problems raised are not purely legal and reference will be made to public policy, medical ethics and the allocation of resources in the National Health Service.

KILLING OR LETTING DIE?

It is trite law that the unlawful killing with malice aforethought of any human life in being, under the Queen's Peace, death resulting within a year and a day of the act or omission causing death, constitutes the crime of murder under the common law in England and Wales[1]. So put, it is hard to imagine that a trained healer in the course of *treating* his patient could be guilty of such a crime. This initial almost intuitive difficulty is overcome if one realises that some forms of treatment might have the *side effect* of shortening the patient's longevity. This could be because of the doctor's inaction or the nature of the drugs etc administered. Such a course of treatment whatever its elements will not of course constitute murder in the absence of the requisite *mens rea.* This is an intention to kill or cause serious harm. How ever much a doctor may hope or desire that the patient does not die, if he decides to bring about that consequence he will possess the necessary *mens rea*[2]. In the majority of cases however, the doctor does not decide to bring about his patient's death. It is now apparent that the intention to kill or cause serious harm to the patient may be *inferred* by the trier of fact from the doctor's actual foresight that the treatment will or is highly likely to cause such harm[3]. It may be that the trier of fact will be reluctant to draw this inference. It would appear to be a matter of discretion. It is submitted therefore that the key factor in determining a doctor's criminal liability for the death of his patient is how the treatment given to that patient is to be *characterised* and when it is and is not to be regarded as criminally culpable.

* This article is a modified and updated version of the dissertation the author submitted to Nottingham Polytechnic in 1991 for the degree of LL.B (Hons) and which subsequently won the Trent Law Journal Prize.

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[1] According to Coke, 3 Inst 47.

[2] *R v Mohan* [1976] QB 1.

[3] *R v Hancock & Shankland* [1986] AC 455. Whether foresight of serious harm as a mere risk will suffice (instead of being highly probable or a virtual certainty) seems doubtful. See *R v Walker (John)* (1989) 90 Cr. App. R. 226.

The case of *R v Dr Bodkin Adams*[4] is instructive as to the approach adopted so far by English judges. The defendant was charged with murdering some of his patients by prescribing for them palliative drugs which while reducing the pain suffered by his patients also hastened their deaths. There was some suggestion that Dr Adams was motivated to kill his patients because of bequests made to him in their testamentary dispositions. At the trial Devlin, J (as he then was) gave a direction to the jury which contained in it the following:

> "It does not matter whether her death was inevitable and her days were numbered. If her life was cut short by weeks or by months it was just as much murder if it was cut short by years. There has been much discussion as to when doctors might be justified in administering drugs which would shorten life. Cases of severe pain were suggested and also cases of helpless misery, the law knows no special defence in this category."

At first blush this direction is uncontroversial and appears to be in accordance with long standing authority[5]. However, in a medical situation such a direction is, with respect to the learned judge, unhelpful. It amounts to no more than an assertion of a conclusion without advancing any reasoned justification for it. The proper question for the courts to consider, it is submitted, is whether the acceleration of death as a result of a course of medical treatment is justifiable in some or all instances.

However Devlin, J referring to his earlier direction added:

> "... but that does not mean that a doctor who was aiding the sick and dying had to calculate in months, or even hours, perhaps not in days or weeks, the effect on a patient's life of the medicines which he would administer. If the first purpose of medicine — the restoration of health — could no longer be achieved there was still much for the doctor to do and he was entitled to do all that was proper and necessary to relieve pain and suffering even if the measures he took might incidentally shorten life by hours or perhaps longer."

This latter direction is, it is submitted, completely inconsistent with the first. If as Devlin, J asserts a doctor is not to be treated *differently* to any other defendant then it is inconceivable that where the patient's prognosis is terminal the doctor should be given a *carte blanche* to *'shorten life by hours or perhaps longer'*. Smith and Hogan[6], whilst recognising that the two directions *"... are not easily to reconcile..."* suggest that the direction taken as a whole means that the defendant's *motive* which is generally irrelevant[7] becomes a defence in 'pain relieving' cases. Any difference between the two directions quoted above is to be treated as merely a change in linguistic style. Brazier[8] appears to take this analysis one step further and argues that the direction introduces into the law a *'double effect'* principle whereby an act causing a bad consequence e.g. death might be justifiable if it also created a comparatively good one e.g. the relief of severe pain.

This latter approach would seem preferable. In analysing the 'justification' the trier of fact can depart on an avenue of investigation which permits all the surrounding circumstances such as medical ethics, the prognosis, the wishes of the patient and their relatives, the available technology and any relevant economic factors to be examined closely. On this

[4] [1957] Crim L.R 773.
[5] See e.g, per Lord Alverstone C.J. in *R v Dyson* [1908] 2 KB 454, at 457.
[6] J. C. Smith & B. Hogan, Textbook on Criminal Law 5th Ed, at 227.
[7] *R. v Sharpe* (1957) Dears & B. 160
[8] M. Brazier, "Morals Medicine & the Law" at p. 308.

view it is submitted that the emphasis correctly falls on the 'judgement' of the doctor when treating his patient and culpability thereby becomes a question of degree and social acceptability. The disadvantages of this approach are firstly; that as a matter of principle it would have to be of wide application and would inevitably include 'mercy killings' carried out by a family member etc and secondly; that it is too simplistic because it assumes that a doctor would be motivated from a *limited* number of motives whereas in truth a doctor being human and complex might act from a great number of *diverse* reasons ranging from compassion to pure greed. Moreover, this solution is for these reasons problematic on the facts of *R v Bodkin Adams* because if the defendant acted out of both a desire to relieve suffering and to receive his inheritance, the approach suggested by Brazier seems to reach either a conceptual stalemate or a socially unacceptable conclusion. It would not in any event seem likely that the law in England and Wales will develop along the lines of a *'double effect'* principle. The House of Lords has recently held that there is no defence of 'duress' to a charge of murder[9]. By analogy therefore where a doctor is faced with two evils it will not be a defence for him to select the lesser of the two. Indeed it would appear that the *'double effect'* principle has been rejected in first instance decisions.

R v Arthur[10] is a case peculiarly in point. The defendant, the late Dr Leonard Arthur, was charged with the attempted murder of a three day old Downs Syndrome baby. Dr Arthur had prescribed a course of non treatment and administered a drug which suppressed the child's appetite and impaired his breathing. The child had been rejected by his parents and having regard to his medical condition Dr Arthur concluded that it was more humane to let the child die. Farquharson, J directed the jury that the defendant's *motive* however noble it was was irrelevant in law compared to what he intended to do.

For the reasons outlined earlier, it is submitted that this approach is correct. Beynon[11] suggests that the directions given by Devlin, J could be considered as indicating that a doctor does not 'intend' a consequence *incidental* to that which he truly desires i.e. the patient's recovery or comfort. This, with respect is objectionable on the grounds that a man who plants a bomb on a plane hoping to destroy its cargo and recover the insurance monies has this object or aim as his primary intent[12]. But there can be little doubt that the fact that he realises the plane also carries a crew and that there may be loss of life is an *incidental* risk to this plan. The position of the bomber and the doctor do not therefore seem distinguishable if the 'primary' and 'incidental' analysis is adopted[13]. Both carry a risk that there will be an incidental loss of life.

On the basis of the decison of the House of Lords in *R v Hancock & Shankland*[14] the correct approach it is submitted is to consider whether the doctor actually foresaw the risk of death as a natural and highly probable consequence of the treatment.

However even if the *mens rea* for murder is established it becomes necessary to consider the *actus reus*. This was the approach adopted by the California Appeal Court in

[9] *R v Howe* [1987] AC 417.
[10] (1981) The Times, 5th November.
[11] H. Beynon, "Doctors as Murderers" [1982] Crim L.R. 17, at 18.
[12] This is the example of Lord Hailsham L-C in *R v Hyam* [1975] AC 55, at p. 74D.
[13] Lord Hailsham L-C's distinction between the bomber and the surgeon, in *R v Hyam* [1975] 55, at p. 74E-F, is difficult to understand and only appears to apply where the treatment is aimed at "survival".
[14] [1986] AC 455.

Barber v Superior Court[15]. In that case and following an operation a severely brain damaged patient was connected to an artificial respirator and intravenous tubes were inserted to supply nutrition and hydration. The prognosis was not good and after discussions with the patient's relatives the doctor decided to disconnect the patient from the respirator. Once removed from the machine however, the patient continued to breathe without intervention. A few days later the doctor removed the tubes supplying the patient with nourishment. Then receiving only nursing care the patient died.

The facts of *Barber* give rise to the irresistible conclusion that the doctor *foresaw* that the removal of nutrition and hydration from his patient would lead to that patient's death in much the same way that the removal of food and water from any other individual would result in their death. Indeed this was the reasoning adopted by the learned trial judge who concluded that notwithstanding the patient's poor prognosis *any* intentional shortening of that life constituted the *mens rea* for murder. Such a conclusion seems unassailable. However the issue on appeal was whether the withdrawal of either the artificial ventilator or the intravenous tubes was culpable.

Firstly, the Court considered that the supply of nutrition and hydration by intravenous tubes was to be considered a *medical treatment* and not be categorised as the supply of food and water. Secondly, the Court held that the termination of treatment is to be considered a non culpable *omission.*

MEDICAL TREATMENT

In deciding that intravenous nutrition is a medical treatment the court said:

> "Medical nutrition and hydration (fluids) may not always provide net benefits to patients. Medical procedures to provide nutrition and hydration are more similar to other medical procedures than to typical human ways of providing nutrition and hydration. Their benefits and burdens ought to be evaluated in the same manner as any other medical procedure."

This would seem a controversial view because it is difficult to accept the proposition that slowly starving a patient to death is preferable to the temporal harm caused by modern methods of medical nutrition. Further, it appears to suggest that where physically handicapped or paralysed persons are unable to feed themselves the provision of food and water whether by 'spoon feeding' or otherwise is also to be regarded as a medical treatment. The categorisation would appear to be a question of extent and degree.

In *Cruzan v Missouri Department of Health*[16] the Supreme Court of the United States unanimously considered that the supply of nutrition and hydration to a patient via a gastrostomy tube to be a medical treatment for two reasons. Firstly by arguing that the artificial nutrition of a person is *analagous* to the artificial ventilation and circulation of the patient's body. This approach, with respect, seems susceptible to criticism on the grounds that the supply of nutrition is distinguishable from the ability of the patient's cardiovascular system to operate. The latter is clearly an automatic almost thought passive function the cessation of which will rapidly lead to death. Whereas the former requires a conscious act of ingestion and may be suspended for relatively long periods of time. The

[15] 195 Calif. Rptr 484 (1983).
[16] 110 S. Ct. 2841 (1990).

second and it is submitted stronger ground was put by Brennan, J[17] as follows:

> "No material distinction can be drawn between the treatment to which [the patient] continues to be subject — artificial nutrition — and any other medical treatment...The technique to which [the patient] is subject — artificial feeding through a gastrostomy tube — involves a tube implanted surgically into her stomach through incisions in her abdominal wall...Typically, and in this case, commercially prepared formulas are used, rather than fresh food...The type of formula and method of administration must be experimented with to avoid gastrointestinal problems...The patient must be monitored daily by medical personnel as to weight, fluid intake and fluid output; blood tests must be done weekly."

It is suggested that in the age of microwave meals the use of commercially prepared foods and mixtures instead of fresh food is not a significant distinguishing feature. The emphasis on Brennan, J's approach is on the *method* used to supply food and water to the patient. If the method is necessarily invasive i.e. incisions have to be made in the patient's body and it has to be administered and monitored for side effects and by skilled and medically qualified professionals these are hallmarks of a form of medical treatment. As the Court recognised food has an emotional significance but fears surrounding the withdrawal of food from other patients can be overcome. Cases involving disabled persons are clearly distinguishable because the method of feeding will usually not be invasive nor administered, nor monitored by medical staff.

ACTS AND OMISSIONS

Accepting then that the withdrawal of the intravenous tubes in *Barber v Superior Court* is to be treated on the same footing as the disconnection of the patient from the ventilator the question arises as to how the disconnection is to be categorised. Addressing this issue the appeal court drew a distinction between acts and omissions and said:

> "Even though these life support devices are to a degree 'self propelled' each pulsation of the respirator or each drop of fluid introduced into the patient's body by intravenous feeding devices is comparable to a manually administered injection or item of medication. Hence 'disconnection' of the mechanical devices is comparable to withholding the manually administered injection or medication."

On this basis the doctor had his appeal against conviction allowed because an omission is not culpable unless there was a duty to act and the court concluded that he was under no duty to act[18].

The characterisation of the withdrawal of treatment as an omission cannot with respect be supported by the explanation given by the Court. There is a difference between devices which are self propelled and those which require manual intervention. The Court in *Barber* failed to adequately compare the effect of the doctor's intervention in both examples. In cases where the machine is self propelled it is the doctor's intervention which leads to death and causes withdrawal whereas in cases where the machine needs manual intervention it is not the doctor's intervention which causes the withdrawal but instead his failure to

[17] Although Brennan, J was in the minority when it came to the decision, it is clear that the rest of the Court agreed with him on this point.

[18] This conclusion will be considered when the duty of care owed by a doctor to his patient is analysed later.

intervene. Using the language of act and omission favoured by the Court in *Barber* the actual decision in that case cannot therefore be supported by the reasoning advanced in it.

Leng[19] might support the decision on the grounds that the life support machine should be viewed as performing a *discrete* series of interventions. Thus its disconnection merely causes the machine to omit to intervene. This is an attractive proposition since it is not hard to categorise the mechanical operation of such a device as discrete acts. However even if it is accepted that the machine's failure to continue to act is properly to be regarded as an omission the doctor is still not absolved. The *focus* of the enquiry merely moves further down the causal chain. The issue in determining liability is what was the substantial and operating factor causing death[20]. The operating factor is surely the doctor's act of disconnecting the machine and not the machine's failure to act.

Professor Glanville Williams has attempted to avoid this conclusion by arguing[21] that if a life support machine could be operated by means of a hand crank then the failure of the doctor to continue to turn the crank would traditionally be regarded as an omission. Similarly he argues that if the machine had a timer on it such that it automatically turned itself off once every 24 hours unless a button was pressed daily then the failure to press the button would be an omission. By analogy he argues the disconnection of the machine is a mere omission notwithstanding the fact that physical action will be necesary to bring it about. Critics have argued that this proposition is unhelpful since it begs the question whether liability stems from the inaction of the machine or the action of the doctor. He has replied thus[22]:

> "...switching off the life support machine is not an act of killing but the expression of a decision by the doctor not to continue to strive for the patient's life."

This would seem an unsatisfactory response and appears to do nothing to address the objections outlined earlier. George Fletcher[23] has tried to put the position in terms of *causing* and *permitting* death:

> "It is significant that we are inclined to refer to the respirator as a means of prolonging life; we would not speak of insulin shots for a diabetic in the same way. The use of the term 'prolongation of life' builds on the same perception of reality that prompts us to say that turning off the respirator is an activity permitting death to occur, rather than causing death. And that basic perception is that the using of the respirator interferes artificially in the pattern of events."

This latter point is of crucial significance because if the respirator does more than merely hold back events then disconnecting it does in a very real sense cause death. Even so this classification is, as Fletcher himself appreciates, subject to an important qualification namely that perception of the respirator's function is largely determined by the state of a people's culture and technology[24].

[19] Leng, "Death & the Criminal Law" (1982) 45 M.L.R. 206, at 208-209.
[20] R v Smith, [1959] 2 QB 35.
[21] G. Williams, "Textbook of Criminal Law" (1st Ed) at p. 237.
[22] [1977] Crim L.R. 635.
[23] G. P. Fletcher, "Prolonging Life" (1967) 42 Washingotn Law Review 999.
[24] Fletcher uses the simpler phrases of 'natural' and 'artificial'. P. D. G. Skegg in his book "Law, Ethics and Medicine" at p. 172-173 suggests that the distinction is independent of these labels but this would with respect seem incorrect because both distinctions stem from Society's general perception of technology. This is more fully discussed later in the contect or *ordinary* and *extraordinary* measures.

Moreover it would seem a semantic device which repackages the 'act' and 'omission' distinction. Professor Ian Kennedy has criticised both Williams and Fletcher because[25]:

> "...to describe turning off the machine as an omission does some considerable violence to ordinary English usage. It represents an attempt to solve the problem by logic chopping. Such an approach may demonstrate to the satisfaction of some that no crime is involved, but it is surely most unsatisfactory to rest the response of the law to what is seen as a testing moral and philosophical issue on some semantic sleight of hand"[26]

Kennedy persuasively argues that the real issue is the nature and scope of the legal duty the doctor owes to his patient[27]. This approach involves a complete departure from the traditional 'act' and 'omission' categorisation of a particular course of conduct. The issue becomes solely whether the doctor was under and continued to be under a duty which involved a course of medical treatment entailing the use of artificial ventilators etc.

Such an approach has not been welcomed by Beynon[28] who argues that this approach is indistinguishable from that advocated by both Williams and Fletcher because it rests causal liability on the doctor's *decision* not to treat the patient. She argues that the decision is by itself meaningless because it is a mere mental activity which until it is physically implemented can not alter the condition of the patient. This reasoning leads her to the inevitable conclusion that it is the *isolated* conduct itself in disconnecting or withdrawing the treatment which must be examined and the classical 'acts' and 'omission' distinction can not be evaded[29]. Kennedy answers this criticism by suggesting that his approach does no more than replace one test for culpable conduct with another. This would seem to be a difficult reply to answer. If it be argued that this is an artificial approach then surely it is no more artificial than that currently used.[30] If the law currently attaches legal significance to an omission because of a *duty to act,* then it would seem reasonable and logical to determine the culpability of acts themselves by reference to the scope of the duty the actor was under. Moreover the duty requirement can be tailored to suit the actor[31]. Hence the first part of Devlin, J's direction to the jury in *R v Adams* is evaded because

[25] I. Kennedy, "Treat Me Right — Essays in Medical Law and Ethics" (1988) at p. 351.

[26] With such academic disagreement it is small wonder that in summing up to the jury in *R v Arthur* the learned trial judge said: "it has become very clear, you may think, that it is a very difficult area to decide precisely where a doctor is doing an act, a positive act, or allowing a course of events or a set of circumstances to ensue, and really this awful problem is now being placed on your shoulders."

[27] Kennedy builds upon this to suggest that a doctor should consider whether it is wise in the first place to connect the patient to a life support machine if the prognosis is not good. This would however seem unnecessarily defensive. Moreover it appears to ignore the point that a prognosis can not always be given at the outset, and the prime medical concern is the stabilisation of the patient in whatever condition he/she might be in.

[28] H. Beynon, "Doctors as Murderers" [1982] Crim L.R 17.

[29] Although Beynon does not expressly put it into these terms, she appears to draw the distinction between the *mens rea* and *actus reus* of the crime. Thus Beynon can support her conclusion that a decision is a state of mind and can not be an act because no muscular movement. Thus she argues that Kennedy's approach links 'causation' classically the *actus reus* to a mental process which is classically the *mens rea.* But even assuming this to be a correct analysis she critically does not say why this is undesirable.

[30] Thus decisions such as *Fagan v Metropolitan Police* [1969] 1 QB 439 can be avoided by accepting that the principle in *R v Miller* [1983] 2 AC 161, is capable of extension such that we are all under various duties some of which require us to act, others which do not. This seems a natural and desirable progression.

[31] Semble that the majority view in the CA decision in *Wilsher v Essex Area Health Authority* [1987] QB 730, at p. 750 would support this approach because "actor" in this context clearly means "post" holder.

just as a banker owes a different duty to his client as compared to that owed by a solicitor or accountant so too can a doctor owe a different duty to his patient compared to that imposed upon a relative or even a stranger. To this extent it becomes possible, adopting Kennedy's approach, to say that a doctor *is* in a special category. However this is a misnomer because the doctor has no special defence, he merely owes a different set of obligations to the patient[32].

Therefore it is submitted that the duty approach is to be preferred to one based upon 'acts' and 'omissions'. In any event it becomes necessary to next examine the duty requirement because even if the traditional approach is to be applied 'omissions' become culpable if the doctor was under a duty to act in order to save the patient. Further the duty will regulate the doctor's civil liability to the patient.

A DUTY TO OFFICIOUSLY STRIVE?

There can now be little doubt that a doctor owes his patient the same duty of care regardless of whether that duty is an implied contractual term or a duty of care imposed in tort[33]. In another commonwealth jurisdiction it has been observed that:

> "...any duty which may be owed by the doctor at common law is not the duty which is imposed on him by the Hippocratic Oath, or by any code of professional ethics which may be prescribed by the British Medical Association of which he is a member."[34]

However, in England and Wales the classical approach to determine the scope of a doctor's duty of care is by reference to the *Bolam* test[35] which in essence requires the doctor to have acted in accordance with a practice accepted as proper by a responsible body of skilled medical men. The test is so widely framed because "[i]n the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professinal men."[36] Thus medical opinion shapes the scope of the duty to be imposed. However in *Sidaway v Bethlem Royal Hospital Governors*[37] Lord Scarman appears to take this principle further by saying:

> "The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at that time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care; but the standard of care is a matter of medical judgement."

It is respectfully submitted that this latter view is incorrect and does not follow from the former. It is one thing to take into account prevailing medical opinion and attach weight to it. However it is quite another for the Courts to consider it conclusive[38]. The treatment of patients is a matter of general public importance. The law has recognised that medical opinion encapsulates diverse and conflicting views. Matters of life and death seem

[32] P. D. G. Skegg, "Law, Ethics, and Medicine" at p. 168-169, rejects this approach.
[33] *Cassidy v Ministry of Health* [1951] 2 KB 343.
[34] *Furniss v Fitchett*[1958] NZLR 398, per Barrowclough, C.J. at p. 401. This proposition seems to go too far. But in this case the B.M.A. standard was exceptionally high.
[35] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, per McNair, J. at p. 586.
[36] *Hunter v Hanley* (1955) SLT 213, per Lord President Clyde at p. 217. This view is defensible on the grounds that to hold otherwise would stifle innovation and lead to defensive medicine.
[37] [1985] AC 871.
[38] But this appears to be the view of the Court of Appeal in *Gold v Haringey HA* [1987] 2 All ER 888.

capable of no lesser diversity within Society as a whole and there appears to be no justification for the law to limit its consideration to the views of a minority within Society no matter how expert or learned that group is perceived to be[39]. To suggest otherwise potentially permits doctors to not merely *advise* but instead to *decide* upon and subject a patient to a course of medical treatment which a court would have no option but to approve. For these reasons it is submitted that the view expressed in the Court of Appeal by Sir John Donaldson M.R.[40], is to be be preferred:

> "[T]he definition of the duty of care is not to be handed over to the medical or any other profession. The definition of the duty of care is a matter for the law and the courts. They cannot stand idly by if the profession, by an excess of paternalism, denies its patients a real choice. In a word, the law will not allow the medical profession to play God."

The modern approach to determining the extent of a duty of care is to consider all the 'ingredients' of a case[41]. Adopting that approach it becomes necessary to consider not only the medico-ethical dimension in deciding how to treat a patient but as a corollary to have regard to the practical problem of allocating resources and technology to one patient in preference to another[42]. These issues overlap but an attempt can be made to consider them separately.

MEDICAL ETHICS

The duty owed by a doctor is to some extent a reflection of the duty owed by Society generally. The ethical problem in essence is how is Society to recognise those persons to whom duties are owed and the subsidiary question of how those duties are to be defined.

Kantian theory[43] postulates a universal rule whereby all beings which subject themselves to laws of whatever nature deserve mutual and equal respect because only rational beings so subject themselves. Thus a rational being realises that his own rights are dependant upon him recognising reciprocal rights in others. Hence *mutuality* generates moral obligations *inter se*. Of course the application of this theory leads to difficulty. We are as free as we permit others to be and ideologically this leads us to vigorously defend the liberties of others. However a difficulty soon emerges if we postulate a situation whereby a person refuses a comparatively simple form of life saving medical treatment. Applying Kantian theory there is nothing Society can do. To impose Society's view on the patient collapses Kant's theoretical basis because put simply, we are not respecting the patient's autonomy. We are instead imposing our own choice merely because we disagree with the choice made by the patient. Similarly to constrain everyone's range of options to parameters of reasonableness, such as whether it is reasonable to refuse treatment, detracts from the principle because suddenly the basis of the principle i.e. submission is gone and instead there is imposition.

[39] Professor Montrose in his article "Is Negligence an Ethical or Sociological Concept?" (1958) 21 MLR 259 correctly points out that the *Bolam* test is exceptional in that on one view it allows those being subjected to the test to prescribe the standard of the test itself. The Privy Council has recently removed such a privilege from solicitors. See *Edward Wong Finance Co. Ltd. v Johnson, Stokes & Master* [1984] AC 296.

[40] *Sidaway v Bethlem Royal Hospital Governors* [1984] 1 All ER 1018.

[41] *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

[42] This is only an issue when the duty of care to a dying patient is viewed in terms of ordinary or extraordinary treatment. The lack of resources will not usually be an issue because it is not a defence to a negligence action (See *Wilsher v Essex Area HA*[1987] QB 730, per Sir Nicolas Browne-Wilkinson V-C (as he then was) but quare whether the reasoning advanced only applies to the Hospital's duty of care and not to an individual doctor).

[43] Immanuel Kant, "Critique of Pure Reason".

The principle of utilitarianism however, takes the imposition (as opposed to the acceptance) of basic values and uses it as a premise. This concept embraces the notion that a course of conduct such as the treatment of a patient should seek to achieve the greatest good *not* for the patient himself but for Society generally. Thus, the prime concern is not the patient's own good but that of Society. Thus if the net advantage to Society in treating an individual outweighs the disadvantage the individual will be treated. This *prima facie* also seems to be an acceptable ethical basis.

Treating a patient in a particular way i.e. by reducing pain and hastening death creates the greatest good, in the sense that it alleviates not only the patient's suffering but also that of his relatives, it becomes an ethical imperative to treat the patient in that manner. But it is not difficult to introduce another factor into the equation; namely that of medical resources. If discontinuing treatment would free vital beds, equipment and medical staff to treat others then this too potentially becomes an imperative. Thus, medical treatment becomes not a matter of caring but instead a question of the allocation of financial resources. The needs of the many outweigh the needs of the few.

This approach appears to be objectionable on the basis that it is an unwarranted intrusion on an individual's right to control their own existence and because it views people not as ends in themselves but as means to an end. Fletcher expresses the antithesis of the argument when he says:

> "there are some sacrifices of individual liberty that persons cannot be expected to make for the welfare of their neighbours."[44]

This objection leads to a third 'hybrid' theory which takes Kant's general rule and incorporates some utilitarian elements into it. If it is accepted that a patient's autonomy should be respected it becomes necessary to define the concept of 'autonomy'. Lockwood succinctly defines it thus:

> "Essentially autonomy is the capacity to think, decide and act on the basis of... thought and reason, freely and independently."[45]

There are therefore several important caveats in the definition. A person must not only be able to reason but also be capable of being reasoned with. Significantly a person who has made a decision must be able to *act* on it. Clearly both of these requirements rule out neonates and mental defectives on the grounds that they cannot apparently reason and similarly persons suffering from paralysis on the grounds that they cannot *act* independently. This leads to the conclusion that the moral duties owed to neonates and paralysed persons are *different* to those owed generally. If this is justifiable in the case of the former it does not seem so in the case of the latter. It is therefore tentatively suggested that a preferable ethical analysis is to define autonomy by reference to an ability to *express* a reasoned decision to the outside world.

From this initial premise it becomes necessary to formulate some general criteria to be applied to those who cannot express or reach an independently reasoned decision such as neonates or patients who are severely brain damaged. Ross[46] has suggested that there are certain *prima facie* moral obligations which when they are not in conflict with one another we would all accept and follow.

[44] George Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harvard Law Rev. 537 at p. 573.
[45] Dr. Michael Lockwood, "Moral Dilemmas in Modern Medicine"
[46] W. D. Ross, "The Right & the Good". Albert Weale in "Cost & Choice In Health Care — the ethical Dimension", in essence adopts the same approach as Ross.

These are so far as they appear relevant:

(i) Fidelity — a duty to be honest, avoid deceit and to keep promises;
(ii) Beneficence — a duty to help others;
(iii) Non maleficence — a duty to avoid causing harm to others;
(iv) Justice — a duty to spread happiness amongst people according to their respective merits.

Clearly when these moral duties are in conflict with one another it becomes a question of judgement which duty or combination of duties prevails. It is easy to postulate a situation where telling a patient a bad prognosis would cause serious pscyhological damage to that patient. This would set the duty of fidelity against that of non maleficence and, arguably, justice. On balance the obligation not to disclose may become greatest, but it is a question of degree and circumstance. What if the patient insists on being told? This would appear to tip the balance in favour of disclosure[47]. To hold otherwise would be to uphold medical paternalism. Doctors being medically qualified are undoubtedly the most *technically* qualified to make medical decisions. Decisions regarding the continuance of life sustaining treatment can be expected to cause complex conflicts and interactions between the moral duties outlined earlier. Buchanan[48] asserts that the balancing of these moral criteria is not a matter of medical qualification or experience at all:

> "...[T]he physician must make intrapersonal comparisons of harm and benefit of each member of the family... Then he must somehow coalesce these various intrapersonal net harm judgements into an estimate of total net harm... to the family as a whole. Finally he must... determine which course of action will minimise harm to the family as a whole... [O]nce the complexity of these judgements is appreciated and once their evaluative character is understood it is implausible to hold that the physician is in a better position to make them than the patient or his family."

This would seem to be correct. Medical paternalism in this field is not to be encouraged if only on grounds of policy. The public fear in cases involving the termination of treatment is that such cases are the 'thin end of the wedge' and will lead to involuntary euthanasia. These fears can, to a large extent, be allayed if doctors are restrained from crossing the Rubicon and making life and death decisions in cases where the patient is capable of deciding for himself in accordance with the autonomy principle outlined earlier. Another public fear is that with limited beds, staff and resources, a doctor's choice between various forms of treatment may be made on financial as opposed to purely medical grounds. Lord Donaldson M.R in *In re J* put it thus:

> "In an imperfect world resources will always be limited and on occasion agonising choices will have to be made in allocating those resources to particular patients."[49]

[47] On this point it is submitted that the law in England and Wales is in accord. In *Sidaway v Bethlem* [1985] AC 871, there are *obiter dictum* to support the proposition that a specific request to explain risks attendant to surgery must be answered.

[48] Professor Allen Buchanan, "Medical Paternalism" (1978) 7 Philosophy & Public Affairs 370, at 380-383.

[49] [1991] 2 WLR 140, at p. 145D.

The Courts have refused to intervene or offer guidance on how doctors are to choose one patient over another[50]. However, it is clear that the allocation of resources has some role to play in determining the treatment to be given to the patient. Expensive state of the art technology may be able to sustain even prolong life but at great financial cost.

Commentators have suggested that the duty owed by the doctor to his patient should be formulated by reference to the nature of the treatment. This results in the classification of treatment as either ordinary or extraordinary. Whilst a doctor is obliged to use ordinary methods to save life he is not always to be bound to use extraordinary ones. This *prima facie* seems a very acceptable premise for the allocation of resources. However, Kennedy, Grubb[51] and Skegg[52] have all criticised such a duty formulation primarily on the grounds that the words "ordinary" and "extraordinary" are both misleading and conceptually uncertain. The two words have meanings which are relative to circumstance. These circumstances may include both the financial cost of treatment and the *perceived* technological status of the resources involved.

Thus formulated the distinction is clearly question begging and a diversity of opinion becomes inevitable[53]. Moreover, it is submitted that the distinction is meaningless unless is is linked to the *benefit* bestowed upon the patient by the particular treatment. This is because one form of treatment may have a different effect on a different patient. In *Re Matter of Quinlan*[54] Hughes, C J said:

> "...[T]he record here is somewhat hazy in distinguishing between "ordinary" and "extraordinary" measures, one would have to think that the use of the same respirator or like support could be considered "ordinary" in the context of the possibly curable patient but "extraordinary" in the context...of an irreversibly doomed patient."[55]

Thus the obligatory form of treatment is linked to the *particular* condition of the patient and not the isolated status of the treatment itself. It follows that the cost of medical care will generally be outweighed by the benefit of the treatment to the patient.

[50] See e.g. *Re Walker's Application* (1987) The Times, 26th November. This case involved a baby with a hole in the heart and attracted national attention. The Health Authority failed to carry out the operation because of lack of funds. The High Court declined to grant leave to seek judicial review of the decision. This decision was affirmed on appeal. Sir John Donaldson M.R. said : "It is not for this court, or indeed any court, to substitute its own judgement for those who are responsible for the allocation of resources."

[51] Professor Ian Kennedy and Andrew Grubb, "Medical Law — Text and Materials" at p. 946 to 950.

[52] P. D. G. Skegg, "Law Ethics, and Medicine" at p. 143 to 146.

[53] An interesting working example of this appears in the 1983 President's Commission Report on "Deciding to forego Life-Sustaining treatment at p.82. A physician gave evidence that "ordinary" meant whether the treatment was in regular day to day use within Society and that the use of an artificial ventilator fell within this category. Conversely, a Florida judge gave evidence that by adopting the same approach in a case which he had tried *(Satz v Perlmutter* 379 So 2d 359) he had considered the use of a ventilator "extraordinary" treatment.

[54] 355 A. 2d 647. This was a decision of the New Jersey Supreme Court authorising the withdrawal of life sustaining treatment for Karen Quinlan who aged 21 was in a persistent vegetative state. Receiving only nutrition and nursing care Karen Quinlan's body survived for a further 9 years after disconnection from the machine.

[55] 355 A. 2d 647, at p. 667-668.

It appears therefore that the duty is to act in the "best interests" of the patient. This appears to be an ethically sound criterion to apply in the light of the medical ethics already discussed because it balances the requirements of non maleficence, beneficence and justice. How those interests are to be ascertained and whether they may require inroads into the principle of respect for autonomy will be considered next.

DECIDING A PATIENT'S BEST INTERESTS

In *Schloendorff v Society of New York Hospital*[56], Cardozo, J said:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without the patient's consent commits an assault, for which he is liable..."[57a]

This principle appears to have its origins in the autonomy principle. As a judicial test it has several components. Firstly the patient must be over the age of majority. This is a key factor because otherwise the Court can assume its inherent *parens patriae* jurisdiction over the minor patient. In cases involving very young children the exercise of this power causes few difficulties because the ward is too young to validly give or refuse consent. It is submitted that the position is different where the child has sufficient intelligence and maturity to understand the nature and consequence of the proposed treatment and come to an independent and reasoned decision as to whether to consent to it or not; the so-called *Gillick* competent minor.

MINORS

In *Gillick v Wisbech Area Health Authority*[57b] a parent sought, *inter alia,* a declaration that it would be unlawful for a doctor to prescribe contraceptives for her daughter (a minor), against that parent's express and communicated prohibition even if her daughter sought such medical treatment and consented to it. The House of Lords by a majority refused to grant such a declaration. Lord Scarman said:

> "The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision..."[57c]

In *Re R (A Minor) (Wardship: Consent to Treatment)*[57d] the Court of Appeal suggested (albeit *technically* obiter) that without deciding the effect of *Gillick* on parental powers, *Gillick* placed no limitation on the exercise of the Court's *parens patriae* jurisdiction over *Gillick* competent minors.

[56] (1914) 105 NE 92, at p. 93.

[57a] This passage was cited by Lord Goff with approval *In Re F. (Mental patient: Sterilisation)* [1990] 2 AC 1, at p. 73 D and would appear to represent the law in England & Wales.

[57b] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. This case split the House and each of their Lordships delivered a speech. Consequently there are nuances between the various speeches constituting the majority. For the purposes of this article it is assumed that Lord Scarman's speech represents the ratio.

[57c] [1986] AC 112, at p. 186D.

[57d] [1991] 3 WLR 592.

Referring to Lord Scarman's speech as quoted above, Lord Donaldson M.R. said:

> "I do not understand Lord Scarman to be saying that, if a child was "Gillick competent," to adopt the convenient phrase used in argument, the parents ceased to have an independent right of consent as contrasted with ceasing to have a right to veto."[57e]

This, with respect, appears to be an artificial distinction between a parental *veto* as to a minor's consent on the one hand and a *refusal* on the other. It is submitted that the issue identified in the speech of Lord Scarman is not the minor's refusal or consent, but instead the minor's *right* to decide[57f]. The refusal or consent are merely products of the exercise of that choice and are of no legal significance in themselves. The "parental right" referred to by Lord Scarman is not limited to the right to refuse but extends to the right to consent. The emphasis is on the right of the minor to decide as opposed to the right of the parent to decide on his behalf.

However, Lord Donaldson M.R. rejects this conclusion on the basis that:

> "If the position in law is that upon the achievement of "Gillick competence" there is a transfer of the right to consent from parents to child and there can never be a concurrent right in both, doctors would be faced with an intolerable dilemma... if the parents consented but the child did not."[57g]

It is respectfully suggested there is no dilemma at all. Lord Donaldson's reasoning appears to proceed upon the premise that there is a *total* transfer of decision making power from parent to child. Whereas, it is submitted that the House of Lords in *Gillick* decided that there is only a partial transfer. The right to decide is only transferred in respect of any particular treatment, if the child is *Gillick* competent in respect of that particular treatment. It is one thing for a child to decide whether or not to have a wart removed, quite another to decide whether or not to undergo pioneering brain surgery. The maturity, intelligence and understanding required in order to appraise each will be different. Competence to decide upon the wart does not imply competence to decide upon the brain surgery. The level required for each is different.

In the Court of Appeal in *Re R,* Staughton L. J considered the conflict between Lords Scarman and Donaldson "an important question" but found it unnecessary to decide, preferring instead to agree with the learned Master of the Rolls and hold that *Gillick* did not fetter the *parens patriae* jurisdiction of the court. Farquharson L.J, like the judge at first instance, applied the *Gillick* restraint to the wardship jurisdiction, but found that R was not competent. Although his lordship expressed doubts about applying *Gillick* it is submitted that those doubts were limited to the unusual facts of *Re R* and should not be taken as doubting the applicability of the *Gillick* test to the usual wardship case[57h].

It is submitted that Farquharson L.J's approach is correct and is supportable on grounds of autonomy and public policy. It is wrong to subject a minor to a treatment he has already declined because it infringes that child's autonomy. If a child has maturity and intelligence so as to appreciate the nature of the ailment, the proposed treatments and the consequences of both then a reasoned decision in favour of one over another should not

[57e] [1991] 3 WLR 592, at p. 600F

[57f] It is submitted that Staughton L.J.'s comments at p. 604E tacitly recognise the strength of this argument.

[57g] [1991] 3 WLR 592, at p. 601A.

[57h] as per p. 608E: *" The Gillick test is not apt to a situation where the understanding and capacity of the child varies from day to day according to the effect of her illness."*

be disturbed because it is conceptually equivalent to the exercise of adult choice and merits similar protection and respect. Children who are near majority are not encouraged to learn to take charge of their lives, make and live with their own decisions if a court intervenes when the minor reaches a decision which the court or the parents disagree with. Foolish minors will be adequately protected from their folly by the *Gillick* test because a minor who reaches a decision which is either irrational or badly reasoned thereby provides very cogent evidence that he is not *Gillick* competent and in respect of non competent minors it is conceded that *Re R* is correctly decided.

ADULT COMPETENCE

The second qualification in *Schloendorff* is that the patient must possess the capacity to refuse consent i.e. he must be competent.

The leading case in England and Wales on the approach to be taken in cases involving adult persons who have always lacked capacity to consent to treatment appears to be *In Re F. (Mental Patient: Sterilisation)*[58].

In that case the House of Lords considered the lawfulness of performing a sterilisation operation on an adult female who was mentally incapable of consenting to the operation. The surgery was not necessary to save the patient's life but due to the sexual activity of the patient was considered to be in her best interests[59]. Their lordships declined to extend the parens patriae jurisdiction to adult incompetents. However, the House unanimously held that a doctor may lawfully operate on a patient, notwithstanding the fact that there was no valid consent, when it is in the "best interests" of that patient to operate.

On the facts of *Re F* the test of the patient's best interests had to be purely objective because the patient was and had always lacked autonomy. It is respectfully submitted that the position is different if the adult patient has possessed autonomy immediately prior to the occurrence of his medical condition. If others must decide then they should try to make a substituted judgement. In the American case of *Re Drabick*[60] the Court said:

> "[M]edical care decisions must be guided by the individual patient's interests and values. Allowing persons to determine their own medical treatment is an important way in which society respects persons as individuals. Moreover, the respect due to persons as individuals does not diminish simply because they have become incapable of participating in treatment decisions... [I]t is still possible for others to make a decision that reflects [the patient's] interests more closely than would a purely technological decision to do whatever is possible. Lacking an ability to decide, [a patient] has a right to a decision that takes his interests into account."

There is no direct English authority on this point. However, it is submitted that the reasoning of the Court of Appeal in *Re J (A Minor) (Wardship. Medical treatment)*[61] supports it because the best interests test used in wardship cases is analagous to the one contemplated by the House of Lords in *Re: F.*

[58] [1960] 2 AC 1.
[59] Scott Baker, J. (the trial judge) had found as a fact and it was not contested on appeal that it would be psychiatrically disastrous for F to conceive a child.
[60] 200 Cal. App. 3d 185, at p. 208
[61] [1991] 2 WLR 140.

Re: J involved a neonate who was suffering from severe brain damage such that he frequently stopped breathing and had to be resuscitated. He was thought to be both deaf and blind, unlikely to develop an intellect and was expected to develop serious spastic quadriplegia. It was not anticipated that he would survive past his teens. Baby J was made a ward of court and an issue arose as to whether he should be resuscitated again if he stopped breathing. There was unanimous medical opinion that the Baby J should not be resuscitated if he stopped breathing again.

The Court of Appeal unanimously upheld the trial judge's[62] direction that consent for such medical treatment should be withheld.

Lord Donaldson M.R applying the classical wardship test explained that the Court's approach:

> "...underlines the need to avoid looking at the problem from the point of view of the decider, but instead requires him to look at it from the assumed point of view of the patient."[63]

The ward in *Re: J* lacked autonomy and had always lacked autonomy. Under such circumstances the Court of Appeal speculated on what view the ward itself if accelerated to adulthood and able to appreciate his own position would take of the quality of his own life. That this was the approach adopted is clear from the judgement of Lord Donaldson M.R. His lordship cited with approval the following part of the judgement of Asch, J in *Re Weberlist* (1974) 360 NYS 2d 783, at p. 787:

> "...the court must decide what its ward would choose, if he were in a position to make a sound judgement."[64]

Thus it is submitted that where a patient has, for example, previously expressed a wish not to be artificially ventilated in specified circumstances e.g. severe brain damage, this opinion albeit hypothetical becomes the *assumed* view of that patient and must generally prevail in the best interests test[65]. Another analysis would be to view the opinion of the patient as a prospective refusal of consent of such treatment.

Prima facie the speeches of some of the Law Lords in *Re: F* threatens the validity of this proposition. Lord Bridge said:

> "It seems to me to be axiomatic that treatment which is necessary to preserve the life, health or well being of the patient may lawfully be given without consent."[66]

[62] Scott Baker, J.

[63] [1991] 2 WLR 140, at p. 149H.

[64] [1991] 2 WLR 140, at p. 147B-C

[65] This approach might trouble the Court of Appeal which went to great pains to stress that it could not consent to a form of treatment which as its primary purpose would cause the ward's death. per Taylor L.J. at p. 155G: "...[I]t cannot be too strongly emphasised that the Court never sanctions steps to terminate life. That would be unlawful." This contrasts with the speech of Lord Donaldson M.R. at p. 149D to the effect that the termination of life as a "side effect" is permissible. This seems to be an application of the "double effect" principle advocated earlier in this article, but which was submitted did not reflect the law in England and Wales. An alternative approach for the court might be to hold that the doctor is under no *duty* to resuscitate.

[66] [1990] 2 AC 1, at p. 52 A. This is a view which was echoed by Lord Brandon at p. 55 E but is presumably only supportable on the view that danger invites rescue. This view goes much further than previous Commonwealth authority. See e.g. *Parmley v Parmley* [1945] 4 DLR 81, (Supreme Court of Canada) where Estey, J. expressly limited operations without consent to "circumstances of emergency".

Depending on the meaning of "necessary" and the context in which it is used, this view would seem extremely broad since it appears to apply to treatment which is not urgent in the sense that it is not life saving and might even allow the patient's express wishes to be ignored.

Lord Goff having formulated a similar principle whereby a non consenting patient may be treated when it is in his "best interests" and it is "impracticable" to seek his consent expressly rejects this conclusion by saying:

> "On this statement of principle, I wish to observe that officious intervention cannot be justified by the principle of necessity... when it is contrary to the known wishes of the assisted person, to the extent that he is capable of forming such a wish."[67]

On this crucial point there is room for conflict between their lordships' speeches. Lord Griffiths considered that the "necessity" approach preferred by Lord Goff was inextricably intertwined with public policy. His lordship emphasised that the general need for consent was merely a facet of that public policy, that the patient's approval was not conclusive and could under certain circumstances be dispensed with. His lordship relying on a number of authorities said:

> "Although the general rule is that the individual is the master of his own fate the judges through the common law have, in the public interest, imposed certain constraints on the harm that people may consent to being inflicted on their own bodies."[68]

It is submitted, therefore, that if public policy can override consent to a touching then sequitir it follows that where consent has been refused public policy can render a subsequent touching lawful if that touching is deemed to be in the public interest. A fortiori it may be that a patient inflicts serious harm on himself by refusing medical treatment.

This public policy approach has been adopted in appellate jurisdictions in the United States. In *John F. Kennedy Memorial Hospital v Heston*[69] a New Jersey appeal court refused to reverse a court order which in effect authorised the giving of a blood transfusion to a patient against her religious convictions. The Court reasoned that it was contrary to the public interest in the administration of medicine to permit a patient who actively sought medical assistance to hinder her own treatment. This decision proceeds on the premise that it is wrong to permit a patient to both seek medical help (thereby imposing a duty of care upon her rescuers) and hinder her rescue by refusing consent, To hold otherwise, so the court reasoned, would place the medical profession in an impossible position. There would be a legal duty to save the patient on the one hand and an ethical duty to respect the patient's autonomy on the other. It is suggested that the authority of this case is to be doubted. The Court appears to have overlooked the point that if the doctor's duty of care is limited by the extent and scope of the patient's consent then there is no dilemma or conflict between the legal and ethical duties at all and therefore no reason to override the patient's refusal.

[67] [1990] 2 AC 1, at p. 76 A. This is the traditionalist's view. See e.g. *Bennan v Parsonnet* (1912) 83 NJLR 20, per Garrison, J. at p. 26: "No amount of professional skill can justify the substitution of the will of the surgeon for that of the patient." In *Malette v Shulman* (1988) 63 OR (2d) 242, it appears that the Ontario High Court extended this principle to oblige a doctor to comply with an unconscious patient's written "advance directive".

[68] [1990] 2 AC 1, at p. 70 D.

[69] (1971) 279 A. 2d 670.

In *Re Conroy*[70] the New Jersey Supreme Court reviewed the leading cases in this area. The Court considered that there were four potentially relevant policy factors:
(i) Preservation of life;
(ii) Prevention of suicide;
(iii) Protection of the medical profession and its ethics;
(iv) Protection of innocent third parties, such as children.

Taking each of these considerations in turn the Court rejected all but the last. Of the argument in favour or preserving life, Schreiber, J said:

> "...[I]t will usually not foreclose a competent person from declining life sustaining medical treatment for himself. This is because the life that [society] is seeking to protect in such a situation is the life of the same person who has competently decided to forego the medical intervention; it is not some other actual or potential life that cannot adequately protect itself."[71]

This would appear to be correct particularly when suicide is not a crime[72]. On this basis the second factor i.e. the prevention of suicide can also be disposed of[73]. In *Kirkham v Chief Constable of Manchester*[74], the Court of Appeal held that the passing of the Suicide Act 1961 not only abolished the crime of suicide but, in the words of Lloyd, L.J, was "symptomatic of a change in the public attitude to suicide generally."[75] and that there was therefore no absolute rule of public policy which prohibited suicide outside the criminal law[76].

This appears to be a reflection of the view that there is no public interest in protecting competent adults from themselves. However this is not a view which has been universally accepted. In *Re Quakenbush*[77], Muir, A.J.S.C. took the view that the public interest in preserving life presumptively outweighs the individual's right to refuse treatment but that this presumption is rebutted by a combination of a "significant bodily invasion and a dim prognosis". If this is the correct approach then a patient may only validly refuse treatment where that treatment will reduce the quality of his life.

[70] (1985) 48 ALR 4th 1.
[71] (1985) 48 ALR 4th 1, at p. 24-25.
[72] See Suicide Act 1961, although by s. 2 aiding and abetting etc a suicide remains a crime. However, it appears that if the duty formulation suggested earlier in this article is used a doctor would not be guilty of this offence.
[73] The New Jersey Supreme Court in *Re Conroy* reached the same conclusion but for additional reasons. One of which was that a patient may not "intend" his own death. This, with respect, is far from convincing. Another reason put by Schreiber, J at p. 26 was that: "...declining life sustaining treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course."
[74] [1990] 2 WLR 987.
[75] [1990] 2 WLR 987, at 993 H. This view is echoed by Farquharson, L.J. at p. 998 C.
[76] Although their lordships limited their views to the case where the patient's judgement was clinically impaired it is submitted that for present purposes the same reasoning applies to perfectly sane patients. It is suggested that the reservations expressed by the Court are limited to cases such as *Davitt v Titcumb* [1990] 2 WLR 168, or where the patient by his suicide attempts a fraud e.g. insurance.
[77] (1978) 352 A.2d 785, at p. 789. This is a first instance decision involving a 72 year old male patient whose medical condition was summarised by the trial judge at p. 787 as: "On his left foot the skin is black from the knee down, is partially mummified and the foot is dangling, about to fall off. On the left leg there is an open sore, which is draining fluid and in which the tibia (shinbone) and tendons are exposed." Without amputating his legs the patient was expected to die within weeks.

This was not the view of the New Jersey Supreme Court in *Re Conroy* which expressed the opinion that:

> "On balance, the right to self determination ordinarily outweighs any countervailing [public] interest, and competent persons generally are permitted to refuse medical treatment, even at the risk of death."[78]

The Court in *Re Conroy* was not directly concerned with a competent patient bringing about his own death by his refusal. However, in *Re Farrell*[79] the same Court was and did not flinch from adopting the approach it had earlier advocated.

Mrs Farrell was a 37 year old competent mother who suffered from amyotrophic lateral sclerosis which was so advanced that she could only breathe with the use of a mechanical respirator. Mrs Farrell wanted the machine disconnecting but the hospital refused. The view of the Court was sought. Garibaldi, J said:

> "... a patient's right to refuse medical treatment even at the risk of personal injury or death is primarily protected by the common law... Mrs Farrell's right to live the remaining days of her life as she chose outweighed any [public interest] in compelling her to accept treatment."

It is submitted, therefore, that *Re Quackenbush* is incorrect on this point and that the objective quality of the patient's life is irrelevant when the patient is competent[80] and that it is the view of the competent patient that matters.

The third factor identified by the Court in *Re Conroy* was the argument that a patient may not insist on a course of treatment which would result in a breach of established medical ethics.

In *Re Farrell* the New Jersey Supreme Court developed this ground and said:

> "Even as patients enjoy control over their medical treatment, health-care professionals remain bound to act in consonance with specific ethical criteria. We realise that these criteria may conflict with some rights of self determination. In the case of such a conflict, a patient has no right to compel a health-care provider to violate generally accepted professional standards."[81]

[78] (1985) 48 ALR 4th, 1 at p. 28.

[79] (1987) 529 A. 2d 404.

[80] This is to be contrasted with the position of an incompetent patient where the objective quality of that patient's life is relevant. See *Re J* [1991] WLR 140.

[81] This echoes the view of the Massachusetts Supreme Court in *Brophy v New England Sinai Hospital* (1986) 497 NE 2d 626. This case involved an incompetent patient in a persistent vegetative state who had expressed a wish that he should not be artificially maintained. An issue arose as to whether artificial nutrition and hydration should be stopped. The Court held that a hospital could not be compelled to stop treating and said: "A patient's right to refuse medical treatment does not warrant...[an] intrusion upon the hospital's ethical integrity..." But this part of the judgement is not entirely consistent with other parts. See e.g. Fn 39 of the judgement: "In Re Saikewicz 370 NE 2d 417, we noted that it was "not necessary to deny a right of self determination to a patient in order to recognise [medical ethics]...it is clear in this case that we can preserve the ethical integrity of the hospital and its staff without impact upon any patient right of self determination."

It is respectfully submitted that this view is incorrect. It is conceded that it is not right to require medical staff to fail to discharge their legal duties of care towards their patients. However, nor is it right to allow the medical profession to formulate an abstract set of ethics which permit them to "play God" with those under their care. As the Court in *Re Conroy* had previously observed:

> "Medical ethics do not require medical intervention...at all costs."[82]

This accords with the relevant medical ethics discussed earlier. It is not a threat to those ethics to permit a patient to forego life sustaining treatment. Instead it is an exercise of those ethics to allow the patient to decide for himself. The Floridan Appeal Court in *Satz v Perlmutter*[83] put it in these forthright terms:

> "It is all very convenient to insist on continuing Mr. Perlmutter's life so that there can be no question of foul play, no resulting civil liability, and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient's sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable but artificially suspended moment of death."

The fourth and final policy factor was the protection of innocent third parties. The obvious example is the patient's young child. In *Hamilton v McAuliffe*[84] a Court authorised a blood transfusion against the patient's express wishes where the patient was a widower and the sole financial provider for his 2 year old son. In *Re Conroy* this policy factor was upheld as valid.

It is submitted that this is a sensible approach. Parent's should not be permitted to recklessly abandon their children. However nor must parents autonomy be needlessly overridden. Thus in *Re Osborne*[85] a patient was permitted to refuse treatment because the Court was satisfied that adequate provision had been made for the child's financial and emotional needs.

Skegg appears to argue that public policy can never vitiate a competent patient's refusal.[86] He cites *R v Blaue*[87] as an English authority supporting his proposition that a competent patient is always entitled to refuse treatment. It is respectfully submitted that *R v Blaue* does not support this proposition. Firstly, on the facts of the case it appears that the victim was young and had no dependants and thus applying the only valid policy factor identified, she would be able to refuse consent. Secondly, the case is properly interpreted as no more than an application of the classical principle that a wrongdoer must take his victim as he finds him[88]. Further since the wound was an operative factor at the time of death in the sense that it caused the loss of blood, a mere refusal to replace that blood would not break the chain of causation.

[82] (1985) 48 ALR 4th, 1 at p. 27. The reasoning advanced in the last chapter would seem to support this conclusion.
[83] (1978) 362 So. 2d 160, at p. 164.
[84] (1976) 353 A. 2d 634.
[85] (1972) 294 A. 2d 372.
[86] P. D. G. Skegg, "Law, Ethics and Medicine" at p. 114.
[87] [1975] 1 WLR 1411. The victim, a young Jehovahs Witness, was stabbed by the appellant. The victim refused a blood transfusion on religious grounds and died through loss of blood.
[88] See the judgement of Lawton L.J. at p. 1416 which it is submitted proceeds upon this basis.

An English authority supporting the public policy proposition is *Leigh v Gladstone*[89] where a suffragette brought an action for battery because while in prison and on "hunger strike" she had been forcibly fed by prison staff. Lord Alverstone C.J. dismissed the action apparently holding on grounds of public policy that there was a power to administer food without consent.

Zellick[90] and Kennedy[91] have persuasively argued that this decision goes too far and is out of line with modern policy. It is submitted that whilst this is correct, *Leigh v Gladstone* is nevertheless authority to the effect that public policy can vitiate a patient's refusal.

Thus there is authority to support the proposition that a competent patient's refusal to be treated must usually be respected. It can, however, be ignored where it is in the public interest to do so.

CONCLUSION

When a patient enters a hospital in England and Wales he rightly expects to be treated to the highest of professional standards. Contrary to the views expressed in some of the American cases he does not thereby cease to be master of his own destiny. A competent patient retains an ethical *right* to refuse treatment. Clauses 2 and 3 of the draft bill annexed hereto give a statutory right to refuse treatment and require medical personnel to actively seek consent.

The degree of control the patient may exercise upon his rescuers depends on his surrounding circumstances. If he is incompetent and has always been so then the Court should exercise the same control over his treatment it would exercise were he a ward of court. The House of Lords in *Re: F* refused to extend the *parens patriae* jurisdiction along these lines. In the context of medical treatment the wardship jurisdiction works well and there seem to be no good reason why it should not be extended. The Law Lords thought that it was not an extension their powers permitted them to make. It is respectfully suggested therefore that Parliament should intervene, reverse this decision and extend the *parens patriae* jurisdiction so as to include the medical treatment of incompetents. Clause 8 of the bill implements this recommendation.

Perhaps more controversial is whether patients who whilst competent express a prospective view of what should happen to them in certain specified circumstances, are entitled to have that view respected by a doctor or the Courts once they have lapsed into "incompetence". *Malette v Shulman,* is Commonwealth authority which answers in the affirmative. But Lord Bridge in *Re: F* can be taken to indicate the opposite such that once a patient has refused treatment (and as a result falls into unconsciousness and arguably incompetence) medical staff have a right to disregard that prior refusal. This is based on the view that where treatment is necessary to preserve the patient's welfare, a patient who is unconscious should not be denied such assistance merely because of his temporary state. Conversely, Lord Goff can be taken to uphold the autonomy principle and require compliance with

[89] (1909) 26 TLR 139.

[90] Graham Zellick, "The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy" [1976] PL 153.

[91] Ian Kennedy, "The Legal Effect of Requests by the Terminally Ill and Aged not to receive further Treatment from Doctors [1976] Crim LR 217, at p. 227. Kennedy opines that: "This case has become all things to all men."

a prior refusal (and by extension an advance directive). The problem is to eliminate the risks of fraud or misunderstanding and safeguard the patient's position. To this end clause 6 seeks to enact the middle ground.

The patients right to refuse is not absolute and is qualified under clause 5. The American cases correctly identify the financial and emotional dependence of innocent third parties as a special case justifying an inroad into the autonomy principle. Clause 5 incorporates this view and gives the Courts a discretion (subject to the specified constraints) to order treatment in such cases.

It is natural and understandable for the medical profession to fear criminal and civil liability for respecting the instruction of their patients and it is human nature for disgruntled patients or their families to blame the patient's medical advisers. A contemporary analysis has been advanced earlier in this article as to why medical staff should not incur liability. However, it is recognised that centainty is desirable if defensive medicine is to be discouraged and clause 9 confers an immunity provided its terms are strictly complied with.

ANNEX

DRAFT OF A BILL INTITULED

An Act to make provision for a patients right to refuse medical treatment in England and Wales; to prevent the treatment of patients against their will; to provide for the medical treatment of persons rendered temporarily unconscious; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Preliminary

1. — (1) For the purposes of this Act —

"appropriate person" means either the person who made the request for consent; or the person or persons who would but for any revocation under this Act perform or administer the treatment; and "court" means the Family Division of the High Court of Justice in England and Wales; and

"incompetent" means a person who on the issue of consent to the proposed medical treatment in question cannot understand the consequences of treatment and non treatment and cannot come independently to a reasoned decision whether to consent to or refuse that treatment; and "life saving" means any medical treatment which can significantly prolong an acceptable quality of life; and

"medical treatment" includes physical connection and continued connection to any external machinery or equipment as part of a therapeutic process; and

"patient" means the person who is to be subjected to the medical treatment.

"quality of life" means the worthwhileness of the patient's life in the context of the disability or suffering resulting or perpetuated by the proposed medical treatment; and

"third parties" means any and all persons who are emotionally or financially dependent on the patient and "third party" is to be interpreted accordingly.

Qualified right to refuse medical treatment

2. Subject to sections 5 and 6 of this Act all persons not being incompetent for the purposes of this act and being present within the jurisdiction of England and Wales shall have the right to refuse medical treatment of any kind.

3. Subject to sections 5, 6 and 8 of this Act it shall be unlawful to perform or administer any medical treatment to any person without that person's consent having been obtained after taking such steps as are reasonably necessary to:

(a) request from that person that person's consent to that particular treatment for the full duration of that treatment; and

(b) determine that person's ability to communicate and identify the form forms language or languages by which that person can make and receive communications; and

(c) ensure that the request is made in a form and in a manner which is intelligible to that person.

4. Subject to section 8 of this Act any consent for the purposes of this Act is invalid and of no effect unless section 3 of this Act has been complied with and the consent is:

(a) Made in writing incorporating the request and signed by the person who is to receive medical treatment; or

(b) Made by a request being made orally or in writing to the person who is to receive medical treatment and that person positively signifies his consent to that treatment in the presence of that person and the person making the request and two other witnesses;

provided always that such consent has not been revoked under section 10 of the Act.

Powers of court

5.—(1) Any third party or person who is qualified as a medical practitioner may apply to the court for an order under this section if the patient refuses or fails to consent to life saving medical treatment.

(2) On an application under this section the court must balance:

(a) the likely emotional and or financial suffering to any third parties which would be caused by the patient's death; against

(b) the likely quality of life the patient could reasonably be expected to enjoy both during and after the proposed medical treatment.

(3) The court may order the patient to submit to life saving medical treatment if it is satisfied that under subsection 2 hereof the harm to be caused to any third parties exceeds the harm to be caused to the patient by making such an order.

Treatment in emergencies

6. Medical treatment may be performed or administered on a person in the absence of that person's consent where:

(a) the person giving the treatment does not know and has not had the opportunity to discover that the patient is ordinarily incompetent; and

(b) the patient is unconscious and has not previously refused this treatment; and

(c) the proposed treatment is reasonably necessary to safeguard the patient's life or quality of life and cannot safely be postponed until the patient regains consciousness.

Savings as to minors

7. Nothing in this Act shall be taken as derogating from any power of the court in exercise of its *parens patriae* jurisdiction over minors.

Extension of courts **parens patriae** *jurisdiction*

8.—(1) Sections 2, 3 and 4 hereof shall not apply to persons who are for the purposes of this Act incompetents.

(2) Incompetents shall not be able to consent to medical treatment.

(3) In relation solely to the medical treatment of incompetents the court shall exercise its *parens patriae* jurisdiction over incompetents in like manner to that exercised over wards of court and in like manner the approval of the court shall be sought before any medical treatment is performed or administered to an incompetent.

Immunity for medical staff

9. Medical staff shall incur no civil or criminal liability whatsoever where:

(a) medical treatment is performed or administered in compliance with section 6 or an order of the court made under sections 5 or 8 hereof; or

(b) the patient has withdrawn refused or failed to consent to the proposed medical treatment and as a consequence has died or sustained injury;provided always that section 3 and 4 hereof has been complied with.

Revocation of consent

10. A person with the right to refuse medical treatment of any kind under section 2 of this Act may revoke any consent given for the purposes of this Act by taking such steps as are reasonably practicable to effect such revocation and are likely to result in communication of the revocation of consent to the appropriate person.

ELECTRONIC MONITORING AND CRIMINAL JUSTICE: SOME RECENT DEVELOPMENTS IN BRITAIN

Stephen J. Fay*

INTRODUCTION

Section 13 of the Criminal Justice Act 1991 affords courts the option of requiring the electronic monitoring of offenders for the purpose of enforcing curfew orders made under s.12 of the same Act. A curfew order, a new measure, requires the offender to remain at home or some other specified place for between two and 12 hours per day for up to six months[1]. The inclusion in the Act of a provision for electronic monitoring may come as a surprise to readers who are unaware of the fact that experimental trials involving the electronic monitoring of defendants on bail took place in England during 1989 and 1990. Ironically, such inclusion might be greeted with a similar degree of surprise, if not incredulity, among those who followed the progress of the trials and are aware of their poor results. This paper aims to explain the reasons for the Conservative Government's interest in electronic monitoring or 'tagging', to discuss the nature and results of the experimental trials, and to draw some conclusions as to the utility of electronic monitoring as a criminal justice measure in Britain.

THE APPEAL OF ELECTRONIC MONITORING TO THE CONSERVATIVE GOVERNMENT

THE POLITICS OF CRIMINAL JUSTICE

Sumner's recent assertion that criminology cannot fulfil its obligation to inform without recognising 'the significance of politics and ideology in the emergence, operation and effects of...criminal justice systems'[2] is particularly apposite to an analysis of the legislative measures of the Conservative Government led by Mrs. Thatcher between 1979 and 1990, given the overtly ideological nature of the New Right economic and social policies pursued by the regime[3]. The 1991 Act's provision for the electronic monitoring of curfew orders is no less a part of the Thatcherite project for having reached the statute book during the premiership of Mrs. Thatcher's successor, John Major: it is clear that the Conservatives'

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[1] Night restriction requirements for juveniles subject to supervision orders were introduced by s.20 of the Criminal Justice Act 1982 (amending s.12 of the Children and Young Persons Act 1969). They have met with forthright opposition from social workers charged with their enforcement, who object to the surveillance role and extra work involved. Such restrictions have seldom been imposed: see M. Nellis, 1991, 'The Electronic Monitoring of Offenders in England and Wales', *British Journal of Criminology*, 31, 2, p. 170.

[2] C. Sumner, 1990, 'Introduction to Contemporary Socialist Criminology', in C. Sumner (ed.), *Censure, Politics and Criminal Justice*, Milton Keynes: Open University Press, p. 10.

[3] Policies which owe much to the work of F. von Hayek (see, e.g. 1944, *The Road to Serfdom*, London: Routledge; 1973-9, *Law, Legislation and Liberty*, Vols. 1-3, London: Routledge; 1980, *1980s Unemployment and the Unions*, London: Institute of Economic Affairs); and M. Friedman (see, e.g. 1962, *Capitalism and Freedom*, Chicago: Chicago University Press).

enthusiasm for tagging was manifest even prior to the commencement of the trials in 1989[4]. In order to explain such enthusiasm it is necessary to advert to two principal contextual factors behind Conservative criminal justice policies: 'Thatcherism'[5] and the 'penal crisis'[6].

THATCHERISM

Thatcherism may be regarded as a coherent (though not necessarily effective) set of economic and social policies aimed primarily at restoring conditions necessary for profit-maximisation. In particular, Thatcherism has: embraced monetarist policies aimed at driving out of business inefficient companies and suppressing wage-levels in those firms which survive, thereby increasing labour productivity and general levels of profitability[7]; constricted the role of government largely to the maintenance of conditions supportive of the free market; in order to promote 'self-reliance' and 'enterprise'[8] and to police the social disruption (including increased levels of unemployment) attendant upon the implementation of monetarist policies[9]; and reduced significantly government expenditure on the public sector, which is regarded as being 'a burden on wealth-creating sectors of the economy'[10]. Such policies have engendered a massive programme of privatisation which has encompassed: the sale of major public utilities and of a considerable amount of the publicly-owned housing stock; the promotion of private sector substitutes for public services; and the contracting-out of some public service activities to private enterprise[11]. It is the latter aspect of the Government's privatisation programme which is of particular relevance to our discussion, for electronic monitoring of offenders offers an opportunity for private enterprise not only to provide and operate electronic monitoring equipment but also to monitor the compliance of offenders with the terms of their curfew orders — a

[4] Conservative MP Sir John Wheeler, Chairman of the House of Commons Home Affairs Select Committee (and former director-general of the British Security Industry Association) visited the USA in 1986 and was clearly impressed with the electronic monitoring schemes which he encountered there: see J. Wheeler, 1990, 'Electronic Monitoring: A Humane Way of Keeping People Out of Prison', *The Magistrate,* 46, 8, p. 144. Shortly thereafter, the Earl of Caithness, then Minister of State at the Home Office, visited several electronic monitoring projects in the USA: see NACRO, 1989, *The Electronic Monitoring of Offenders,* London: NACRO, p. 9. See also note 50.

[5] Useful analyses of Thatcherism and its effects are contained in S. Hall and M. Jacques (eds.) 1983, *The Politics of Thatcherism,* London: Lawrence and Wishart; and S. Edgell and V. Duke, 1991, *A Measure of Thatcherism,* London: Harper Collins.

[6] For details, see M. Fitzgerald and J. Sim, 1982 (2nd Edn.) *British Prisons,* Oxford: Basil Blackwell; V. Stern, 1987, *Bricks of Shame: Britain's Prisons,* Harmondsworth: Penguin; A. Rutherford, 1988, 'The English Penal Crisis: Paradox and Possibilities', *Current Legal Problems,* 41, pp. 93-113; R. King and K. McDermott, 1989, 'British Prisons 1970-1987: The Ever-Deepening Crisis', *British Journal of Criminology,* 29, 2 , pp. 107-108.

[7] See A. Glyn and J. Harrison, 1980, *The British Economic Disaster,* London: Pluto Press, pp. 139-140 for succinct discussion of monetarism.

[8] See M. Sullivan, 1987, *Sociology and Social Welfare,* London: Allen and Unwin, pp. 17-28.

[9] As S. Hall puts it, 'If the state is to stop meddling in the fine-tuning of the economy, in order to let "social market values" rip, while containing the inevitable fall-out, in terms of social conflict and class polarization, then a strong, disciplinary regime is a necessary corollary': 1980, *Drifting Into a Law and Order Society,* London: Cobden Trust, p. 4. For numerous illustrations of the shift towards authoritarianism or a 'control culture' in the UK, see M. Brake and C. Hale, 1992, *Public Order and Private Lives: The Politics of Law and Order,* London: Routledge, pp. 35-68.

[10] M. Sullivan, *op. cit.,* p. 18.

[11] See M. Holmes, 1989, *Thatcherism: Scope and Limits, 1983-87,* London: Macmillan, pp. 59-70 for more details of the Conservatives' privatisation programme. For a discussion of privatisation in the criminal justice system in general, see R. Matthews (ed.), 1989, *Privatizing Criminal Justice,* London: Sage. On the subject of recent Conservative proposals for private prisons, see M. Wainwright, 1991, 'Private jail to shatter union's monopoly', *The Guardian',* 7 November, p. 2; and Part IV of the Criminal Justice Act 1991.

function which might otherwise be performed by probation officers in the public sector. In the USA, where electronic monitoring of offenders was first employed in 1983 and has since proliferated[12], many schemes are administered and supervised by private agencies[13]. One of the main reasons for the rapid growth of electronic monitoring in the USA has been 'a fiscal crisis which has made it very difficult to justify further expenditure'[14] on what Box termed the 'hard end' of penal policy[15] — in particular, the expansion of the prison estate in pursuance of a policy of incarceration. It is the perceived cheapness of electronic monitoring relative to the cost of traditional custodial measures which has been flaunted by the protagonists of electronic monitoring[16] and which:

> dovetails nicely with current governmental concerns on both sides of the Atlantic to control inflation and stimulate the economy by reducing public expenditure and personal taxation[17].

Thus, electronic monitoring appears to accord well with the Thatcherite strategies of encouraging private enterprise and reducing state expenditure (although the issue of the cost of electronic monitoring is problematic, as we shall see later). Of course, to impute the motives of cost-saving and the pursuit of privatisation to the Thatcher Government with regard to its interest in tagging without evaluating the evidence would be to engage in mere speculation. However, the Government's Green Paper of 1988, 'Punishment, Custody and the Community'[18], which was the first Government publication to bring to public attention the possibility of electronic monitoring's use to enforce the home confinement of offenders who would otherwise be in custody, provides evidence not only of a desire to save costs and to introduce an element of privatisation but also to instil a sense of responsibility and self-reliance among offenders:

> Imprisonment restricts offenders' liberty, but it also reduces their responsibility; they are not required to face up to what they have done...they are less likely to acquire self-discipline and self-reliance which will prevent reoffending in the future...Punishment in the community should be more economical in public resources. Holding someone in prison costs twice as much as the average community service order... Personal visits to the offender's home by a supervisor, especially in unsocial hours, would be expensive...Electronic monitoring might help to enforce an order which required offenders to stay at home... Private sector security organisations may be able to play a part in some aspects of the new arrangements, e.g. by monitoring curfews[19].

[12] By the end of of 1989 there were over 300 electronic monitoring programmes operating across 44 states, and a daily electronically monitored population of about 12,000: see J. Lilly, 1990, 'Tagging Reviewed', *The Howard Journal*, 29, 4, p. 234. Useful discussions of electronic monitoring in the USA are also contained in B. McCarthy (ed.), 1987, *Intermediate Punishments: Intensive Supervision, Home Confinement and Electronic Surveillance*, New York: Criminal Justice Press; and R. Ball *et al.*, 1988, *House Arrest and Correctional Policy: Doing Time at Home*, Beverly Hills: Sage.

[13] See, for example, the role played by Pride, Inc. in supervising electronic monitoring schemes in Monroe County and Palm Beach County, Florida: discussed by R. Ball *et al.*, *ibid.*, pp. 92-94.

[14] G. Mair and C. Nee, 1990, *Electronic Monitoring: The Trials and Their Results*, Home Office Research Unit Study No. 120, London: HMSO, p. 7.

[15] S. Box, 1987, *Recession, Crime and Punishment*, London: Macmillan, pp. 107-108.

[16] See, for example in the USA, R. Gable, 1986, 'Application of Personal Telemonitoring to Current Problems in Corrections', *Journal of Criminal Justice*, 14, p. 173; and in the UK, T. Stacey, 1989, 'Why Tagging Should be Used to Reduce Incarceration', *Social Work Today*, 20, 20 April, p. 19: 'all forms of tagging are far cheaper to operate than any form of imprisonment'.

[17] A. Wade, 1988, *The Electronic Monitoring of Offenders*, Probation Monograph, Norwich: University of East Anglia, p. 13.

[18] Cm. 424, Home Office, London: HMSO.

[19] *Ibid.*, pp. 1, 2, 11, 12.

The moralistic concern to promote self-reliance and responsibility is a feature of Conservative criminal justice policy which has come into increasing prominence since the mid-1980s, largely as a result of a realisation among Conservative ranks that expensive, overtly authoritarian and punitive policies have not had the desired effect of stemming rapidly rising levels of recorded crime (which increased by 79% during Mrs. Thatcher's premiership)[20]. That said, it is discernible from the tone of the Green Paper and from the pronouncement of the then Home Office minister, John Patten, prior to the commencement of the electronic monitoring trials, that tagging was regarded by the Government as potentially more punitive and controlling than existing non-custodial measures and as therefore worthy of public confidence[21]. Finally, it is clear that electronic monitoring was perceived by the Conservatives as offering the prospect of a reduction in the size of the prison population: the Green Paper prefaced its proposals for 'punishment in the community' with statistics of the size of the prison population, and the rhetorical question: 'Are we sending too many people to prison?'[22]; and the ensuing White Paper of February 1990, 'Crime, Justice and Protecting the Public'[23], stated clearly that such proposals should reduce the use of custody[24]. The importance of a potential reduction in the prison population cannot be appreciated without a knowledge of the second major contextual factor behind the Government's interest in tagging: the English penal crisis, a crisis 'which takes the visible and immediate form of overcrowding but which is ultimately a crisis in the legitimacy of incarceration itself'.[25]

THE PENAL CRISIS

The extent of the crisis within the prison system in England and Wales is well-documented and widely acknowledged. Fitzgerald and Sim's study[26], first published in 1979, found that by the late 1970s there was a consensus among politicians, civil servants and media commentators that English prisons were in a 'parlous state'[27], the most visible manifestations of which were overcrowding, appalling conditions (inadequate sanitation, decrepit buildings, etc.), allegations of serious malpractice (including staff beatings of inmates and the use of psychotropic drugs for control purposes), trade union militancy among prison officers, and increasingly vociferous prisoner protest against such conditions and circumstances[28]. Subsequent studies by Stern [29] and Rutherford[30], among others, have

[20] For an excellent discussion of the change in emphasis in Conservative thinking on law and order, see I. Taylor, 1987, 'Law and Order, Moral Order: The Changing Rhetorics of the Thatcher Government', in R. Miliband *et al.* (eds.), *Socialist Register 1987,* London: Merlin Press, pp. 297-331. For the crime figures, see J. Carvel, 1991, '79% crime rise under Thatcher revealed by Home Offfice figures', *The Guardian,* 28 March, p. 3; also D. Campbell, 1992, 'Crime rate rise twice as fast under Tories', *The Guardian,* 1 February, p. 2.

[21] For example, Mr. Patten remarked in relation to tagging: 'If we are to persuade the public it is worth — and safe — looking beyond punishment in prison to "punishment in the community", we must be able to increase the degree of discipline and control exerted on an offender', *The Times,* 7 March 1988, quoted in NACRO, *op. cit.,* p. 9. See also Green Paper, *op. cit.,* pp. 11-12.

[22] Green Paper, *ibid.,* pp. 8-9.

[23] Cm. 965, Home Office, London: HMSO.

[24] *Ibid.,* p. 47.

[25] B. Berry and R. Matthews, 1989, 'Electronic Monitoring and House Arrest: Making the Right Connections', in R. Matthews (ed.), *op. cit.,* p. 107.

[26] M. Fitzgerald and J. Sim, *op. cit.*

[27] *Ibid.,* p. 5.

[28] *Ibid.,* pp. 2-3.

[29] V. Stern, *op. cit.*

[30] A. Rutherford, *op. cit.*

marshalled convincing evidence to support the view that prison overcrowding and insanitary conditions are 'an affront to a civilized society' and that imprisonment 'does not constitute a very effective or constructive way of dealing with criminals or reducing crime'[31]. Rutherford claims that the present crisis stems in large measure from the publication in October 1979 of the 'Report of the Committee of Inquiry into the United Kingdom Prison Services', chaired by Mr. (later Lord) Justice May[32]. The Committee accepted evidence from the Home Office to the effect that the prison system had been starved of resources, and urged the doubling of capital expenditure on prisons — a proposal which found favour among authoritarian elements within the newly elected Thatcher Government[33]. By 1982, the Thatcher Government had adopted an 'open front door'[34] policy with regard to prisons, which embodied a determination, in the words of William Whitelaw, then Home Secretary, to 'ensure that there will be room in the prison system for every person whom the judges and magistrates decide should go there'[35]. This policy has been buttressed by a substantial prison-building programme and an increase in expenditure on the prison system of 70% in real terms between 1980 and 1987[36]. Crucially, such a 'supply side' expansion has been matched by an increase in demand for prison places, as the prison-building programme has signalled to sentencers the message that additional capacity is available. The consequences have been disastrous, as Rutherford notes:

> The prison population has continued its relentless increase, exceeding 50,000 and then 51,000 in 1987...Conditions endured by prisoners and staff are worse than ever...Prison overcrowding has never been greater[37].

Rutherford expressed such views in 1988, together with a belief that the problem of prison overcrowding was likely to persist, if not worsen, during the rest of the century[38]. That year the Conservative Government began to address some aspects of the penal crisis by stressing the importance of adopting a 'twin-track' approach to offenders, that is, 'splitting offenders into the very bad and the not so bad'[39], imposing longer custodial sentences on the former, and non-custodial measures on the latter. Such a policy was evident in the 1988 Green Paper, which stressed the continued necessity of imprisoning those who commit serious offences against the person or property, but which proposed a number of changes, including the possible use of electronic monitoring, which would intensify existing non-custodial measures in order to facilitate the punishment in the community of those responsible for less serious offences[40]. In 1989 the average prison population in England and Wales was 48,600, a reduction of about 3% over 1988, and the first fall since 1973 [41]. However, Brake and Hale point out that the reduction was attributable mainly to a fall in the number of remand prisoners (owing to the success of the probation service's bail information schemes) and in the number of young offenders imprisoned (owing to restrictions imposed by the Criminal Justice Act 1988)[42], rather than to the Government's

[31] V. Stern, *op. cit.*, pp. 13; p. 73. The first phrase was originally that of D. Trevelyan, a former director-general of the prison system.
[32] Cm. 7673, London: HMSO.
[33] A. Rutherford, *op. cit.*, p. 97.
[34] *Ibid.*, p. 100.
[35] Quoted in A. Rutherford, *ibid.*
[36] A. Rutherford, *ibid.*, p. 100.
[37] *Ibid.*, p. 102.
[38] *Ibid.*
[39] *Ibid.*, p. 102.
[40] Green Paper, *op. cit.*, *passim.*
[41] See M. Brake and C. Hall, *op. cit.*, p. 137.
[42] See Part IX of the 1988 Act.

new enthusiasm for the diversion of petty offenders from prison[43]. Moreover, the Home Office itself estimates that the average daily prison population will increase to about 62,000 by 1998[44].

AN IDEAL THATCHERITE PENAL MEASURE?

Hence, it can be seen that electronic monitoring was alluring to the Thatcher Government for the following reasons: it was perceived to be a cheaper measure than imprisonment; it appeared to offer the prospect of a reduction in the size of the prison population; it was thought to facilitate the inculcation of responsibility and self-reliance among those who would otherwise achieve neither in prison; it was more punitive and controlling than existing non-custodial measures (indeed, it might be regarded as a type of custodial measure in that it converts the home into a site of incarceration); and it accorded with the Thatcherite predilection for privatisation by providing for private sector involvement in the supply of monitoring equipment and possibly in the supervision of offenders. In many respects, therefore, the Conservative Government's interest in electronic monitoring revealed the congruence of its economic and criminal justice policies. Nellis appreciates this fact when he remarks that:

> Tagging...fits the thrust of contemporary economic and political development in so far as it feeds on the ideologically inspired need to reduce expenditure on public services, whether prisons or social welfare, and also on the need to develop cheaper, but none the less effective, means of control over the dispossessed populations — elements of the urban underclass — who are becoming surplus to capitalism's requirements[45].

If tagging could achieve such objectives it would indeed merit enthusiasm from the Conservative Government. But whether all of the perceived advantages of electronic monitoring were realisable in practice remained to be seen.

THE ELECTRONIC MONITORING TRIALS IN ENGLAND, AUGUST 1989-APRIL 1990

THE GOVERNMENT'S ENTHUSIASM

Although the Green Paper of July 1988 invited its readers to express their views 'on the usefulness of electronic monitoring in keeping more offenders out of custody'[46], it disclosed that the Home Office was evaluating various forms of monitoring equipment[47]. Green Papers are by tradition consultative in nature but the Thatcher Government gained a reputation for presenting in such command papers policies which it had already decided to pursue[48]. Parker argues that such was the case in respect of the Green Paper in question: a six-month trial of electronic monitoring was announced on 11 February 1989 (to commence that summer), only eleven days after the 'consultation' period stipulated in the Green Paper had ended[49]. More tellingly, however, Mair and Nee, the authors of the Home Office's own study of the trials, have revealed that the 'decision to test out electronic monitoring had been taken by the middle of 1988'[50].

[43] M. Brake and C. Hall, *op. cit.*, p. 137.
[44] Home Office, 1990, *Projections of the Long Term Trends in the Prison Population to 1998*, Home Office Statistical Bulletin 13/90, London: HMSO, cited by M. Brake and C. Hall, *ibid.*
[45] M. Nellis, *op. cit.*, p. 180. See also, by the same author, 1989, 'Keeping Tags on the Underclass', *Social Work Today*, 20, 25 May, pp. 18-19.
[46] Green Paper, *op. cit.*, p. 12.
[47] *Ibid.*
[48] For example, see R. Hyman, 1981, 'Green Means Danger?' *Politics and Power*, 4, pp. 129-146, for a discussion of this practice in the area of labour law.
[49] H. Parker, 1989, 'Soft-Packaging Penal Reform', *Social Work Today*, 21, 25 January, pp. 14-15.
[50] G. Mair and C. Nee, *op. cit.*, p. 8.

Nellis[51] suggests that the Government's interest in tagging was stimulated initially by the publication in April 1987 of a House of Commons Home Affairs Committee report, 'The State and Use of Prisons'[52], which, in an attempt to address the problem of prison overcrowding, urged the Home Office to 'study the use made of electronic tagging of offenders in the USA to see what, if any, application it has in England and Wales'[53].

THE PURPOSE OF THE TRIALS

The Home Office published four formal objectives of the experiment in advance of the trials' commencement[54]. These were:

> 1) to evaluate the extent to which the availability of electronic monitoring can enable defendants to be remanded on bail rather than in custody;
> 2) to evaluate current electronic monitoring technology;
> 3) to evaluate cost effectiveness and performance of electronic monitoring services provided by the private sector; and
> 4) to inform consideration of the scope of widening the application of electronic monitoring to convicted offenders who would otherwise have received a custodial sentence[55].

The first objective was not simply a response to the problem of large numbers of prisoners being held on remand pending trial or sentence[56]; it was also a legal necessity, for as Mair and Nee point out, tagging could not be used as anything other than a condition of bail without legislative changes:

> It was clear from the beginning that monitoring could not legally be used as a sentence of the court; legislation would be necessary for this and the Parliamentary timetable was too busy to allow access for a new Bill to be presented at short notice. Legal advice made it clear that electronic monitoring would be possible under current legislation as a condition of bail for an unconvicted offender[57].

Such an explanation begs the question of why it was thought necessary to start the tagging trials in advance of a parliamentary opportunity to amend existing legislation (notably, the Powers of Criminal Courts Act 1973). One gets the impression that the Government was determined to introduce tagging, albeit as an experiment, almost irrespective of the difficulties attendant thereto. Certainly, Mair and Nee make much of the fact that the 12-month period between the Government's decision to instigate the trials and their commencement was 'a remarkably short time in which to carry out all the planning and detailed negotiations which had to be done before the trials commenced'[58].

[51] M. Nellis, 1991, *op. cit.*, p. 169.

[52] House of Commons, 1987, Third Report from the Home Affairs Committee: *The State and Use of Prisons 1986/87,* London: HMSO.

[53] *Ibid.*, para 61.

[54] See E. Grant, 1989, 'Electronic Monitoring Trial in Nottingham', *The Magistrate,* 45, 8, p. 144. The author was Head of C2 Division, Criminal Justice and Constitutional Division at the Home Office. J. Lilly, *op. cit.*, p. 239, must have overlooked Grant's article (which appeared in August 1989) in implying that the Home Office was vague, indeed mute, as to the purpose of the tagging trials until October 1989.

[55] E. Grant, *ibid.*

[56] In 1989, the latest year for which full statistics are available, 65,905 persons were remanded in custody in England and Wales (of which fewer than 27,000 went on to get a prison sentence): see J. Carvel, 1992, 'Courts "too ready to jail on remand" ' *The Guardian,* 14 April, p. 6.

[57] G. Mair, and C. Nee, *op. cit.*, p. 8. Courts may require accused persons to comply with such conditions that appear necessary to secure that, *inter alia,* they do not commit offences whilst on bail: see section 3 of the Bail Act 1976.

[58] G. Mair and C. Nee, *ibid.*

The second objective of the trials was to be expected; the third made 'explicit the Government's interest in using the logic of market forces to determine if monitoring [was] to be incorporated into the criminal justice system'[59]; and the fourth confirmed the Government's interest in the possibility of using electronic monitoring as an alternative to imprisonment for convicted offenders rather than solely for remandees[60].

PREPARATORY MATTERS

Once the objectives of the trials had been enunciated, certain other important preparatory matters had to be dealt with, including the choice of the location of the trials. According to Mair and Nee, it was considered 'essential to try electronic monitoring in more than one area, but resource constraints limited the trial period to six months in three petty sessional areas'[61]. Home Office official, Elliot Grant, has indicated that it was considered necessary to 'look at areas where enough people are remanded in custody to produce a range of candidates for electronic monitoring', and that the areas chosen 'needed to produce a geographical spread'[62]. In consequence, the petty sessional areas of Nottingham City, North Tyneside and Tower Bridge, London were chosen; they had 22%, 14% and 13%, respectively, of defendants remanded in custody for alleged indictable offences[63].

Having decided on locations, the Home Office needed to specify to the relevant benches of magistrates the appropriate criteria for the selection of potential participating defendants (or 'controlees', in the parlance of some commentators)[64]. Such criteria are set out by Mair and Nee:

> As well as being available as a condition of bail where the defendant would otherwise have been remanded in custody, defendants had to be volunteers, they had to be 17 or over...they would have to reside in the area covered by the jurisdiction of the court and be likely to remain at the same address for the duration of the monitoring period. In addition, only defendants who were not likely to pose a danger to members of the public should be considered...and where monitoring was to take place in a defendant's home, undue hardship should not be caused to the families of defendants or other occupants. Both male and female defendants would be considered for monitoring[65].

These requirements reveal an awareness on the part of the Home Office of some of the potential problems arising from tagging[66]. For example, the expression of intent that tagging be used only on those who would otherwise be remanded in custody was a clear indication of the Home Office's appreciation of the necessity of true diversion from custody if remand levels are to fall, and perhaps also an indication of an awareness of the problem of 'net-widening' — a phrase associated with Cohen's 'dispersal of discipline thesis'[67] (to which we shall return later), which connotes an expansion and intensification

[59] J. Lilly, *op. cit.*, p. 240.

[60] It transpired that section 12 of the 1991 Act would provide only for the use of curfew orders on those (aged 16 or older) convicted of an offence. However, as the 1991 Act does not alter the relevant provisions of the Bail Act 1976 (see note 57) it would still be possible to use electronic monitoring on unconvicted defendants as a condition of bail.

[61] G. Mair and C. Nee, *op. cit.*, p. 9.

[62] E. Grant, *op. cit.*, p. 144.

[63] *Ibid.*

[64] The phrase is used by B. Berry and R. Matthews, *op. cit., passim,* and will be adopted in this article.

[65] G. Mair and C. Nee, *op. cit.* p. 11.

[66] For a full discussion of such problems, see B. Berry and R. Matthews, *op. cit.*, and A. Wade, *op. cit.*

[67] See S. Cohen, 1979, 'The Punitive City: Notes on the Dispersal of Social Control', *Contemporary Crises,* 3, pp. 339-363; and his 1985, *Visions of Social Control,* Cambridge: Polity Press; and J. Austin and B. Krisberg, 1981, 'Wider, Stronger and Different Nets: The Dialectics of Criminal Justice Reform', *Journal of Research in Crime and Delinquency,* 18, 1, pp. 165-196.

of state control and surveillance over the populace. In this context, net-widening would occur if courts were to impose on defendants electronically monitored home confinement instead of unconditional bail or otherwise less restrictive bail conditions. If this were the case, tagging would obviously be used merely as an alternative to other (less restrictive) alternatives to custody, the liberty of defendants would be restricted unduly, and no reduction in the remand population would be effected by the new measure. Although the limited evidence so far available from the USA does not reveal net-widening to be a significant problem[68], there are commentators who believe that 'the more monitoring expands, the greater are the risks that public and media pressure will press towards its use on lower tariff offenders'[69]. In addition, the British experience of the use of suspended sentences of imprisonment and community service orders, both intended as alternatives to custody[70], lends credence to the net-widening argument[71].

The requirement of the scheme that controlees be non-dangerous was presumably intended to protect the public in the event of those tagged absconding or re-offending whilst on bail. In deference to public safety and public confidence in the courts, all US schemes 'attempt to identify "low-risk" prison-bound candidates who do not have a record of violence'[72]. Hence, in the USA, both violent and 'serious' sex offenders are invariably excluded, and some programmes refuse to accept serious property offenders and illicit drug dealers (in case the latter continue to deal from their homes)[73]. The Government's concern not to cause undue hardship to those who live with controlees, who may suffer from being 'cooped up' with the latter for long periods of time or who 'could be woken at night when the computer telephones, or may be asked to perform all of the simple domestic tasks that involve leaving the house'[74], also reflects the practice in the USA of avoiding the use of electronic monitoring on those 'who have poor relationships with their family or tendencies towards domestic violence'[75]. However, as the US schemes endeavour also to avoid selecting controlees who have a history of drug or alcohol abuse (in recognition that electronically monitored home confinement may contribute to depression and such abuse)[65], the use of electronic monitoring may well be confined in practice to 'good risks' — those who have committed minor offences and who have a stable background and job — who would almost certainly qualify for community supervision *without* electronic monitoring[77]. In such circumstances, of course, electronic monitoring would be superfluous.

[68] See A. Wade, *op. cit.*, p. 33.
[69] J. Petersilia, 1987-8, A Man's Home is his Prison: House Arrest May Well be the Future of Corrections', *Criminal Justice,* Winter, p. 42.
[70] Although there is some uncertainty as to the precise status of the community service order as an alternative to custody, there is 'not much doubt that the Parliamentary and Home Office intention in enacting [it] was that it would serve primarily as an alternative to custody': A. Bottoms, 1987, 'Limiting Prison Use: Experience in England and Wales', *The Howard Journal,* 26, 3, p. 191.
[71] See A. Bottoms, *ibid.*, pp. 177-202; and A. Vass, 1990, *Alternatives to Prison,* London: Sage, pp. 80-91.
[72] A. Wade, *op. cit.*, p. 12.
[73] B. Berry and R. Matthews, *op. cit.*, p. 117.
[74] A. Wade, *op. cit.*, p. 31.
[75] *Ibid.*
[76] *Ibid.*
[77] See NACRO, 1989, *op cit.*, pp. 10-11.

Finally, as in the case of all programmes in the USA, the participation of defendants in the English trials would be voluntary, although the establishment of informed consent may be problematic when a defendant has to choose between imprisonment and electronic monitoring[78]. However, unlike 75% of the schemes in the USA[79], the English trials would not require controlees to pay for the use of the monitoring equipment[80].

In addition to satisfying the above criteria, participants in the monitoring programme needed to have a telephone, or had to agree to have one installed[81]. The system used in the English trials was an 'active', telephone-based, continuously monitoring type[82], consisting of a transmitter-bracelet, or 'tag', worn on the ankle, which sends out signals when it is within the range of a receiver-dialler connected to the controlee's telephone line, which in turn relays the signals to a central computer. The computer alerts the monitoring staff of any apparent violation (manifest in a break in signal) during the curfew periods, and the monitoring staff then investigate, usually by visiting the participant's home. The possibility that otherwise eligible and consenting participants might not have a telephone meant that the Home Office had to engage in negotiations with British Telecom in order to procure the installation of telephone lines at short notice. Ultimately, British Telecom agreed to supply a line within 24 hours of being so requested (much quicker than its service to domestic users) but only in those cases where there were existing lines in the area of the participant's residence; in other cases, as Mair and Nee note, 'the cost and time needed...would be prohibitive (defendants would have to be kept in custody, while these arrangements were being made)'[83].

Home Office consultation prior to the start of the trials extended far beyond its dealings with British Telecom. As the bail and remand system encompasses all of the major agencies of the criminal justice system, the Home Office could have involved the courts, the police, the Crown Prosecution Service (CPS), and the prison and probation services in the planning of the trials. However, it seems that no plans were made with the prison service because the successful diversion of tagged offenders was considered likely to pose no

[78] See M. Shapiro, 1972, 'The Uses of Behavior Control Technologies: A Response', *Issues in Criminology*, 7, 2, pp. 78-80; and T. Blomberg *et al.*, 1987, 'Home Confinement and Electronic Surveillance', in B. McCarthy (ed.), *Intermediate Punishments: Intensive Supervision, Home Confinement and Electronic Surveillance, op. cit.*, p. 177: 'Does coercion exist when an offender is offered the choice of serving a prison sentence versus electronic monitoring in the home ?'

[79] M. Nellis, 1991, *op. cit.*, p. 168.

[80] Nor is there any specific provision in the 1991 Act for the payment by offenders of fees in connection with electronic monitoring. Such a requirement, which may offset some of the costs of electronic monitoring, would be entirely inappropriate in the case of low-income and unemployed offenders. The possibility of the future introduction of fees in Britain has not been broached publicly by the Government.

[81] G. Mair and C. Nee, *op. cit.*, p. 11.

[82] As distinct from a 'passive', programmed contact form of telephone-based system which is used in North America (as is the 'active' system) and which entails the monitoring computer's dialling the controlee's telephone number at random or selected times during the curfew period, in response to which the controlee must usually insert an identification transmitter (often a bracelet) into a verifying receiver attached to the telephone: for details, see A. Schmidt and C. Curtis, 1987, 'Electronic Monitors', in B. McCarthy (ed.), *Intermediate Punishment: Intensive Supervision, Home Confinement and Electronic Surveillance, op. cit.*, pp. 137-152; and K. Russell, 1990, 'Electronic Monitoring Equipment', *Yearbook of Law, Computers and Technology*, 4, pp. 139-142.

[83] G. Mair and C. Nee, *op. cit.*, p. 11.

problems thereto[84]; and the probation service was not invited to participate at all in the planning of the trials (although each area probation service would be asked to nominate a member to sit on a 'liaison committee' once the trials were underway) — a decision probably not unrelated to the oppositional stance adopted prior to the trials by the two major trade unions representing probation officers in Britain, the Association of Chief Officers of Probation (ACOP) and the National Association of Probation Officers (NAPO). Both bodies rejected tagging as being anathema to the probation service's social work-based values[85] and NAPO's members voted in 1988 'to campaign vigorously against any...proposal or practice'[86] involving electronic monitoring.

It seems that the police were persuaded by the Home Office to modify their normal practice of dividing cases into two groups, one of which would contain defendants in respect of whom they would not oppose bail, and the other containing those whom the police wished to see remanded in custody. The modification entailed the police's reconsideration of cases falling into the second category in the light of the monitoring scheme's criteria of eligibility, in order to identify those cases in which they would not oppose bail if the defendant were to be tagged[87]. The Crown Prosecution Service agreed with the Home Office to give 'further consideration to possible cases where they themselves might recommend monitoring although the police had decided against'[88].If the CPS did recommend a defendant for tagging, either by endorsing or rejecting the police's opinion, the court officer responsible for tagging would be notified and would inform the 'service provider' (Home Office jargon for the organisation responsible for providing the monitoring equipment) of a potential demand for one of its monitoring devices[89]. Of course, it would be for the magistrates themselves to decide who might be bailed with electronic monitoring, and they could do this without any recommendations from the CPS[90]. In addition, defence solicitors could propose that their clients be tagged[91].

When magistrates did decide to tag a defendant, it would be necessary to secure his or her written consent to being monitored and subjected to a curfew for a given number of hours per day. This would be achieved by requiring the defendant to read and sign a document called an 'Electronic Monitoring Agreement' (EMA) which set out comprehensively the conditions of participation and possible consequences of non-compliance[92].

[84] Other than having to keep overnight some of those granted bail subject to electronic monitoring, in order to await the installation of a telephone line: G. Mair and C. Nee, *ibid.*, p. 12.
[85] See ACOP, 1988, *Electronic Surveillance*, London: ACOP, p. 1; NAPO, 1988a, *Punishment, Custody and the Community: the Response of the National Association of Probation Officers*, London: NAPO, p. 9. Such views appear to ignore the punitive role already played by the probation service in relation to other measures: see A. Wade, *op. cit.*, p. 22.
[86] NAPO, 1988b, *Annual General Meeting Report*, London: NAPO, quoted in B. Berry and R. Matthews, *op. cit.*, p. 128.
[87] G. Mair and C. Nee, *op, cit.*, p. 11.
[88] *Ibid.*, p. 12.
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] See *ibid.*, p. 69, for a copy of the agreement.

The service providers were chosen by the Home Office from a shortlist of six companies which had been invited to tender in 1988. The contracts for the Nottingham and North Tyneside trials were awarded to Marconi Electronic Devices Ltd., and the Tower Bridge, London contract was won by Chubb-Racal Ltd. The firms' representatives would be responsible for fitting the transmitter, or 'tag', once a defendant had signed an EMA, and monitoring would begin after the defendant had returned from court to his residence[93]. Monitoring and home visits would be carried out by sub-contractors, Securicor Ltd.[94].

The Home Office decided to categorise apparent breaches of the EMA either as 'Level 1' violations where the violation was of two hours or less, in which case a written report would be sent by the service provider to the police, the CPS and the court the following day, or as 'Level 2' violations, where the police would be notified between two to four hours after the violation's commencement. The latter category would also include apparent violations involving tampering with the transmitter, where this was detectable[95]. The procedure adopted with regard to all alleged violations entailed firstly a check of the computer, then a check of the defendant's telephone. If the fault was in the latter, British Telecom would be informed; if in the former, the service provider's operative would visit the defendant in order to check the monitoring equipment[96]. Different levels of staffing and slightly different types of equipment were deployed across the three schemes in order for the Home Office to assess their relative effectiveness[97].

THE TRIALS

The first trials began on 14 August 1989 in Nottingham 'with a good deal of media interest'[98]. The Nottingham Evening Post (NEP) had carried several news articles that summer informing its readers of the impending experiment to be based at the city's Guildhall Magistrates' Court. On 8 May, for example, the paper's front-page headline announced the prospect of ' "Freedom Tags" for Accused' and the accompanying article revealed that Marconi's contract as service provider in Nottingham was worth £200,000, and that the other two contracts had a combined worth of £590,000. Also revealed was the expectation on the part of the Home Office that the six-month trial in Nottingham would involve the tagging of between 50 and 100 defendants[99]. Unfortunately, the wealth of advance publicity 'proved to be somewhat of an anti-climax'[100]: no-one was tagged on either the first or second day of the trial. Although the police and defence solicitors had made several recommendations for electronic monitoring, only one defendant had met the selection criteria and his landlady had objected to the installation of the necessary equipment, fearing that she would be unable to cope with the ensuing publicity[101]. The NEP carried an article on the 14 August entitled 'Scrap this tag trial gimmick', an exhortation of Harry Fletcher, assistant general secretary of NAPO. Fletcher argued that the trial would have no significant impact on the remand population, and that:

[93] G. Mair and C. Nee, *ibid.*, p. 13.
[94] M. Nellis, *op. cit.*, p. 172.
[95] G. Mair and C. Nee, *op. cit.*, pp. 12-13.
[96] *Ibid.*, p. 13.
[97] *Ibid.*
[98] *Ibid.*, p. 17.
[99] ' "Freedom Tags" for Accused', *Nottingham Evening Post*, 8 May 1989, p. 1.
[100] G. Mair and C. Nee, *op. cit.*, p. 17.
[101] *Ibid.*, pp. 17-18.

> The Government would do better investing in facilities for the mentally ill, in drug addiction programmes, and in bail hostels rather than electronic gimmickry if it genuinely wishes to empty the remand prisons[102].

This view reflects something of a change in emphasis on the part of NAPO, from a stance that stressed the ethical objections to tagging on the ground of its alleged inhumane and humiliating nature, to one that explicitly challenged the Government's priorities with regard to community treatment and punishment. Of course, such a demand, which was likely to be costly if implemented, was unlikely to find favour with a Government already committed to spending almost £800,000 on the three tagging trials with the aim ultimately of *saving* money.

The first order for electronic monitoring was made on the third day of the trials, in respect of a 23-year-old married man with three children, Richard Hart. Hart was facing minor charges of theft and motoring offences and had been remanded in Lincoln Prison since the end of June. He had to stay in custody until the day after his court appearance in order to allow a telephone to be fitted in his flat. Hart's curfew was set at 21 hours per day, leaving him only from 9 a.m. until 12 noon to venture beyond his residence[103]. On the same day that Hart agreed to be tagged, three other defendants appeared whom the police had considered as likely candidates for monitoring. One was rejected as unsuitable by the CPS, one's mother objected to his being tagged because of his psychiatric and drink problems, and the third refused to participate because he was worred about the publicity involved, and objected to his home being 'bugged'[104].

The local liaison committee met on 24 August, primarily in order to determine why there had been no-one other that Hart tagged, despite there having been about a dozen recommendations. Mair and Nee, who were privy to the discussion at the meeting, explain what occurred:

> There were signs of frustration, particularly on the part of the police, that so few were being monitored and the question which dominated the proceedings was why this was the case. No simple answer emerged...The police...were disappointed that none of their recommendations had been accepted... There was a view...that one reason for the low numbers lay in the lack of suitable accommodation for some potential candidates... The opposition of defence solicitors, lack of time for consideration by CPS, the magistrates being cautious, the fact that it was still early days for the trial, and the police had always said that there would be few potential candidates — all of these were mentioned as lying behind the low numbers[105].

By the beginning of September, the issue of the possible shortage of volunteers for tagging had begun to interest the news media. On 1 September, the NEP carried an article headed ' "Tag" test shortage?' in which Harry Fletcher of NAPO expressed disbelief that the original target of between 50 and 100 defendants would be reached during the six-month duration of the trial. Fletcher adverted to problems that Richard Hart had encountered since being tagged — including being woken by a police visit in the early hours of the morning in response to an apparent Level 2 violation (absence for 3.5 hours), and the termination of his benefits by the Department of Social Security (DSS) as a result of its

[102] H. Fletcher, quoted in 'Scrap this tag trial gimmick', *Nottingham Evening Post*, 14 August 1989, p. 3.
[103] 'Tagged man heads home', *Nottingham Evening Post*, 17 August 1989, p. 1.
[104] G. Mair and C. Nee, *op. cit.*, p. 18.
[105] *Ibid.*, p. 19.

adjudging him to be unavailable for work — as possibly deterring magistrates from recommending tagging in subsequent cases[106]. Mair and Nee reveal that there was 'some embarrassment' on the part of the Home Office and the court that Hart's alleged violation[107] was brought to their attention by the press rather than by the service provider[108]; and the authors also reveal that 'efforts were made to assure the DSS that curfews could be varied (and no further specific problems came to light)'[109].

Despite a personal appearance in Nottingham on 8 September by Douglas Hurd, then Home Secretary, who exhorted members of the Nottingham Magistrates' Association 'not to hold back' in their use of tagging[110], the first four weeks of the trial resulted in only five defendants being tagged out of a total of 26 thought suitable by the magistrates[111]. Precise details of the four immediate successors to Hart are not provided by Mair and Nee nor by the news media (the latter perhaps an indication that the newsworthiness of the scheme had already begun to decline). However, it appears that at least two of the defendants were monitored as a result of an intervention by the Macedon Trust, a charitable organisation providing shelter for the homeless. The trust had offered in early September to make available up to a dozen hostel places for homeless defendants so that they could be tagged[112]. The first two defendants to be monitored at the hostel were given curfews of 23 and 24 hours, respectively[113]. It transpired that the recipient of the latter, Christopher Varney, cut off his tag and absconded after five weeks of being monitored because his solicitor had just informed him that his trial date on a wounding charge had been postponed. Varney left a message on the Macedon Trust's hostel wall before leaving: 'You treat tagged people with no respect. You are not using me for an example'[114]. Varney gave himself up the following day, telling police he could no longer cope with being 'stuck up' in the hostel, which he claimed was dirty, populated by tramps, and the venue for 'regular fights and a lot of drinking'[115]. Varney's pronouncement that he would rather be in jail (which led to his being remanded to Lincoln Prison) tends somewhat to undermine the assumption made by the supporters of electronic monitoring that the privations of the latter cannot possibly be as great as those of imprisonment[116].

By 12 October, 12 defendants had been tagged in Nottingham, but five of them by the Crown Court rather than by magistrates[117]. Mair and Nee claim that while no detailed plans were made in advance for Crown Court participation in the trials, 'it was clear that judges in the three trial areas could make use of electronic monitoring in bail

[106] H. Fletcher, quoted in ' "Tag" test shortage?', *Nottingham Evening Post*, 1 September 1989, p. 22.
[107] Which the controlee denied was the result of his absence from home: see G. Mair and C. Nee, *op. cit.*, p. 19.
[108] G. Mair and C. Nee, *ibid.*
[109] *Ibid.*, p. 27.
[110] 'Hurd's plea to JPs on tagging', *Nottingham Evening Post*, 9 September 1989, p. 2.
[111] 'Tagging doubts after first test', *The Guardian*, 19 September 1989, p. 2.
[112] 'We'll help on tagging', *Nottingham Evening Post*, 13 September 1989, p. 11.
[113] G. Mair and C. Nee, *op. cit.*, p. 20.
[114] Quoted in 'I'd rather be in jail', *Nottingham Evening Post*, 3 November 1989.
[115] *Ibid.*
[116] The 'stock comment' of all supporters of electronic monitoring is that it cannot be as bad as prison: M. Nellis, 1991, *op. cit.*, p. 179.
[117] G. Mair and C. Nee, *op. cit.*, p. 20.

applications'[118]. However, it is contended that it is barely credible that the Home Office anticipated much, if any, use by the Crown Court of electronic monitoring: none of the advance publicity for the trials seen by this writer made mention of the senior court's involvement, and it is evident from Mair and Nee's own account that the Crown Court's employment of tagging necessitated changes to agreed procedures:

> As a result of the Crown Court use, detailed procedures had to be organised for the personnel involved and the acceptance form agreeing to electronic monitoring had to be redrafted. Neither Crown Court staff nor the police were prepared to remove the transmitter-bracelet from the defendant when he/she was acquitted or received a non-custodial sentence at the Crown Court; the service operators were expected to be aware of this possibility and to arrange for the retrieval of any equipment[119].

Given the extensive preparation involved in respect of procedures in the magistrates' court, it seems unlikely that the Home Office would not have made greater provision for Crown Court involvement if that were thought likely to be significant. One might therefore suggest that the Crown Court's use of tagging may have been a response to the small numbers of defendants being tagged by magistrates. It seems that the Crown Court-initiated taggings in Nottingham were the product of judicial encouragement of defence solicitors to recommend their clients for monitoring[120].

By early November, various alternatives for ending the trial were being discussed by the Nottingham liaison committee. Mair and Nee reveal that the original plan had been for a six-month trial 'with the possibility of extension on a monthly basis'[121]. However, in the light of the fact that the numbers of defendants being monitored had been declining since even before the mid-point of the trial, it was decided that no new defendants would be tagged after 29 January, and that a monitoring-only service would continue until 30 April or until the last case was disposed of by the courts, whichever was the sooner[122].

During the penultimate month of the monitoring trial, more adverse publicity appeared in the pages of the Nottingham Evening Post. An account of the activities of one of the first offenders to be tagged, 29-year-old Michael Curtain, revealed that he had absconded only *two minutes* after his first curfew started and had later attacked a man in the street who had refused to give him money. He was subsequently jailed for 27 months[123]. Another report in the NEP claimed that the Government might be forced to reconsider its support for tagging after a 'disastrous start' to the trials. The report referred to numerous problems encountered by the scheme, including the startling fact that eight out of 13 defendants monitored had been sent to prison either for re-offending or for breaching their curfew[124].

[118] *Ibid.*, p. 12.
[119] *Ibid.*, p. 20.
[120] For example, the first application was made at the suggestion of Matthewman J. by Andrew Rimmington, a Nottingham Polytechnic LLB Sandwich Degree student, whilst on placement with the Nottingham firm of solicitors, Curtis and Parkinson. I am grateful to Andrew and to his fellow student, Chris Boyd, for this information.
[121] G. Mair and C. Nee, *op. cit.* p. 21.
[122] *Ibid.*
[123] 'Tagged suspect wasn't there....', *Nottingham Evening Post*, 1 December 1989, p. 5.
[124] 'Tagged men are back behind bars', *Nottingham Evening Post*, 6 December 1989, p. 1.

During the currency of the Nottingham trial, a total of 68 recommendations were made for electronic monitoring: 62 in the magistrates' court and six in the Crown Court. However, only 17 defendants were monitored: 11 in the magistrates' court and six in the Crown Court. This figure is substantially smaller than the 50 to 100 offenders considered likely to be monitored before the start of the Nottingham trial. Moreover, nine of the 17 defendants monitored in Nottingham either violated their curfews or were charged with committing further offences during their period of monitoring[125].

The trial at North Tyneside began five weeks after Nottingham's had commenced — on 18 September — and 'it was hoped that some of the early difficulties in Nottingham would be avoided as a result of lessons which had been learnt'[126]. Instead, a number of other problems arose. By the fifth day of North Tyneside's trial, no-one had been tagged — a tardier start even than Nottingham's. The reasons for this may have been threefold: the number of overnight arrests had inexplicably dropped by about one-third during the first week of the trial; many potential participants were homeless as a result of a recent closure of a hostel (and were therefore ineligible); and the bench had refused to accept that the availability of electronic monitoring amounted to a change of circumstances in re-remand cases[127]. In addition, the scheme seemed to be characterised by poor organisation:

> There was no central filtering system set up by the police, and no meeting between the interested parties every morning as took place in Nottingham. It became clear that the police would not, in fact, be able to hold overnight those who had been approved for monitoring but awaited equipment installation. While people were helpful, there was a distinct lack of interest and motivation[128].

One wonders whether the less-than-encouraging progress of the Nottingham scheme had dampened enthusiasm at North Tyneside. By the end of October, six defendants had been tagged at North Tyneside but, as Mair and Nee note, 'there was little effective co-ordination between the various agencies, and several other problems had appeared'[129]. Indeed, the authors claim that it had become evident that North Tyneside 'should not perhaps have been chosen for the trial'[130]: the ostensibly high remand rate of North Tyneside was misleading because the court tended to remand defendants in custody for a week for the purpose of gathering information about them and then grant conditional bail. In other words, an informal bail information scheme existed in the area (the very thing that the National Association for the Care and Resettlement of Offenders (NACRO) suggests is a more constructive and cost-effective alternative to electronic monitoring)[131]. That this practice at North Tyneside was not known to the Home Office before selection of the locations for the experiment is an indication, perhaps, of hasty preparation for the trials.

[125] G. Mair and C. Nee, *op. cit.*, p. 44.
[126] *Ibid.*, p. 27.
[127] *Ibid.*, p. 28.
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] See P. Cavadino, NACRO spokesman: 'If the same amount of money [that was spent on the monitoring trials] was used to finance more constructive alternatives to custodial remands, such as bail information schemes and bail hostels, it could successfully divert many more people from custody': quoted in 'Tagging trial run to be extended', *Nottingham Evening Post*, 11 January 1990, p. 9.

In addition to this fundamental flaw in the North Tyneside scheme, and to the difficulties arising from the police's refusal to hold overnight defendants awaiting the installation of equipment, problems stemmed from the following: faulty equipment and computer programming; a reluctance on the part of magistrates to change curfew hours where defendants had found work; difficulties transporting defendants from prison or remand centre; and poor liaison between the service providers and British Telecom[132]. Moreover, one defendant was found to have tampered with his telephone's wiring in order to stay out beyond his curfew — an act which was discovered only after *three* inspections by British Telecom — and others tried to disguise their violations by claiming that their tags did not work whilst they were bathing (a ruse based upon the fact, possibly disclosed by the service provider, that water reduced the intensity of the electronic transmitter-bracelet's signals, though not to the extent that a violation would be recorded)[133]. Several other defendants who were considered suitable for tagging simply refused to participate, apparently because they realised that time spent being monitored, unlike that on remand, would not be set off against the length of any custodial sentence they might receive[134].

In short, the North Tyneside trial was fraught with difficulties, which may well have contributed to its disappointing results. When it ended on 5 March 1990 (with the same termination arrangements that obtained in Nottingham), only 15 defendants had been monitored out of a total of 35 recommendations. Twenty-six of the recommendations had been made by magistrates and nine by the Crown Court; all but one of those monitored came from the magistrates' court[135]. Nine of the 15 defendants monitored violated their curfews or were charged with committing another offence during the trial period[136]. As in the Nottingham trial, at least one controlee asked to go back into prison on remand rather than endure tagging[137]. In response to publicity revealing North Tyneside's poor results, the Home Office expressed a desire to initiate another experiment in a larger court area[138], whereas Harry Fletcher reiterated NAPO's opposition to tagging and claimed that it would have been cheaper if each of the defendants in North Tyneside had been allocated his own personal full-time probation officer[139].

The Tower Bridge trial began on 23 October 1989. Unlike the trials in Nottingham and North Tyneside, Tower Bridge accepted someone (indeed, two defendants) for monitoring on the first day of the scheme. Both men were remanded in custody until the following day, pending the installation of a telephone in their shared, rented accommodation[140]. Both men were charged with robbery: an offence that perhaps one would not have expected to figure in the trials because of its seriousness. (No alleged robbers had been accepted for monitoring in Nottingham)[141]. However, by four weeks into the trial, six defendants had

[132] G. Mair and C. Nee, *op. cit.*, pp. 29-30.
[133] *Ibid.*, p. 30.
[134] *Ibid.*
[135] *Ibid.*, pp. 30-31.
[136] S. Cohen, 1990, ' "Tagging" scheme under attack as political gimmick', *The Independent*, 9 March, p. 8; G. Mair and C. Nee, *op. cit.*, p. 44.
[137] S. Cohen, *ibid.*
[138] J. Carvell, 1990, 'Tagging scheme fails test', *The Guardian*, 9 March, p. 6.
[139] *Ibid.*
[140] G. Mair and C. Nee, op. cit., p. 36.
[141] *Ibid.*, p. 49.

been tagged and it was apparent that Tower Bridge magistrates were 'interpreting the selection criteria rather differently from those in Nottingham and North Tyneside'[142] by routinely recommending for monitoring those accused of robbery. This practice stemmed from the fact that burglars were normally granted bail at Tower Bridge and thus 'the bottom rung of the remand population started with those charged with robbery and these would comprise the potential target-group for electronic monitoring'[143]. Whilst this practice accorded with the Government's desire that tagging be used only on those who would otherwise have been imprisoned, it was not one of which the CPS or the police approved: neither had made any recommendations for tagging, and the latter believed that those defendants who were being monitored were a danger to the public[144]. This belief was reinforced by subsequent events: the first two defendants to have been tagged in London were interviewed on television about their experience, received a fee for their interview, spent the fee on alcohol, and promptly removed their anklets and absconded; another defendant absconded in February 1990 and was subsequently arrested and charged with murder[145]. Such events did nothing to instil public confidence in the monitoring scheme, and as Mair and Nee note, the second incident 'was seen to have an effect upon the motivation of the magistrates, who became considerably more apprehensive about the public safety aspects of electronic monitoring'[146]. For the final two months of the trial, no new defendants were monitored[147].

When the Tower Bridge trial ended on 7 April, there had been a total of 37 recommendations for electronic monitoring, all but one of which had come from the magistrates' court. Fourteen of the recommendations came from the magistrates themselves, 23 from defence solicitors, and none from the police (because of their concern for public safety). Only 18 defendants were monitored, one at the behest of the Crown Court. Ten out of the 18 defendants violated their curfews or were charged with new offences during their period of monitoring[148]. In addition to the problems caused by absconders, there is evidence that the Tower Bridge trial encountered difficulties stemming from the misinterpretation of computer printouts (which allowed one defendant to go *three weeks* without being monitored), poor communication between the police and the service provider, and deception on the part of some defendants (one of whom had forged letters from employers in an attempt to secure an alteration to his curfew period)[149].

THE RESULTS OF THE TRIALS

All of the following figures are taken from Mair and Nee's study.

In total, 50 defendants[150] were monitored during the three trials, compared with the pre-trial target of at least 150. On completion of the trials only *eight* defendants had been tagged 'successfully' to the point of being sentenced: five of these received custodial

[142] *Ibid.*, p. 37.
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*, pp. 38-39.
[146] *Ibid.*, p. 39.
[147] *Ibid.*
[148] *Ibid.*, p. 39; p. 44.
[149] *Ibid.*, pp. 38-39.
[150] Actually, 49 — one defendant was tagged by both a magistrates' court and Crown Court, and is counted twice: G. Mair and C. Nee, *ibid.*, p. 44

sentences of between three months and three years, two received two-year probation orders, and one received a community service order[151].

Almost 60% of those monitored (29 out of 50) violated their curfews (some by absconding) or were charged with a new offence during the monitoring period. The remaining 13 out of the 50 consisted of six defendants who were bailed following a change of circumstances (such as a variation of charge), and seven 'others', including three cases where charges were withdrawn and one where the defendant was found not guilty[152].

There were 140 recommendations for electronic monitoring in total, 124 originating in the magistrates' courts and 16 in the Crown Courts. 105 of the recommendations came from defence solicitors, of which 32 led to monitoring; 18 came from magistrates themselves, of which 14 led to monitoring; 15 came from the police (all but one from Nottingham police), of which three led to monitoring; one came from a judge in North Tyneside, which led to monitoring; and only one came from the CPS, and that was not accepted[153]. Of the 90 recommendations which were refused, 21 were rejected because conventional bail was considered more appropriate, and in the remaining 69 cases defendants were remanded in custody. Of those 69, 16 were refused because the offence was considered to be too serious, 20 because the defendant was thought likely to re-offend, three because the defendant's accommodation was unsuitable, four because the defendant lived outside the court's area of jurisidiction, and 24 for a variety of other reasons, including two where the defendant refused to be monitored[154].

Whilst the number of defendants monitored in each area was similar, the use of tagging as a proportion of those who were remanded in custody during the trial periods differed considerably: in Nottingham there were 17 monitored and 209 remanded, in North Tyneside there were 15 monitored and 41 remanded, and in Tower Bridge there were 18 monitored and 97 remanded. In Nottingham and North Tyneside the most frequently monitored category of offence (in eight out of 17 cases, and seven out of 15 cases, respectively) fell within Mair and Nee's 'other' category, consisting mainly of motoring offences. In contrast, 16 out of the 18 cases monitored at Tower Bridge involved charges of robbery, violence or burglary[155]. Mair and Nee explain this variation in terms of different patterns of offending and different bail and remand practices in each area[156]; and the differences presumably also reflect different perceptions among sentencers of the possible threat to public safety posed by certain types of defendant.

All of those monitored during the trials were male. One female was recommended for tagging but was not accepted, for reasons unknown[157]. Nineteen of those tagged were aged between 17 and 20, fifteen between 21 and 25, and sixteen were between 26 and 47. According to Mair and Nee, of the 50 monitored in total, 'almost all' had been

[151] G. Mair and C. Nee, *ibid.*
[152] *Ibid.*, pp. 44-45.
[153] *Ibid.*, p. 48.
[154] *Ibid.*
[155] *Ibid.*, p. 49.
[156] *Ibid.*, p. 45.
[157] *Ibid.*, p. 49.

remanded in custody on a previous occasion, and the rest had been held overnight by the police[158]. In addition, 'more than half' of those monitored had been discharged from a custodial sentence within the previous three years[159].

Although the courts could impose curfews on defendants for up to 24 hours per day (and Nottingham Crown Court did so on two men appearing before it), this was not the norm. North Tyneside was the strictest of the magistrates' courts in terms of the length of its curfews: over 60% of its curfews were for 16 hours or more per day, whereas Nottingham and Tower Bridge magistrates imposed curfews of such length in less than 50% of cases[160]. Although those monitored at Tower Bridge tended to be accused of more serious offences than those in the other areas, this was not reflected in the length of the curfews imposed[161].

Finally, Mair and Nee point out that 'there was no clear relationship between further alleged offences or absconding and the age of defendants, the number of weeks for which they been monitored, or the length of the curfew period'[162].

AN EVALUATION OF THE TRIALS

Writing shortly after the experimental trials had begun, Berry and Matthews identified several issues which they believed were relevant to the question of the potential effectiveness of house arrest and electronic monitoring[163]. It is proposed to evaluate the trials in terms of some of those issues.

THE STAGES OF USE OF ELECTRONIC MONITORING WITHIN THE CRIMINAL JUSTICE SYSTEM

Berry and Matthews stress the potential flexibility of electronic monitoring in that it may be used at the pre-trial stage, as a means of reducing the remand population, at the sentencing stage, as an alternative to a custodial sentence, and as a means of policing the early release of prisoners[164]. The English trials operated, of course, exclusively at the pre-trial stage of the criminal justice process, with the aim of diverting participants from institutions of remand. Even if all of those monitored were true divertees from custody, their small number (50) would have made little difference to the size of the remand population in the three areas during the six months of the trials, and more importantly, must raise doubts as to the likely significance of tagging's contribution to reducing the remand population if electronic monitoring were to be adopted on a wider basis. Moreover, Berry and Matthews point out that the growth of the remand population in Britain in recent years has been due primarily to a large increase in the length of time that accused persons have to await trial, together with a persistent rise in the numbers of people appearing before the courts[165]. The authors therefore suggest that expediting the process

[158] *Ibid.*, p. 44.
[159] *Ibid.*, p. 49.
[160] *Ibid.*, pp. 49-50.
[161] *Ibid.*, p. 49.
[162] *Ibid.*, p. 50.
[163] B. Berry and R. Matthews, *op. cit., passim.*
[164] *Ibid.*, pp. 110-117.
[165] *Ibid.*, p. 111.

of bringing defendants to trial 'may be more effective in reducing the remand population than trying to create...compensatory measures'[166] such as tagging. This argument is convincing but the alternative it suggests would no doubt require the allocation of considerable additional resources to the criminal justice system (to pay for more courts and allied personnel), an option which may not be attractive in times of fiscal stringency.

TARGETING

Whilst US electronic monitoring schemes have tended to target white-collar, 'low-risk' offenders with stable backgrounds and jobs[167], it seems very unlikely that those tagged in England during the experiment had such characteristics. Although no information appears in Mair and Nee's study as to the socio-economic status of those tagged, we have seen that some were homeless, and the magistrates' court official responsible for tagging in Nottingham has expressed a belief to the author that probably only two of the 17 defendants tagged in Nottingham were employed[168]. Such a finding, though hardly 'scientific', and based on a small sample, is not inconsistent with Nellis' aforementioned description of tagging as a means of control over 'elements of the urban underclass'[169]. Although the English trials followed the example of those in the USA which seek to avoid the use of monitoring where it might place a strain on the defendant's family or on other occupants of the premises, Mair and Nee discovered that nearly half of the cohabitees of controlees 'found the long curfews a definite strain after a time and a source of considerable friction'[170], and at least two parents of controlees revoked the consent which they originally had given to their monitored sons' occupancy of their (the parents') houses, despite the fact that such a revocation would lead to the defendants' remand in custody[171]. Mair and Nee concluded that friction among the family of controlees 'may be a potentially serious consequence of the system'[172]. Finally, with regard to the issue of the exclusion of dangerous offenders from the tagging scheme, it is noteworthy that Tower Bridge's monitoring of the largest number of defendants accused of violence or robbery out of the three areas did not lead to its having the highest proportion of curfew violations or alleged further offences[173].

NET-WIDENING

Mair and Nee assert unequivocally that electronic monitoring was used as an alternative to a remand in custody during the trials[174]. The evidence for their statement is persuasive but not conclusive. The authors reason that 'almost all of those who were bailed subject to electronic monitoring had been remanded in custody prior to monitoring, and thus it may be concluded that electronic monitoring was indeed used as an alternative to a remand in custody'[175]; they dismiss as 'hypothetical' the possibility that some of the

[166] *Ibid.*
[167] A Wade, *op. cit.*, p. 12.
[168] Beth Henderson, Principal Court Clerk at Nottingham Guildhall Magistrates' Court, in private interview with author, July 1990.
[169] M. Nellis, 1991, *op. cit.*, p. 180.
[170] G. Mair and C. Nee, *op. cit.*, p. 57.
[171] *Ibid.*
[172] *Ibid.* Section 12(6) of the 1991 Act appears to acknowledge this issue by requiring that the court, before making an order, 'obtain and consider information about the place proposed to be specified in the order (including information as to the attitude of persons likely to be affected by the enforced presence there of the offender)'.
[173] G. Mair and C. Nee, *ibid.*, p. 44.
[174] *Ibid.*, p. 63.
[175] *Ibid.*

participants would have been bailed (without monitoring) at some point[176]; they cite as further (impressionistic) evidence the beliefs of the criminal justice personnel in all of the trial areas that electronic monitoring was used as an alternative to remand[177]; and they add that the problems encountered by the police and CPS in finding suitable candidates, and the 'lengthy deliberations which took place in court when monitoring was recommended', also suggest that monitoring was used correctly[178]. Even if such reasoning is accepted, it must be remembered that the trials were conducted under the close direction of the Home Office, which was doubtless careful to avoid, as far as possible, any undesirable consequences that would offer sustenance to the critics of tagging. Whether net-widening would have occurred in the absence of such close scrutiny, or if the trials had been longer, is another question, as Mair and Nee concede[179]. Whilst Mair and Nee regard such possibilities merely as 'hypothetical issues'[180], we have seen that some commentators are of the opinion that the more monitoring is used, the greater are the risks of its use on lower tariff defendants; Wade, for example, argues:

> If sentencers are tempted to apply for longer periods of monitoring with stricter conditions, breach rates could increase dramatically... This could have the effect of undermining programme credibility, leading to the selection of lower tariff offenders who, in turn, 'breach' and go to prison. At the same time...monitoring could expand amongst lesser offenders because, unlike prisons, the use of electronic monitoring is not limited to available bed space[181].

Such an eventuality would not only 'widen the net' of social control but should also be anathema to any Goverment desirous of reducing expenditure on the criminal justice system.

However, even if the sentencers resist any temptation to move 'down tariff', there is little doubt that the practice of home confinement, with or without electronic monitoring, is tantamount to the conversion of an offender's or alleged offender's home into a prison[182], thereby 'blurring' (to use a concept allied to net-widening in Cohen's work)[183] the boundaries between institutional and non-institutional forms of punishment. Moreover, electronic surveillance in the home represents a significant extension (or 'penetration', in Cohen's terminology)[184] of state control and intrusiveness into civil society. Both phenomena are facets of the dispersal of discipline thesis, mentioned earlier, in support of which there is a considerable body of evidence[185]. Whether one considers such developments to be desirable or objectionable may depend upon one's views as to the benignity or oppressiveness of the state. Research into state activities during the 'new age of surveillance'[186], however, has revealed some very unsavoury Orwellian practices in supposedly liberal democracies[187].

[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.*
[181] A. Wade, *op. cit.*, pp. 35-36.
[182] A view held, for example, by R. Corbett and E. Fersch, 1985, 'Home as Prison: The Use of House Arrest', *Federal Probation*, 49, pp. 13-17.
[183] See S. Cohen, 1979, *op. cit.*, pp. 344-346; and 1985, *op. cit.*, pp. 57-63.
[184] *Ibid.*, 1985, pp. 76-83.
[185] See, for example, J. Austin and B. Krisberg, 1982, 'The Unmet Promise of Alternatives to Incarceration', *Crime and Delinquency*, 28, 3, pp. 374-409; and J. Hylton, 1982, 'Rhetoric and Reality: A Critical Appraisal of Community Correctional Programs', *Crime and Delinquency*, 28, 3, pp. 341-373; cf. A. Vass, 1990, *op. cit.*, pp. 101-114.
[186] A phrase used by J. Lilly, *op. cit., passim.*
[187] Regarding the UK, see D. Campbell, 1981, *Big Brother is Listening; Phonetappers and the Security State*, N.S. Report 2, London: New Statesman; and C. Ackroyd *et al.*, 1980, *The Technology of Political Control*, London: Pluto Press. For a US commentary, see G. Marx, 1985, 'I'll be Watching You', *Dissent*, Winter, pp. 26-54.

PRIVACY AND OTHER ETHICAL CONSIDERATIONS

Although electronically monitored home confinement is not considered to be unconstitutional in the USA[188], some US commentators have expressed concern about its violation of the privacy of the controlee's body and home, and about the debilitative psychological impact that invasion of privacy may have on those tagged[189]. Mair and Nee interviewed a sample of 20 defendants who were tagged during the trials, and found that only eight out of the 20 'felt that the system was intruding on their privacy and that they were constantly under scrutiny', whereas 'just over half had no problems with feelings of intrusion at all'[190]. That said, eight interviewees described their experience as being like that of a prisoner in their own home, and one remarked:

> I don't know, at times it makes you depressed you know. I've gone upstairs and laid down and just laid there depressed thinking well, I'm in prison anyway, but I've got to make the most of it[191].

Although the proponents of tagging may regard it as highly desirable that controlees perceive themselves as being under scrutiny and therefore constrained to comply with their curfew conditions, it is difficult to envisage how feelings of depression can foster self-reliance and a sense of responsibility.

An issue sometimes raised in conjunction with privacy is that of stigma. NACRO claims that tagging is 'degrading and stigmatising in a way which other high tariff non-custodial measures, such as community service orders, residence at a probation hostel, or attendance at a day centre are not'; and that tagging is 'purely restrictive, whereas the other options are not'[192]. This may well be the case but the Conservative Government patently does not regard the alternative non-custodial measures mentioned as being sufficiently punitive[193]. Vass has drawn parallels with sociological and psychological research findings concerning the manner in which different 'stigmatised' populations are treated by others — in terms of 'rejection, exclusion and widening of social distance'[194] — and suggests that tagging may lead to the isolation of offenders and their exclusion 'from normal social relationships, including employment'[195]. This view is not inconsistent with Mair and Nee's finding that three defendants out of 20 interviewed considered it very difficult to obtain employment whilst being monitored, in part because of the stigma associated with the monitor [196]; and that over half of those interviewed felt embarrassed about wearing the anklet and 'did their best to cover it up in public (usually using a sock or bandage), and sometimes from their children'[197].

Of course, concern about the possible undesirable effects of tagging, such as its denial of privacy and its potential to stigmatise, might be countered with arguments that offenders are unworthy of such concern, or that their consent to being monitored vitiates any grounds of complaint, or that imprisonment offers greater privations than those resulting from electronic monitoring. Such assertions are worthy of scrutiny.

[188] See R. Del Carmen and J. Vaughan, 1986, 'Legal Issues in the Use of Electronic Surveillance in Probation', *Federal Probation*, 50, 2, pp. 60-69; and R. Ball *et al.*, *op. cit.*, pp. 100-126.
[189] See R. Ball *et al.*, *ibid.*, pp. 126-133.
[190] G. Mair and C. Nee, *op. cit.*, p. 55.
[191] *Ibid.*, p. 56.
[192] NACRO, *op. cit.*, p. 11.
[193] See note 21. The 1990 White Paper, *op. cit.*, pp. 18-24, discusses the need for, and nature of, the new community penalties now contained in Part 1 of the 1991 Act.
[194] A Vass, 1989, 'Spiderman Looks at the Web of Electronic Tags', *Social Work Today*, 20, 22 June, p. 20.
[195] *Ibid.*
[196] G. Mair and C. Nee, *op. cit.*, p. 58.
[197] *Ibid.*

The first argument is implicit in Ingraham and Smith's assertion that privacy is 'a difficult right to apply to criminals because it is precisely their inability to leave their fellow members of society alone that justifies not leaving them alone'[198]. Such a value judgment, which presumably would not apply to unconvicted defendants, is capable of being met with a competing claim that 'whether one is...law abiding or criminal, society should assign considerable value to [one's] demands for psychic autonomy'[199]. Moreover, Ingraham and Smith's stance as to the undeserving nature of offenders has little or no purchase on contemporary penological thought in Britain: the recent Wolff Report concerning the prison disturbances in Britain during April 1990[200], for example, and the promises it induced from the Home Office[201], recognise the need to improve conditions and to treat prisoners 'with justice, humanity and respect'[202].

For the second argument to have any credibility it would have to be established that the defendant's consent was informed, that is, given without duress or coercion, with a knowledge and understanding of the conditions and responsibilities of participation in the monitoring scheme. Although it might be assumed that the English trials' requirement of the defendant to read and sign an Electronic Monitoring Agreement guaranteed the establishment of informed consent, Mair and Nee's interviews reveal such an assumption to be unfounded. Most of the defendants first heard of the chance of being monitored from their defence solicitors, and appear to have agreed to it despite knowing very little about what it entailed. Indeed, the researchers reveal that the system of monitoring was explained to the defendants only *after* (in some cases, a 'day or two after') they had consented to participate[203]. In such cases, the consent obtained was anything but informed consent, and thus the concern about privacy and stigma cannot be assailed by reference to it. It seems that defendants were not unduly concerned about their lack of understanding of what tagging entailed, as long as it would mean they would be released from custody[204]. It is contended that this is one of the more worrying findings of Mair and Nee's study: one is reminded of Wade's fear that the defendant may 'facilitate the increased interference of the State into his life and his home in return for what he perceives to be leniency'[205]. Whether what the defendant gets is lenient is another matter, of course, and one of direct relevance to the third argument, namely, that tagging is a more humane punishment than imprisonment because it affords greater privacy and dignity to the offender or defendant[206].

[198] B. Ingraham and G. Smith, 1972, 'The Use of Electronics in the Observation and Control of Human Behavior and Its Possible Use in Rehabilitation and Parole', *Issues in Criminology*, 7, 2, p. 43.
[199] M. Shapiro, *op. cit.*, p. 62.
[200] 1991, *Prison Disturbances April 1990*, Cm. 1456, London: HMSO.
[201] The Home Office responded to Wolff with promises of improved sanitation, less censorship and more telephones for prisoners: see J. Carvel, 1991, 'Jail officers warn against reform delay', *The Guardian*, 21 May, p.3.
[202] R. Morgan, 1991, 'Woolf: In Retrospect and Prospect', *Modern Law Review*, 54, 5, p. 713.
[203] G. Mair and C. Nee, *op. cit.*, p. 54.
[204] *Ibid.*
[205] A. Wade, *op. cit.*, pp. 15-16.
[206] For a discussion of this view, see A. Wade, *ibid.*, p. 16.

This argument, which rests on the assumption that tagging will be used solely as an alternative to imprisonment, is presumptuous: the fact that there is little or no privacy enjoyed in prisons does not mean that electronic monitoring outside prison is not an unacceptable invasion of privacy[207]. Moreover, Nellis argues forcefully that one must judge penal measures on their own merits because the issues raised by each may be unique, and that the unique feature of electronic monitoring is its ability to convert hitherto private spaces into penal spaces and arenas of scrutiny[208]. Mair and Nee's survey of 20 monitored defendants concluded that tagging 'was certainly not seen as any easy option by defendants':

> Even those who were willing to volunteer for monitoring if they were given a choice in the future (12 out of 20) spoke of problems. Electronic monitoring was seen as restrictive and closer to a remand in custody than to bail with conditions... Long curfews were considered to be particularly oppressive, and the importance of having a job was noted by several respondents. Domestic problems could also arise[209].

It seems that eight of the defendants interviewed found the experience of being tagged 'difficult and trying' but appreciated greatly the freedom of their own home; most of another group of eight who had described themselves as being like prisoners in their own home 'marginally preferred monitoring to custody'; three felt that having to wear the tag had helped them stay out of trouble; and two (one of whom was Michael Curtain, an absconder from Nottingham) expressed the view that tagging was *more* punitive than prison custody[210]. The eight defendants who said that they would not choose to be tagged again did so apparently because monitoring 'was too rigorous and it would not be deducted from a custodial sentence'[211].

EFFECTIVENESS

Even if, as the low numbers of those tagged during the English trials suggest, the diversionary potential of electronic monitoring may be limited, it is nevertheless possible to assess the effectiveness of electronically monitored home confinement in accordance with other criteria, including the extent to which it may afford protection to the public. McVicar, for example, asserts that tagging, to a much greater extent than probation, suspended sentences or parole, protects the public in three ways: by restricting movements of those monitored and thus their opportunities to commit crime; by increasing the chances of detection of crimes; and, in consequence, by acting as an individual deterrent to those tagged[212]. There is probably some substance in McVicar's assessment of the advantages of tagging over other non-custodial measures in terms of the increased risk of detection (given the degree of surveillance involved in the former), and this may have a deterrent effect on the controlee if he or she perceives there to be a sufficiently high probability of detection[213], but it is important to bear in mind that, as the Green Paper of 1988 conceded, tagging may reduce opportunities for re-offending but cannot prevent it altogether: 'an offender confined to his home could still receive stolen goods, and engage in drug trafficking or drug abuse'[214]. In addition, there remains the problem of *demonstrating* the effectiveness of tagging in terms of its potential deterrence; and this may be difficult given that 'relatively little is known about the effectiveness of penal measures'[215], and that other factors such as that of incapacitation would have to be distinguished from deterrence in terms of their effect on individual controlees.

[207] See M. Shapiro, *op. cit.*, p. 81.
[208] M. Nellis, 1991, *op. cit.*, p. 179.
[209] G. Mair and C. Nee, *op. cit.*, p. 60.
[210] *Ibid.*, p. 56.
[211] *Ibid.*, p. 66.
[212] J. McVicar, 1987, 'The Damocles Detective', *Criminal Justice*, 2, p. 5.
[213] See N. Walker, 1985, *Sentencing Theory, Law and Practice*, London: Butterworths, p. 96.
[214] Green Paper, *op. cit.*, p. 11.
[215] C. Harding and L. Koffman, 1988, *Sentencing and the Penal System: Text and Materials*, London: Sweet and Maxwell, p. 361.

Unfortunately, the few available studies of the effectiveness of electronic monitoring in the USA have evaluated it simply in terms either of 'successful' completions of monitoring programmes, that is, completions of the full term of electronically monitored sentences without violations of programme rules or new offences, or in terms of post-programme re-offending. The few schemes studied appear to suggest that the proportion of successful completions is high and that the rates of recidivism are low[216], but it must be remembered that the selection of 'low-risk' participants for the US schemes is almost certain to contribute to such results[217]. Mair and Nee concede that the evidence as to the effectiveness of the US programmes is 'at best, equivocal'[218].

With regard to the effectiveness of the English trials, Mair and Nee's evaluation concentrates on the number of violations, alleged further offences and equipment failures (the latter will be discussed shortly). We have seen that violations of curfew (including absconding) or the alleged commission of further offences during monitoring occurred in about 60% of cases. Irrespective of whether it is possible to extrapolate from this result to make a judgment about electronic monitoring generally, it is contended that the electronic monitoring's use as a condition of bail *in the trials* was far from successful. Though Mair and Nee reserve judgment about the trials' effectiveness in this area, claiming that there is 'nothing against which this *seemingly* high level of violations can be compared'[219] [emphasis added], it is worth noting that of the 350,000 defendants who were bailed by magistrates in 1988, only 7% failed to appear in court and only 6% re-offended whilst on bail[220]. Moreover, given the obvious care taken by magistrates during the monitoring trials to select participants, it is probably not unreasonable to assume that efforts were made to avoid the proposal of defendants perceived likely to abscond or re-offend. In this respect, it is interesting to note that Berry and Matthews regard a failure rate in the US of between 10% and 20% as 'significant' because 'most of the projects specifically select 'low-risk' offenders; while those currently administering these programmes have a vested interest in demonstrating significant levels of success'[221]. Given the likelihood of Government and service provider enthusiasm to ensure a successful outcome to the English trials, it is contended that the high failure rates (and the low numbers of those tagged compared with pre-trials estimates) were little short of disastrous. Moreover, there were, in addition to the serious violations of curfew, 'more than 200 time violations, 75 per cent of which lasted for less than one hour'[222]. These violations, which were largely the result of controlees' bad time-keeping or testing out the system, appear to have been regarded by Mair and Nee as insignificant[223]. Such an interpretation might not have been shared, however, by a Government concerned with the costs entailed in the checking of such violations, or with the apparent mischievousness or lack of self-discipline manifest in the monitored defendants' violations.

[216] See, for example, the electronic monitoring scheme in Kenton County, Kentucky, discussed by R. Ball *et al, op. cit.*, pp. 80-92; and P. Hatchett, 1987, *The Home Confinement Program: An Appraisal of the Electronic Monitoring of Offenders in Washtenaw County, Michigan:* Michigan Community Evaluation Unit, p. 25, cited in A. Wade, *op. cit.*, p. 29.
[217] R. Ball *et al., ibid.*, p. 97; and J. Petersillia, *op. cit.*, p. 41.
[218] G. Mair and C. Nee, *op. cit.*, p. 7.
[219] *Ibid.*, p. 64.
[220] See M. Nellis, 1991, *op. cit.*, p. 172.
[221] B. Berry and R. Matthews, *op. cit.*, p. 125.
[222] G. Mair and C. Nee, *op. cit.*, p. 64.
[223] *Ibid.*

TECHNICAL PROBLEMS

An essential ingredient of any effective electronic monitoring scheme will be properly functioning monitoring equipment. In the USA, early monitoring programmes encountered numerous and varied technical problems: telephone lines which were incompatible with the signals transmitted by some systems; adverse weather conditions and domestic appliances which interfered with or interrupted monitoring signals; steel construction materials and cast iron bathroom fitments in houses which affected signals; and so on[224]. Despite sustained attempts by US equipment manufacturers to improve their monitoring systems and eradicate such faults, 'there still remain some serious problems with the equipment'[225].

During the English trials, the Home Office required the service providers to record all faults relating to their computer hardware, software and communications, and to send such information to it every week[226]. Mair and Nee's study reveals there to have been 159 equipment failures, including tamper alerts, transmitter battery failures, home unit and central computer failures, telephone line faults, and possible 'dead spots' (where the tag's signal is blocked, for some reason)[227]. The researchers claim that equipment failures not only contributed to the number of alleged time violations but also undermined police confidence:

> They....led to disagreements between service operators and defendants about whether or not an alleged violation was due to the defendant or to an equipment malfunction. Such disagreements in turn led to doubts from police officers about the efficacy of the equipment, and the confidence of the police in the equipment would seem to be a critical factor in their support of electronic monitoring[228].

It goes without saying that alleged violations of curfew conditions lack evidential credibility if it cannot be determined whether they are the product of technical faults or the defendants' actions. Although Mair and Nee concluded that the electronic monitoring systems worked 'adequately' during the trials, they stressed the need to improve computer software and staff training in advance of any future use of tagging[229]. In addition, they suggested the substitution of a radio-based link between the controlee's home and the central computer for the telephone-based system, in order to save money by excluding the involvement of British Telecom[230]. The issue of cost-saving should remind us that technical unreliability is likely to cause frequent, time-consuming and therefore costly intrusions by monitoring staff into controlees' homes. It is to the cost of electronic monitoring systems that we turn finally.

COST

We have seen that one of the attractions of tagging for the Government was its perceived low cost relative to that of imprisonment. Such a perception is shared by a number of other commentators, including Tom Stacey of the British pro-tagging pressure group, the Offender's Tag Association[231], and a Lieutenant Eugene Garcia of the Sheriff's Office of Palm Beach County, Florida, who has opined that electronic monitoring ' is the greatest thing to happen to the American taxpayer in memory'[232].

[224] A. Schmidt and C. Curtis, *op. cit.*, p. 149.
[225] B. Berry and R. Matthews, *op. cit.*, pp. 129-130. See also J. Lilly, *op. cit.*, p. 232.
[226] G. Mair and C. Nee, *op. cit.*, p. 61.
[227] *Ibid.*, pp. 26; 34; 43.
[228] *Ibid.*, p. 64.
[229] *Ibid.*, p. 62.
[230] *Ibid.*
[231] See note 16. For a discussion of the Association, see M. Nellis, 1991, *op. cit.*, pp. 166-171.
[232] E. Garcia, quoted in R. Ball *et al.*, *op. cit.*, p. 95.

It is contended, however, that such views should be treated with caution for they tend to assume that direct comparisons between the cost of home incarceration and imprisonment are easily drawn, which is far from the case. For example, Garcia's pronouncement was based on a simple calculation of savings in terms of the daily cost of those who were being electronically monitored in the scheme run by his Sheriff's office: it did not take into account such costs as would normally be incurred in purchasing monitoring equipment or in hiring additional probation or parole officers; nor did it take into account the costs of reprocessing those who breach the conditions of monitoring programmes or who re-offend during such programmes. Moreover, direct cost comparisons fail to recognise several other important factors such as the fact that in the USA only three out of four of those sentenced to home confinement are divertees from prison (the others would have received some other form of non-custodial sentence) and thus in 25% of cases home confinement represents an additional cost to that of a normal probation or supervision order[233]. In addition, offenders in the USA are not sentenced to home confinement for the same length of time as they would have been imprisoned: in Palm Beach County, Florida, for example, sentencers have regarded three days of electronic monitoring to be the equivalent of one day of imprisonment[234]; hence, calculations of relative costs must be adjusted accordingly. Furthermore, as 85% of the costs of imprisonment are fixed costs[235], the savings per offender diverted are marginal. Thus, as Wade notes:

> There would only be a compelling financial case for electronic monitoring if large inroads were made into the prison population, and a number of prisons shut down or prison-building programmes forestalled. So far, however, none of the electronic monitoring programmes in the USA have caused a reduction in jail or prison budgets[236].

Given the size of the prison-building programme currently underway in England and Wales (which has been costed at £618 million for the period 1990-93)[237], this observation would appear to have a particular relevance to any decision to adopt tagging in Britain on more than an experimental basis.

Mair and Nee acknowledge some of these difficulties in their assessment of the cost-effectiveness of tagging compared with other conditions of bail and remands in custody. They correctly point out, for example, that it would be misleading to divide the total costs of the trials, which they claim to have been about £700,000, by the total number of defendants monitored (50) in order to arrive at a cost of £14,000 per defendant[238]. No doubt this method of calculation informed the aforementioned remark of Harry Fletcher that it would have been cheaper to allocate a full-time probation officer to supervise each defendant exclusively. According to Mair and Nee, this approach takes no account of the capital costs involved, estimated to be at least 20% of the total costs of the trial, nor of the unfamiliarity of the parties involved with the new procedures, which the researchers believe added between 5 and 7% to the total costs[239].

[233] J. Petersilia, *op. cit.*, p. 18.
[234] A. Schmidt, 1986, 'Electronic Monitoring', *Federal Probation*, 50, June, p. 57.
[235] B. Berry and R. Matthews, *op. cit.*, p. 123.
[236] A. Wade, *op. cit.*, p. 28.
[237] See J. Wheeler, *op. cit.*, p. 144.
[238] G. Mair and C. Nee, *op. cit.*, p. 67.
[239] *Ibid.*, pp. 67-68.

Nevertheless, even taking such estimates into account to arrive at a cost of around £500,000, the authors concede that the trials could not be said to be cost-effective[240]. Moreover, although Mair and Nee do not dismiss out of hand the possibility that tagging could prove cost-effective if adopted on a wider basis, it is clear that they believe that several factors militate against the likelihood of this happening, most notably those of high costs and probable low usage:

> Most of those involved in the trials were sceptical about electronic monitoring, although they did see a place for it in the criminal justice system — albeit a relatively small place. And this may be where the difficulty lies. If electronic monitoring is to be developed then it will surely be on a national basis. This will ensure that the costs of the system will be high. Given the low numbers deemed suitable for monitoring during the trials...will there be enough candidates to make electronic monitoring cost-effective?[241].

It is contended that if sentencers continue to apply the current selection criteria as rigorously to participants in any future scheme as they did during the trials, the answer to Mair and Nee's question will almost certainly be 'no', for cost-effectiveness would depend upon suitable economies of scale. Of course, if sentencers are not so scrupulous (and it has been suggested that 'the extensive discussions and careful preparation in the three experimental areas could not be duplicated on a national scale')[242], the result would almost inevitably be net-widening — itself a costly and ethically unacceptable outcome.

CONCLUSION

The experimental trials of 1989-90 seem to confirm that electronic monitoring is a problematic and controversial criminal justice measure, the use of which may raise a wide range of ethical and practical difficulties. The experiment was of small scale and short duration, and thus cannot provide conclusive evidence for any proposition about electronic monitoring in general. Nevertheless, it is clear that the trials proved to be far less successful than was expected by their sponsor (particularly with regard to their take-up and violation rates) and it is contended that their results can instil little confidence that electronic monitoring has the capability significantly to address the problems currently facing the criminal justice system in Britain.

However, in spite of the less-than-encouraging results of the trials, we have seen that the Government proceeded to include an electronic monitoring provision in its Criminal Justice Act of 1991. It is not entirely clear why the Government continued to offer tenacious support for electronic monitoring in the wake of the very poor trial results. John Patten maintained publicly that the experimental trials were a success[243], and sought to avert parliamentary criticism of the technical problems encountered during them by intimating that new, radio-based technology would prove to be more reliable[244]. It has been suggested, however, that Patten's unwavering enthusiasm for tagging was a product of political expediency, in that the initiative was regarded as a 'vote-winning example...of how politicians could impose their personal ideas on reluctant civil servants'[245]. If this is the case, political expediency may recently have been subordinated to economic expediency

[240] *Ibid.*, p. 68.
[241] *Ibid.*
[242] A. Ashworth, 1991, Editorial, 'Electronic Monitoring', *Criminal Law Review*, March, p. 154.
[243] 'Tagging no soft option says Patten', *Nottingham Evening Post*, 26 November 1990, p. 7.
[244] *House of Commons Official Report*, Standing Committee A, Criminal Justice Bill, 18 December 1990 (a.m.), London: HMSO, col. 286.
[245] J. Carvel, 1992, 'Baker forced to backtrack on law-and-order policies', *The Guardian*, 22 February, p. 2.

and to an awareness of some of the practical difficulties associated with tagging. In January 1992, the Home Office announced that the provisions in the 1991 Act relating to curfew orders and electronic monitoring would not be implemented on 1 October 1992 when many of the other provisions of the Act would come into force. The tagging and curfew order provisions were being delayed, according to one commentator, 'by a belated recognition that [such] sanctions will be expensive and perhaps impossible to enforce'[246]. The Home Office indicated that it had no idea of how many tags would be needed, or of the cost of such proposals[247]. However, Cohen estimates that the total cost of introducing electronic monitoring in all petty sessional areas would be a 'prohibitive' £60 million , and suggests that such cost would lead to government encouragement of sentencers to impose non-electronically monitored curfew orders[248]. In addition, the Home Office had apparently underestimated or overlooked the problems of monitoring the compliance of offenders with curfew orders[249]. For example, section 12(4) of the Criminal Justice Act 1991 provides that a curfew order must 'include provision for making a person responsible for monitoring the offender's whereabouts during the curfew periods specified in the order; and a person who is made so responsible shall be of a description specified in an order made by the Secretary of State'. No such order has yet been made by the Secretary of State. In January 1992, Harry Fletcher of NAPO opined that both the police and the probation service would refuse to monitor defendants on curfew orders (with or without electronic monitoring)[250]; and Michael Ward of ACOP referred to the 'potentially enormous costs of hiring extra probation staff to wander round towns checking on whether offenders had left their homes at night'[251]. The Home Office was reported to have appointed 'a senior civil servant' whose task would be to determine who should ensure that offenders comply with curfew orders[252], but in February 1992 it was announced by the then Home Secretary, Kenneth Baker, that further consultation was necessary before the curfew and electronic monitoring provisions of the Act could be brought into force[253]. The publication of a consultation paper on the subject is promised for the near future[254].

The Government's White Paper of February 1990 suggested that an agency other than the probation service might be made responsible for enforcing curfew orders[255]. If this suggestion proves to be impracticable, the Government may defer the implementation of sections 12 and 13 indefinitely, or may seek the involvement of the probation service after all. But even if the probation service — whose future participation in electronic monitoring was found by Mair and Nee to be 'crucial'[256] — is eventually persuaded or forced to take part in the monitoring of curfew orders, the problem of limited enthusiasm for, and lack of confidence in, tagging among sentencers and other professionals within the criminal justice system remains to be surmounted. Without such confidence and enthusiasm, however, electronic monitoring in Britain is likely to be, in the words of Harry Fletcher, 'expensive, ineffective and irrelevant'[257].

[246] N. Cohen, 1992, 'Tagging plan for offenders delayed', *The Independent*, 18 January, p. 3.
[247] *Ibid.*
[248] *Ibid.*
[249] *Ibid.*
[250] *Ibid.*
[251] *Ibid.*
[252] *Ibid.*
[253] J. Carvel, 1992, *op. cit.*, p. 2.
[254] *Ibid.*
[255] White Paper, *op. cit.*, p. 23.
[256] G. Mair and C. Nee, *op. cit.*, p. 66.
[257] H. Fletcher, quoted in J. Carvel, 1990, 'Tagging scheme fails test', *op. cit.*, p. 6.